

ABILITY APARTHEID AND PAID LEAVE

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ABLEISM AT WORK: DISABLEMENT AND HIERARCHIES OF IMPAIRMENT.
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INTRODUCTION

Two ripple effects of the COVID-19 pandemic are on a collision course. Lockdowns, quarantines, and plummeting consumer confidence have forced millions of American workers into unemployment¹ and compelled others to hold onto jobs that they would have left but for the pandemic.² This high supply and low demand for labor affords the business community virtual carte blanche in selecting which workers to hire and retain, as well as significant leeway in how they are treated. At the same time, interpersonal losses due to death and sickness, combined with massive societal disruption from social distancing and quarantining, presage an “imminent mental health surge” that mental health care professionals are calling “another ‘second wave.’”³ For instance, one study from the summer of 2020 indicated a pronounced increase in the prevalence of symptoms of various mental disorders, such as anxiety

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1. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession> [perma.cc/DGB5-FKLT].

2. *Consumer Confidence Index (CCI)*, OECD DATA, <https://doi.org/10.1787/46434d78-en>; Karla L. Miller, *Trapped by the Pandemic in a Job That Was Supposed to Be Short-Term*, WASH. POST (July 30, 2020), <https://www.washingtonpost.com/business/2020/07/30/work-stress-coronavirus> [perma.cc/L7B7-72K5]; see also Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, IMFBLOG (Apr. 14, 2020), <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression> [perma.cc/6AQM-3EA3]; Holly Ellyatt, *Global Economic Hit from Coronavirus Will Be Felt For a Long Time to Come*, *OECD Warns*, CNBC (Mar. 23, 2020, 8:37 AM), <https://www.cnbc.com/2020/03/23/coronavirus-oecd-warns-economic-hit-will-be-felt-for-a-long-time.html> [perma.cc/5NNU-V3ND].

3. Naomi M. Simon, Glenn N. Saxe & Charles R. Marmar, *Mental Health Disorders Related to COVID-19–Related Deaths*, 324 JAMA 1493, 1493 (2020), <https://doi.org/10.1001/jama.2020.19632>. On second waves resulting from the pandemic, see generally Lisa Maragakis, *Coronavirus Second Wave, Third Wave and Beyond: What Causes a COVID Surge*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus> [perma.cc/6U33-Y4LG] (last updated Oct. 21, 2021).

disorders, depressive disorders, and trauma- and stressor-related disorders, as well as increased substance use and suicidal ideation, attributable to the pandemic.⁴ Combining these two phenomena foments the perfect storm for de facto workplace sanism—that is, prejudice against individuals with psychosocial disabilities⁵—to thrive: a material increase in mental impairments⁶ coupled with employers primed to marginalize workers with a psychosocial disability who they deem to be dangerous, inefficient, unworthy of legal protection, socially unacceptable, or just not worth the effort (pp. 1, 9–10, 103, 126, 133).

Paul David Harpur's new book, *Ableism at Work: Disablement and Hierarchies of Impairment*,⁷ offers a potential salve for these issues by exposing and critiquing the de jure sanism perpetuated by the employment laws of many common-law jurisdictions, including our own. It also lays the groundwork for progressive law reform to allay at least some of the unique harms endured by workers with psychosocial disabilities. Harpur's primary thesis is that employment laws writ large entrench a pernicious hierarchy of impairments in the workplace—privileged physical impairments on top; mental impairments marginalized below—born out of bias against workers with psychosocial disabilities (pp. 1–2). Reform-minded legislators, regulators, and scholars can use this evidence of systemic sanism to combat the de jure subjugation of workers with a psychosocial disability at a time when de facto bias against them is certain to flourish.

While legal scholarship increasingly addresses ableism—a value-based essentialism of human beings—few legal scholars or jurists have focused their work on sanism in particular.⁸ This is despite the striking fact that approximately half of all Americans will be diagnosed with a mental disorder at some

4. Mark É. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic—United States, June 24–30, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1049, 1049, 1053 (2020).

5. P. 15; Michael L. Perlin, *Sanism and the Law*, 15 VIRTUAL MENTOR 878, 878 (2013), <https://doi.org/10.1001/virtualmentor.2013.15.10.msoc1-1310>; see also p. 6 (defining psychosocial disability as “the disablement of people with mental impairments”).

6. We use the phrase “mental impairments” to encompass all symptoms of “mental disorders” as that technical term is used in the DSM-5. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5]. This includes neurodevelopmental disorders, psychotic disorders, bipolar and related disorders, depressive disorders, anxiety disorders, obsessive-compulsive and related disorders, trauma- and stressor-related disorders, dissociative disorders, somatic symptom and related disorders, feeding and eating disorders, elimination disorders, sleep-wake disorders, sexual dysfunctions, gender dysphoria, disruptive, impulse-control, and conduct disorders, substance-related and addictive disorders, neurocognitive disorders, personality disorders, paraphilic disorders, and medication-induced movement disorders.

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8. The giant of the field remains Michael L. Perlin. See, e.g., MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000); Michael L. Perlin & Keri K. Gould, Rashomon and the Criminal Law: *Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995). For other treatments of law's sanist impact, see *City of Cleburne v.*

point in their lives.⁹ For many, that disorder is acute. In a study of 2015 data, for example, the Center for Behavioral Health Statistics and Quality found that roughly ten million American adults had experienced a “serious mental illness” that year.¹⁰ The paucity of attention paid by legal scholars to sanism juxtaposed against the ubiquity of mental impairments in America, even before the COVID-19 pandemic, highlights the exigence of *Ableism at Work*. Thus, in Part I, we examine and elucidate Harpur’s claims of employment laws’ wide-ranging sanism, supplement them with examples of our own, and argue that his assertions are convincing.

Although American medical-leave laws are prime examples of sanism, they are only briefly addressed in *Ableism at Work*. Part II expands Harpur’s thesis by digging into the sanism of the Family and Medical Leave Act of 1993 (FMLA), recent federal paid leave laws (e.g., the Families First Coronavirus Response Act’s (FFCRA) Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act), and the bevy of state and municipal paid leave laws spreading across the nation. More specifically, we highlight the sanism resulting from these laws’ “temporal thresholds” and repercussions stemming from medical certifications permitting the inclusion of the employee’s diagnosis.

