MORAL ACCOMMODATIONS: TOLERATING IMPAIRMENT-RELATED MISCONDUCT UNDER THE AMERICANS WITH DISABILITIES ACT

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ABSTRACT

People with disabilities sometimes have impairments that manifest in unacceptable and disruptive behavior, such as inappropriate language, angry outbursts, and conflict-generating harassment. Such behavior, which I call "impairment-related misconduct," often leads to exclusion from work or public places. Notwithstanding the Americans with Disabilities Act's goal of promoting the full and equal social participation of disabled people, legal challenges to those exclusionary responses have generally failed.

Using cases involving employees with Borderline personality disorder, this article criticizes this outcome as grounded in a conceptual conflation of duty and sympathy, which in turn arises from a tragic view of disability. It also offers an original approach to resolving these cases. Specifically, this article develops a novel category of reasonable accommodations for persons with disabilities. I

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call them "moral accommodations." These are duties to tolerate, to various degrees, unacceptable behavior related to an impairment. They involve, for instance, giving people second chances, reassigning them to different positions or service providers, or exempting them from certain rules of conduct.

Establishing the theoretical foundations for this new category, I argue that, like other reasonable accommodations moral accommodations are plausibly grounded in various conceptions of justice, most notably egalitarianism and the "capabilities approach." I also address potential objections, both pragmatic and philosophical. For example, although misconduct causes harm to others, I argue that moral accommodations are nevertheless justifiable. By expanding the duties owed to persons with disabilities, moral accommodations develop our conception of a just society as one in which inappropriate behavior is sometimes tolerated.

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INTRODUCTION

A case worker curses at her colleague and threatens to "kick her ass;"[1] a university researcher makes racially insensitive remarks at work;[2] a library patron raises his voice and accuses library staff of being white supremacists;[3] a police officer embarks on a two-year vendetta against his Chief and attempts to serve him with a lawsuit at his retirement party;[4] and a hospital patient uses her service dog to block hospital staff and then laughs at their predicament.[5] If such inappropriate behavior is linked to an "impairment," broadly understood as an underlying health condition, what should the employer or service provider do?

Typically, engaging in such behavior eventually leads to exclusion from work or public places and denial of services. Thus, people with disabilities whose impairments manifest in unacceptable behavior, which I call "impairment-related misconduct," may end up losing their jobs;[6] banned from entering public spaces;[7] suspended or even refused admissions to educational institutions;[8] and denied healthcare services.[9]

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1. Palmer v. Cir. Ct. of Cook Cnty. Ill., 117 F.3d 351, 351 (7th Cir. 1997).
2. Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 4 (D.D.C. 2000).
3. Grant-Davis v. Bd. of Trustees of Charleston Cnty. Pub. Libr., C.A. No. 2:15-CV-2676-PMD-MGB, 2017 WL 9360875, at *5 (D.S.C. May 24, 2017).
4. Michael v. City of Troy Police Dep't, 808 F.3d 304, 306 (6th Cir. 2015).
5. Roe v. Providence Health Sys-Or., 655 F. Supp. 2d 1164, 1167 (D. Or. 2009).
6. *See infra* Part II (describing the chain of events leading to employees' dismissal following impairment-related workplace misconduct).
7. *See, e.g.*, *Grant-Davis*, 2017 WL 9360875, at *3–7 (D.S.C. May 24, 2017) (prohibiting plaintiff from entering public libraries following his "inappropriate" behavior toward library staff, which included impatience, yelling and raising his arms, calling security "white supremacist," and refusing to lower his voice).
8. *See, e.g.*, Doe v. New York Univ., 666 F.2d 761, 767–69 (2d Cir. 1981) (regarding when NYU asked a medical student with Borderline Personality Disorder (BPD) who exhibited angry outbusts, vandalism, and self mutilation to withdraw from her courses and later refused her readmission); *see also infra* note 164 (regarding school exclusion).
9. *See generally, e.g.*, Harris v. Or. Health Scis. Univ., No. CV-98-1-ST, 1999 WL 778584 (D. Or. Sept. 22, 1999) (regarding a physician who ended the treatment of a patient with BPD following her angry and demanding behavior, which included constant complaints and threats of litigation); *Roe*, 655 F. Supp. 2d 1164 (involving a medical center that sought to prevent a former patient with BPD from seeking treatment at the defendants' medical facilities following her disrespectful behavior toward hospital staff and dozens of conflicts concerning her

Contesting those exclusionary responses, some have filed claims under the Americans with Disabilities Act (ADA), arguing that their exclusion constitutes unlawful discrimination. However, in the three decades since the enactment of the ADA, such claims have generally failed. Almost unanimously, courts have found that adverse employment action or denial of services does not constitute wrongful discrimination when it is a response to misconduct, even if the latter is related to an impairment.[10]

This Article puts forth an original analysis of the appropriate response to impairment-related misconduct using the lens of the duty to provide reasonable accommodations to persons with disabilities.[11] Specifically, it contends that there are *pro tanto* duties to tolerate impairment-related misconduct to various degrees. Furthermore, this Article argues that such duties form a novel category within the broader category of reasonable accommodations. Duties to tolerate impairment-related misconduct are an addition to familiar categories of duties to accommodate by altering the built environment or by changing customary social practices. These are duties that involve changes to practices that are closely linked to our moral views on the appropriate response to misconduct. I therefore call them "moral accommodations."[12]

To contextualize the discussion, this Article focuses on cases involving employees with a psychiatric disorder called Borderline

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service dog, which was reportedly extremely smelly and deemed at risk of spreading infections).

10. *See infra* Part II (analyzing courts' approach to impairment-related misconduct).

11. *See infra* Part III.A (explaining the duty to provide reasonable accommodations).

12. The term "moral" in this context calls for further clarifications. By using the term "moral" to describe this category of accommodations, I do not mean to imply that other types of accommodations are immoral. The term "moral" best describes this category of accommodations for it captures some distinctive aspect of the domain in which changes are taking place. It is thus comparable to terms used to describe other categories of accommodations, such as physical or structural accommodations, which refer to changes to the built environment. To be sure, I am not arguing that moral accommodations change our morality as such, but rather that they involve changes to practices that are closely related to our moral views. I am grateful to Havi Carel, Mark Weber, and Roy Kreitner for encouraging me to reconsider this term and clarify why I chose to use it. *See also infra* Part III.B (describing the category of moral accommodations).

personality disorder (BPD),[13] who engage in workplace misconduct in interpersonal relationships.[14] Clearly, people with BPD are not all the same. Their symptoms vary in levels of intensity and duration. They come from different backgrounds and have different personal resources and support systems, both of which affect their access to healthcare and the social response they face. It is nonetheless possible to use BPD as a test case, based on the assumption that people with BPD have at least some shared experiences, emanating both from their condition and society at large.[15]

Bearing this caveat in mind, cases involving employees with BPD serve as an illuminating test case to explore the duty to provide moral accommodations for several reasons. First, BPD symptoms

13. BPD is characterized by rapid shifts of mood, impulsive behavior, chronic feelings of emptiness and inappropriate anger, instability in self-image and in interpersonal relationships due to alternating between extremes of idealization and devaluation, and a tendency to self-harm. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 663, 770 (5th ed. 2013) [hereinafter DSM-5]. Throughout the paper, in referring to "BPD," I use the terms "mental" or "psychiatric" and the terms "condition" or "disorder" interchangeably, following the DSM-5. I am mindful of the critiques directed at such medicalized terminology, *see generally, e.g.*, Bradley Lewis, *A Mad Fight: Psychiatry and Disability Activism*, *in* THE DISABILITY STUDIES READER 115 (Lennard J. Davis ed., 4th ed. 2013) (reviewing the antipsychiatry or Mad Pride movement and its impact on disability activism in the United States). I nevertheless prefer not to use the term "mental disability," because I want to leave open the possibility of distinguishing between "impairment" as a feature of the individual, and "disability" as a disadvantage generated by unaccommodating social practices.

14. Misconduct extending beyond interpersonal relationships, such as stealing, tardiness, or drug use, bring out additional sets of questions. In practice, types of misconduct are often intertwined, yet analytically it makes sense to consider each type separately to clarify the nuanced considerations at play. Moreover, as a matter of law, misconduct related to alcohol or drug use is expressly excluded from ADA protection. *See* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 204 (2005) (analyzing cases revolving around various kinds of employees' impairment-related miscondcuct, and explaining that under the ADA employers may hold people addicted to drugs or alcohol under the same standards as nondisabled employees); *see generally*, Raytheon Co. v. Hernandez, 540 U.S. 513 (2003) (holding that a refusal to rehire a former employee who previously resigned after failing a drug test was not in violation of the ADA).

15. Seeking to avoid overgeneralizing the challenges that people with BPD might face in the workplace, the analysis will be based on real life cases. As such, this methodology does not—and cannot—capture the full range of challenges facing people with BPD.

include a tendency to generate conflicts, lash out in angry outbursts, and use verbal or physical violence.[16] Accordingly, cases involving employees with BPD typically bring out little doubt regarding the causal link between the misconduct and one's underlying condition. This causal link is key for moral and legal analysis given that reasonable accommodations are provided on the basis of people's disabilities and related symptoms.[17] It is also crucial for establishing a link between the limiting effects of one's impairment and the sought-after accommodation, which some courts require.[18] Second, BPD is not generally associated with symptoms that reduce people's cognitive abilities. In fact, some claim that people with BPD are often very intelligent and creative as a consequence of their "easy access to powerful emotions,"[19] which enables excellent educational and work achievements.[20] As Gregory Duhl, a law professor with BPD, writes: "[m]y mind is, objectively, neither sound nor unsound, but it is the source of my greatest assets. . . . To 'cure' my mind, using the medical paradigm, is to zap me of all of my strengths."[21] Therefore, cases involving employees with BPD allow us to analyze moral accommodations without having to also consider employees' other capacities to work. Third, people with BPD face negative social stigma and disadvantage on the basis of their diagnosis and related symptoms.[22] Their exclusion from various social settings demonstrates the complexity and pervasiveness of disability

16. DSM-5, *supra* note 13, at 468, 663–64.

17. Establishing the causal link between one's impairment and related misbehavior gives rise to a whole new set of issues, as evidenced in efforts to dispute school exclusion on the basis of misbehavior related to students' disabilities. *See infra* note 164 (regarding school exclusion).

18. Note, *Three Formulations of the Nexus Requirement in Reasonable Accommodations Law*, 126 HARV. L. REV. 1392, 1395–1397 (2013) [hereinafter *Three Formulations*] (analyzing courts' approaches to whether a requested accommodation is sufficiently linked to the plaintiff's disability and proposing strategies to mitigate the disadvantages in each of the three approaches).

19. JEROLD J. KREISMAN & HAL STRAUS, I HATE YOU—DON'T LEAVE ME. UNDERSTANDING THE BORDERLINE PERSONALITY 16 (2010).

20. By contrast, the debate surrounding disabled people's capacity to work both underlies the call for accommodations and the resistance to those accommodations.

21. Gregory Duhl, *Over the Borderline - A Review of Margaret Price's Mad at School: Rhetoric of Mental Disability and Academic Life*, 44 LOY. U. CHI. L.J. 771, 777 (2013).

22. *See infra* Part I (discussing the negative stigma against people with BPD and its impact on their access to justice).

disadvantage and highlights the need for expanding the duties owed to persons with disabilities. Fourth and finally, there are ongoing philosophical debates concerning the nature of BPD as a clinical condition, as opposed to a moral deficit, and whether people with BPD are morally responsible for their behavior.[23] Focusing on cases involving plaintiffs with BPD sheds light on some of these contentious issues which are central to the analysis of moral accommodations.

Although the issue of the appropriate response to impairment-related workplace misconduct may seem anecdotal at first, it is in fact key for understanding overarching questions in the theory and practice surrounding disability law. First, unpacking the social response to impairment-related misconduct demonstrates the pervasiveness of disadvantage disabled people face. Specifically, dismissal against the backdrop of impairment-related misconduct in the workplace is often part of a pattern of limited opportunities and social exclusion. Further, losing one's job often causes instability and stress that can exacerbate one's underlying condition. Indeed, BPD is associated with emotional pain, distress, feelings of anxiety, emptiness, hopelessness, meaninglessness, powerlessness, and self-hate.[24] Psychologist Marsha Linehan famously describes borderline individuals as "the psychological equivalent of [a] third-degree burn patient. They simply have, so to speak, no emotional skin. Even the slightest touch or movement can create immense suffering."[25] Expectedly, the emotional suffering of people with BPD is even greater when facing strenuous life events, such as losing one's job.

Second, and relatedly, the analysis of cases dealing with impairment-related misconduct contributes to a wider debate taking place in academia and beyond regarding mental health. The pivotal challenge from the point of view of the disability rights movement, and disability law, is to better understand the disadvantage facing people with mental disorders and adapt the social and legal response to disability to address their distinctive circumstances.[26] My notion of

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23. *See infra* Parts V.C, IV.A, respectively (discussing these two philosophical debates).

24. Kent-Inge Perseius et al., *To Tame a Volcano: Patients With Borderline Personality Disorder and Their Perceptions of Suffering*, 19 ARCHIVES PSYCHIATRIC NURSING 160, 163 (2005).

25. MARSHA M. LINEHAN, COGNITIVE-BEHAVIORAL TREATMENT OF BORDERLINE PERSONALITY DISORDER 69 (1993).

26. *See generally* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399 (2006) (suggesting

moral accommodations offers a new way of responding to people dealing with mental health issues who often—albeit not exclusively—face social exclusion following impairment-related misconduct.[27]

Finally, the notion of moral accommodations can serve as a lens through which to explore the theoretical foundations and scope of the duty to provide reasonable accommodations more broadly. Although the duty to provide reasonable accommodations has by now become a common feature of disability discrimination law, its philosophical underpinnings received surprisingly scant scholarly attention.[28] Focusing on the contentious case of impairment-related workplace misconduct invites us to delve into the justification of the duty to provide reasonable accommodations. It also provides an opportunity to offer the first systematic analysis of common objections to reasonable accommodations, including the claim that they are too burdensome.[29]

The Article proceeds as follows. It begins by outlining the nature and scope of the problem of impairment-related misconduct in the context of BPD. Part I draws on case law under Title I of the ADA to portray the typical chain of events leading to employees' dismissal following impairment-related misconduct. It also discusses the distinctive challenges facing individuals in such circumstances in filing legal claims to challenge their exclusion. The Article then analyzes courts' approach to disability discrimination cases involving impairment-related workplace misconduct. It shows that courts in such cases typically hold that the plaintiff is not disabled (Part II.A); that the plaintiff is not qualified for the job (Part II.B); or that there was a legitimate reason to dismiss the employee (Part II.C). Next, in Part III, I put forth an alternative approach to impairment-related misconduct cases which extends our current understanding of reasonable accommodations to include moral accommodations. I hypothesize three types of moral accommodations—second chances,

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that discriminating against people with mental illness is often motivated by a desire to avoid "hedonic costs"—namely an increase in negative emotions or loss of positive emotions that results from being around them).

27. Related cases involve stimming (self-stimulating behavior) of people with Autism or using slurs by people with Tourette's Syndrome. For more on disabilities manifesting in unacceptable behavior, see *infra* note 32.

28. *See infra* Part IV (discussing the justification of moral accommodations).

29. *See infra* Part V.A (responding to the objection that moral accommodations impose undue burdens).

job reassignments, and exemptions from customary rules of conduct. I argue that such moral accommodations are consistent with the construction of reasonable accommodations under the ADA, and explain the benefits that they could bring to plaintiffs in impairment-related misconduct cases.

After putting forth the notion of moral accommodations, its legal basis, and potential benefit for plaintiffs, the next two sections move on to analyze the philosophical justification of moral accommodations. In Part IV, I argue that different justifications for reasonable accommodations also apply to *moral* accommodations as a category therein. Next, in Part V, I raise and respond to four possible objections to moral accommodations, including the objection that moral accommodations harm other employees, are accordingly too burdensome, and therefore never justified.

Finally, drawing on the justification of moral accommodations laid out in previous sections, Part VI criticizes the current judicial approach to impairment-related misconduct, which does not recognize what I call moral accommodations as reasonable accommodations. I argue that this approach rests on a conflation of rights and sympathy, whereby engaging in misconduct renders people not "deserving enough" in the eyes of the court. I conclude by considering some of the practical implications of recognizing the duty to provide moral accommodations.

I. The Problem of Impairment-Related Workplace Misconduct

This Part explains the problem of impairment-related workplace misconduct. It begins by describing the typical chain of events relating to misconduct that leads to the dismissal of employees with BPD. It then argues that limited access to justice generates further disadvantage for people in those circumstances who may wish to challenge their dismissal.

Generally, various circumstances could give rise to impairment-related workplace misconduct. Sometimes workplace stress exacerbates underlying conditions which could ultimately result in misconduct.[30] In other cases, some change in the workplace,

30. Susan Stefan, "*You'd Have to be Crazy to Work Here*": *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 844 (1998) (citing cases where employees' disabilities were triggered or exacerbated by workplace stress and abusive environment, and criticizing courts for dismissing disability discrimination claims in those circumstances).

such as a new supervisor or modifications in job responsibilities or schedule triggers impairment-related workplace misconduct.[31] In still other cases, employees' underlying conditions manifest in symptoms perceived as unacceptable behavior.[32]

A common upshot of impairment-related misconduct is that the relationship between the employee and his or her colleagues deteriorates beyond repair. The escalation results from the employee's problematic behavior on the one hand, and colleagues' response to that behavior on the other. After the misconduct and pursuant deterioration in workplace relationships, employers often take disciplinary action against misbehaving employees. The outcome is that such employees are being pushed out of the workplace.

The facts described in *Coia v. Vanguard* vividly flesh out this chain of events.[33] The plaintiff, Veronica Ann Coia, worked as a graphic designer for Vanguard investment firm.[34] After seven years working there with no notable incidents, Coia received a new supervisor with whom she had a strained relationship.[35] This new supervisor repeatedly negatively evaluated Coia for her inability to "demonstrate resilience and composure," for losing emotional control in professional settings when unexpected things occurred, and for being rude and disrespectful towards her supervisor and peers.[36] During this time, Coia was also diagnosed with depression and BPD, and she informed her employer of her diagnosis.[37] Five years after she had begun working with the new supervisor, Coia received a particularly bad end-of-year review, after which she wrote her supervisor an email calling her (among other things): "lazy," "spiteful," "dishonest," "incompetent," "narcissistic," "unapproachable," "full of [her]self," and a "megalomaniac."[38] Coia

31. *See, e.g., infra* notes 33, 45, 109 and accompanying text (citing cases in which misconduct followed some work-related change).

32. *See, e.g.*, Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans With Disabilities Act*, 1 U.C. DAVIS L. REV. 1109, 1124 (2017) (discussing symptoms associated with Tourette's Syndrome); Timmons, *supra* note 13, at 208–10 (describing in detail mental disorders that manifest themesleves in the form of conduct).

33. Coia v. Vanguard, No. CV 16-3579, 2017 WL 724334 (E.D. Pa. Feb. 23, 2017).

34. *Id*. at *1.

35. *Id*.

36. *Id*. at *2–7.

37. *Id*. at *1–3.

38. *Id*. at *8–9.

also accused her supervisor of bullying her, lying about her performance, targeting her, setting her up to fail, starting a campaign to drive her insane, and creating a toxic work environment that triggered her depression and anxiety.[39] Coia concluded that she had "zero respect" for her supervisor, who she said will "never acquire heart, soul or common sense."[40] Following this email, Coia was fired for violating company professional conduct and fair treatment policies.[41]

Other cases of impairment-related workplace misconduct involving plaintiffs with BPD include employees who made offensive racial- and ethnically-based remarks in the workplace;[42] demonstrated insubordination;[43] sent colleagues hurtful and offensive emails, including ones with sexual nature;[44] and raised false allegations of sexual harassment and workplace bullying.[45]

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39. *Id.*

40. *Id.* at *9.