Subsequently, in Part III, we assess the implications of *Ableism at Work*’s global contentions on the impending battle in the United States over paid leave. To that end, we make the case for modest amendments to the Democrats’ currently favored paid leave vehicle, the Family and Medical Insurance Leave Act,¹¹ that would minimize workplace sanism without causing repercussions for employers or radically departing from the FMLA’s familiar statutory terrain. We consider this application of Harpur’s scholarship to be especially timely for several reasons. Foremost, the recent change in presidential administration, paired with a more progressive Congress, has rendered

Cleburne Living Center, 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part) (stating that state-mandated institutional segregation of individuals with an intellectual disability “rivaled, and indeed paralleled, the worst excesses of Jim Crow”); Grant H. Morris, *Pursuing Justice for the Mentally Disabled*, 42 SAN DIEGO L. REV. 757 (2005); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987); and David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897 (1975). See also Fiona AK Campbell, *Inciting Legal Fictions: ‘Disability’s’ Date with Ontology and the Ableist Body of the Law*, 10 GRIFFITH L. REV., no. 1, 2001, at 42, 44 n.5 (describing sanism as a form of ableism).

9. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of Mental Disorders in the World Health Organization’s World Mental Health Survey Initiative*, 6 WORLD PSYCHIATRY 168, 170 (2007) (examining the prevalence of certain anxiety, mood, impulse-control, and substance-use disorders).

10. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., SMA 16-4984, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES 2 (2016), [https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf](https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf) [perma.cc/Y77H-F3MV].

11. S. 248, 117th Cong. (2021).

such workplace law reforms a realistic possibility. Furthermore, the COVID-19 pandemic has not only increased the propensity for sanism in the workplace but also rendered the need for federal paid leave legislation even more apparent, as millions of Americans have been terminated after catching the virus or forced into the catch-22 of quitting or working a job that puts them at increased risk of contracting it.¹²

In light of all these factors, we seek to build upon the groundwork laid by Harpur at this unique time in American history, excoriate the sanism of well-intentioned law reforms before they inflict needless harm on workers with psychosocial disabilities, and facilitate the equitable treatment of workers with all disabilities.

I. ABILITY APARTHEID OF EXTANT EMPLOYMENT LAWS

Employment laws sometimes explicitly impose sanism. Infamously, the Americans with Disabilities Act of 1990 (ADA) excludes many mental disorders and mental impairments from the scope of “disability”¹³ that have long been acknowledged by medical science.¹⁴ And even when employment laws do cover recognized mental impairments, they often relegate workers with psychosocial disabilities to a lesser caste than those with physical disabilities vis-à-vis the burden or quantum of proof required to secure legal rights or the quality and duration of such rights.¹⁵ Of greater import than explicit sanism is Harpur’s recognition that, far more commonly, employment laws exhibit sanism implicitly, as with facially neutral laws that adversely affect workers with psychosocial disabilities unjustly.¹⁶ This Part explicates such effects, focusing on Harpur’s examples and adding our own to argue that Harpur’s far-reaching assessment is correct.

12. Economically developed countries, for example, provided paid sick leave that “[p]ermit[s] workers exposed to the virus to self-isolate; [c]ontain[s] and mitigat[es] the spread of the virus; [s]afeguard[s] the jobs of vulnerable workers during the economic shock; [and] [a]llow[s] for an orderly de-confinement as a key component of a *testing, tracking, tracing and isolating* (TTTI) strategy.” OECD, PAID SICK LEAVE TO PROTECT INCOME, HEALTH AND JOBS THROUGH THE COVID-19 CRISIS 2 (2020), https://read.oecd-ilibrary.org/view/?ref=134_134797-9iq8w1fnju&title=Paid-sick-leave-to-protect-income-health-and-jobs-through-the-COVID-19-crisis [perma.cc/T78X-CTKQ].

13. 42 U.S.C. § 12211(b). For additional examples of employment laws explicitly excluding certain mental disorders and/or mental impairments, see pp. 105–13.

14. See DSM-5, *supra* note 6, at 702 (transvestic disorder); *id.* at 697 (pedophilic disorder); *id.* at 689 (exhibitionistic disorder); *id.* at 686 (voyeuristic disorder); *id.* at 452 (gender dysphoria); *id.* at 423 (sexual dysfunctions); *id.* at 585 (gambling disorder); *id.* at 478 (kleptomania); *id.* at 476 (pyromania); *id.* at 483 (substance use disorder).

15. Pp. 184–96; Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1159–60 (2017); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 298–99 (2000).

16. What matters is not whether a particular law adversely affects workers with psychosocial disabilities *more so* than workers with physical disabilities or workers without any disabilities, but rather whether a law inflicts *unjustifiable* burdens on workers with psychosocial

Harpur sets out to prove his thesis by focusing first on the international treaties, agencies, and mechanisms that combat sanism. His general assertion is that prior to the 2006 adoption of the Convention on the Rights of Persons with Disabilities (CRPD) by the United Nations,¹⁷ international laws and standards relating to employment, including those promulgated by the International Labour Organization (ILO), were essentially sanist and insufficiently considered the needs of workers with psychosocial disabilities (pp. 26–27). By contrast, the CRPD opposes hierarchies of impairments at work and has supplanted the ILO’s standards as the leading international standard on how disability is to be mediated and incorporated into the workplace.¹⁸ Harpur supports these assertions through a textual analysis of the CRPD, as well as an analytical reading of employment-related Concluding Observations issued by the Committee on the Rights of Persons with Disabilities, the body of experts tasked with enforcing the treaty (pp. 42–46).

Turning next to domestic laws, Harpur aptly criticizes national employment laws for predominantly following the minority group approach instead of the universalist approach (p. 86). In the minority group approach, workers are slotted into one of two buckets based on their “pan-disability” identity: disabled or not disabled.¹⁹ Advocates of this approach generally contend that “the specific diagnosis [i]s not what matter[s]. What matter[s] is that people with all of these different diagnoses face[] exclusion from physical and social structures as a result.”²⁰ In contrast, the universalist approach contends, at its apogee, that “all of us are disabled in some ways and for some purposes,”²¹ implying that the disability rights movement’s focus should be coalitional in nature, based “on removing barriers to ability equality” without designing laws requiring a determination of who is “able” and who is “disabled” (p. 87).

disabilities. Hence, sanism does not necessarily imply quantifiable disparate impact against workers with psychosocial disabilities; rather, it presumes only unnecessary harm against them.

17. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3. The United States has signed, but not ratified, the CRPD. *Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION (2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4 [perma.cc/VHV2-4M5Z]. This fact begs the question of whether the treaty’s standards, which are equally applicable across disability categories, would have influenced American law and policy in a more progressive direction in the event of ratification.

18. See p. 31. See generally THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

19. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 863–64 (2006) (originating the term); see also Samuel R. Bagenstos, *The ADA Amendments Act and the Projects of the American Disability Rights Movement*, 23 UDC/DCSL L. REV. 139, 141 (2020).

20. Bagenstos, *supra* note 19, at 142; see Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 939 (2012); 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, 213–17 (2010).

21. Bagenstos, *supra* note 19, at 142; see Travis, *supra* note 20, at 939; Barry, *supra* note 20, at 217–21.

Finally, as yet another alternative, one may acquiesce in the minority group approach's line drawing out of necessity (e.g., for administrative purposes) but focus instead on universally opposing ableism regardless of which side of that line the victim falls.²²

Before turning to Harpur's criticism of the minority group approach and why he favors the universalist approach, it is worth briefly reflecting on one of its key shortcomings. Universalizing a group of individuals tends to erase constituents' individuality, which inflicts both a psychic harm (e.g., feeling that you do not exist as you see yourself) and a tangible harm (e.g., having interests unique to your constituency relegated to the back burner in service of the interests that maximize utility for the most constituents within the group). Universalizing a group can also inflict political harm by reducing the salience and moral authority of claims to civil and human rights protections as appropriate responses to historical and continuing exclusions from social participation.²³ For example, the gay rights movement, a name already hinting at such erasure, has recognized that a "universalizing definition of bisexuality"—the idea that "[e]veryone is bisexual" to a degree, just as universalist disability rights advocates contend that "everyone is disabled" to some degree—"maximizes the number of persons erased."²⁴ The same can be said of the term "transgender," which critics contend "eras[es] the differences in experiences and struggles of different groups (mainly the needs and desires of self-identified transsexuals)";²⁵ "colorblindness," and the erasure of racial and ethnic categories if one argues that "virtually everyone is multiracial";²⁶ and Judith Butler's post-modern, deconstructionist project seeking to trouble gender categories.²⁷

Those valid criticisms of universality notwithstanding, the minority group approach, which highlights the salience of group-specific characteristics, has its drawbacks too. Opponents of the minority group approach cite the heterogeneity of disability and contend that individuals with a disability lack sufficient commonality of interest.²⁸ This framing results in opposition to

22. Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 741–43 (2014).

23. For a classic exploration of the tensions between universal and identity-specific protections, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

24. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 370 (2000) (alteration in original).

25. Ido Katri, *Transgender Intrasectionality: Rethinking Anti-discrimination Law and Litigation*, 20 U. PA. J.L. & SOC. CHANGE 51, 55 (2017).

26. John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 798 (1997).

27. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 20–21 (2d ed. 1999) ("It would be wrong to assume in advance that there is a category of 'women' . . .").

28. See, e.g., Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 621 (2002); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 664 (1999).

pan-disability class actions, disparate impact claims, and claims involving statistical evidence of discrimination.²⁹ Furthermore, the minority group approach diffuses the disability rights community's political power, giving greater voice to issues unique to constituencies within the larger community while diluting opportunity for collective action.³⁰

The minority group approach also has the real-world implication of excluding many "edge cases" (i.e., disabilities that "[do] not fit society's more general understanding of what constitutes a 'disability'"),³¹ with psychosocial disabilities chief among them. The line drawing necessitated by the minority group approach incentivizes powerful actors like employers and affected state agencies to narrowly construe legal tests to attempt to minimize their financial and administrative burdens. As evidence of this line drawing, Harpur cites three common policies: first, duration tests, such as recognizing only impairments with long-lasting symptoms when many mental impairments are episodic (p. 82); second, preconditioning legal rights on a diagnosis when mental disorders notoriously are difficult to diagnose and often require long periods of time to arrive at a diagnosis;³² and third, burdening workers with proving their mental disorder or mental impairment when proof can be onerous, if proof can be marshalled at all (pp. 95–98). To that array, we add other temporal thresholds like frequency tests (i.e., only recognizing disorders or impairments requiring frequent treatment) and minimum hours tests (i.e., conditioning coverage on working a minimum number of hours over a given period of time). Together, these elements of national employment laws demonstrate the pervasive sanism structured and proliferated by the minority group approach.

In fact, the operation of national laws derived from the minority group approach exposes sanism even when workers fall within the ambit of having a "disability." Harpur contends that this is because the sort of "non-ideal behaviours" exhibited by some workers with psychosocial disabilities can be "regarded as undesirable, with workers who exhibit such practices counselled, retrained or dismissed" (p. 126). Accordingly, employers are more likely to acquiesce to providing as a reasonable accommodation a onetime auxiliary aid (e.g., a screen reader for a blind person or a reaching device for a little person) or a onetime modification to a built work environment (e.g., a wheelchair ramp for someone who cannot use steps or an air purifier for an individual with cystic fibrosis) than recurring adjustments to how things are done

29. Stein & Waterstone, *supra* note 19, at 874–75.

30. Travis, *supra* note 20, at 976; SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 30 (2009).

31. Bagenstos, *supra* note 19, at 140, 148–50; see Chai R. Feldblum, Kevin Berry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 193 (2008); Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 177–78 (2000).

32. Pp. 94–95; see also Matthew J. Edlund, *Psychiatric Diagnosis Is Difficult, and So Is Treatment*, PSYCH. TODAY (July 19, 2018), <https://www.psychologytoday.com/us/blog/the-power-rest/201807/psychiatric-diagnosis-is-difficult-and-so-is-treatment> [perma.cc/25L4-YGCF].