41. *Id.* at *10 (describing policies required employees to treat all those with whom they work "as valued and respected colleagues," and to "adhere to the highest ethical professional standards of behavior").

42. Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 4 (D.D.C. 2000). In Weigert, a university researcher insulted her colleagues, made racially insensitive "venomous" remarks towards them, and consistently demanded immediate attention without regard to the needs of others. After receiving both written and verbal warnings she was dismissed. Medical opinions suggested she had BPD. *Id.*

43. Rogers v. New York Univ., 250 F. Supp. 2d 310, 311 (S.D.N.Y. 2002). In Rogers, a university administrative aide with BPD exhibited insubordination toward her supervisor with whom she had interpersonal tensions. She then went on medical leave. When her leave expired, she was dismissed due to lack of medical opinion stating she was ready to return to work. *Id.*

44. Smith v. Salt Lake City Corp., No. 2:05CV00943, 2007 WL 582969, at *2 (D. Utah Feb. 20, 2007). In Smith, a police dispatcher with BPD and depression sent a colleague multiple emails with statements such as: "go ahead and fuck him," "your boobs are made of water," and "YOU['RE] A BITCH!", and she also sent 15 other employees emails with cartoons of genitals. She was eventually terminated due to violations of computer messaging and sexual harassment policies. *Id.*

45. Wellman v. Dupont Dow Elastomers, L.L.C., 414 F. App'x 386, 388 (3d Cir. 2011). In Wellman, an administrative assistant diagnosed with traits of borderline, hysterical and narcissistic personality falsely accused her supervisor of sexual harrassment and of subjecting her, with another colleague, to threats and abuse. The employee was terminated after failing to report to work when her medical leave expired. *Id.*; *see also* Cetina v. Newbold Servs., No. CA 6:12-2222-TMC, 2013 WL 5596921, at *2–3, *6 (D.S.C. Oct. 11, 2013). In Cetina, a janitor was dismissed after making allegations against co-workers regarding sexual and physical assaults, that her employer found to be false. She subsequently began

Impairment-related misconduct clearly causes harm to others in the workplace. It hurts co-workers' feelings, makes them feel threatened, undermines their motivation to work and may possibly lead them to quit their jobs.[46] Yet dismissal in such circumstances severely disrupts the lives of misbehaving employees, too. Termination takes away people's livelihoods. It is often deeply humiliating because people typically value the opportunity to work and perceive it as essential to being equal participants in society.[47] Moreover, for people with mental disorders, dismissal plausibly hinders rehabilitation by creating further disruption to their lives.[48] More pragmatically, losing one's job could involve relinquishing one's health insurance, thus making it more difficult to seek care.[49]

However, there aren't many legal challenges to dismissal against the backdrop of impairment-related misconduct, and even fewer involving plaintiffs with BPD. This may sound puzzling given that the prevalence of people with BPD in the population is estimated at about 1.6%–5.9%.[50]

A plausible explanation of the scarcity of cases is the limited access to justice facing persons with disabilities. Generally, people do not bring their aggrievances to trial for various reasons. Some do not conceive their experience as unjust or do not believe it worthwhile to seek remedy.[51] Others favor pre-trial settlements or alternative dispute resolutions to avoid emotionally draining, costly, and time-

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receiving Social Security disability benefits on the basis of several physical impairments and mental disorders, including BPD. Her claim that she was subject to unlawful discrimination on the basis of disability, and other prohibited grounds, was dismissed as untimely. *Id.*

46. *See infra* Part V.A (addressing the objection that moral accommodations impose undue burdens).

47. SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION 144–45 (2020) (arguing that employment is something people need to be valued and seen as equals in our society).

48. *See supra* note 25 and accompanying text (discussing the vulnerability of people with BPD to strenuous life events).

49. *See infra* Part V.B (discussing the view that in addressing the disadvantage facing people with disabilities, treatment is preferable to social change).

50. DSM-5, *supra* note 13, at 665.

51. *See generally*, William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631 (1980) (describing the process in which conflicts and injurious experiences turn into legal disputes).

consuming legal proceedings.[52] Persons with disabilities experience additional hurdles in vindicating legal claims. Firstly, these hurdles include laws restricting the legal capacity of people with certain disabilities, courts' inaccessible architectural design, incompatibility of legal proceedings regarding testimony of people with various impairments, difficulties accessing legal knowledge and representation, and lack of substantive legal protections.[53] Second, due to prevalent social biases and stigma surrounding disability, people are sometimes reluctant to self-identify as disabled. This in turn hinders their ability to vindicate claims under disability law, which often requires such self-identification.[54] Third, and more concretely, persons with disabilities may struggle to obtain expert legal representation in employment cases.[55] As one comprehensive study showed, lawyers who specialize in disability litigation are disinclined to pursue employment cases, which they perceive as lacking the ability to "make an impact" that extends beyond the particular case without contributing to bad legal precedent.[56]

As a subgroup of people with disabilities, people with BPD face distinctive challenges in accessing justice. People with BPD plausibly avoid filing claims because of particularly high levels of stigma associated with this disorder.[57] Moreover, some lawyers are

52. *See generally*, Patricia Lee Refo, *The Vanishing Trial*, 30 LITIG. 1 (2004) (discussing the reasons for the sharp decline of federal court trials in the US).

53. *See* Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 635–46 (2017) (describing various factors hindering disabled people's access to courts and legal proceedings).

54. *See generally,* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Legislation*, 2 UTAH L. REV. 247 (2001) (exploring the process of self-identifying as disabled for filing claims under federal law); Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547 (2021) (arguing that reluctance to self-identify as disabled is a profound obstacle for achieving the goals of the disability rights movement and advocating for a positive "claiming of disability").

55. Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV 1287, 1312–14 (2012) (discussing findings from interviews with lawyers specializing in disability rights advocacy, who prefer not to take on disability employment cases).

56. *Id*.

57. *See, e.g.*, Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 278 (2000) [hereinafter Stefan, *Delusions of Rights*] ("The scarcity of claims by people with diagnoses of borderline personality disorder . . . suggests that the levels of stigma and discrimination against people with these diagnoses are so high that people with these diagnoses . . . do not want to disclose the diagnosis."); Roe v. CVS Caremark Corporation, No. 4:13-cv-3481-

reluctant to represent clients with BPD due to difficulty getting along with them,[58] or due to low chances of winning their claims, combined with the practice of working on results-based fees.[59] Finally, courts tend to find people with BPD unreliable witnesses, perceiving them as manipulative with a tendency to lie.[60] Accordingly, people with BPD may withhold legal claims due to previous disappointing experience with the legal system.

Hopefully, the growing public awareness around BPD will reduce stigma and lead to greater access to justice for this group. To name a few examples of this trend, the month of May has been designated as "BPD Awareness Month" in the United States since 2008;[61] public figures are now speaking publicly about their

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RBH, 2014 WL 12608588, at *2 (D.S.C. Sept. 11 2014) (regarding a case in which appellant challenged previous court's decision that she had BPD, although this decision led to her winning her original claim).

58. *See, e.g.*, two anecdotal yet illuminating examples: In re C.E., No. 0925, 2015 Md. App. LEXIS 279, at *4, *8, *22 (Md. Ct. Spec. App. Dec. 15, 2015) (regarding a case in which Social Services Department requested to take custody over a mother's baby, based on her "untreated mental health conditions" including BPD, that arguably rendered her unable to care for her baby; the mother faced difficulties cooperating with three attorneys appointed by the Office of the Public Defender and eventually was left without legal representation); and *generally* Sam Margulies, *Representing the Client from Hell: Divorce and the Borderline Client*, 25 J. PSYCHIATRY & L. 347 (1997) (describing a family law practicing attorney's difficulties with his client whom he believed had BPD, due primarily to her lack of cooperation and bursts of anger, and recommending to other lawyers not to accept clients that they suspect might have BPD).

59. Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans With Disabilities Act*, 17 GEO. MASON U. C.R. L. J. 79, 111 & n.169 (2006).

60. *See, e.g.*, Susan Stefan, *Impact of the Law on Women with Diagnoses of Borderline Personality Diorder Related to Childhood Sexual Abuse*, *in* WOMEN'S MENTAL HEALTH SERVICES - A PUBLIC HEALTH PERSPECTIVE 240 (Bruce Lubotsky Levin, Andrea K. Blanch, & Ann Jennings eds., 1998) (suggesting that the levels of stigma and discrimination against people with BPD and multiple personality disorder partially explains the scarcity of claims brought by them) [hereinafter Stefan, *Impact of the Law on Women*]; Rosanna Langer, *Gender, Mental Disorder and Law at the Borderline: Complex Entanglements of Victimization and Risk*, 23 PSYCHIATRY, PSYCH. & L. 69, 77 (2016) (arguing that BPD diagnoses are often used by litigants in Canadian courts to try to undermine credibility of plaintiffs and witnesses with BPD).

61. H.R. 1005, 110th Cong. (2008).

experiences with BPD;[62] and portrayals of the struggles of people with BPD now appear in popular culture and the press.[63]

After briefly introducing the problem of impairment-related misconduct, the next Part will turn to the courts. It will show that courts typically deny discrimination claims challenging workplace dismissal following impairment-related misconduct. Interestingly, this judicial approach provides little hope that legal claims would lead to redress, and possibly disincentivizes potential plaintiffs. By contrast, the alternative approach that I put forth in this Article—according to which misconduct related to people's impairments should sometimes be tolerated—could improve chances of success for plaintiffs in such cases and in turn bolster their willingness to bring claims to court.

II. Courts' Approach to Impairment-Related Misconduct

This Part will show how courts have thus far denied claims challenging workplace dismissal against the backdrop of impairment-related misconduct. First, courts often hold that plaintiffs bringing such claims do not have a "disability" as defined in the law (Part II.A). Second, even if they hold that plaintiffs have a disability, they sometimes find that engaging in workplace misconduct renders plaintiffs not "otherwise qualified" to perform the necessary functions

62. For example, National Football League star Brandon Marshall is a prominent public spokesperson for BPD. *See* Brandon Marshall, *The Stigma*, PLAYERS' TRIBUNE (June 1, 2017), https://www.theplayerstribune.com/en-us/articles/brandon-marshall-nfl-mental-health-awareness [https://perma.cc/H4EW-NMR3] (discussing his personal struggles with BPD).

63. For example, popular culture portraying female characters whose behavior is associated with BPD such as "Fatal Attraction" (1987) or "Young Adult" (2011), or who are explicitly diagnosed with BPD, such as television show "Crazy Ex-Girlfriend." *See* Emily Nussbaum, *Losing Her Mind: 'Crazy Ex-Girlfriend' Ends With Hope*, NEW YORKER (Apr. 8, 2019), https://www.newyorker.com/culture/culture-desk/losing-her-mind-crazy-ex-girlfriend-ends-with-hope [https://perma.cc/8BFF-8ERB] (reviewing the series' depiction of BPD). More recently, BPD featured in the press following the testimony of a forensic psychologists in the Johnny Depp–Amber Heard trial, claiming that the latter had BPD. *See* Julia Jacobs, *Jury Reaches Verdict in Johnny Depp-Amber Heard Trial: What to Know*, N.Y. TIMES (Apr. 21, 2022), https://www.nytimes.com/2022/04/21/arts/johnny-depp-amber-heard-trial.html [on file with the *Columbia Human Rights Law Review*] (summarizing witness testimony).

of the job (Part II.B).[64] Third, even if courts hold that plaintiffs are both disabled and qualified for the job, they often find that workplace misconduct constitutes a legitimate reason for adverse employment action unrelated to the employee's disability (Part II.C).

A. Qualifying as a Person with a Disability

Under the ADA, only people who qualify as having a "disability" are covered by the Act.[65] The ADA provides a three-prong definition of disability: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."[66]

Following the enactment of the ADA, courts interpreted the definition of disability narrowly, consequently limiting the class of individuals protected by the Act.[67] This jurisprudence has become known as the "backlash" against the ADA.[68] Hurdles at this

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64. "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

65. 42 U.S.C. § 12102(1).

66. *Id.*

67. *See* Linda Hamilton Krieger, *Introduction*, *in* BACKLASH AGAINST THE ADA : REINTERPRETING DISABILITY RIGHTS 1, 10–13 (Linda Hamilton Krieger ed., 2003) (reviewing Supreme Court decisions narrowing the ADA's coverage); Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L. J. 181, 212–23 (2008) (reviewing decisions by federal courts of appeals on qualifying as disabled).

68. In this context, the term "backlash" is used to describe resistance to successful civil rights initiatives. In this case it was a resistance led by courts. *See* Krieger, *supra* note 67, at 5 (indicating that as early as 1996, "many in the disability community were speaking of an emerging *judicial* backlash against the ADA") (emphasis added). This term also implies rejection of explanations unrelated to the subject matter, such as that cases brought to court were inherently weak, that the statute was poorly drafted, or that the enactment of major legislation typically leads to confusion in implementation and interpretation. For suggested explanations of the judicial backlash against the ADA, see Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 78–82 (Linda Hamilton Krieger ed., 2003) (claiming that courts interpreted the ADA at a time when they were "inhospitable" to expansive interpretations of civil rights protection more broadly, specifically with regards to differential treatment as a way of securing equal opportunities); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 13 (2014) (arguing that

preliminary stage not only narrowed the Act's coverage, but also confined opportunities to consider the applicability of the legal duty to provide reasonable accommodations, including in circumstances of impairment-related misconduct.[69]

In 2008, responding to widespread criticism directed at this judicial backlash, Congress approved the ADA Amendments Act (ADAAA).[70] The amendment superseded the Court's interpretation of "disability" and mandated that "the question of whether an individual's impairment [is] a disability under the ADA should not demand extensive analysis."[71] Since the ADAAA, then, qualifying as "disabled" should be relatively straightforward.

However, many plaintiffs still struggle to qualify as disabled.[72] Plaintiffs with BPD face distinctive—albeit illuminating—challenges in this regard. First, plaintiffs with BPD might find it difficult to prove that they have or had an "impairment"[73] supported by a medical diagnosis.[74] Although BPD

courts interpreted the term "disability" narrowly to ensure that the ADA's reasonable accommodations provisions, viewed as conferring special treatment, were only given to those who were truly deserving).

69. Smith, *supra* note 59, at 146–47 (arguing that only after plaintiffs with mental illness survive beyond the definition stage will courts have the opportunity to "examine the broader questions posed by the ADA: What are our expectations of those who employ persons with mental illness? What accommodations are appropriate?").

70. 42 U.S.C. § 12101. For an overview of ADA enactment, judicial construction of the third prong, and the advocacy efforts and negotiations leading to the legislation of the ADAAA, see generally, Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010).

71. Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110–324, § 2(5), 122 Stat. 3553 (2008) (incorporated in 42 U.S.C. § 12101(b)(4)).

72. *See generally* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. POVERTY L. & POL'Y 383 (2019) (arguing that many courts still erroneously find plaintiffs "not disabled" while disregarding or wrongly applying the ADAAA).

73. According to related regulations, impairment is "any physiological disorder or condition" or "[a]ny mental or psychological disorder, such as . . . emotional or mental illness . . . ." 29 C.F.R. §1630.2 (2012); *see also* Christopher Boorse, *Disability and Medical Theory*, *in* PHILOSOPHICAL REFLECTIONS ON DISABILITY 55, 73–76 (D. Christopher Ralston & Justin Ho eds., 2009) (claiming that "impairment" under the ADA is nearly the same as a "clinically evident pathological condition" that is a biological dysfunction).

has been recognized as a psychiatric disorder for decades, its validity is still subject to ongoing debate. Some argue that its diagnostic criteria are too ambiguous and insufficiently distinct, lending themselves to significant heterogeneity and overdiagnosis,[75] particularly of women.[76] Others argue that the distinction between having a bad personality and having a personality disorder is too elusive, particularly when behavioural symptoms are exaggerated manifestations of typical human behavior.[77] Most radically, still others claim that BPD is a made-up category that unnecessarily

74. For a recent compelling critique of this deference to medical knowledge, see generally Katherine Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59 (2021) (criticizing deference to medical knowledge for the purpose of determining entitlement to reasonable accommodations, and proposing instead a "documentation-free" model for providing accommodations in the workplace); *see also infra* note 303 and accompanying text (discussing Macfarlane's proposal).

75. *See, e.g.*, Peter Tyrer, *Why Borderline Personality Disorder is Neither Borderline Nor a Personality Disorder*, 3 PERSONALITY & MENTAL HEALTH 86, 94 (2009) (suggesting that the BPD diagnostic criteria should be abolished due to its significant heterogeneity). *Contra* Joel Paris, *The Nature of Borderline Personality Disorder: Multiple Dimensions, Multiple Symptoms, but One Category*, 21 J. PERSONALITY DISORDERS 457, 462 (2007) (recommending that more diagnostic criteria be required to diagnose individuals with BPD to overcome the problem of heterogeneity).

76. *See, e.g.*, Debra Simmons, *Gender Issues and Borderline Personality Disorder: Why do Females Dominate the Diagnosis?*, 6 ARCHIVES PSYCHIATRIC NURSING 219, 221 (1992) (claiming that BPD diagnostic criteria are defined in relation to gender-based norms); Dana Becker & Sharon Lamb, *Sex Bias in the Diagnosis of Borderline Personality Disorder and Posttraumatic Stress Disorder*, 25 PRO. PSYCH.: RSCH. & PRAC. 55, 57–60 (1994) (showing that when patients' symptoms match either BPD or PTSD, men were more likely to be diagnosed with PTSD and women were more likely to be diagnosed with BPD); Dana Becker, *When She Was Bad: Borderline Personality Disorder in a Posttraumatic Age*, 70 AM. J. ORTHOPSYCHIATRY 422, 422–23 (2000) (criticizing feminist therapists who diagnosed women with PTSD, instead of BPD, due to the different "moral baggage" of each diagnosis).

77. Smith, *supra* note 59, at 82–92. The DSM-5 seems to recognize this ambiguity, stating that personality traits are to be diagnosed as a personality disorder only when they are "inflexible, maladaptive, and persisting, and cause significant functional impairment or substantive distress" and "must be distinguished from personality traits that do not reach the threshold for a personality disorder." DSM-5, *supra* note 13, at 648; *see also infra* Part V.C (discussing the view that BPD is a moral deficit, not a mental disorder).

medicalizes women's non-pathological responses to abusive life experiences.[78]

Even if it is granted, *arguendo*, that BPD is a pathology, such conceptual challenges complicate the process of diagnosing BPD in practice.[79] The facts described in *Weigert v. Georgetown University* demonstrate the possible implications of difficulties in timely receiving a BPD diagnosis.[80] There, the court rejected the plaintiff's claim that she had a disability based on her unspecified neurological condition, hypothyroidism, the effects of her medications, and claustrophobia.[81] The court further mentioned that had the plaintiff brought a BPD diagnosis early enough, it could constitute a disability, but that determination was foreclosed as her treating physicians did not indicate that she had BPD until the trial phase of her case.[82]

Second, qualifying as disabled under the first two prongs of the ADA's definition of disability requires proving that one's impairment substantially limits a major life activity.[83] BPD is associated with difficulties managing interpersonal relationships and therefore fits with what Susan Carle calls "social impairments," namely impairments that primarily limit people in their social interactions.[84] For the purpose of qualifying as disabled, central

78. Stefan, *Delusions of Rights*, *supra* note 57, at 241 ("[W]omen's struggle to reassert their own worth and control over their lives . . . the very identity of these behaviors as the struggle of a sexually abused child to redefine her place in the world is transformed into a set of pathological symptoms."); *see also* Andrea Nicki, *Borderline Personality Disorder, Discrimination, and Survivors of Chronic Childhood Trauma*, 9 INT'L. J. FEMINIST APPROACHES TO BIOETHICS 218, 220 (2016) (arguing that the BPD diagnosis and clinical practices surrounding it, such as treatment, rest on a misunderstanding of the social context of survivors of chronic childhood abuse and trauma). For a general critique of mental illness along these lines, see generally Lewis, *supra* note 13 (reviewing the antipsychiatry or Mad Pride movement and its impact on disability activism in the United States).