(e.g., patience with a worker with autism spectrum disorder who gets angry about a relatively minor workplace policy change, or ten minute breaks for a person with bipolar disorder to reflect on and adjust their emotional balance).³³ Harpur echoes the suspicion of other legal scholars before him, as yet unproven by empirics but highly probable in our view, that such reasonable accommodation laws tend to privilege workers with a physical or sensory disability over workers with a psychosocial disability. This is because the “accommodations for employees with psychiatric disabilities often involve modifications of schedules or workplace practices or policies, as opposed to changes in the physical environment,” which tend to be easier to quantify and administer.³⁴

Even when national employment laws do adopt a universalist approach, they often fail to support workers with a psychosocial disability. For instance, occupational health and safety laws typically require businesses to intervene if any workers create a health and safety risk to the workplace, not just workers in one minority group or another.³⁵ Yet, Harpur accurately details how ignorance and sanist prejudices engender flawed perceptions of risks from workers with a psychosocial disability, leading some employers to discipline or terminate workers with a psychosocial disability rather than face any modicum of risk that they may pose a “direct threat” to themselves or others.³⁶

In sum, Harpur convincingly exposes sanism as pervasive within national employment laws despite international law’s opposition. However, one aspect where Harpur’s research could use further development concerns leave laws in the United States. We view these as perhaps the clearest examples of workplace sanism for a host of reasons explained in the following Part.

33. See pp. 148–49; *cf.* *Adams v. Crestwood Med. Ctr.*, 504 F. Supp. 3d 1263 (N.D. Ala. 2020) (denying summary judgment to medical center that refused to relieve kitchen porter/dishwasher with an intellectual disability of the responsibility for delivering meals to patients); *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1424 (11th Cir. 1998) (reversing summary judgment for grocer that fired utility clerk with autism spectrum disorder who spoke loudly to customers and asked them personal questions instead of reassigning him to a non-customer-facing role).

34. Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 856–57 (2008); see pp. 124–26; Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 103–05 (2003) (describing easier-to-quantify accommodations).

35. Pp. 166–67; see, e.g., OSHA, U.S. DEP’T OF LAB., DIRECTIVE NO. CPL 02-01-058, ENFORCEMENT PROCEDURES AND SCHEDULING FOR OCCUPATIONAL EXPOSURE TO WORKPLACE VIOLENCE 18 (2017), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf [perma.cc/SS8G-5VBW].

36. Pp. 167–68; see, e.g., *Haas v. Wyo. Valley Health Care Sys.*, 465 F. Supp. 2d 429, 435–37 (M.D. Pa. 2006) (citing 42 U.S.C. § 12182(b)(3)) (finding hospital terminated surgeon with schizotypal personality disorder out of fear that his hypomanic episodes would pose a direct threat to patients despite uncertainty of that risk).

II. DOMESTIC LEAVE LAW SANISM

Until last year, federal law failed to guarantee paid family leave or paid sick leave.³⁷ Rather, federal law guaranteed only unpaid leave via a sparse patchwork of statutes like the FMLA, which guarantees leave, *inter alia*, when an employee's "serious health condition" renders that employee unable to perform the basic functions of the position.³⁸ In Section II.A, we highlight two aspects of the FMLA and its regulations that propagate sanism: (1) temporal thresholds and (2) recognizing medical diagnoses as relevant. In Section II.B, we then examine the sanist effects of contemporary federal, state, and municipal paid leave laws, including those enacted in response to the COVID-19 pandemic.

A. *The Family and Medical Leave Act*

1. Temporal Thresholds

Foremost, the FMLA and its implementing regulations contain multiple arbitrary lines drawn to exclude certain employees from leave. Herein, we highlight duration tests, frequency tests, and minimum hours tests, all of which fall under our umbrella term, "temporal thresholds." These line-drawing exercises operate to marginalize workers with a psychosocial disability without sufficient medical justifications, thereby exposing their sanism.

Consider duration tests, which condition leave on incapacity of certain durations, and frequency tests, which condition leave on frequent treatment. The FMLA and its regulations define a "serious health condition" as involving "inpatient care" or "continuing treatment by a health care provider."³⁹ Setting aside inpatient care and the inapposite definitions of continuing treatment for workers with a psychosocial disability,⁴⁰ an employee with a serious health condition qualifies for FMLA leave only upon demonstrating continuing treatment by proving "incapacity of more than three consecutive, full calendar days" or a "chronic serious health condition," which the regulations define as a condition requiring treatment by a health care provider at least twice per year and continuing over an extended period of time that may cause episodic

37. See *infra* notes 62–67 and accompanying text.

38. 29 U.S.C. § 2612(a)(1)(D).

39. *Id.* § 2611(11); see also 29 C.F.R. § 825.113(a) (2020).

40. See 29 C.F.R. § 825.115(b) (2020) (pregnancy, prenatal care); *id.* § 825.115(d) (permanent or long-term conditions for which treatment may not be effective); *id.* § 825.115(e)(1) (conditions requiring multiple treatments for restorative surgery). The regulations' examples of conditions for which treatment might not be effective include "Alzheimer's, a severe stroke, or the terminal stages of a disease," *id.* § 825.115(d), implying conditions for which palliative care is indicated, as opposed to mental disorders which generally are treatable. See DSM-5, *supra* note 6, at xli (stating the DSM-5 is intended to "aid in the . . . treatment of mental disorders") (emphasis added).

incapacity.⁴¹ However, many mental impairments can be episodic,⁴² incapacitating employees for minutes, hours, or a few days at a time, but never “three consecutive, full calendar days” of incapacity. Examples include stereotypic movements in the disorder of the same name; panic attacks, one symptom of panic disorder; and periods of impairment incident to hypersomnolence disorder.⁴³ As Harpur explains, the FMLA’s “duration tests” are a common form of value judgment used “to arbitrarily control who is able to claim the mantle of disability” because “duration of impairment may have no relevance to the level of disablement” and the resulting impact on employment (pp. 91–92).