79. Duhl, *supra* note 21, at 777–79 (sharing personal experience of being diagnosed with various disorders before finally receiving the BPD diagnosis).

80. Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 4–5 (D.D.C. 2000).

81. *Id*. at 7–12.

82. *Id*. at 9 n.8 (noting that plaintiff's doctors "now assert that Ms. Weigert may have [BPD]," which "may constitute an impairment" but that plaintiff did not allege that she suffers from BPD or that BPD substantially limited her, and, therefore in this case, BPD "cannot constitute a disability under the ADA.").

83. 42 U.S.C. § 12102(1).

84. Carle, *supra* note 32, at 1118.

issues for people with social impairments are whether "interacting with others" is a major life activity and, relatedly, what constitutes being significantly limited in that ability.[85] Before the ADAAA, courts' varying approaches on this issue made it all the more challenging for plaintiffs to show they were disabled.[86] Today, federal regulations state specifically that interacting with others *is* a major life activity, and most courts agree.[87] Nevertheless, it remains unclear what—outside an *inability* to communicate—qualifies as a substantial limitation in this major life activity.[88] Does a pattern of unstable and intense interpersonal relationships, or a tendency to lash out in angry outbursts—both symptomatic behaviours of BPD—amount to a substantial limitation?[89] If not, plaintiffs with BPD will struggle to be recognized as disabled under the statute's first two prongs.

Alternatively, plaintiffs who cannot establish that they have an *actual disability* may claim that they have a *perceived disability*, namely that they are "regarded as" having a substantially limiting impairment.[90] In the years following the enactment of the ADA, courts' interpretation of the "regarded as" prong mimicked their interpretation of the first two prongs, requiring plaintiffs to prove that they were perceived as having an impairment that substantially

85. *Id.* at 1127–29.

86. Smith, *supra* note 59, at 116–120; Stefan, *Delusions of Rights, supra* note 57, at 283.

87. *See* 29 C.F.R. § 1630.2(i)(2)(i) (including "interacting with others" as a major life activity); *see also* Carle, *supra* note 32, at 1127.

88. Carle, *supra* note 32, at 1133–35.

89. A related question is whether such behavior constitutes a substantial limitation in interacting with others as opposed to merely *positively* interacting with others. Positively interacting with others does not seem like a major life activity, because it is one of numerous modes of interactions, such as interacting assertively, confidently etc. People vary in their abilities to interact with others, and it is up for debate whether every mode of interaction amounts to a major life activity, or whether lacking one mode of interaction amounts to a substantial limitation in this ability.

90. Boorse rightly criticized the use of the term "perceived disability," arguing that under the ADA people have an actual disability under the third prong, based on perceived impairments, and that any other way of putting this leads to inherent contradictions. Boorse, *supra* note 73, at 72–73. However, as the distinction between "actual" and "perceived" disabilities has now become a familiar jargon to describe the three prongs of the ADA's definition of disability, I use these terms for ease of reference.

limits a major life activity.[91] Since the ADAAA, this stringent interpretation has been softened, so more people may plausibly establish they are "regarded as" disabled.[92]

Nevertheless, uncertainty surrounding the manner in which "impairment" is understood in connection with a perceived disability gives rise to other challenges. Importantly, it is unclear whether one needs to be perceived as having a *particular* impairment, or whether being perceived as having symptoms relating to some *unspecified* impairment is enough. Proving that one was perceived more broadly as "mentally disabled," "mentally impaired," or even just "crazy" (to use a loaded term) would plausibly be enough to establish that one was "regarded as" having some unspecified impairment. By contrast, establishing that one was "regarded as" having a particular impairment would likely involve proving that one was perceived as having a specific condition, such as BPD, which is undoubtedly difficult in practice.[93] As Carle rightly notes, proving that the employer perceived the employee's behavior as stemming from a specific mental condition is often possible only through a "smoking gun" discriminatory comment.[94]

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91. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) (explaining that a person may show that they are regarded as having a substantially limiting impairment if "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities").

92. 42 U.S.C. § 12102(4)(A); *see also* Barry, *supra* note 70, at 233–36, 262–66, 272–74 (reviewing the legislative and judicial history leading to the new interpretation of the third prong under the ADAAA, and claiming that the ADAAA's mandate regarding the third prong "harmonize[d] the concept of impairment with race, sex, and other protected characteristics").

93. One way of dealing with the difficulty in attributing knowledge of one's impairment to another is to disclose one's diagnosis in advance. Yet people are often reasonably reluctant to disclose their BPD diagnosis, due to the pervasive social stigma against people with mental disorders, and against BPD in particular, realizing that such disclosure could increase the chances of adverse action. *See* Stefan, *Delusions of Rights*, *supra* note 57, at 290; Carle, *supra* note 32, at 1179.

94. *Compare* Carle, *supra* note 32, at 1177–78 (explaining that for people with social impairments it is difficult to prove they have been regarded as disabled, because they would have to prove "not only that their employer discriminated against them on the basis of a negatively perceived impairment, but also that the emplyer realized that the traits to which it reacted negatively stemmed from a recognized disability. This may often be impossible absent an employer making 'smoking gun' discriminatory comments."), *with* Conrad v. Bd. of

B. "Otherwise Qualified" for the Job

In addition to establishing that one has a disability, plaintiffs claiming disability discrimination under Title I of the ADA must also show that they are "otherwise qualified" for the job.[95] A qualified individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[96] According to Michelle Travis, proving one is "otherwise qualified" for the job is becoming the new gatekeeping requirement limiting the ADA's reach in practice.[97]

Under the Act, employers are entrusted with wide discretion to determine the essential functions of a particular job.[98] But their discretion is not unlimited. The law stipulates that "qualification standards" that screen out or tend to screen out an individual or class of individuals with disabilities are discriminatory,[99] unless they are "job-related for the position in question and consistent with business necessity."[100] More concretely, it is an open question under the ADA whether qualification standards relating to *conduct* could be deemed discriminatory if they tend to screen out people with disabilities.[101]

Generally speaking, the "otherwise qualified" clause generates a double-bind for ADA plaintiffs.[102] On the one hand, as

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Johnson County Comm'rs, 237 F. Supp. 2d 1204, 1238–39 (D. Kan. 2002) (holding that the plaintiff was not "regarded as" disabled, even though she was sent to a psychiatric fitness evaluation for her "erratic behavior," limited ability to focus, and extreme emotional responses to managerial decisions).

95. 42 U.S.C. § 12112(a).

96. *Id.* § 12111(8).

97. *See generally* Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Amendments Act*, 2015 MICH. ST. L. REV. 1689 (2015) (arguing that since the ADAAA, employers and federal courts have been using the "otherwise qualified" prong to restrict the ADA's coverage).

98. 42 U.S.C. § 12111(8) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.").

99. *Id.* § 12112(b)(6).

100. *Id.* § 12113(a).

101. Unless the misconduct was related to drug use or alcoholism. 42 U.S.C. § 12114(c)(4).

102. Krieger, *supra* note 67, at 10 (claiming that the three Supreme Court cases handed down in 1999, often referred to as the trilogy of ADA Title I cases "gutted" the ADA, generating a catch-22 for disabled people who were either too

discussed above, to qualify as disabled plaintiffs must prove that they are substantially limited in a major life activity. On the other hand, they must show they can perform the essential functions of the job. Bradley Areheart aptly describes this tension as "the Goldilocks dilemma" whereby ADA plaintiffs must situate themselves in an elusive middle-ground where they are neither too disabled nor not disabled enough.[103] Having to prove both limitation and ability is problematic, especially when the limitation on a major activity is related to the relevant job. For example, if one is substantially limited in the major life activity of "working" due to an ongoing health condition that requires medical care and leads to absenteeism, how can one then also be qualified to perform the functions of the job?[104]

Plaintiffs in impairment-related misconduct cases face a similar double-bind with regards to their ability to interact with others. As Carle shows, courts often find that jobs involve the essential function of interacting with others, even when they are carried out with little to no interpersonal contact or communication.[105] However, people whose impairments manifest in interpersonal difficulties often claim to be substantially limited in the major life activity of interacting with others in order to qualify as disabled.[106] Thus, a plaintiff's claim of being significantly limited in interacting with others due to an impairment could undermine their equally necessary claim that they qualify for the job and can get along with others.[107]

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disabled to be deemed otherwise qualified, or not disabled enough to qualify as disabled).

103. Areheart, *supra* note 67, at 212–25.

104. *See generally, e.g.*, Rogers v. NYU, 250 F. Supp. 2d 310 (S.D.N.Y. 2002) In Rogers, a plaintiff with BPD was fired from her job while on medical leave. The defendant claimed that the plaintiff was not otherwise qualified to do her job since she could not regularly attend work. The discussion revolved around contradictory medical expert opinions regarding when the plaintiff will be ready to return to work: some stated that she was already ready to return to work while others said she needed more time, possibly a lot more, to recover. The court held that whether the plaintiff would be able to work after her extended medical leave was a matter for trial. *Id.*

105. Carle, *supra* note 32, at 1123–24 (discussing cases analyzing jobs such as grocery store clerks).

106. *Id.* at 1125–36 (analyzing case law before and after the ADAAA where plaintiffs with impairments manifesting in conduct claimed to be limited in the major life activity of interacting with others).

107. *Id.* at 1135–36. *See also* Weaving v. City of Hillsboro, 763 F.3d 1106, 1114 (9th Cir. 2014) (holding that an employee with ADHD who bullied his co-

This double-bind also clearly faces employees with BPD. Their tendency to generate interpersonal conflicts could serve as basis for establishing a limited ability to interact with others and qualify as disabled. But that same tendency could harm their case, by paving the way to a finding that they are unable to get along with others and are therefore not qualified for the job. For example, in *Weigert v. Georgetown University*, the court found that the plaintiff's outbursts towards co-workers rendered her unqualified, as she could not effectively collaborate with colleagues on a number of projects, and collaborating was an essential function of her job.[108] Yet those same outbursts could have served as a basis for claiming she was limited in the major life activity of getting along with others.

In addition to difficulties establishing both disability and ability to get along with others, plaintiffs in impairment-related misconduct cases struggle to establish that they are otherwise qualified because courts often view misconduct as disqualifying in and of itself.

Some courts hold that angry outbursts and profanities in and of themselves render people not otherwise qualified. This view is found in *Calef v. Gillette Co.*, where the plaintiff was a production manager who was dismissed following altercations with supervisors and co-workers, during which he exhibited "erratic" behavior that seemed "nonsensical[]" and "out of control."[109] Although it was not disputed that the plaintiff's misconduct was due to his ADHD, the majority opinion of the Court of Appeals for the First Circuit held that he was not otherwise qualified for the job because he could not perform the essential function of handling stressful situations "without making others in the workplace feel threatened for their own safety."[110]

In cases involving employees who make threats against co-workers, a prevalent view is that threatening colleagues is itself disqualifying. In *Palmer v. Circuit Court*, the Court of Appeals for the Seventh Circuit explicitly stated that "[t]he Act protects only

workers was not disabled under the ADA because his difficulties getting along with others did not amount to substantial limitation in interacting with others).

108. 120 F. Supp. 2d 1, 15 (D.D.C. 2000) (noting that courts "have consistently held that one who displays abusive and threatening conduct toward co-workers is not an otherwise 'qualified individual'" citing Palmer v. Cir. Ct. of Cook Cnty., 905 F. Supp. 499, 508 (N.D. Ill. 1995)).

109. 322 F.3d 75, 80–81 (1st Cir. 2003).

110. *Id.* at 86–87.

'qualified' employees . . . and threatening other employees disqualifies one."[111] The court further explained that while an employer ordinarily has a duty to make reasonable accommodations, "we cannot believe that this duty runs in favor of employees who commit or threaten to commit violent acts. . . . So clear is this that we do not think a remand is necessary to explore the possibilities of accommodation."[112] Similarly, in *Mayo v. PCC Structurals, Inc.*, the Court of Appeals for the Ninth Circuit held that an employee who made threats to kill his supervisor and other colleagues in "chilling detail and on multiple occasions" was not otherwise qualified, because he could not perform the essential function of interacting with others.[113] As I will explain later, moral accommodations do not warrant tolerating violence, but may well call for tolerating behavior that merely makes others *feel* threatened, when there is sufficient reason to think that such threat will not materialize.[114]

In some circumstances, employees' misconduct is perceived not merely as making others *feel* threatened, but rather as posing a significant risk to their health and safety. In such cases, courts have consistently held that the employee is not otherwise qualified.[115]

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111. 117 F.3d 351, 352 (7th Cir. 1997). In Palmer, the plaintiff's inappropriate behavior toward her colleagues and particularly her former supervisor culminated when in a series of telephone calls the plaintiff said that her former supervisor would be "better off dead." She also stated, "I'm ready to kill her. I don't know what I'll do. Her ass is mine. . . . I want Clara bad and I want her dead." *Id.*

112. *Id*. at 353.

113. 795 F.3d 941, 944 (9th Cir. 2015).

114. *See infra* Parts III, V.A (introducing the category of moral accommodations and its justification, and addressing the objection that moral accommodations are too burdensome on the grounds that they harm others, respectively).

115. *See, e.g.*, EEOC v. Amego Inc., 110 F.3d 135, 144 (1st Cir. 1997) (holding that an employee with bulimia and major depression, who attempted suicide several times, was not qualified for her job at a facility caring for severely disabled people, which included medication-related functions); Michael v. City of Troy Police Dep't, 808 F.3d 304, 307–09 (6th Cir. 2015) (holding that a former city patrol officer who exhibited "aberrant" behavior due to a brain tumour and subsequent surgeries, posed a threat to others and was therefore not qualified for the job); School Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 1131 (1987) (holding that determining whether a person with a disability is "otherwise qualified" should be based on individualized inquiry and findings of fact to achieve the "goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety

Notably, employers may also invoke the "direct threat" statutory defense to abrogate liability in such cases.[116] But in practice, given the broad interpretation of the "otherwise qualified" clause, the "direct threat" defense is almost redundant in employment discrimination cases.[117]

Interestingly, the direct threat defense is indispensable to employers when the misconduct does not pose a threat to others, but to the individual with the disability. The language of the ADA explicitly includes "threat to others" as a qualification standard that is "job related and consistent with business necessity."[118] Going one step further, however, the Equal Employment Opportunities Commission's regulations state that threat to others includes threat to the self, meaning the individual with the disability.[119] In a case unrelated to misconduct, the Supreme Court upheld the regulations.[120] That case, *Chevron v. Echazabal*, revolved around an employer's refusal to hire an applicant for a job in oil refineries after the applicant's physical pre-hiring examination indicated that working in this job would exacerbate his liver condition.[121] Writing for the Court, Justice Souter explained that, under the ADA, "threat to others" does not preclude the possibility that other kinds of threats emanating from an impairment, such as threats to one's own health

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risks"; and remanding the case to the District Court to make such necessary inquiry of facts regarding the plaintiff).

116. 42 U.S.C. § 12113(b).

117. Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35, 85 (2013) [hereinafter Travis, *The Part and Parcel*]. *But see* Mayo v. PCC Structurals, Inc., 795 F.3d 941, 945 (9th Cir. 2015) (drawing a distinction between the plaintiff's threatening behavior and posing a direct threat).

118. 42 U.S.C. § 12113(a)–(b); *see also* Karen Dill Danforth, *Reading Reasonableness Out of the ADA: Responding to Threats by Employees with Mental Ilness Following Palmer*, 85 VA. L. REV. 661, 690–91 (1999) (explaining that while the direct threat defense was initially intended to exclude people with contagious diseases, it was amended shortly before the passage of the ADA specifically with psychiatric disorders in mind).

119. 29 C.F.R. § 1630.2(r) (2022). According to the EEOC guidelines, evaluating whether an individual poses a direct threat must be based on objective evidence including reasonable medical judgment, taking into account "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." *Id.*

120. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 79–87 (2002).

121. *Id*. at 76.

and safety as a result of working at a particular job, will disqualify a job applicant or employee.[122] Justice Souter further reasoned that the ADA was intended to outlaw adverse actions against disabled people based on "untested and pretextual stereotypes" concerning their own good.[123] However, when working at a particular job is proved to constitute a threat to a particular individual on the grounds of some health condition, disqualifying that individual does not constitute problematic paternalism that the ADA was intended to outlaw.[124]

For plaintiffs with BPD, construing the direct threat defense as including a threat-to-self is particularly inimical. A threat-to-self is more imminent than a threat-to-others when self-harming and self-mutilating activities are linked to an impairment, as in the case of BPD.[125] This is striking concerning women with BPD who often direct their aggression inwards much more than outwards.[126] One early case in this regard is *Doe v. NYU,* involving a plaintiff whose past behavior of cutting herself, vandalizing property, and resisting medical staff formed the basis for disqualifying her as a medical student.[127] The Court of Appeals for the Second Circuit held that "any appreciable risk" that an applicant will harm herself or others may be properly considered as an eligibility requirement in making admission decisions.[128]

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122. *Id*. at 80–84.

123. *Id*. at 85.

124. *Id*. at 86.

125. Self-harming activities are symptomatic of BPD. DSM-5 at 663 (including "recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior" as a diagnostic symptom of BPD). Importantly, these self-harming behaviors often lead to death by suicide, which is far more common for people with BPD than the rest of the population. *See* John M Oldham, *Borderline Personality Disorder and Suicidality*, 163 AM. J. PSYCHIATRY 1, 20 (2006) (describing the correllation between BPD and suicidality); Joel Paris, *Chronic Suicidality Among Patients With Borderline Personality Disorder*, 53 PSYCHIATRIC SERVS. 738, 738 (2002) (describing the higher rates of suicide completion among people with BPD).

126. *See* DANA BECKER, THROUGH THE LOOKING GLASS: WOMEN AND BORDERLINE PERSONALITY DISORDER 36 (1997) (describing women with BPD who self-harm).

127. 666 F.2d 761, 767 (2d Cir. 1981).

128. *Id*. at 777 (using the "otherwise qualified" prong, under Section 504 of the Rehabilitation Act). *Cf.* E.E.O.C. v. Amego Inc., 110 F.3d 135, 144 (1st Cir. 1997) (analyzing the threat posed by an employee who attempted suicide twice as a result of her access to medications at her job at a care facility for disabled

C. Legitimate Reason for Adverse Action

If it has been established that a plaintiff has a disability and is otherwise qualified for the job, under the ADA, the cause, or reason, of the adverse action must be one's disability in order for it to constitute "discrimination."[129] Notably, the issues of being "otherwise qualified" for the job and whether the adverse action was related to one's disability are intertwined, both conceptually and as a matter of law. If an adverse action against an employee with a disability is not because of her disability, but rather because of some other legitimate reason, this suggests that the employee was not otherwise qualified for the job, and vice-versa. Notwithstanding the ambiguity surrounding delineation of these issues, each brings out different challenges for theory and practice.

One major issue in determining whether the cause of the adverse action was the disability or some other legitimate reason concerns the distinction between impairment and its symptoms.[130] As Michelle Travis describes, in 2009, a public debate ensued surrounding this issue following the proposed regulation for implementing Title I of the ADA, which stated that discrimination based on impairment "includes, but is not limited to, an action based on a symptom of such an impairment," regardless of whether the employer is aware of the individual's underlying condition.[131] On the one hand, the business community objected to equating adverse

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people, focusing on the risk she imposes on clients in the facility, not on the risk to herself).

129. The ADA uses the phrases "on the basis of" and "because of" disability interchangeably. *See, e.g.*, 42 U.S.C. § 12112(b) ("[T]he term 'discriminate against a qualified individual on the basis of disability' includes—(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee *because of* the disability of such applicant or employee . . . .") (emphasis added).

130. *See generally* Travis, *The Part and Parcel, supra* note 117 (quoting EEOC Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48,431, 48,443 (Sept. 23, 2009)) (discussing the concepts of impairment discrimination and discrimination based on symptoms under the ADA); *see also* School Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 282, 284–85 (1987) (rejecting the distinction between a disease's contagiousness and its effects on the person with the disability); Travis, *The Part and Parcel, supra* note 117, at 54–55 (analyzing *Arline*'s applicability to ADA regulations regarding the impairment-symptom distinction).