Next, consider frequency tests, which condition leave on frequent treatment. Many mental impairments and mental disorders require less frequent visits to a health care provider than twice annually. For example, one physician at the Mayo Clinic “recommend[ed] that adults who take medication for chronic conditions see their primary care physician at least once a year” to manage such conditions and keep current with preventive screenings.⁴⁴ Therefore, workers with a mental impairment requiring annual or less frequent health care visits are excluded from the FMLA’s continuing treatment prong. Indeed, judges have had little difficulty concluding that physical impairments like back pain, lumbago, muscle spasms, and sacroiliac joint arthritis and physical disorders like degenerative disc disease qualify as serious health conditions given the frequency of follow up visits with health care providers.⁴⁵ Yet, judges have found that mental disorders such as anxiety disorders, depressive disorders, and sleep-wake disorders are not serious health conditions when the patients needed less frequent treatments.⁴⁶ It is a sanist act of arbitrary line drawing to deny FMLA leave to workers with relatively brief impairments that require comparatively infrequent treatments.

41. 29 C.F.R. § 825.115(a), (c), (e)(2) (2020). The regulations allow employees to qualify for “continuing treatment” in cases of “[t]reatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider,” only if they also demonstrate “incapacity of more than three consecutive, full calendar days.” *Id.* § 825.115(a)(2).

42. P. 82; *What’s the Difference Between Mental Health and Mental Illness?*, HERE TO HELP, <https://www.heretohelp.bc.ca/q-and-a/whats-the-difference-between-mental-health-and-mental-illness> [perma.cc/LG7F-Y3TE] (“[M]ental illnesses (like other health problems) are often episodic . . .”).

43. DSM-5, *supra* note 6, at 78, 190, 369.

44. Rachel Nania, *How Often Do You Really Need to Go to the Doctor?*, AARP (Nov. 19, 2019), <https://www.aarp.org/health/conditions-treatments/info-2019/how-often-you-should-visit-doctor.html> [perma.cc/KS6M-P65E].

45. See, e.g., *Smith v. AS Am., Inc.*, 829 F.3d 616, 622 (8th Cir. 2016); *West v. Pella Corp.*, No. 16-cv-154, 2017 WL 4765653, at *5 (W.D. Ky. Oct. 20, 2017); *Hepner v. Thomas Jefferson Univ. Hosps., Inc.*, No. 12-5443, 2013 WL 2334148, at *3 (E.D. Pa. May 29, 2013); *Pinson v. Berkley Med. Res. Inc.*, No. 03-1255, 2005 WL 3210950, at *16 (W.D. Pa. June 21, 2005).

46. See, e.g., *Pivac v. Component Servs. & Logistics, Inc.*, 570 F. App’x 899, 903 (11th Cir. 2014); *Kauffman v. St. Mary Med. Ctr.*, No. 13-4705, 2014 WL 4682035, at *4–5 (E.D. Pa. Sept. 22, 2014).

Finally, consider minimum hours tests, which condition leave on working a minimum number of hours in a recent timeframe. The FMLA contains a binary trigger—mandating that employers provide a full, twelve weeks of leave for employees who, *inter alia*, work at least 1,250 hours in a twelve-month period, but mandating zero weeks of leave for employees who work 1,249 hours or fewer in the same time period.⁴⁷ Rather than providing leave on a pro rata basis (e.g., accruing an hour of leave for every thirty to forty hours worked, as with many state and municipal paid sick leave laws), the FMLA is all or nothing. Though scholars have exposed the FMLA's hours test as falling harshly on women,⁴⁸ and especially low-income women,⁴⁹ it also disadvantages employees with certain mental impairments who often cannot work 1,250 hours in a twelve-month period due to societal expectations. For instance, the expectation of a nine-to-five, Monday-to-Friday workday may be untenable for a worker with a bipolar disorder or antisocial personality disorder.⁵⁰

The primary justification for the FMLA's minimum hours test was imposing lesser leave obligations on smaller businesses by allowing them to deny leave for many part-time workers.⁵¹ Yet this value judgment lacks any medical justification and operates to the detriment of many workers with a psychosocial disability. If Congress's concern was imposing lesser leave obligations on smaller businesses, it could have accomplished the same with pro rata leave rights for part-time workers while mandating less total leave. We do not suggest that Congress adopt this approach; the FMLA is already stingy enough. Rather, we mention it as evidence of Congress having more than one option to palliate smaller businesses and electing the one that resulted in harm for workers with a psychosocial disability, among many other marginalized communities.

2. Medical Diagnoses

Another sanist element of the FMLA apart from temporal thresholds is the relevance of diagnoses. Although a diagnosis is not necessary in every case

47. 29 U.S.C. §§ 2611(2)(a)(ii), 2612(a)(1).

48. Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims After the Supreme Court's Decision in Young v. United Parcel Service, Inc.*, 68 RUTGERS U. L. REV. 683, 714 (2016); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 140 (1998).

49. Ann O'Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 44 (2007).

50. P. 55; *see also* DSM-5, *supra* note 6, at 123 (bipolar disorders); *id.* at 659 (antisocial personality disorder).

51. *See* 138 CONG. REC. 27,512 (1992) (statement of Sen. John Chafee).

for an employee to qualify for leave for a “serious health condition,”⁵² diagnoses are one of several medical facts that a health care provider may include in a certification “support[ing] the need for [FMLA] leave.”⁵³ However, mental disorders are infamously difficult to diagnose, sometimes taking multiple visits to a health care provider over an extended period of time, if a conclusive diagnosis can be made at all.⁵⁴ As such, workers with a mental disorder that has yet to be diagnosed can expect greater difficulty substantiating the need for leave than workers who have a physical impairment with less diagnostic uncertainty.

In a similar vein, the FMLA’s regulations authorize health care providers to disclose an employee’s serious health condition in such certifications even if the employee wishes to keep the condition confidential.⁵⁵ Because psychosocial disabilities can carry enormously harmful stigma, it is no wonder that many employees with such a disability choose to forego requesting leave for fear of having their disability exposed.⁵⁶ In addition to stigma, workers with a psychosocial disability may fear both overt and subtle discrimination, ranging from petty slights to terminations based on their disability.⁵⁷ And, in any event, an employer’s lay knowledge of a diagnosis is of limited to no utility in

52. *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858, 863 (8th Cir. 2000); WAGE & HOUR DIV., U.S. DEP’T OF LAB., NEED TIME? THE EMPLOYEE’S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 7 (2015), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employeeeguide.pdf> [perma.cc/2E4X-V2TP] (“You do not have to tell your employer your diagnosis . . .”).