131. Travis, *The Part and Parcel, supra* note 117, at 41–43.

action based on symptoms with discrimination on the basis of impairment, claiming this proposal exceeded statutory text and legislative intent by imposing liability on a wide range of everyday managerial decisions, like disciplining employees for unproductive and disruptive behavior.[132] On the other hand, disability rights activists claimed that adverse action on the basis of symptoms related to one's impairment is akin to discrimination on the basis of impairment itself, arguing that targeting people because of a symptom related to their impairments is "part and parcel" of impairment-based discrimination.[133] Ultimately, the reference to discrimination based on symptoms was removed from the regulations, and the issue of whether the ADA proscribes adverse actions on the basis of symptoms was left an open question.[134]

Still today, courts are split on this issue. When courts view adverse action on the basis of symptoms as akin to adverse action on the basis of disability, they are more likely to find that impairment-related misconduct is not a legitimate reason for adverse action. In *Gambini v. Total Renal Care, Inc.*, the Court of Appeals for the Ninth Circuit held that the plaintiff was entitled to have the jury instructed that if her violent outbursts were "caused by or [were] part of her disability" then she was dismissed because of her mental health condition.[135] In cases involving plaintiffs with BPD, this judicial approach is found in challenges to denial of public services and exclusion from places of public accommodations. For instance, in

132. *Id.* at 52–63, 77 (arguing that the proposed regulations were compatible with legislative intent and explaining that the concern about impeding everyday managerial decisions were unfounded as the trait/impairment distinction was relevant only to the first threshold of qualifying plaintiffs as persons with disabilities, whereas they still had to be "otherwise qualified").

133. *Id.* at 46–47. Moreover, according to Susan Carle, *supra* note 32, at 1177, one indirect implication of the distinction between impairment and symptoms might be that employers will be disincentivized from educating themselves on the symptoms of specific impairments, contrary to the purpose of the ADA of fighting prejudice and stigma.

134. *See* Travis, *The Part and Parcel, supra* note 117, at 64–68 (arguing that prior to the ADAAA, defendants' claims that their adverse actions were in response to employees' symptoms, and not their underlying mental disorder brought mixed results: some courts rejected employers' claims that they suspended or dismissed employees not because of their disorder but because of their related uncooperative and disruptive behavior, and other courts found no causation between the adverse act and the underlying impairment, although the adverse act was a response to an impairment-related outburst).

135. 486 F.3d 1087, 1095 (9th Cir. 2007).

Harris v. Oregon Health Sciences University, the plaintiff's angry and demanding behavior toward her primary care physician, which included constant complaints and threatening litigation, was the reason he ended her treatment.[136] The plaintiff claimed that her behavior was related to her BPD and therefore that discontinuing her treatment was discriminatory.[137] Finding that her behavior was related to her impairment, the Oregon District Court denied the physician's request for summary judgement.[138] Another example is *Brown v. Washington Department of Corrections*, where a prisoner with several mental disorders including BPD complained that disciplinary measures taken against him—including placing him in isolation due to his repeated attempts at self-harm—were discriminatory under the ADA.[139] The Washington District Court allowed the case to go to trial, explaining that the issue was whether the plaintiff's behavior, which included threatening to kill himself and smearing his own blood on the walls of his prison cell, was caused by his mental disorders or whether it was volitional: if plaintiff's behavior was caused by his mental disorder, then taking disciplinary measures against him constituted a violation of the ADA.[140]

But not all courts share this approach. Some instead view adverse action on the basis of symptoms as not presenting an issue for disability discrimination.[141] In cases involving plaintiffs with BPD, this approach seems to prevail in employment discrimination claims. For example, in *Smith v. Salt Lake City Corp.*, the plaintiff was a police dispatcher with BPD who was dismissed after sending her co-workers hateful, offensive, and "obscene" emails,[142] including one notably "sexual" email with cartoons of genitals, despite repeated warnings.[143] The District Court held that the employee's behavior provided a legitimate reason to dismiss her, unrelated to her disability.[144] Similarly, in *Coia v. Vanguard*, the plaintiff was fired

136. No. CV-98-1-ST, 1999 WL 778584, at *9 (D. Or. Sept. 22, 1999).
137. *Id*.
138. *Id*. at *10.
139. No. C13-5367 RBL-JRC, 2015 WL 4039322, at *1 (W.D. Wash. May 13, 2015).
140. *Id*. at *8.
141. Palmer v. Cir. Ct. of Cook Cnty., 117 F.3d 351, 352 (7th Cir. 1997) (rejecting the claim that dismissing an employee due to behavior linked to her mental illness presented an issue under the ADA).
142. No. 2:05CV00943, 2007 WL 582969, at *2 (D. Utah Feb. 20, 2007).
143. *Id*. at *3.
144. *Id*. at *9.

after continuously failing to demonstrate "resilience and composure," and "emotional control," through outbursts and offensive emails in violation of company policies.[145] Here too, and although the employee's behavior was clearly symptomatic of her underlying BPD, the court found that the employer had a legitimate reason to terminate her employment, unrelated to her disability.[146]

Conceptually, however, distinguishing between impairment and its symptoms is problematic, particularly in the context of mental disorders. When impairments are defined as the *accumulations of symptoms* with no underlying identifiable biological marker—as is the case in most mental disorders[147]—a distinction between impairment and its symptoms is contentious. Quite simply, without symptoms there is no impairment. How, then, is a distinction between the two drawn? This conceptual conflation also bears on the conception of discrimination against people with mental disorders, given that adverse actions and unfavorable attitudes toward them are often rooted in their behavioral symptoms, not their impairments as such.[148]

This Part has demonstrated the overall judicial trend with respect to discrimination claims involving impairment-related misconduct. Courts typically hold that employees who engaged in impairment-related misconduct are not disabled, not otherwise qualified for the job, or that the adverse action against such employees was not because of their disability. This approach leads to decisions in favor of employers, leaving people whose impairments manifest in unacceptable behavior without legal redress. Crucially, the notion of moral accommodations has the potential to reverse this trend, as I explain next.

145. No. CV 16-3579, 2017 WL 724334, at *2–7 (E.D. Pa. Feb. 23, 2017).

146. *Id*. at *14.

147. DSM-5, *supra* note 13, at 31 (putting forth diagnostic criteria for mental disorders based on behavioural symptoms.)

148. A hypothetical case in which an adverse action against an employee with a mental disorder occurs because of the employee's impairment (not its symptoms) is where the adverse action is based on the employer's worry that the disabled employee will "drive away" clients with biases against disabled people.

III. An Alternative Approach to Impairment-Related Misconduct: Moral Accommodations

This Part introduces the notion of moral accommodations as a novel category of reasonable accommodations. I begin by outlining the legal duty to provide reasonable accommodations. I then propose the duty to provide moral accommodations, and discuss its unique features. I put forth three types of moral accommodations: second chances, job transfers, and exemptions. I argue that each potentially offers distinctive benefits for plaintiffs in impairment-related misconduct cases. I further demonstrate that moral accommodations are consistent with the ADA, but are typically rejected by courts nonetheless.

A. Reasonable Accommodations

The ADA stipulates employers' duty to provide reasonable accommodations to employees or job applicants with a disability.[149] Accommodations involve changes to the surrounding environment designed to allow disabled people to seek employment and work on an equal basis with others. In practice, reasonable accommodations involve giving people something that others are not entitled to. This in turn leads to an ongoing debate concerning whether they are the same as—or distinct from—other antidiscrimination duties.[150]

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149. 42 U.S.C. § 12112(b)(5). Indeed, duties to provide reasonable accommodations to persons with disabilities have by now become a common feature of disability antidiscrimination law worldwide. *Compare, e.g.*, Equality Act 2010, c. 15, §§ 20–22 (UK) (describing the duties to make adjustments for persons with disabilities, failures to comply with duties to make adjustments, and regulations regarding adjustments for persons with disabilities under the Act), *with* Council Directive 2000/78 art. 5, 2000 O.J. (L 303) 16-22 (EC) (establishing a general framework for equal treatment in employment and occupation and explaining the duty to provide reasonable accommodations to persons with disabilities), *and* U.N. Convention on the Rights of Persons with Disabilities, arts. 2, 27, *opened for signature* Mar. 30, 2007, 112 U.S.T. 7, 2515 U.N.T.S. 3 (entered into force May 3, 2008) (defining reasonable accommodations and establishing duties of State Parties to the Convention to provide reasonable accommodations to persons with disabilities).

150. *See* US Airways, Inc v. Barnett, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially."). The explicit duty to provide reasonable accommodations to persons with disabilities under the ADA has led to a "canonical distinction" between duties of antidiscrimination and duties to provide accommodations, which many have since rejected for various reasons. *See, e.g*,

Under the Act, reasonable accommodations serve two primary functions in establishing a discrimination claim. First, failure to provide reasonable accommodations constitutes unlawful discrimination.[151] Second, reasonable accommodations affects whether an individual is found "otherwise qualified."[152] The Act explicitly states that one may be deemed qualified with or without reasonable accommodations.[153] In other words, when an employee can perform the essential functions of the job only with reasonable accommodation, that employee is deemed qualified.

The legal duty to provide reasonable accommodations to persons with disabilities is delineated in three ways. First, it applies only to disabled—as opposed to nondisabled—people.[154] Second, the

Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651–66 (2001) (arguing that duties to accommodate are already found in antidiscrimination law, particularly under disparate impact liability); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 UNIV. PA. L. REV. 579, 583, 636–39 (2004) (claiming that duties to provide reasonable accommodations are "consistent with other antidiscrimination regulations in remedying historical inequities"); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859–70 (2003) (claiming that duties to provide accommodations serve antidiscrimination law's antisubordination goal); Mary A. Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 863 (2004) (claiming that duties to provide accommodations are akin to other antidiscrimination duties, as they are all concerned with removing barriers to equal opportunities to full participation in society); KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS 71–73 (2015) (suggesting duties to provide reasonable accommodations are grounded in equality like other antidiscrimination duties, even if duties to provide accommodations extend traditional notions of equality as sameness); *see also generally* Adi Goldiner, *Membership Rights: The Individual Rights of Group Members*, 32 CAN. J. L. & JURIS. 343 (2019) (claiming that reasonable accommodations are a paradigmatic case of rights held only by people of certain social categories or groups).

151. 42 U.S.C. § 12112(b)(5).

152. *See supra* Part II.B (regarding the statutory requirement of being "otherwise qualified").

153. 42 U.S.C. § 12111(8) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

154. Notably, since the ADAAA, being "regarded as" having an impairment no longer entitles one to accommodations. *See* Elizabeth F. Emens, *Disabling*

employer must know about the employee's disability.[155] Finally, the employer's obligation is only to provide "reasonable" accommodations which do not impose "undue hardship,"[156] defined as "an action requiring significant difficulty or expense."[157]

The law and scholarship on reasonable accommodations focus primarily on two categories of accommodations: changes to physical structures and changes to the way things are customarily done, or to "social institutions."[158] In the workplace, changes to the physical structure include installing lifts, ramps, or accessible utilities. Changes to social institutions include adjustments to customary workplace procedures such as to the time and place where work is carried out, or employee training.

Accommodations of both categories, if found reasonable and implemented on the ground, can reduce the risk of employees engaging in impairment-related misconduct. Changes to the worksite, such as creating quieter, less crowded and better lit spaces to work,

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Attitudes: U.S. Disability Law and the ADA Amendments Act, 60 AM. J. COMP. L. 205, 216 (2012).

155. 42 U.S.C. § 12112(b)(5).

156. *Id*. § 12112(b)(5)(A). For a discussion of the relationship between the "reasonableness" requirement and the "undue hardship" defense, *see infra* Part V.A.

157. *Id*. § 12111(10)(A)–(B) (delineating how, under the ADA, whether an action requires significant difficulty or expense will be evaluated based on: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility, number of persons employed at the facility, effect on expenses and resources, or impact of such accommodation on the operation of the facility; (iii) the overall financial resources and overall size of the business of a covered entity; and (iv) the type of operation of the entity, including the composition, structure, and functions of the workforce). Under related regulations, 29 C.F.R. § 1630.2(p)(2)(v) (2022), "the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties" should also be considered. The regulations explicitly state that the "undue hardship" provision takes into account not only the financial realities of the particular employer, but also "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" *Id*.

158. 42 U.S.C. § 12111(9) (The term "reasonable accommodation" may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities"; and "(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities").

plausibly positively impact employees' behavior, especially when impairment-related misconduct is aggravated by stress.[159] Similarly, changes to workplace procedures, such as clarifying expectations, could minimize misunderstandings in personal communications that often lead to employee misconduct.[160] At times, accommodations in work schedule, such as flexible hours, shorter workdays, or longer periods of medical leave will help employees with disabilities reduce misconduct by giving them more time to seek treatment. Finally, allowing employees to work from home could reduce misconduct by minimizing unnecessary interpersonal interactions.[161]

However, both categories of accommodations address impairment-related misconduct only by way of preemption, namely to prevent misconduct from happening. Once an individual has engaged in impairment-related misconduct, these types of accommodations become futile. It is then when moral accommodations become crucial.[162]

B. Moral Accommodations

Moral accommodations mandate changes to *the response* to impairment-related misconduct. They involve suspending a range of responses that are typically appropriate in cases of workplace

159. For example, according to JAN Job Accommodation Network, employees' difficulties controlling anger and emotions as well as disruptive and noncompliant behavior may be addressed through changes to worksite design, such as adding lights and lamps that stimulate windows and the natural light of the sun, introducing noise machines that make relaxing sounds, or creating a private clutter-free space for the employee, e.g. in a private room or a shielded cubicle, that is away from high traffic and other distractions. *See Accommodation and Compliance: Personality Disorder*, JOB ACCOMMODATION NETWORK, https://askjan.org/disabilities/Personality-Disorder.cfm?csSearch=4133322_1#publications [https://perma.cc/M443-RJBB] (providing examples of accommodations for employees based on limitation and work-related function).

160. *See generally* Duhl, *supra* note 21 (based on his personal experience, suggesting changes to workplace practices that could support employers of people with BPD, such as written job requirements, specific goals, advance notice of concrete tasks, and specified standards for a "professional" relationship).

161. *See generally, e.g.*, Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. (forthcoming 2022) (arguing that remote work is a reasonable accommodation especially due to changes on the ground in response to the COVID-19 pandemic).

162. An employee with a disability may request moral accommodations before the misconduct took place, but their indispensable function is rooted in their potential benefit to employees after the misconduct occurred.

misconduct unrelated to impairment. At bottom, moral accommodations rest on the view that when misconduct is related to an impairment, it cannot always justify disadvantaging and excluding the misbehaving individual.[163] On the contrary, the fact that the misconduct is related to an impairment serves as a reason against responding to misconduct in these ways.[164]

Moral accommodations thus form a novel category within the broad category of reasonable accommodations. They are an addition to familiar categories of accommodations that involve changes to physical structures and social institutions. Like other kinds of accommodations, moral accommodations are subject to various limitations vis-à-vis their applicability in particular cases and are therefore best understood as pro tanto duties. Moreover, like other reasonable accommodations, moral accommodations call into question the perceived neutrality of our surrounding environment and shed light on the ways in which our practices disadvantage people with disabilities. Uniquely, however, moral accommodations do not question the built environment or social institutions. Rather, they focus on practices that are closely linked to our views of the appropriate response to unacceptable behavior. Moral accommodations mandate changing those practices and tolerating, to various degrees, impairment-related misconduct.

Recognizing the legal duty to provide moral accommodations could transform the analysis of impairment-related misconduct cases, particularly with respect to being otherwise qualified, and being subject to adverse action because of a disability.[165] First, as explained above, determining whether one is otherwise qualified is inseparable

163. For more on the philosophical justification of moral accommodations, see *supra*, Part IV.

164. In the context of education, schools are not permitted to suspend or expel students with disabilities on the grounds of misbehavior caused by students' impairment, or if the misbehavior was a direct result of school failure to provide special education services. 20 U.S.C. § 1415(k)(1)(E) (2012); Honig v. Doe, 484 U.S. 305, 308 (1988). *See also generally* Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860 (2018) (criticizing the fact that students with disabilities are still subject to school exclusion at much higher rates than their peers and attributing it to stringent implementation of the causation requirement between the disability and the misbehavior).

165. The issue of qualifying as a person with a disability should be relatively straightforward after the ADAAA. *See supra* Part II.A (discussing the issue of qualifying as a person with a disability in the context of impairment-related misconduct, before and after the ADAAA).

from determining which accommodations one needs and is entitled to.[166] Moral accommodations open up new possibilities in this analysis: if an employee can perform the essential functions of the job with moral accommodations, that employee would be deemed qualified. Second, failure to provide accommodations is an independent cause of action under the ADA.[167] As described above, some courts hold that employee dismissal following impairment-related misconduct is not an adverse action on the basis of a disability. Recognizing the duty to provide moral accommodations would enable plaintiffs to claim that their employer failed to accommodate them, quite apart from the issue of a legitimate reason for the adverse action. In other words, recognizing a duty to provide moral accommodations under the ADA would establish an alternative route in the legal analysis.

Importantly, moral accommodations involve changing the applicability of rules of conduct onto certain employees, but they do not modify such rules altogether. A helpful distinction in this respect is between accommodations and modifications, whereby the former involve individual-based changes and the latter involve generalized changes to the practice as a whole.[168] Using this distinction, moral accommodations are best understood as individual accommodations rather than modifications. They do not fundamentally alter the manner in which employees are expected to behave. They change only the employer's response to misconduct in individual cases. Instead of disciplining and ultimately dismissing employees for their misconduct, moral accommodations require toleration, to various degrees.

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166. *See supra* Part II.B (discussing courts' construction of the "otherwise qualified" clause in the context of impairment-related misconduct).

167. *See supra* Part II.C (discussing courts' approach to the issue of what constitutes legitimate reason for adverse action unrelated to a disability in the context of impairment-related misconduct).

168. For an illuminating account of the principled distinction between "accommodations" and "modifications," and the manner in which conflating the two concepts leads to problematic results for persons with disabilities, *see* Leslie Francis & Anita Silvers, *Making "Meaningful Access" Meaningful: Equitable Healthcare for Divisive Times*, *in* DISABILITY, HEALTH, LAW, AND BIOETHICS 147–58 (Glenn Cohen et al. eds., 2020). In this Article, I assume that in the workplace, persons with disabilities may be entitled to accommodations, modifications, or both. But my discussion of moral accommodations is limited to accommodations.

In practice, a duty to provide moral accommodations would manifest in various changes to customary response to misconduct, depending on the circumstances. These include second chances, job transfers, and exemptions from rules of conduct. I now discuss each in turn.

1. Second Chances

The first type of moral accommodations is "second chances." Providing a second chance as an accommodation following impairment-related misconduct involves giving employees an opportunity to avoid misconduct in the future, while allowing them to remain in the same job they had when the misconduct took place. The rationale for second chances is rooted in the assumption that the misconduct was an isolated event, which the employee can refrain from looking forward. While this may seem less plausible at first, employees with BPD are indeed often able to refrain from misconduct under certain circumstances; only when some abrupt change occurs does the deterioration in their behavior begin.[169]

Recognizing second chances as reasonable accommodations could change the legal analysis of impairment-related misconduct cases to the benefit of plaintiffs. First, withholding sanctions in response to violating rules of conduct, based on the assumption that the employee will be able to avoid the unacceptable behavior in the future and thus comply with the job's essential functions, could lead to the conclusion that the employee is qualified for the job, despite the previous misconduct. Second, if second chances are recognized as reasonable accommodations, then failure to provide a second chance could amount to unlawful discrimination in itself. It would thus provide a separate cause of action, if the employee was dismissed after just one incident of misconduct.

In practice, however, courts categorically reject claims seeking second chances as reasonable accommodations. Kelly Cahill Timmons showed that courts repeatedly hold that a second chance is not an accommodation envisioned by the ADA, regardless of the type of disability that the employee has.[170] And Susan Carle demonstrated

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169. *See supra* note 31 (citing cases in which misconduct followed some change in the workplace).