53. 29 C.F.R. § 825.306(a)(3) (2020); *see also* 29 U.S.C. § 2613(b)(3).

54. Pp. 95, 97; *see* Edlund, *supra* note 32.

55. *Cf.* 29 C.F.R. § 825.306 (2020) (limiting only what employers can require, not what health care providers can include, in such certifications). In contrast, California employers “must take steps to see that the health care provider does not disclose the underlying diagnosis of the serious health condition without the patient’s consent.” 4 MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 30:28, Westlaw (database updated November 2021).

56. P. 214 (“While it is exceptionally challenging to hide all manifestations of impairment for an extended period of time, some workers nevertheless choose to endure this burden rather than expose themselves to the negative stigma associated with disability.”); Robert S. Teachout, *Keys to FMLA, ADA Compliance for Mental Health Are Communication, Flexibility*, SOC’Y FOR HUM. RES. MGMT. (Mar. 15, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/keys-to-fmla-ada-compliance-for-mental-health-are-communication-flexibility.aspx> [perma.cc/XU7X-7QVM] (“The stigma often attached to mental health may make employees ashamed to talk about the fact they’re dealing with these issues and may keep them from reaching out for help.”). This phenomenon was documented very early on in the ADA’s history. *See, e.g.*, SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* (2002).

57. Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47 AM. J.L. & MED. 9 (2021), <https://doi.org/10.1017/amj.2021.1>; Lori Anderson Snyder et al., *Perceptions of Discrimination and Justice Among Employees with Disabilities*, 22 EMP. RESPS. & RTS. J. 5, 5 (2010).

discerning whether a particular health condition qualifies as “serious” if the employer has other available medical facts like symptoms on hand.⁵⁸

B. *Paid Leave Laws*

Turning next to paid leave laws, Congress recently added “a provision for paid leave for all purposes for which the FMLA allows unpaid leave,” but only for most federal employees and not for private employees or employees of state and local governments.⁵⁹ Hence, the new law merely redoubles the sanism of the FMLA. Separately, in the wake of the COVID-19 pandemic, Congress passed and the President signed into law the FFCRA.⁶⁰ This law sunset at the end of calendar year 2020 but briefly expanded the bases for FMLA leave and required paid sick time in certain situations.⁶¹ Vis-à-vis expanded FMLA leave, the FFCRA mandated that all public agencies, as well as small- and medium-sized employers (not just those previously subject to the FMLA), provide FMLA leave to employees who had been on payroll for thirty calendar days who needed leave for childcare if the child’s school or child care provider closed due to COVID-19 precautions.⁶² In so doing, the FFCRA swapped the FMLA’s minimum hours requirement for a less onerous, but nonetheless all-or-nothing, minimum days requirement that can be satisfied more easily by employees with a psychosocial disability who may have difficulty working full-time. Vis-à-vis paid sick leave, the FFCRA mandated that the same swath of employers provide paid sick leave to any employee “to the extent that the employee is unable to work (or telework) due to a need for leave because,” among several other reasons, “[t]he employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.”⁶³ No exception was codified for workers with a psychosocial (or other) disability who were unable, due to their impairment, to seek a medical diagnosis of COVID-19 until the incapacitating, episodic symptoms of their impairment subsided.

Finally, states and municipalities have enacted both paid family and paid sick leave laws, which often duplicate or even exacerbate the FMLA’s sanism.

58. An employer may be able to discern an underlying mental disorder from knowledge of symptoms alone, but that result is unavoidable when the law calls upon employers to review medical certifications. Even employers that insulate medical certification review from management or outsource that review to third-party leave administrators may nonetheless deter employees with a psychosocial disability from requesting FMLA leave out of fear of exposure by the employer’s agent and the resulting stigma or adverse employment actions.

59. Eric Yoder, *Starting Thursday, Most Federal Employees Are Eligible for Paid Parental Leave*, WASH. POST (Oct. 1, 2020), https://www.washingtonpost.com/politics/federal-paid-parental-leave/2020/09/30/ac8e36c8-0335-11eb-b7ed-141dd88560ea_story.html [perma.cc/RQZ6-AAPK].

60. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

61. *Id.* § 3102, 134 Stat. at 189 (FMLA expansion); *id.* § 5102, 134 Stat. at 195 (paid sick leave provision); *id.* § 5109, 134 Stat. at 198 (sunset provision).

62. *Id.* § 3102, 134 Stat. at 189.

63. *Id.* § 5102(a)(3), 134 Stat. at 195 (emphasis added).

For example, California's paid family leave law requires a diagnosis of a serious health condition within the employee's certification,⁶⁴ whereas the FMLA only permits the inclusion of a diagnosis.⁶⁵ Washington, D.C.'s, paid family leave law reproduces the FMLA's definition of "continuing treatment" as requiring, among other bases, "incapacity of more than 3 consecutive, full calendar days" or "incapacity due to a chronic serious health condition" which "[r]equires 2 or more periodic visits annually for treatment."⁶⁶ Massachusetts's paid family leave law applies only to employees who have minimum recent earnings (i.e., \$5,400 in the preceding twelve months, presently),⁶⁷ effectively serving as a minimum hours requirement proxy.