170. Timmons, *supra* note 14, at 288–90 (citing Siefken v. The Village of Arlington Heights, 65 F.3d 664, 665–67 (7th Cir. 1995)).

more recently that courts' approach to second chances has not changed.[171]

This approach is not necessarily required by law. Both Timmons and Carle have persuasively argued that courts *should* recognize the possibility of second chances as reasonable accommodations under the ADA. Timmons claimed that second chances are reasonable accommodations under certain conditions: there is little evidence of employee fault with respect to both the misconduct and not requesting some accommodation prospectively, the misconduct is of low severity, and there is little likelihood of misconduct recurrence.[172] More recently, Carle drew a comparison between the ADA and other employment regimes, claiming that American employment law of unions requires graduated "for cause" application of workplace discipline and provides for "second chances" where appropriate, and so there is no reason that the ADA would disallow "some second chances" too.[173] This paper further supports Timmons and Carle's claims by developing a theoretical justification of second chances as a type of moral accommodation.[174]

2. Job Transfers

When an employee's relationship with a co-worker has deteriorated beyond repair following the misconduct, moral accommodations could involve transferring the employee to another position. The justification for this type of accommodation is rooted in the assumption that in a different setting, with different colleagues, the employee will be able to avoid further misconduct.[175] Thus, like

171. Carle, *supra* note 32, at 1166–69.

172. Timmons, *supra* note 14, at 190.

173. Carle, *supra* note 32, at 1169.

174. *See infra* Parts IV–V (discussing the justification of moral accommodations and responding to possible objections).

175. The claim that an individual with BPD could avoid misconduct under different circumstances rests on the view that social stressors affect BPD symptoms. *See, e.g.*, LINEHAN, *supra* note 24, at 42 ("BPD is primarily a dysfunction of the emotion regulation system; it results from biological irregularities combined with certain dysfunctional environments, as well as from their interaction and transaction over time."); JOEL PARIS, TREATMENT OF BORDERLINE PERSONALITY DISORDER: A GUIDE TO EVIDENCE BASED PRACTICE, 61–93 (2008) (explaining that mental disorders exist within social contexts and BPD is a disorder that arises only under specific social conditions); Anke Limberg et al., *Emotional Vulnerability in Borderline Personality Disorder Is Cue Specific and Modulated by Traumatization*, 69 BIOL. PSYCHIATRY 574, 574 (2011) (noting

second chances, job reassignments provide employees with another opportunity to comply with workplace rules of conduct. However, unlike second chances, the employee is given this opportunity in another setting. Moreover, job transfers involve not only changes to the employer's standard response to employee misconduct but also changes to the typical way of doing things, particularly vis-à-vis hiring processes.

Importantly, job reassignments are a recognized accommodation, both in the ADA text and in the case law.[176] Recognizing job reassignments as *moral* accommodations, that is as reassignments that follow impairment-related misconduct and are designed to enable misbehaving employees to keep working, could have far-reaching implications for plaintiffs in impairment-related misconduct cases. First, it appears that employees often seek reassignment to a different position after engaging in impairment-related misconduct.[177] This is plausibly to avoid additional tensions and keep their jobs. If denying them that accommodation could amount to unlawful discrimination, that would provide them with an independent claim well before further deterioration takes place. Second, a job reassignment could render employees otherwise qualified despite their previous impairment-related misconduct. In a different position, with different co-workers, where the misconduct and response to it from co-workers will no longer be an issue, they could arguably perform the essential functions of the job.

However, job reassignments are rarely granted against the backdrop of impairment-related misconduct. Some courts are skeptical about the necessity of job transfers or their effectiveness in enabling future compliance with rules of conduct. This reasoning is found in *Mayo v. PCC Structurals Inc.*, where the Court of Appeals for the Ninth Circuit held that an employer's failure to grant

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that people with BPD show increased emotional vulnerability in the context of specific schemas, such as abandonment, but not in general).

176. Notably, disabled employees may seek job reassignment for other reasons, for example when they are unable to perform certain tasks that their current position requires. *See, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 394 (2002) (moving to a less physically demanding position after suffering a back injury); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 187–89 (2002) (plaintiff requested a job reassignment because of a physical limitation that rendered her unable to perform her job on the assembly line).

177. *See infra* notes 181–194 and accompanying text (citing cases discussing job reassignments following impairment-related misconduct).

plaintiff's request for a job transfer was not discriminatory, because reassigning an employee would not have changed his inappropriate response to stress—it would have just removed one potential stressor.[178] Notably, the court reached this conclusion notwithstanding a psychologist's opinion that the plaintiff was not a violent man and recommendation that he return to work under a different supervisor.[179]

Other courts tend to reject job reassignments when they seem to disapprove of the reasons the plaintiff is requesting the transfer, namely difficulties getting along with co-workers.[180] Such disapproval is elusive but can sometimes be inferred from the overall circumstances of the case. An interesting example is found in *Wellman v. Dupont Dow Elastomers L.L.C.*[181] The facts described in this case revolve around the plaintiff's allegation that her supervisor sexually harassed her and together with an administrative assistant created a hostile work environment, subjecting her to threats and abuse which eventually led her to seek medical leave.[182] While on leave, different clinicians diagnosed the plaintiff with various mental disorders, including traits of borderline personality, and some recommended that she should not return to her old position given her strained relationship with her former supervisor and peers.[183] While the plaintiff was still on medical leave, she applied to different positions with the employer's parent corporation, which was her previous employer,[184] but was rejected.[185] The employer determined that her allegations of sexual harassment and abuse were false, and so, when her leave expired, the employer offered to return the plaintiff to her old position.[186] The plaintiff then failed to report to work and was accordingly dismissed for abandonment.[187] The court, however, did not explore whether the employer had a duty to reassign

178. 795 F.3d 941, 946 (9th Cir. 2015).
179. *Id*. at 943.
180. Stefan, *Delusions of Rights*, *supra* note 57, at 295.
181. 414 F. App'x 386 (3d Cir. 2011).
182. *Id*. at 388.
183. *Id*.
184. *Id*.
185. Wellman v. DuPont Dow Elastomers L.L.C., 739 F. Supp. 2d 665, 674 (D. Del. 2010).
186. *Wellman*, 414 F. App'x at 391.
187. *Id*. at 390.

the plaintiff as a disability accommodation, given its holding that the plaintiff was not a person with a disability under the Act.[188]

Yet other courts find that employers do not have to grant job transfers due to pragmatic reasons, such as the absence of an alternative vacant position.[189] Thus, in *Coia v. Vanguard*, the court upheld an employer's refusal to grant a job transfer to an employee with BPD who had a tense relationship with her supervisor, accepting the employer's claim that there was no comparable work she could do.[190] In another case, *Rogers v. NYU*, the plaintiff was an administrative aide who was suspended for insubordination following a problematic relationship with her supervisor.[191] The plaintiff then took several medical leaves, during which she was diagnosed with PTSD and BPD. Following the advice of at least two of her counsellors, the plaintiff requested to return to work in an environment with "limited stress"—that is, with a different supervisor. However, her employer did not consider the plaintiff eligible for transfer, based on her poor performance in her current job.[192] At trial, the court recognized that the plaintiff felt she could return to work if transferred.[193] However, given that the plaintiff had not demonstrated that a vacant position existed, the court dismissed the claim that NYU failed to accommodate the plaintiff by not reassigning her to a different position.[194]

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188. *Id*. at 391.

189. For a similar line of reasoning outside the workplace, see, e.g., Harris v. Or. Health Scis. Univ., No. CV-98-1-ST, 1999 WL 778584, at *4 (D. Or. Sept. 22, 1999) (describing a patient with BPD who requested a transfer to another physician, after her relationship with her treating physician was derailed, but where the court accepted the clinic director's claim that there was no other resident qualified to treat her); In re C.E., 2015 Md. App. No. 0925, LEXIS 279, at *26 (Md. Ct. Spec. App. Dec. 15, 2015) (denying an appellant's request to be appointed a different attorney, explaining that there is no indication the appellant would cooperate with a new attorney, after failing to cooperate with previous appointed attorneys, notwithstanding the fact the appellant named the attorney she wanted).

190. No. CV 16-3579, 2017 WL 724334, at *8 (E.D. Pa. Feb. 23, 2017).

191. 250 F. Supp. 2d 310, 311 (S.D.N.Y. 2002).

192. *Id*. at 312.

193. *Id*. at 316.

194. *Id*. Notably, the court in *Rogers* focused on the employer's failure to extend the plaintiff's medical leave as a reasonable accommodation. *Id.* at 316–17.

3. Exemptions

Lastly, when it is unlikely that an employee will be able to refrain from engaging in misconduct looking forward, either in one's current position or in a different one, moral accommodations could involve exemptions from certain rules of conduct. An exemption is, for instance, not disciplining people who use offensive language or lash out in angry outbursts related to their impairment. Unlike second chances and job reassignments, which give employees an opportunity to comply with rules of conduct in one's current position or in a different setting, respectively, exemptions allow for ongoing violation of such rules and are therefore much more contentious.

However, exemptions are not as unconventional as they first appear. They are best understood as a type of job restructuring—which is recognized as a reasonable accommodation under the ADA.[195] Against the backdrop of impairment-related misconduct, job restructuring would involve removing or suspending the function of complying with certain rules of conduct, or at least the function of being subject to sanctions for failure to comply with such rules.

Conceptualizing exemptions as a type of job restructuring foregrounds an important difference between exemptions on the one hand, and second chances and job reassignments on the other hand. Exemptions rest on the view that complying with rules of conduct is not always an essential function of the job whereas second chances and job reassignments are agnostic as to whether complying with rules of conduct is an essential function of some or all jobs. If avoiding misconduct *is* an essential function of a job, then providing second chances or job reassignments are meant to allow employees to meet the essential functions of the job—that is, to avoid misconduct—looking forward. If avoiding misconduct is not necessarily an essential function of all jobs, morally accommodating employees by exempting them from generally applicable rule of conduct would render them qualified for at least some jobs. Moreover, failing to provide such exemptions could amount to unlawful discrimination. Indeed, rules of conduct are rarely unique to a particular job, but rather apply to workplaces as a whole. As such, they often lack the specificity of a particular job's description. Moreover, rules of conduct address a wide variety of behaviors with

195. 42 U.S.C. § 12111(9)(B).

varying levels of severity. It is an open question, which calls for a case-by-case analysis, whether all rules of conduct are essential to all jobs.

In practice, employees with disabilities rarely explicitly claim that they should be exempted from certain workplace rules of conduct, either in the context of establishing they are otherwise qualified or to prove that they were discriminated against. A claim of this sort is implied in *Sanford v. Rubin Lublin*,[196] revolving around the termination of an employee with BPD and Post Traumatic Stress Disorder for being "too emotional."[197] The plaintiff claimed, among other things, that the employer discriminated against her by denying her requested accommodation of "being understanding of her disability."[198] The magistrate judge recognized that the plaintiff, through her behavior, indeed requested an accommodation that I would call an "exemption," and therefore denied the employer's summary judgment, but the judge did not state whether this was a reasonable accommodation at all.[199] A similarly inexplicit claim was raised in *McElwee v. City of Orange,* where a volunteer with Autism requested as a reasonable accommodation that female employees whom he followed and stared at be educated about the plaintiff's disability and corresponding limited attentiveness to social cues.[200] The District Court viewed his claim as a request to tolerate misconduct, holding it was not required by the ADA.[201]

To summarize, moral accommodations involve changing employers' responses to workplace misconduct: rather than disciplining or dismissing the misbehaving employee, they call for toleration. The three types of accommodations—second chances, job transfers, and exemptions—can be recognized as reasonable accommodations under the ADA and can potentially benefit plaintiffs in impairment-related misconduct cases. They are nevertheless systematically denied as reasonable accommodations by courts. In the

196. Sanford v. Rubin Lublin, LLC, No. 1:20-CV-00712-AT-LTW, 2021 WL 3056853, at *1 (N.D. Ga. June 9, 2021), *report and recommendation adopted sub nom*. Sanford v. Rubin Lublin, LLC, No. 1:20-CV-0712-AT, 2021 WL 3073261 (N.D. Ga. June 29, 2021).

197. *Id*. at *1–2.

198. *Id*. at *6.

199. *Id*. at *7.

200. 700 F.3d 635, 645 (2d Cir. 2012). Notably, as the plaintiff in this case was not an employee, he brought suit under Title II of the ADA.

201. *Id*. at 645–46.

remainder of this Article, I criticize this judicial approach to moral accommodations. In the next two Parts I explore the justification of moral accommodations and respond to possible objections. In Part VI, I criticize courts' approach as resting on a conflation of sympathy toward disabled people and duties correlative to disabled people's rights.

IV. Justifying Moral Accommodations

This Part discusses the justification of moral accommodations. That is, of a pro tanto duty that applies to employers to tolerate impairment-related misconduct. Recognizing that there are various ways of justifying employers' duties to provide reasonable accommodations—depending on one's underlying normative commitments—I explore the four most central to the debate, which are: compromised moral responsibility;[202] the Social Model of disability;[203] equality;[204] and the capabilities approach.[205] I will argue that insofar as these commitments ground duties to provide reasonable accommodations, and give a reason for recognizing such duties as a matter of law, they also ground moral accommodations. More specifically, I will argue that the first two contribute to our understanding of the disadvantage facing people with disabilities, but ultimately fail to ground duties to provide reasonable accommodations. By contrast, I will argue that the two latter justifications provide plausible grounding of employers' duties to provide reasonable accommodations, including moral accommodations.

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202. *See infra* Part IV.A (discussing compromised moral responsibility as a possible grounding of moral accommodations).

203. *See infra* Part IV.B (discussing the Social Model of disability as a possible grounding of moral accommodations).

204. *See infra* Part IV.C (discussing equality as a possible grounding of moral accommodations).

205. *See infra* Part IV.D (discussing the capabilities approach as a possible grounding of moral accommodations). This is not meant to be an exhaustive list of conceptions of justice or normative commitments that ground duties to provide reasonable accommodations. I focus here on views central to the disability debate. I am mindful, however, that a more extensive exploration is needed, which is nonetheless beyond the scope of this Article.

A. Compromised Moral Responsibility

An intuitive starting point for justifying reasonable accommodations emanates from the view that people are not morally responsible for the symptoms of their impairments. The thought is that if people lack moral responsibility for manifestations of their disabilities, or their symptoms, it is impermissible to impose further disadvantage on them because of such symptoms. Instead, the thought goes, society should accommodate people with disabilities to various degrees. By the same token, if people behaving in unacceptable ways due to their impairments are not morally responsible for their behavior, they deserve toleration.

Grounding reasonable accommodations in compromised moral responsibility corresponds with widely held views about the unjustifiability of criminal punishment when the perpetrators are not morally responsible for their actions.[206] A similar reasoning suggests that being excluded from the workplace, or from other social activities, constitutes an unjust punitive measure in response to behavior that the individual is not morally responsible for.

However, despite its initial intuitive appeal, compromised moral responsibility fails to ground duties to provide reasonable accommodations, let alone moral accommodations. This is for two reasons: the impracticability of discerning people's moral responsibility, and the unnecessary link between compromised moral responsibility and tolerating symptoms.

First, if people's lack of moral responsibility for manifestations of their disabilities grounds the duty to provide

206. For more nuanced accounts of the relationship between the justifiability of punishment and moral responsibility, see generally Antony Duff, *Legal and Moral Responsibility*, 4 PHIL. COMPASS 978 (2009) (distinguishing between two kinds of moral responsibility: answerability and liability, and claiming that strict criminal liability is better understood and justified as strict answerability than strict liability); Nicola Lacey & Hanna Pickard, *From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame Into the Legal Realm*, 33 OXF. J. LEG. STUD. 1 (2013) (exploring theoretical possibilities and practical implications for penal practices of separating moral responsibility from affective blame involving hostile and negative attitudes). Specifically, personality disorders present a challenge for the law in this regard. *See generally*, Jill Peay, *Personality Disorder and the Law: Some Awkward Questions*, 18 PHIL., PSYCHIATRY, & PSYCH. 231 (2011) (discussing how the law should respond to the nuanced accounts of capacity and responsibility of people with personality disorders).

reasonable accommodations, then applying this duty requires parsing who is morally responsible for which disability, symptom, and related conduct. Specifically, discerning whether an employee's impairment-related misconduct should be tolerated would require performing extensive assessments of the conditions of moral responsibility and applying them to particular cases.

Expectedly, there is ongoing debate on the conditions of moral responsibility, which is closely intertwined with the enduring question of whether people's actions are predetermined or freely willed.[207] While many thinkers believe that moral responsibility necessarily involves some ability to control one's actions, the question of what this ability entails is far from settled.[208] Moreover, even if a particular view of moral responsibility is granted, discerning whether an individual meets the necessary conditions of moral responsibility is a complex exercise.

Take for example Peter Strawson's influential account that assumes the truth of determinism and grounds moral responsibility not in people's free will vis-à-vis their actions but rather in moral practices.[209] According to Strawson, people are morally responsible for their actions because people have certain responses to such actions as reflecting certain attitudes toward them.[210] One example of these responses that Strawson calls "reactive attitudes" is resentment, which is typically a response to another's behavior that reflects indifference or contempt.[211] Strawson explains that being "deranged" or "compulsive" may modify people's reactive attitudes, to the extent of no longer viewing one as worthy of reactive attitudes at all.[212] This is not because the deranged person lacks the ability to control one's

207. Matthew Talbert, *Moral Responsibility*, STAN. ENCYC. OF PHIL. (Oct. 16, 2019), https://plato.stanford.edu/archives/win2019/entries/moral-responsibility/ [https://perma.cc/JZ5K-RPM4].

208. Susan Wolf, *Sanity and the Metaphysics of Responsibility*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 46–62 (Ferdinand David Schoeman ed., 1987).

209. Peter F. Strawson, *Freedom and Resentment*, *in* PERSPECTIVES ON MORAL RESPONSIBILITY 45, 49–50, 63–64 (John Martin Fischer & Mark Ravizza eds., 1993).

210. *Id*. at 50.

211. *Id*. at 50.

212. *Id.* at 52 (explaining that responses to the behavior of the "deranged" then transform from reactive to objective attitudes, namely from viewing one as involved in reciprocal human relationship to viewing one as the object of social policy or the subject of treatment).

actions, but because the person is viewed as "incapacitated in some or all respects for ordinary interpersonal relationship[s]."[213]

Accepting, *arguendo*, Strawson's view, it is still unclear whether particular individuals are deranged or compulsive enough so that they are no longer *seen* as participants in reciprocal relationships, unfitting for reactive attitudes, and not morally responsible for their actions. The case of people with BPD clearly demonstrates this complexity.[214] On the one hand, it is a diagnostic symptom of BPD to experience impulsiveness and dichotomous "black-and-white" thinking that alternates between extremes of idealization and devaluation of oneself and others.[215] This could indicate a possibly distorted conception of social interactions, and limited ability to withhold certain responses. During episodes of aggressive outbursts, people with BPD may be seen as unfitting for reactive attitudes and hence not morally responsible for their conduct.[216] But those same outbursts may be seen as the upshot of agential choices, even if not entirely voluntary.[217] They may even invoke reactive attitudes from those who view their behavior as manipulative, reflecting a cynical attempt to exert attention from others.[218] These reactive attitudes suggest that people with BPD are seen as still participating in interpersonal relationships and accordingly morally responsible for their misconduct.

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213. *Id*. at 55.

214. *See generally* Hanna Pickard, *Responsibility Without Blame*, 18 PHIL., PSYCHIATRY, & PSYCH. 209 (2011) (discussing the complexity in blaming people with personality disorders including BPD for their impairment-related conduct, while recognizing that holding them responsible is key for clinical treatment; accordingly proposing a conceptual framework for clinical treatment that involves holding people responsible without blaming them).

215. DSM-5, *supra* note 13, at 663.

216. Strawson, supra note 209, at 55 (explaining that a person is incapacitated for ordinary interpersonal relationship one is judged to have a "picture of reality [that] is pure fantasy" or simply "moral idiot[s]").