Paid sick leave laws, on the other hand, tend to eschew such sanist temporal thresholds. For instance, they typically allow for paid leave in short increments,⁶⁸ thereby accommodating many workers with an episodic mental impairment. Furthermore, although many paid sick leave laws condition leave on the employee working a minimum number of hours in a recent timeframe, just like the FMLA, they do so more leniently in a way that is relatively reasonable for many workers with a psychosocial disability. For example, employees must have worked more than eighty hours in a given calendar year to qualify for New York City's paid sick leave law, whereas the FMLA requires 1,250 hours worked in a twelve-month period.⁶⁹

In some cases, state and municipal paid leave laws retreat entirely from the FMLA's sanism. For example, the Massachusetts Department of Family and Medical Leave's regulations implementing the state's paid family leave law mandate a health care provider certification for leave related to a serious health condition, but the prescribed contents of such certification do not include a diagnosis.⁷⁰ Although an explicit prohibition on inclusion of a diagnosis likely would further assuage any employees with a psychosocial disability who fear others learning about and discriminating based on their disability, the certification substantially mitigates against these fears of exposure and stigma: the certification is submitted to and reviewed by the state and not the employer,⁷¹ as is common in paid family leave laws but not paid sick leave laws.⁷² Finally, paid sick leave laws "often limit the circumstances under which employers can require employees to provide documentation of their

64. CAL. UNEMP. INS. CODE § 2708(a)(1) (West 2013).

65. 29 C.F.R. § 825.306(a)(3) (2020).

66. D.C. CODE § 32-541.01(20)(E)(i)-(ii) (2001 & Supp. 2021); 29 C.F.R. § 825.115 (2020).

67. MASS. GEN. LAWS ch. 175M, § 1 (2020) (defining "[c]overed individual"); see *How PFML Is Different Than FMLA*, MASS.GOV, <https://www.mass.gov/info-details/how-pfml-is-different-than-fmla> [perma.cc/SR6X-8MWZ].

68. Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20 U. PA. J. BUS. L. 623, 658 (2018).

69. N.Y.C., N.Y., ADMIN. CODE § 20-912(f) (2021); 29 C.F.R. § 825.110 (2020).

70. 458 MASS. CODE REGS. § 2.08(5)(a) (2021).

71. *Id.* § 2.08(4)(g).

72. See Nelson, *supra* note 68, at 624-25.

need for leave, typically permitting employers to require that employees provide documentation only for leave of several days at a time” and not for shorter leaves.⁷³

These Brandeisian laboratories of democracy⁷⁴ have exhibited legal schemas that inflict lesser harms on workers with a psychosocial disability without imposing any undue hardships on employers or third-party stakeholders like state agencies. In the subsequent and final Part of this review, we explore how Congress should use these more equitable schemas, as well as that of the FFCRA, as models for national paid leave rather than building upon the sanist structure of the FMLA.

III. MINIMIZING SANISM IN PAID LEAVE LEGISLATION

On July 8, 2020, then-candidate Joe Biden released an array of policy recommendations developed in conjunction with Senator Bernie Sanders, called the “Unity Platform.”⁷⁵ Now that he has been sworn in, President Biden is likely to rely on the recommendations in the Unity Platform as a blueprint for governing. Included within those recommendations are a pair of policy goals that have been on progressive agendas for years: paid family leave and paid sick leave. If enacted, the United States would finally shed its ignominious title as the only developed country in the world that does not guarantee paid leave to most workers.⁷⁶

However, the Unity Platform is a campaign document, not a bill. It is poetry, not prose.⁷⁷ To that end, its details are understandably light. Regarding paid family leave, for instance, it calls for “a new social and economic contract with the American people . . . that at last supports working families and the middle class by securing . . . paid family leave for all.”⁷⁸ Beyond that, it offers

73. *Id.* at 658.

74. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

75. BIDEN-SANDERS UNITY TASK FORCE, BIDEN-SANDERS UNITY TASK FORCE RECOMMENDATIONS (2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> [perma.cc/QK92-Q498].

76. HYE JIN RHO, SHAWN FREMSTAD & JARED GABY-BIEGEL, CTR. FOR ECON. & POL’Y RSCH., *CONTAGION NATION 2020: UNITED STATES STILL THE ONLY WEALTHY NATION WITHOUT PAID SICK LEAVE 3* (2020), <https://cepr.net/wp-content/uploads/2020/03/2020-03-Contagion-Nation-2020.pdf> [perma.cc/U24C-MZHT]; Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave> [perma.cc/886M-E78D]. For an overview of the 193 United Nations member states and their policies regarding family needs leave beyond infancy, see *Family Needs Leave Beyond Infancy*, WORLD POL’Y ANALYSIS CTR., <https://worldpolicycenter.org/topics/adult-labor-and-working-conditions/family-needs-leave-beyond-infancy/policies> [perma.cc/GZW2-RC3N].

77. “You campaign in poetry; you govern in prose.” Mario Cuomo, FORBESQUOTES, <https://www.forbes.com/quotes/6525> [perma.cc/3ZHX-RSRV].

78. BIDEN-SANDERS UNITY TASK FORCE, *supra* note 75, at 11.

few details other than pledging to “fight to ensure all employers provide at least 12 weeks of paid family and medical leave for all workers and family units, to enable new parents to recover from childbirth and bond with their newborns or adopted children and allow all workers to take extended time off to care for themselves or an ailing relative” and “[e]nsure [w]age replacement of at least 66% (as proposed in the FAMILY Act) and higher levels of wage replacement for low-income workers” during that time.⁷⁹ The Unity Platform’s triggers for paid family leave largely mirror those in the FMLA.⁸⁰ And, lest there be any doubt, the FAMILY Act, the Democrats’ paid leave plan referenced by the Unity Platform, explicitly incorporates the FMLA, conditioning payment on engagement in “qualified caregiving” activities, which the bill defines by explicitly referencing the FMLA.⁸¹

Through the lens of Harpur’s thesis, the Biden Administration’s proposal for paid family leave is doomed to retrench ability apartheid because FMLA leave marginalizes workers with a psychosocial disability. By leaving the FMLA’s sanist structure untouched, progressives would sacrifice workplace equity for the sake of simpler legislation. If this is our once-in-a-generation opportunity for enacting truly progressive workplace law reform, President Biden and the Congressional Democrats must fix what has ailed the FMLA for the past generation by uprooting the statute’s outdated stereotypes against workers with a psychosocial disability.