217. Pickard, supra note 214, at 213. On Hanna Pickard's view, the behavior of people with personality disorders involves actions over which people have choice and control, but that due to reduced capacity to comprehend the full effects of their behavior, and lacking alternative mechanisms to cope with distress, "control may be diminished, and with it, responsibility. But reduction is not extinction. The difficult behavior of PD service users nonetheless counts as voluntary action." *Id.*

218. For a critical discussion of some clinicians' tendency to interpret BPD behavior as manipulative, see LINEHAN, *supra* note 24, at 16–17.

This complexity notwithstanding, compromised moral responsibility does not seem like a plausible grounding of duties to provide reasonable accommodations—let alone moral accommodations—for a more principled reason. Whether an individual is morally responsible for some conduct or symptom is only indirectly related to others' duties to tolerate that behavior or to accommodate that symptom. To illustrate using the case of impairment-related misconduct, if one is not morally responsible for one's unacceptable behavior, it could follow that certain punitive responses are inappropriate. But whether there is a duty to tolerate such behavior is a different question altogether. Such a duty obtains when one has a right to be included in social activities and practices on the one hand, and when tolerance does not excessively impede others' rights and important interests, on the other hand. Accordingly, if one is not morally responsible for some behavior, it does not follow that others have a duty, even *pro tanto*, to tolerate such behavior. For example, even if a kleptomaniac is not morally responsible for stealing, it does not follow that such behavior should be tolerated by his employer. On the flipside, if one *is* morally responsible for some unacceptable behavior, sometimes others should nevertheless tolerate such behavior due to other normative commitments, such as securing a person's rights. Consider for instance a person who is deliberately impolite to his physicians. While that person is plausibly morally responsible for unacceptable behavior, her behavior may still be an insufficient reason for denial of treatment, because of the patient's entitlement to receive care.

B. Social Model of Disability

A promising, and often cited, conceptual framework for justifying duties to provide reasonable accommodations on the basis of disability is the "Social Model" of disability.[219] This model

219. The origins of the Social Model of disability are traced back to the Union of the Physically Impaired Against Segregation, a group of disabled activists that operated in the United Kingdom in the second half of the 20th century. *See Policy Statement*, UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION (Sept. 8, 1976), https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-UPIAS.pdf [https://perma.cc/E53Z-QGKN] (outlining the union's policies advocating for the replacement of segregated facilities with arrangments to enable physically impaired people to participate fully in society); *Fundamental Principles of Disability*, UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION & THE DISABILITY ALLIANCE (Nov. 22, 1975), https://disability-

conceptualizes the disadvantage facing persons with disabilities as the exclusion imposed on them by the societies in which they live. The Social Model is typically contrasted with the "Medical Model" of disability, which views people's bodies and minds as the root cause of their disadvantage and limited participation in various aspects of social life.[220]

On the Social Model, the best way to address disability-related disadvantage is by "removing" social and structural "barriers"—namely, aspects of our society that exclude people from participating in social life.[221] Unlike the Medical Model, which calls for treating people with impairments, the Social Model mandates scrutinizing *society* in view of the opportunities it provides to—or denies from—people with impairments. To the extent that features of our society disadvantage people with disabilities, the Social Model calls for social changes to enable disabled people's full social participation on an equal basis with others. Such changes include reasonable accommodations.

To illustrate, consider two familiar examples. Changes to the physical environment, such as public buildings, roads, and dwellings, can increase wheelchair users' participation in society.[222] And

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studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf [https://perma.cc/5EUX-7TRC] (summarizing discussion regarding the conceptualization of disability as social oppression and the necessity that disabled people assume control over the struggle to eliminate disability disadvantage).

220. On the relationship between the Social and Medical models, see Jonas-Sébastien Beaudry, *Beyond (Models of) Disability?*, 41 J. MED. PHIL. 210, 210–12 (2016) (distinguishing the basis of the Social Model as one that recognizes exclusion as the real problem); Adi Goldiner, *Understanding "Disability" as a Cluster of Disability Models*, J. PHIL. DISABILITY (forthcoming 2022) (explaining different conceptions of disability, including the Social and Medical models and how they related to one another).

221. *See, e.g.*, MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 37 (1996) (explaining that the principles of the Social Model of disability and arguing that it is this model's core that "it is society that has to change not individuals" to address disabled people's disadvantage); Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER 214, 216 (Lennard J. Davis ed., 4th ed. 2013) ("Social model thinking mandates barrier removal, anti-discrimination legislation, independent living and other responses to social oppression."). And for some critiques of this model, *see also* Lorella Terzi, *The Social Model of Disability: A Philosophical Critique*, 21 J. APPL. PHIL. 141, 144–53 (2004).

222. Vic Finkelstein, *To Deny or Not to Deny Disability*, 74 PHYSIOTHERAPY 650, 650–51 (1988).

changes to social practices, such as the ways people communicate, can facilitate the social participation of people with hearing impairments.[223] Arguably, by the same token, the Social Model calls for critical scrutiny of rules of conduct in view of their impact on persons with disabilities. If certain rules disadvantage disabled people relative to others, because of their impairments, the thought is that rules—or at least their application to certain individuals—should change.

However, in real life the causes of disability disadvantage are often intertwined and the distinction between the effects of society and people's impairments is elusive. It is unclear whether eliminating disabled people's disadvantage is best achieved through social changes as the Social Model holds, treating people's impairments as the Medical Model holds, or both. For example, in the case of employees with BPD it is difficult to discern whether they are disadvantaged in the workplace because of their impairment-related tendency to tamper with their relationships with colleagues, or because of negative attitudes toward them given their highly stigmatized mental disorder, ranging from fear to outright rejection.[224] Recognizing this complexity, some indeed favor an interactional model of disability which views the disadvantage facing people with disabilities as the result of the *interaction* between people's impairments and their surrounding environments.[225] On the interactional model, addressing disability disadvantage would

223. *See generally* NORA ELLEN GROCE, EVERYONE HERE SPOKE SIGN LANGUAGE: HEREDITARY DEAFNESS ON MARTHA'S VINEYARD (1985) (describing the community in a small town in Martha's Vineyard in 1850 and 1900 where a relatively high precentage of residents were deaf due to a wiespread genetic trait, and where people deaf and hearing alike spoke sign languge which allowed for the social inclusion of deaf people in social and economic life).

224. Emens, *supra* note 26, at 435–38 (arguing that some people avoid interaction with people with mental illness due to "hedonic costs," namely the inflictions of negative emotions on them through an automatic psychological process called "emotions contagion" in which people unconsciously absorb the particular mood or emotion of another).

225. *See generally, e.g.*, TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED (2nd ed. 2014); TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS (2006); Jerome Bickenbach, *Disability, Health, and Difference*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY AND DISABILITY 46 (Adam Cureton & David T. Wasserman eds., 2018).

sometimes involve changing society, and sometimes treating people's impairments.[226]

Although it is often untenable to isolate the social causes of the disadvantage facing persons with disabilities, the Social Model's immense contribution to the emancipation of persons with disabilities cannot be overestimated. It shifts the focus from changing the individual to changing society to accommodate the individual. And it is rightly considered the organizing concept of the disability rights movement. Indeed, the ADA has been described as "signal[ing] the social model's legislative victory in the United States."[227]

However, it is debatable whether the Social Model in itself grounds a duty to provide reasonable accommodations. The Social Model illuminates the ways in which features of our society disadvantage persons with disabilities. It also provides indispensable tools for devising changes to our society that would improve disabled people's participation and in turn their lives. But it does not immediately explain when and why introducing changes to aspects of our society that disadvantage persons with disabilities are required as a matter of justice.[228] The interactional model is also left wanting in this regard: if both changes to society and treating impairments can address the disadvantage associated with disability, why is there a duty to provide the former?[229]

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226. On the possibility of treatment, see *infra* Part V.B.

227. Michael Ashley Stein & Penelope J. S. Stein, *Beyond Disability Civil Rights*, 58 HAST. L. J. 1203, 1208 (2007).

228. *See* Jessica Begon, *Disability: A Justice-based Account*, 178 PHIL. STUD. 935, 935–37 (2021) (arguing that to be disabled is to be subject to restricted opportunities that individuals are entitled to as a matter of justice); LINDA BARCLAY, DISABILITY WITH DIGNITY: JUSTICE, HUMAN RIGHTS AND EQUAL STATUS 30 (2019) (arguing that conceptions of disability do not ential just claims, but rather conceptions of justice make certain concpetions of disability more plausible than others); Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1262–67 (2007) (describing three lines of critique of the Social Model).

229. For a recent compelling defense of the Social Model's normative prescriptions, see generally Sean Aas, *Disability, Society, and Personal Transformation*, 18 J. MORAL PHIL. 49 (2020) (defending the view that the Social Model grounds society's responsibility for addressing disabled people's disadvantage, as well as the preference for social change over treating individuals' bodies and minds).

C. Equality

Probably the most prevalent justification of the duty to provide reasonable accommodations appeals to the value of equality.[230] Thus conceived, reasonable accommodations are concrete manifestations of the duty against wrongful discrimination and grounded in the same reasons.[231]

According to some theorists, discrimination is wrong when and because it contributes to the lower social status of certain social groups and their members.[232] On such "subordination" theories, disability discrimination is wrong because it perpetuates the systematic, socially contingent disadvantage assigned to persons with disabilities who are viewed as being outside the "norm."[233] The duty to provide reasonable accommodations is accordingly grounded in a commitment to change policies, practices, and physical structures that overlook disabled people's interests and needs and thereby contribute to their ongoing subordination.[234]

Other theorists hold that discrimination is wrong because it constitutes a violation of the manner in which people in society should relate to one another.[235] On this "relational egalitarian" view, a just society is a society of equals in which there is no social hierarchy and people stand in relations of equality to one another and where members of a community all have a set of freedoms that are

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230. *See also supra* Part III.A on the legal duty to provide reasonable accommodation under antidiscrimination law.

231. For an analysis of other theories, see generally Jeffrey M. Brown, *What Makes Disability Discrimination Wrong?*, 40 L. & PHIL. 1 (2020) (arguing that other prominent theories explaining why discrimination is wrong fail to account for why denail of reasonable accommodations to persons with disabilities is also similarly problematic).

232. Precisely what "subordination" means in this context is debatable. *See, e.g.*, DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 35–38 (2011) (suggesting that discrimination subordinates because it demeans people and puts them down, sending a message that they are less worthy of respect than others); MOREAU, *supra* note 47, at 50–63 (arguing that discrimination subordinates because it contributes to the lower social status of certain social groups, in terms of perpetuating their lower power and authority in society, reinforcing negative stereotypes of group members, and rendering their different needs invisible or abnormal).

233. *See generally* Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397 (2000) (developing an antisubordinatist approach to understanding the category of disability" under the ADA).

234. MOREAU, *supra* note 47, at 56–57.

235. Brown, *supra* note 231, at 15–18.

sufficient for functioning as equals.[236] Reasonable accommodations are accordingly justified on the grounds that they are necessary for persons with disabilities to function as equals in society.[237] More specifically, reasonable accommodations constitute "preconditions" to the effective exercise of people's most basic liberties, opportunities, and other social goods; they are instrumental in tackling the prevalent subordination facing persons with disabilities in various domains of life; and they have expressive significance in sending the message that persons with disabilities have equal social status.[238]

To illustrate, consider a workplace that has only stairs leading to its entrance, such that everyone can enter but people using wheelchairs. The needs of people using wheelchairs are thus rendered invisible, and their lower social status is perpetuated through their denial of valuable opportunities of work. Furthermore, under such circumstances, people using wheelchairs face a degrading message about their inferiority. Therefore, installing a ramp offers persons using wheelchairs the same kind of freedom to enter and exit the building, addresses the subordination facing disabled people who are systematically excluded from places of public accommodations and work, and sends an expressive message that persons with disabilities are welcome in the community, being of equal moral worth to others.

Both subordination theories of wrongful discrimination and relational egalitarianism can plausibly ground employers' duty to provide moral accommodations. Workplaces often have rules of conduct that everyone but some people with impairments can easily follow. Providing moral accommodations by tolerating employees' misconduct enables those employees with disabilities to continue to work, prevents them from occupying subordinated social status linked to unemployment, and expresses the unequivocal message that they belong to the community, as equals.

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236. *Id*.

237. *Id*. at 18–20.

238. *Id*. at 19–20; *see also* Jonathan Wolff, *Disability among Equals*, *in* DISABILITY AND DISADVANTAGE 112, 112–37 (2009) (arguing that even when other measures for securing an opportunity to function are available, such as enhancing mental and physical abilities, changes to society are often preferable, because they are inclusive in welcoming people in their differences and benefit everyone by reducing the risk of losing function due to acquiring a disability).

D. The Capabilities Approach

Finally, reasonable accommodations may be grounded in the "capabilities approach."[239] On this approach, justice requires that all persons have certain "capabilities," that is, "opportunit[ies] to achieve valuable combinations of human functionings: what a person is able to do or be . . . ."[240] This approach uniquely focuses on the conditions that facilitate or hinder people's actual opportunities to function, and grounds states' duties to secure people's capabilities to function.

Michael Stein and Penelope Stein argue that the capabilities approach has enormous potential for disability justice.[241] It recognizes that "individuals require both resources and the opportunity to utilize those resources to achieve their potential."[242] For example, other things being equal, a person using a wheelchair has fewer actual opportunities in realizing his personal choices if public places are not accessible to wheelchair users. On the capabilities approach then, providing actual opportunities would involve, inter alia, mandating that such places are accessible to wheelchair users.

The same line of reasoning demonstrates how the capabilities approach justifies imposing on employers duties to provide reasonable accommodations. Reasonable accommodations are instrumental in providing people with a certain level of capability to function in the different domains of life. For example, reasonable accommodations in the workplace are instrumental in providing people with an actual opportunity to engage in paid work, which most would agree is key to various central human capabilities. In this way, the capabilities approach's focus on actual opportunity to function explains why the

239. *See, e.g.*, Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 332 (2004) (suggesting the benefits of adopting the capabilities approach); MARTHA CRAVEN NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17–18 (2011) (explaining and defining the capabilities approach). *But see* Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L. REV. 75, 98–106 (2007) (criticizing Nussbaum's version of the capabilities approach as basis for a disability rights). Grounding individuals' moral duty to provide reasonable accommodations in the capabilities approach might be more complex. I leave this inquiry for another time.

240. Sen, *supra* note 239, at 332.

241. Stein & Stein, *supra* note 227, at 1216–21.

242. *Id.* at 1220.

state is justified in obligating employers to provide reasonable accommodations.[243]

Insofar as the capabilities approach justifies requiring employers to provide reasonable accommodations, it also justifies requiring them to provide moral accommodations. Being denied the opportunity to work, or to participate in other social activities because of people's impairment-related misconduct hinders people's actual opportunities. Therefore, at times, mandating the toleration of impairment-related misconduct as a way of securing people's human capabilities would also be just.

V. Responding to Objections to Moral Accommodations

My discussion thus far has shown that as a matter of law, recognizing moral accommodations is consistent with the ADA, and that duties to provide moral accommodations derive from various conceptions of justice that plausibly ground reasonable accommodations more broadly. I now turn to address several possible objections to moral accommodations, as follows: (1) there is not even a *pro tanto* duty to tolerate impairment-related misconduct because it is always too burdensome; (2) social participation is best achieved by treating people's disorders rather than by tolerating their misconduct; (3) misconduct should not be accommodated because it is an indication of a moral deficit, not a mental disorder; and (4) the implications of recognizing the legal duty to provide moral accommodations are untenable, as they would eventually apply to nondisabled people too.

A. Undue Hardship

The first—and probably most compelling—objection to the duty to provide moral accommodations would be that moral accommodations are too burdensome and therefore are never warranted. More explicitly, the thought would be that even if moral accommodations can benefit people whose impairments manifest in workplace misconduct, there is nevertheless no duty to tolerate misconduct because it is just too difficult to do.

243. Of course, states could secure that workplaces are accessible not only by mandating employers to change the physical structures, but also by providing employers with other kinds of support, such as financial support.

This objection has roots in our philosophical understanding of duties correlative with rights. Duties correlative with rights have a special function in overriding other considerations.[244] But it is inevitable that in practice duties correlative to one right will conflict with duties correlative to another.[245] When conflict arises, complying with a duty that infringes on another's interests and rights could sometimes be unwarranted, all things considered.

A similar view is manifested in the ADA, which stipulates that reasonable accommodations are not warranted if they impose "undue hardship."[246] The content of the undue hardship defense, and its relationship to the *reasonableness* of accommodations is the subject of ongoing debate among legal scholars. On the one hand, Mark Weber argues that the undue hardship defense and the reasonableness requirement should be read together, as they are two sides of the same coin.[247] Some courts seem to follow this approach, treating inquiries of the undue hardship defense and the reasonableness of the requested accommodation as one.[248] On the other hand, Nicole Porter argues that the reasonableness requirement of accommodations and the undue hardship defense stand for two separate inquiries under the ADA.[249] She claims that some accommodations are unreasonable without imposing undue hardship, such as accommodation that involve discharging another employee,[250] or giving an unfair advantage to the employee with the

244. For two seminal, albeit distinct, views, see Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1984) (claiming that rights trump utilitarian considerations and mandating equal respect); JOSEPH RAZ, THE MORALITY OF FREEDOM 186 (1986) (suggesting that duties correlative to rights have pre-emptive force of overriding other considerations).

245. Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 506 (1989) (explaining that conflict of rights really means conflict of duties that rights "imply," and arguing that resolving such conflicts is qualitatively distinct from utilitarian trade-off considerations).

246. *See supra* Part III.A (explaining the duty to provide reasonable accommodations under the ADA).

247. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1166–70 (2010).

248. Nicole B. Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 157–64 (2019).

249. Nicole B. Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 584–89 (2013) [hereinafter Porter, *Martinizing Title I*].

250. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 338–39 (2007) (advocating for a legislative amendment clarifying that accommodations

disability.[251] It is also possible that an accommodation would be unreasonable but not unduly burdensome, if it does not address the disadvantage linked to the disability.[252]

Concretely, moral accommodations impose significant burdens on other employees. Tolerating misconduct arguably leaves employees who were the targets of impairment-related misconduct without redress, feeling unsafe and unprotected in the workplace. It further exposes employees to the risk of suffering from their colleagues' misconduct in the future. Finally, providing moral accommodations could lead employees to want to resign to avoid future tensions altogether. Some would thus lose their livelihood, while others who would not be able to afford to just quit would have to live through circumstances that they find too difficult to bear.

Note, however, that as currently understood, the duty to provide reasonable accommodations, and moral accommodations as a category therein, does not apply to employees but to employers.[253] Therefore, the manner in which employers' toleration of misconduct

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are reasonable barring exceptional circumstances such as that they involve the termination of another employee).

251. Porter, *Martinizing Title I*, *supra* note 249, at 571–79 (arguing courts should evaluate whether accommodations excessively burden other employees by determining whether they would provide the employee an unfair advantage, following *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) concerning places of public accommodations).

252. *See, e.g.*, Three Formulations, *supra* note 17, at 1395–96 (describing the "bridge model" according to which reasonable accommodations must address the substantial limitation in a major life activity that qualifies the plaintiff as a person with a disability).

253. I want to leave open the possibility that *employees* also have a *moral* duty to accommodate colleagues with disabilities. Indeed, reasons to provide accommodations plausibly apply to employees too, insofar as they can curtail each other's opportunities to function as equals in society. The fact that employees are not singled out in the law as subject to accommodation duties may simply emanate from pragmatic rather than principled reasons. *Compare* MOREAU, *supra* note 47, at 233–39 (arguing that duties to treat others as equals extend to individuals in various interpersonal contexts, but that there are other reasons that the law does not regulate certain intimate relationships), *with, generally*, Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009) (contending that differentiating between individuals in intimate relationships is not necessarily bad, and arguing accordingly that the law should not target such differentiation directly; but identifying the role that the law plays in maintaining such intimate discrimination by determining the "accidents and sex and love," and calling for legal reform to address such discriminatory practices).

burdens other employees bears on the justification of employers' duty only indirectly. That is, it matters to the extent that the harm caused to other employees renders the accommodations unduly burdensome or unreasonable for the employer.[254]

Indeed, the burdens that moral accommodations impose on other employees also hinder employers' interests. Thus, if moral accommodations generate tensions in the workplace, they could diminish employee morale, causing a reduction in productivity and inhibiting employers' interest in maintaining workplace efficiency. Moreover, if moral accommodations lead employees to resign, then an employer must face the cost of attrition; rehiring and retraining new employees involves operational and sometimes even direct financial costs. Lastly, if the upshot of tolerating misconduct is a hostile work environment, then employers could end up violating their other duties to maintain a safe work environment.

The crucial question, however, is not whether moral accommodations impose burdens—on other employees, employers, or both—because they obviously do. In fact, most if not all reasonable accommodations envisaged by the ADA burden employees and employers to various degrees.[255] Instead of imposing burdens *per se*, the issue is whether moral accommodations involve burdens that are excessive, overriding their grounding in the moral sense and imposing undue hardship as a matter of law.[256] It is crucial, in this regard, to be very clear about the nature of the duty to provide moral

254. *See infra note* 266 (discussing the Supreme Court's holding in *US Airways, Inc. v. Barnett*, where it found that an accommodation that interfered with the employer's seniority system was unreasonable due to its harm to other employees' expectations).

255. 42 U.S.C. § 12111(9). For example, changes to physical structures of the workplace such as installing lifts, impose alteration costs on the employer. Changes to the way things are customarily done in the workplace such as changes to time and place where work is carried out also impose administrative burdens and adjustment burdens on colleagues.

256. On this point generally, see Waldron, *supra* note 244, at 518–19 (exploring theoretical strategies for resolving moral conflicts between duties, and suggesting that "conflicts . . . are best handled in the sort of balancing way. . . . [W]e establish the relative importance of the interests at stake, . . . the contribution each of the conflicting duties may make to the importance of the interest it protects, and . . . try to maximize our promotion of what we take to be important."); *see also*, more specifically, Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L. J. 79, 144–78 (2003) (providing a framework for determining the reasonableness of accommodations, based on their cost, efficiency and benefit).

accommodations. It is a pro tanto duty to tolerate people's impairment-related misconduct, which implies that such toleration is not always morally required, all things considered, and not always warranted as a matter of law. It is not required if tolerating misconduct excessively undermines others' rights and important interests.

Whether employers have a duty to tolerate misconduct will depend on numerous factors that vary from case to case, such as the nature of workplace relationships, the organizational culture, and the type of misconduct. Plausibly, when the misconduct affects one's peers and supervisors, tolerating misconduct would be less burdensome than tolerating one's misconduct toward subordinates.[257] When an organizational culture is harsh and conflict-oriented, it is likely that accommodating impairment-related misconduct will not impose excessive burdens because employees are used to dealing with interpersonal conflicts at work.[258] Conversely, where there is a collaborative organizational culture, the more an accommodation generates friction in the workplace the more burdensome it is. Applied to the three types of moral accommodations mentioned above, reassigning to a vacant position is plausibly less burdensome than providing a second chance, which is in turn less burdensome than providing an exemption from some rule of conduct. Yet just as the hardship involved in changing physical structures and social institutions is often wrongly overestimated,[259] the hardship of tolerating employees' impairment-related misconduct might well be overestimated too. This overestimation of the cost is particularly

257. Note that in the case of BPD, misconduct is typically directed at peers and supervisors, not subordinates. *See, e.g., supra* notes 33, 42–45 (discussing cases involving employees with BPD misconduct toward peers and supervisors).

258. Jodi Kantor & David Streitfeld, *Inside Amazon: Wrestling Big Ideas in a Bruising Workplace*, N.Y. TIMES (Aug. 15, 2015), https://www.nytimes.com/2015/08/16/technology/inside-amazon-wrestling-big-ideas-in-a-bruising-workplace.html [on file with the *Columbia Human Rights Law Review*] (describing ecommerce giant Amazon's conflict-oriented and demanding organizational culture).

259. *See, e.g.*, Stein, *supra* note 227, at 103–09 (reviewing studies on the cost of accommodations and suggesting that additional empirical research and rigourous analysis is necessary to evaluate the cost of accommodation); *Don't Break the Bank in 2014 – Low Cost Accommodations Do Exist*, JOB ACCOMMODATION NETWORK (Jan. 2014), https://askjan.org/blogs/jan/2014/01/don-t-break-the-bank-low-cost-accommodations-do-exist.cfm [https://perma.cc/3GUZ-GKNJ] (suggesting that most accommodations cost absolutely nothing, and the rest typically amount to $500 only).

likely to occur with respect to accommodating employees with psychiatric disorders that manifests in social interactions, due to stigma and stereotypes of such disorders.[260]

More concretely, it is unlikely that moral accommodations would ever amount to undue hardship for employers in strictly financial terms. If tolerating impairment-related misconduct lowers workplace morale, which in turn affects employees' productivity, this would impose a financial burden. For example, tolerating misconduct in a small workplace[261] could lead to other employees quitting their jobs, thus imposing significant hardship on the employer. But mild interruptions to workplace productivity as a result of interpersonal difficulties can occur in most workplaces. Accordingly, it does not seem that such interruptions are overly burdensome even when caused by impairment-related misconduct. Moreover, as Lisa Key argues, given the ADA's goal of eliminating animus and prejudice against persons with disabilities, there is reason to distinguish between lowered morale that stems from such biases, which should never be considered in assessing undue hardship, and lower morale that stems from the direct impact of accommodations on the rights and working conditions of other employees, which may be considered, but on its own will likely only amount to undue hardship in "unusual situation[s]."[262]

Nonfinancial burdens are more likely to abrogate a duty to provide moral accommodations as a matter of law. First is the burden on other employees, which may render the accommodation unreasonable for the employer. Indeed, in *US Airways, Inc. v. Barnett*, the Supreme Court held that an accommodation that conflicts with an employer's seniority system would ordinarily be unreasonable.[263] This is because an interference with an employer's stated seniority system undermines other employees' expectations of consistent uniform treatment.[264] By the same token, moral accommodations arguably interfere with employees' expectations that their employers provide them with a safe workplace, free from angry outbursts, profanities, and constant conflicts.

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260. Timmons, *supra* note 14, at 263.

261. The ADA only applies to employers with 15 employees or more. 42 U.S.C. § 12111(5)(A).

262. Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1039–41 (1997).

263. 535 U.S. 391, 391 (2002).

264. *Id.* at 404.

However, again, not all burdens of this sort are excessive or undue. Reassigning an employee to a different position in order to allow them to "start over" would primarily burden new co-workers in exposing them to a risk of suffering from misconduct. Providing an employee a second chance would primarily burden co-workers who are not only exposed to the risk of further misconduct but may also feel uncomfortable around the misbehaving employee, at least for a while until their relationship restabilizes. Exempting employees from certain rules of conduct will burden co-workers who will be exposed to their misconduct. Whether or not such burdens are excessive for the employer should be determined on a case-by-case basis. The important point is that they will not always be. Crucially, assessing the extent of burdens on employers as a result of the harm to employees must take into account ways in which employers can mitigate those harms, as part of their duty to accommodate employees with disabilities. For example, employers could support their employees by introducing diversity training in the workplace to enhance their tolerance, or other activities to support their mental and emotional well-being. Such initiatives could mitigate the burdens that other employees experience and even instill in them a commitment to tolerating their colleagues' impairment-related misconduct.

Therefore, the first objection to moral accommodations fails. Tolerating impairment-related misconduct will sometimes impose excessive burdens and will then not be warranted. But it will not always do so. The extent of the burden is contingent on the facts of each case, and it is crucial not to overestimate the extent of that hardship, neither in particular cases nor in general.

B. Treatment Instead of Social Change

The second possible objection to moral accommodations would challenge the view that toleration is the best way to achieve workplace participation. It would hold that supporting people whose impairments manifest in workplace misconduct is best achieved through treating their disorders and mitigating their symptoms, not through changing the response to their misconduct. The thought is that once employees are treated, they will suffer no disadvantage.[265]

265. This objection is based on the Medical Model of disability. *See supra* note 220 and accompanying text (regarding the Medical Model).

However, focusing on treating impairments to secure social participation is problematic first and foremost because some impairments are not responsive to treatment. Accordingly, this alternative approach leaves at least some disabled people significantly disadvantaged without available recourse.

The case of BPD clearly demonstrates the possibly insurmountable challenge in relying on treatment. Firstly, treatment for BPD is not always effective. In the past BPD had been commonly viewed as chronic and untreatable. As early as 1938, psychoanalyst Adolf Stern observed that patients who exhibited symptoms we now associate with BPD become worse, not better, as a result of undergoing therapy.[266] Over time, clinicians developed new psychotherapeutic approaches to treat BPD, which positively affected patterns of self-harm, suicidal behavior, utilization of medication, and hospitalization.[267] In fact, recent studies confirm that treatment can lead to significant improvement in symptoms in most patients with BPD and extended periods of remission.[268] Still, some people with BPD are notably not responsive to treatment, and full recovery from BPD is significantly less likely when compared to other similar mental disorders, such as depression.[269] In addition, while the behavioral symptoms relating to BPD, such as impulsivity, are relatively responsive to treatment and remitting at a high pace, other personality traits associated with BPD, such as feelings of emptiness, often endure over time.[270]

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266. PARIS, *supra* note 175, at 9.

267. John G. Gunderson, *Borderline Personality Disorder: Ontogeny of a Diagnosis*, 166 AM. J. PSYCHIATRY 530, 534 (2009). Interestingly, both psychoanalytic psychotherapy and treatment for PTSD were found to cause people with BPD to react badly and even made them worse. *Id.* at 530–31, 533.

268. Robert S. Biskin, *The Lifetime Course of Borderline Personality Disorder*, 60 CAN. J. PSYCHIATRY 303, 306 (2015) (reviewing recent studies on the course of BPD in all age groups, and its prognosis); Joel Paris & Hallie Zweig-Frank, *A 27-Year Follow-up of Patients with Borderline Personality Disorder*, 42 COMP. PSYCHIATRY 482, 485 (2001) (noting that after 27 years, the vast majority of patients with BPD no longer met the diagnostic criteria).

269. Biskin, *supra* note 268, at 304, 306. Slightly more than half of patients with BPD achieved remission in symptoms and gained functioning in work, studies, and interpersonal relationships. They were also likely to rapidly redevelop symptoms and withdraw from social participation. Recovery was defined as "remission from symptoms as well as good, full-time vocational or educational functioning and at least one stable and supportive relationship with a friend or partner." *Id.*

270. *Id*. at 305.

Secondly, even effective treatment does not always eliminate people's disadvantage in social participation. Studies confirm such pessimism regarding the poor social functioning of people with BPD, even after receiving treatment.[271] In employment, for example, people with BPD have lower rates of workplace participation compared to people with other comparable psychiatric disorders.[272] Moreover, effective treatment will not increase workplace participation if conditions in the surrounding environment continue to trigger impairments and exacerbate their symptoms.[273]

Finally, in real life seeking medical treatment also sometimes leads to losing one's job, because it often involves missing work.[274] This practical challenge is augmented in the case of BPD where it is unclear whether and by when treatment would be successful. BPD is one of few psychiatric disorders—possibly the only major one—for which the primary treatment involves psychosocial interventions without psychiatric medications.[275] In other words, given the indefinite duration of BPD treatment, employees with BPD may seek treatment to preempt any unacceptable behavior, but nonetheless end up losing their jobs for absenteeism.

To sum up, the limited responsiveness of some people with BPD to treatment, the lack of direct correlation between remission in

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271. John G. Gunderson et al., *Ten-Year Course of Borderline Personality Disorder*, 68 ARCHIVES GEN. PSYCHIATRY 827, 834–35 (2011) ("[I]mprovement in social function was not significantly associated with subsequent reductions in psychopathology.").

272. *Id.* at 835. Interestingly, in the same study more education was correlated with better chances of full-time employment for people with BPD. *See also* Biskin, *supra* note 268, at 306. This suggests that increasing social participation in some domains, such as education, can improve disabled people's chances of participating in other life domains, such as employment.

273. In the context of employment, see generally Stefan, *supra* note 30 (arguing that workplace stress and abuse often triggers and exacerbates employees' disabilities); Jackson v. Kaplan Higher Educ., 106 F. Supp. 3d 1118, 1121 (E.D. Cal. 2015) (involving a problematic relationship between the plaintiff—who was later diagnosed with BPD—and her supervisor presumably caused plaintiff depression and anxiety necessitating her going on medical leave. As her physician wanted to postpone her return to work, she was fired).

274. *See, e.g.*, Rogers v. N.Y.U., 250 F. Supp. 2d 310, 313 (S.D.N.Y. 2002) (involving an employee who was dismissed when her medical leave expired, in the absence of medical expert's opinion that she was ready to return to work).

275. Gunderson, *supra* note 267, at 536 ("At this time, borderline personality disorder is the only major psychiatric disorder for which psychosocial interventions remain the primary treatment.").

BPD symptoms and social participation, and the possible problematic effects of seeking medical care on stable employment, cast doubt on the effectiveness of treatment to address the disadvantage of employees with BPD. Clinicians infer from the limited effects of successful treatment on social participation that treatment should include more rehabilitation strategies, or that psychotherapeutic interventions are needed at an earlier stage in people's lives.[276] However, until those practices are developed and proven effective, it seems that treatment cannot in itself address the disadvantage facing employees with BPD.

C. Moral Deficit Not a Mental Disorder

A third possible objection to the duty to provide moral accommodations would hold that misconduct is often a sign of moral deficit not impairment, and accordingly it need not be tolerated. On this view, conceiving of misconduct as a symptom of impairment is nothing more than pathologizing morally reprehensible behavior, which should be denounced. This objection rests on the assumption that only people with impairments have a right to reasonable accommodations, which in turn must be linked to the symptoms of their impairments.[277]

The case of BPD, again, contextualizes this objection. BPD has been recognized as a psychiatric disorder for over 40 years, but since its inception there has been a debate regarding its clinical validity and nature as a psychiatric disorder as opposed to merely a moral deficit.[278] In recent years, Louis Charland reignited this debate by arguing that BPD belongs to a category of personality disorders that are fundamentally moral in nature.[279] Simply put, the thought is

276. *See* Gunderson et al., *supra* note 271, at 836 (suggesting that future BPD therapies need to address people's limited social functioning, for example by incorporating social learning and rehabilitation strategies); *see also* Biskin, *supra* note 268, at 307 (proposing early identification of and early therapeutic intervention for persons with BPD as a solution to current treatment problems).

277. *See supra* Part III.A (discussing the duty to provide reasonable accommodations).

278. Smith, *supra* note 59, at 89–92 (reviewing leading critics of the distinction between personality traits and personality disorders as manifested in the personality disorders categories in the DSM).

279. Louis Charland, *Moral Nature of the DSM-IV Clustre B Personality Disorders*, 20 J. PERSONALITY DISORDERS 116, 119 (2006) (focusing on what used to be labeled Cluster B disorders, which also included Antisocial, Histrionic, and Narcissistic personality disorders).

that BPD is a moral deficit more than it is a mental disorder. On this critique then, the condition currently designated as BPD should not be considered a psychiatric diagnosis, because people who have this condition are not sick, they are simply bad people.

The first claim supporting the contention that BPD is a moral deficit more than a mental disorder revolves around BPD diagnostic criteria, which include immoral behaviors.[280] For example, BPD diagnostic criteria include "inappropriate, intense anger," and "instability in interpersonal relationships," which is often manifested in a tendency to generate conflicts, lash out in angry outbursts, and even use violence. Reference to morally reprehensible behaviors is also found in two other BPD diagnostic criteria: "frantic efforts to avoid real or imagined abandonment" that manifest themselves in manipulative suicidal threats intended to prevent others from leaving, and "impulsive behavior" that results in reckless conduct that puts others at risk.[281] According to Charland, a pattern of such behaviors is indicative of "clear moral deficits in empathy and regard for others."[282] Similar views of the immorality that characterizes people with BPD are found in clinicians' description of such people; they use moral terms to describe patients' lack of judgement and inappropriate behavior or attitudes towards others, such as "fickle," "flighty," "inconstant," "reckless," "unreasonable," "childish," "vehement," "outrageous," "unstable," "hostile," "irascible," "[m]anipulative," "demanding," "importunate," "possessive," and "seductive."[283]

A second claim supporting the view that BPD is a moral deficit scrutinizes the treatment of BPD, thus "working backwards" from the nature of treatment to the nature of the condition. Arguably, successful treatment of BPD and other personality disorders is not clinical but rather is "tantamount to a moral conversion"; it is about changing someone's behavior and personality drastically from "bad" to "good."[284] Hypothetically, successful treatment of BPD would result in a patient's "commitment to being patient and loving with both others and oneself."[285] It involves as its primary goal establishing mutual respect in doctor-patient relationships, with an obvious moral

280. *Id.* at 119–20.
281. DSM-5, *supra* note 13, at 663.
282. Charland, *supra* note 279, at 122.
283. BECKER, *supra* note 126, at 21.
284. Charland, *supra* note 279, at 122.
285. *Id.*

component in aspiring to reduce the patient's manipulation and vindictiveness and promote truthfulness.[286]

However, the view that BPD is a moral deficit does not give rise to a conclusive objection to moral accommodations. First, whether a trait constitutes an impairment is contingent on the conceptualization of impairment, which is subject to ongoing debate.[287] In particular, the view that BPD is not a mental disorder rests on the assumption that clinical and moral traits are mutually exclusive. That is, that impairment is not a moral deficit. But this begs the question: why not accept that impairments also include moral deficits?[288]

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286. *Id.* at 123–24. *But see* Hanna Pickard, *Mental Illness is Indeed a Myth*, *in* PSYCHIATRY AS COGNITIVE SCIENCE: PHILOSOPHICAL PERSPECTIVES 83, 97 (Linda Bortolotti & Matthew Broome eds., 2009) (arguing that rather than moral conversion, therapy allows patients with personality disorders, including BPD, to develop skills to realize their existing moral conviction by developing their character); Greg Horne, *Is Borderline Personality Disorder a Moral or Clinical Condition? Assessing Charland's Argument from Treatment*, 7 NEUROETHICS 215, 216 (2014) (analyzing prominent treatment models for BPD and arguing that BPD is essentially a clinical condition, not a moral deficit, with immoral behavior rooted in cognitive and emotional deficits that obscure the expression of an otherwise intact moral character).

287. For various accounts of the notion of "impairment" and relatedly "health," *see, e.g.*, Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP & SOC'Y 5, 10–13 (1987) (doubting the prevalent view that impairment is caused by "natural" causes, and explicating the social and political factors that cause impairments); Ron Amundson, *Against Normal Function*, 31 STUD. HIST. & PHIL. BIOLOGICAL & BIOMEDICAL SCIS. 33, 33 (2000) ("The disadvantages experienced by people who are assessed as 'abnormal' derive not from biology, but from implicit social judgments about the acceptability of certain kinds of biological variation."); Christopher Boorse, *On the Distinction Between Disease and Illness*, 5 PHIL. & PUB. AFFS. 49, 57 (1975) (putting forth the notion of health as a normal state in which an organ's mode of functioning conforms to its "natural design"); Christopher Boorse, *Health as a Theoretical Concept*, 44 PHIL. SCI. 542, 571 (1977) (developing a conception of health as normal species functioning based in statistical prevalence and biology, and defending it as a value-free account); Shelley Tremain, *On the Subject of Impairment*, *in* DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY 32, 33–34 (Mairian Corker & Tom Shakespeare eds., 2002) (reviewing scholarship on theories of impairment and arguing that "impairment and its materiality are naturalized *effects* of disciplinary knowledge/power").