To begin, paid family leave legislation must dispense with harmful temporal thresholds. The FMLA’s duration and frequency tests can remain intact without imposing sanist effects so long as leave for serious conditions requiring infrequent treatment is also covered under the FMLA or its regulations. Defining a chronic serious health condition to include conditions that require treatment by a health care provider at least once, resulting in a regimen of continuing treatment under the supervision of the health care provider, would be one such way of doing so. Regarding the FMLA’s minimum hours test, Congress should instead adopt the FFCRA’s minimum-days-on-the-payroll approach coupled with the pro rata approach to accumulating paid leave seen in many state and municipal paid sick leave laws.⁸² This would ensure that traditionally marginalized communities like women, low-income workers, and workers with a psychosocial disability all have equitable access to paid family leave. It would concomitantly ease some of the burdens on employers; for example, new hires would be barred from using paid family leave immediately, and part-time workers would qualify for less paid leave and thus impose less of a financial burden.

Furthermore, paid family leave legislation ought to bypass employers’ first-line judgment calls regarding what qualifies as a serious medical condition and reserve that evaluation for a neutral third party like a government

79. *Id.* at 15, 65.

80. *See* 29 U.S.C. § 2612(a)(1).

81. S. 248, 117th Cong. §§ 2(6), 4(a)(4) (2021).

82. *See supra* note 62; Nelson, *supra* note 68, at 656–67.

agency or an insurance carrier, as many state and municipal paid family leave laws already do.⁸³ Hence, workers with a psychosocial disability would be less fearful about requesting paid leave and having their disability exposed to their employer. Moreover, economies of scale would operate to make these third-party physicians relatively efficient compared to employers forced to make the same call less often.

Yet, if Congress is adamant about maintaining the FMLA's basic structure when it institutes paid family leave, it should at least amend the FMLA or its regulations to ban diagnoses from being included in medical certifications. Diagnoses are more likely to carry stigmas than symptoms. Consider, for instance, the greater stigma that would attach to a medical certification identifying an employee as having schizophrenia, as opposed to such certification identifying the employee as exhibiting disorganized speech, diminished emotional expressions for a month or more, and continuous signs of difficulty functioning at work, symptoms that may indicate schizophrenia.⁸⁴

From a normative perspective, symptoms indicative of one or more serious health conditions that necessitate leave should trigger FMLA and paid family leave regardless of whether an underlying condition has been diagnosed. To be clear, we do not mean to suggest that unsubstantiated or fleeting symptoms would always qualify for FMLA or paid family leave; the FMLA's other strictures, including the requirement to prove inpatient care or continuing treatment, would curtail potential abuse. For example, an employee suffering from a single episode of fatigue that precludes the ability to perform the basic functions of the position would qualify for FMLA and paid family leave only if that episode necessitates inpatient care (which is unlikely) or continuing treatment (which, under our proposed revisions, would require not only treatment by a health care provider, but a regimen of continuing treatment). Regulating paid family leave in this manner would in fact encourage public health by incentivizing workers with symptoms of a serious health condition to pursue a regimen of continuing treatment under the care of a health care provider.

The Unity Platform offers even less insight about paid sick leave than it does about paid family leave. It states only that the Biden Administration "will immediately enact robust paid sick leave protections as part of the COVID-19 response for all workers in the economy, including contractors, gig workers, domestic workers, and the self-employed" and that it should "[e]xpand paid sick leave and family leave and enable 14-day emergency leave for COVID-19-related events/quarantines (and ensure employers do not bear any additional cost for this time away)."⁸⁵ It remains to be seen what President Biden will propose: novel paid sick leave legislation, legislation premised on one or

83. See, e.g., Emp. Dev. Dep't, *Roles of Physicians/Practitioners in State Disability Insurance*, CA.GOV (Mar. 8, 2021), <https://www.edd.ca.gov/disability/Physicians-Practitioners.htm> [perma.cc/9F97-9AY8] (stating that a state agency conducts review of medical certifications).

84. See DSM-5, *supra* note 6, at 99.

85. BIDEN-SANDERS UNITY TASK FORCE, *supra* note 75, at 13, 76.

more of the myriad state and municipal paid sick leave laws, a bill premised upon the FFCRA's approach to paid sick leave, or support for one of the recently proposed federal paid sick leave bills (e.g., the Healthy Families Act⁸⁶).

Paid sick leave legislation ought to avoid temporal thresholds and diagnoses in the same manner as paid family leave legislation, but it can do much more. There is no federal paid sick leave infrastructure; Congress has a blank slate upon which to write. On that slate, Congress would be well served by avoiding any restrictive line drawing in terms of what qualifies for paid sick leave and what does not. All workers need time off for countless reasons, and a legislature that delimits those reasons is bound to unnecessarily exclude marginalized groups like workers with a psychosocial disability. For example, conditioning extended paid sick leaves on proof of illness from a health care provider (as necessitated by the minority group approach) implies the existence of a health care provider, as well as the ability of that provider to discern the employee's symptoms and/or condition. Yet, workers with a psychosocial disability may have difficulty finding appropriate medical care and getting diagnosed and may have invisible symptoms that providers and employers may question. Paid sick leave ought to be an opportunity to heed Harpur's endorsement of the universalist approach and recognize all workers as needing occasional time off for an illness, sickness, infirmity, or even a "mental health day"—call it whatever you prefer—withstanding society's belief that certain reasons may be unworthy of paid leave. A universal federal paid sick leave law wherein workers accrue leave as they work, up to a cap, and can use that leave for any purpose would avoid the line-drawing minority group approach which would likely infect workplaces nationwide with sanism and other forms of systemic discrimination.

CONCLUSION

Ableism at Work should be seen as making two moves. First, it argues generally for a universalist approach to employment law in aid of eliminating sanism. Second, absent such an opportunity, it argues for reforming employment laws that follow the minority group approach to minimize the adverse effects of such laws on workers with psychosocial disabilities. Here in the United States, paid leave legislation ought to hew closely to Harpur's framework.

To that end, political realities being what they are, progressive law reform regarding paid family leave is unlikely to entirely uproot that statute's minority group approach. The FMLA is a preexisting condition. Nevertheless, we implore Congress to reflect upon Harpur's dutiful analysis as a justification for reforming the FMLA before the FAMILY Act cements sanism into the United States Code for another generation. Paid sick leave, on the other hand, presents an opportunity to universalize workers and eschew systemic discrimination against marginalized communities, especially workers with psychosocial disabilities.

86. S. 1195, 117th Cong. (2021).