288. *See generally* Peter Zachar & Nancy Nyquist Potter, *Personality Disorders: Moral or Medical Kinds—or Both?*, 17 PHIL., PSYCHIATRY, & PSYCH. 101 (2010) (exploring the nature of BPD and Narcissistic personality disorder

Moreover, this philosophical debate notwithstanding, as long as certain traits *are* categorized as impairments as a matter of clinical practice, the diagnosis itself gives rise to certain entitlements. By implying that a trait is pathological, a diagnosis often provokes fears and stigma about unpredictability and reoccurrence of one's related behavior. Accordingly, in social settings, a diagnosis could potentially expose people to further disadvantage that they would not have been otherwise subject to. By comparison, in the absence of a diagnosis, engaging in interpersonal conflicts and exhibiting morally reprehensible behavior toward others does not always lead to exclusion. For example, when employees with no diagnosed mental disorder lose their temper in the workplace, or experience difficulties with their colleagues, employers deploy various techniques to resolve tensions in the workplace. The stigma associated with certain impairments—based on the pathologizing of traits—motivates at least to an extent the reluctance to resolve tensions in the workplace when persons with disabilities are involved. Therefore, people may still be entitled to moral accommodations on the basis of being diagnosed with BPD, even if the category itself is not without difficulties.

D. Moral Accommodations for All?

Finally, some may worry that operationalizing a duty to provide moral accommodations involves untenable practical implications due to the possibility of it extending to nondisabled people. This worry is best understood as involving three distinct claims: one principled claim and two pragmatic claims. The first claim would hold that moral accommodations imply that all misconduct should be tolerated regardless of disability as there is no reason to treat impairment-related misconduct differently than other types of misconduct. The second claim would hold that even assuming that moral accommodations only apply to disabled people, in practice employers do not know who has a disability and will therefore be

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from a virtue ethics perspective, focusing on questions of control and judgment, and rejecting the dichotomy between morality and mental health); Pickard, *supra* note 286 (arguing that personality disorders such as BPD involve failings of virtue, which can be scientifically explained and accordingly successfully treated, thus rendering idle the question of whether they are indeed medical conditions). *But see* Louis C. Charland, *Medical or Moral Kinds?: Moving Beyond a False Dichotomy*, 17 PHIL., PSYCHIATRY, & PSYCH. 119, 119 (2010) (responding to the arguments posed by Zacher and Potter).

obligated to provide moral accommodations to everyone. Finally, even if misconduct should only be tolerated when it is linked to people's underlying impairments that the employer is aware of, a third claim would hold that in real life moral accommodations could still apply to everyone as people would fake a disability to have their misconduct tolerated. However, all three claims fail, as I now show in turn.

Consider the principled claim first. In recent years, disability law scholars questioned the delineation of the duty to provide reasonable accommodations only to persons with disabilities and suggested instead that it extends to nondisabled people too.[289] Notably, Michael Stein, Anita Silvers, Bradley Areheart, and Leslie Francis proposed that the duty to provide accommodations in the workplace should extend both to people with and without a disability, as long as the requested accommodation is necessary and effective in enabling people to work.[290] Their proposal has several advantages, including overcoming practical challenges in determining individuals' disability status, addressing dependency costs attributed to aging population by keeping more individuals in the workforce, and reducing stigma currently associated with claiming accommodations.[291] The universalization of accommodations can possibly even incentivize structural changes in the workplace before a request for accommodation is made, which in turn could promote the acceptance of difference in society in accordance with the relational equality ideal.[292]

However, the universalization of accommodations faces a significant hurdle relating to its justification. Specifically, given the burden that providing reasonable accommodations imposes on employers, is it justified all things considered when owed to all?

Contemplating a possible pushback from employers against the possibility of universalizing duties to provide reasonable accommodations, Nicole Porter suggests distinguishing between two

289. Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 693 (2014); Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 88–89 (2017).

290. Stein et al., *supra* note 289, at 693.

291. *Id.* at 749–55.

292. *Id.*; *see also* Jonathan Wolff, *Disability, Status Enhancement, Personal Enhancement and Resource Allocation*, 25 ECON. PHIL. 49, 56 (2009) (explaining that successful policies of "status enhancement" erode group members' disadvantage, promoting a society of equals).

kinds of accommodation requests.[293] On the one hand are "necessary accommodations" that would be warranted unless they impose significant difficulty or expense.[294] On the other are "unnecessary accommodations," which she contends should be granted unless they involve anything more than "de minimis" expense.[295] This suggested distinction further blurs the already blurry line between accommodations and universal mandates.[296] Yet even if we accept Porter's proposed distinction, the question of justification remains. Indeed, on her view, accommodations that impose significant difficulty or expense would still only be justified if they are "necessary," and so the justification of providing such accommodations to all, including nondisabled people, arises again.

The universalization of reasonable accommodations could thus undermine the justifiability of *moral* accommodations too. Reconceiving the duty to provide moral accommodations as applying to every work-capable individual regardless of disability status means that every misconduct should be tolerated, even when it is the upshot of people's outright malice. Given the distinctive burdens that tolerating misconduct impose on employees and employers alike, the universalizing of moral accommodations would make it too burdensome.

However, our current legal and moral conceptions of the duty to provide reasonable accommodations suggest that these concerns are overrated.[297] As it is currently understood, a duty to provide accommodations is only owed to people with disabilities.[298] Therefore, the possible implications of universalizing reasonable accommodations are purely hypothetical at this time. Accepting, *arguendo*, that duties to provide reasonable accommodations are only owed to persons with disabilities, the next two claims I discuss

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293. Porter, *supra* note 289, at 110–21.

294. *Id*. at 118.

295. *Id*.

296. *See generally* Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates - Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111 (2003) (analyzing universal mandates that require employers to provide benefits to all employees and arguing that they are analytically similar to antidiscrimination and accommodation mandates, but vary in their applicability).

297. *See supra* Parts III–IV (explaining and defending moral accommodations in the ADA framework).

298. *See supra* Parts III.A (explaining that under the ADA, the legal duty to provide accommodations only applies toward disabled people).

criticize moral accommodations on the grounds of how they would play out in practice.

A second claim against moral accommodations arises from the assumption that in practice employers often do not know whether an employee is disabled. It holds that in the absence of concrete knowledge of employees' disabilities everyone's workplace misconduct would have to be tolerated.[299] But again, this worry contradicts our current understanding of the legal and moral duty to provide reasonable accommodations, as obtaining only if an employer has knowledge of an employee's underlying impairment, and possibly of the link between an impairment and some misconduct.[300]

A third claim in this regard is that recognizing a duty to provide moral accommodations will incentivize people to fake disabilities in order to avoid disciplinary action and dismissal following their misconduct. The worry underlying this claim reflects a widely held sentiment of what Doron Dorfman calls the "fear of the disability con," namely the worry that nondisabled people pretend to be disabled in order to gain some advantage in the form of a disability right.[301] According to Dorfman, the fear of the disability con pervades American society and American law, and derives from the tension between the fluid nature of disability and false conceptions of what disability looks like.[302] The fear of the disability con is arguably exacerbated by suggestions to significantly ease the process of discerning who has a disability. For example, Katherine MacFarlane has recently argued that determining one's disability should not be contingent on medical proof, but rather on self-identification.[303] If

299. Notably, the assumption underlying this worry is that it is in people's best interest to keep their disability private, which has recently been criticized. *See generally* Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681 (2021) (arguing that disability law's preference for keeping disability private problematically obscures the pervasiveness and diversity of disability in society, reinforces bias, and hinders opportunities for broader structural reform).

300. *See supra* Parts III.A (explaining that employers must only provide reasonable accommodations to disabled people that they know of their disabilities).

301. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 3–4 (2019).

302. *Id.* at 6–12, 28–32.

303. Macfarlane, *supra* note 74, at 95–97 (drawing a comparison between disability and religious accommodations and proposing to adopt the "hands-off" approach that characterizes the latter to the former). Macfarlane's proposal has several advantages, such as overcoming inadequate access to healthcare services

qualifying as disabled to be eligible for accommodations would be wholly determined based on one's self-identification, then the applicability of moral accommodations could be much wider, and the fear of the disability con even greater.

However, the worry that nondisabled people will abuse moral accommodations does not warrant sidelining this new category. In fact, the pervasiveness of the fear of fakery demonstrates that this worry is not unique to moral accommodations. It pervades all disability accommodations and as such calls for a more comprehensive strategy for resolution. As Dorfman rightly argues, this comprehensive strategy must not be the curtailing of disability rights, but rather the adoption of strategic measures to increase trust and reduce stereotypes.[304] Specifically, addressing the fear of moral accommodations' con calls for improving workplace diversity, not for denying people the accommodations they are owed.

VI. Critique of Courts' Approach to Moral Accommodations

As I have argued in previous sections, there is a legal basis and a moral basis for recognizing moral accommodations as a novel category within the broader category of duties to provide reasonable accommodations to persons with disabilities. The crucial question then becomes: what underlies courts' rejection of moral accommodations? Employers plausibly have reasons to oppose moral accommodations due to the burdens moral accommodations impose, or simply due to unfavorable attitudes towards individuals with disabilities seeking moral accommodations. However, these do not explain why *courts* are reluctant to recognize moral accommodations under the ADA.

In the final Part of this Article, I argue that courts' rejection of moral accommodations is based on a conceptual conflation of rights and sympathy arising from the "Tragedy Model" of disability. I begin

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resulting in lack of documentation despite an obvious need for accommodation, reducing the prevalence of people with disabilities working without accommodations that they need, at substantial efforts and costs, or being pushed out of the workplace, and providing redress to people who do not yet have a disability but are subject to substantial risk of acquiring one as a result of working without accommodations. *Id.*

304. Dorfman, *supra* note 301, at 32–35 (suggesting measures to reduce the fear of the disability con such as increasing integration of persons with disabilities in society and providing accessible knowledge of disability law and its internal safeguards to the entire population, as well as the fluidity of disability).

by outlining the Tragedy Model's view of disability as a personal tragedy calling for pity and help rather than rights and justice. I subsequently argue that this view leads to a conflation of duties and sympathy, underpinning decisions against unsympathetic plaintiffs such as those engaging in impairment-related misconduct.

According to the Tragedy Model of disability, impairments are primarily a cause of loss and suffering to the individual.[305] Further on this model, the appropriate response to disability disadvantage is preventing impairments or providing ameliorative treatment to cure impairments or at least minimize the pain and suffering they cause. However, if treatment or prevention is unavailable, the appropriate response to the suffering of persons with disabilities is pity and charitable assistance.

The Tragedy Model of disability is further linked to an often-criticized social expectation that persons with disabilities behave in ways that are hospitable to pity and help.[306] For example, disabled people are expected to cooperate with attempts to help them, without being too demanding or aggressive. By living up to these expectations, people with disabilities can evoke in others sympathy and a desire to help, thus reinforcing the social relationship between those who are in need of help or sympathy and those who provide it. Further, when disability is characterized by suffering and misfortune, and people with disabilities are seen as appropriate subjects of pity and help, then duties owed to persons with disabilities are seen as manifestations of sentiments of pity and desire to help. Conversely, when people with disabilities are unsympathetic, there is no pity or desire to help them.

The Tragedy Model's relation to disability antidiscrimination law is complex. On the one hand, the views associated with the Tragedy Model are analytically compatible with laws proscribing

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305. *See, e.g.*, Sally French & John Swain, *There but for Fortune*, *in* DISABILITY ON EQUAL TERMS 7–20 (John Swain & Sally French eds., 2008) (describing the tragic conception of disability) .

306. *See, e.g.*, JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 12–24 (1993) (claiming that people with disabilities have rejected the notion that they are dependent and in need of charity or pity); JENNY MORRIS, PRIDE AGAINST PREJUDICE: TRANSFORMING ATTITUDES TO DISABILITY 108–11 (1991) (arguing that the portrayal of disabled people as pitiful and in need of help creates a culture of dependency and undermines the status of disabled people as autonomous human beings).

discrimination on the basis of disability.[307] On the other hand, in practice accepting the Tragedy Model hinders the possibility of recognizing unsympathetic people as disabled, for their real-life behaviors fly in the face of this model's view of disability.

This tension is evident in the case of disabled people seeking moral accommodations, particularly those with BPD. People whose impairments manifest in misconduct defy the social expectation that disabled people behave in ways deserving of pity and help. Aggressive and demanding behavior frustrates the commonly held view that they should be patient when asking for assistance. A tendency to generate conflicts further erodes others' desire to help. And behaving in ways perceived as manipulative is seen as morally reprehensible and worthy of condemnation. Above all, the hardship people's misconduct inflicts on others overshadows the disadvantage that they themselves experience as a result of their disorder, the disadvantage they face, and the social response to their misconduct.[308] Sympathy is then typically directed at their "victims."

For all these reasons, people with disabilities whose impairments manifest in misconduct are more likely to evoke anger and social rejection than sympathy. They are no longer seen as deserving of pity and help. Consequently, endorsing views along the lines of the Tragedy Model of disability, even implicitly, may lead to believing that people whose impairments manifest in misconduct are not entitled to disability rights protection, let alone moral accommodations.

However, this view rests on a conflation of the notions of pity and sympathy with that of a duty. Duties are not about sympathy and help, but about things owed to people who have certain rights.[309] The fact that certain duty bearers do not want or feel the desire to help those to whom their duties are owed is beside the point, both as

307. On the compatibility of the Tragedy Model of disability with an antidiscrimination approach *see* Goldiner, *supra* note 220, at 10.

308. This dual harmful effect on the self and others has been called the Janus-faced nature of personality disorders, *see* Hanna Pickard, *What Is Personality Disorder?* 18 PHIL., PSYCHIATRY, & PSYCH. 181, 182 (2011) ("[T]he Janus-faced nature of PD: The fact that the characteristics and traits that cause distress and impairment to the individual often involve harm to others.").

309. Here I am limiting my discussion to what is sometimes referred to as "directed duties," that is, duties correlative with rights. *See also* Jeremy Waldron, *Introduction*, *in* THEORIES OF RIGHTS 1–20 (1984) (distinguishing duty-based theories of rights from other theories).

a matter of law and morality. Duties are not grounded in duty-bearers' desire to help, nor in the deservedness of those to whom duties are owed. Indeed, we recognize duties owed to unsympathetic right-holders in other contexts, so why not unsympathetic right-holders with a disability?

The Tragedy Model of disability and this conflation of duties and sympathy underlies courts' approach to impairment-related misconduct, particularly when the misconduct affects interpersonal relationships. As clearly demonstrated in the cases reviewed throughout this Article, plaintiffs whose BPD manifests in misconduct in interpersonal relationships are far from sympathetic. In *Smith v. Salt-Lake City*, the plaintiff continuously sent many hurtful emails violating company policies, disregarding the harm to others and repeated warnings.[310] In *Coia v. Vanguard*, the employee's disrespectful behavior toward her supervisor and co-workers, constant complaints, and outbursts continued for five years.[311] In *Rogers v. NYU*, an administrative aide regularly generated conflicts with her supervisor.[312] In *Wellman v. Dupont Dow Elastomers*, the plaintiff made false allegations against her co-workers.[313] And in *Weigert v. Georgetown University*, the plaintiff was hostile toward co-workers despite receiving various accommodations to her physical surroundings.[314] Ultimately, plaintiffs in those cases do not invoke pity nor a desire to help them, and this arguably underlies the courts' reluctance to recognize moral accommodations.

My claim that a conflation of duties and sympathy underlies courts approach to moral accommodations finds further support in rare judicial opinions that either explicitly acknowledge plaintiffs' lack of sympathy or seem sympathetic to plaintiffs despite their misconduct. A striking example is the dissenting opinion in *Calef v. Gillette*.[315] The Court of Appeals' Judge Bownes recognized at the outset that the plaintiff was not the most sympathetic ADA plaintiff, as indeed "he threatened to hit a 60 year old woman and scared a Gulf War veteran," but nevertheless emphasized that the court "should take extra care not do more harm than good where the

310. No. 2:05CV00943, 2007 WL 582969, at *1–2 (D. Utah Feb. 20, 2007).
311. No. CV 16-3579, 2017 WL 724334, at *2–4 (E.D. Pa. Feb. 23, 2017).
312. 250 F. Supp. 2d 310, 311–12 (S.D.N.Y. 2002).
313. 414 F. App'x 386, 388 (3d Cir. 2011).
314. 120 F. Supp. 2d 1, 4–5 (D.D.C. 2000).
315. 322 F.3d 75, 88–97 (1st Cir. 2003).

plaintiff is not a nice person."[316] Judge Bownes then explained that avoiding the subjective fear of co-workers is not an "essential function" of the job, reasoning that holding otherwise would open the door to dismissing employees with disabilities because of others' fears.[317] Given that the plaintiff in this case did not act violently or threaten anyone with violence on the day leading to his dismissal, and further that he never had a violent incident at work after he began seeking treatment, the dissenting opinion concluded that this case was distinguishable from other cases of workplace misconduct.[318] Another illuminating example, albeit from the opposite end, is found in *McKenzie v. Dovala*, where the Court of Appeals for the 10th Circuit rejected the claim that the plaintiff's misconduct as a deputy sheriff rendered her unqualified.[319] There, the misconduct included the plaintiff firing her gun at her father's grave, self-mutilating, and using drug.[320] As the conduct was primarily self-directed, and the plaintiff had a history of childhood abuse by her father, which presumably triggered her mental health conditions, including BPD, the plaintiff seemingly remained sympathetic, at least in the eyes of the court.

CONCLUSION

The question of how we should respond to misconduct that is related to an impairment has been the focus of this Article. It showed that rather than excluding people with disabilities in those circumstances, the appropriate response is sometimes to accommodate them by tolerating their misconduct.

I argued that this appropriate response is a novel category of duties to provide reasonable accommodations, which I called moral accommodations. I outlined three types of moral accommodations: second-chances, job transfers, and exemptions from rules of conduct. I claimed that there is a legal basis for recognizing such accommodations under the ADA and a moral basis for recognizing them, like other duties to provide reasonable accommodations. I also responded to several possible objections to moral accommodations. Finally, I submitted that courts fail to recognize moral

316. *Id*. at 88.
317. *Id*. at 95.
318. *Id*. at 96.
319. 242 F.3d 967, 975 (10th Cir. 2001).
320. *Id*. at 968.

accommodations because of an outdated perception of disabled people as needing pity and help rather than as right-holders who deserve compliance with duties owed to them even if they are not sympathetic.

Recognizing employers' duty to provide moral accommodations under the ADA could have far reaching practical implications for the lives of those whose impairments manifest in misconduct. While this Article focused on impairment-related misconduct in the workplace, the duty to provide moral accommodations could apply to other domains of life, where entities are subject to the duty to provide reasonable accommodations under the ADA and where misconduct leads to disadvantage and exclusion.

Moreover, the analysis of moral accommodations illuminates the exclusionary aspects of workplace practices that adversely affect not only people with disabilities, but every one of us who sometimes fails to live up to standards of conduct. The focus on BPD as a test case further underlines this point, as the behavioral symptoms associated with BPD are exaggerated manifestations of behaviors and emotions common to all human beings. As Jerold Kreisman and Hal Straus wrote in the first book to introduce BPD to the public:

> [t]o one degree or another, we are all struggling with the same issues as the borderline. . . . How many of us have not had a few intense, unstable relationships? Or flew into a rage now and then? . . . If nothing else, BPD serves to remind us that the line between 'normal' and 'pathological' may sometimes be a very thin one.[321]

In other words, BPD symptoms are distinct from "normal" behaviors not in kind but rather in degree and identifying exactly when the degree of a normal behavior becomes pathological is a difficult task. Considering whether and when the pro tanto duty to provide moral accommodations obtains reminds us that interpersonal relationships are sometimes messy. The workplace as well as other places of social interaction should be safe places for all, but interpersonal conflicts are a part of life and misconduct is not always intolerable. The notion of moral accommodations invites us to reconsider our ideals of a just society and to change practices that we typically consider to be appropriate responses to misconduct, in view of our commitments to persons with disabilities' equal and full participation in society.

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321. KREISMAN & STRAUS, *supra* note 19, at 21.