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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 22-1140

PROFESSOR RICHARD FRASCA, PH.D.,

Plaintiff - Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, Director of Human Resources; PROFESSOR PARIMAL PATIL, Department of South Asian Studies,

Defendants - Appellees.

Before

Kayatta, Lynch,
Gelpí and Montecalvo, Circuit Judges.

ORDER OF COURT

Entered: June 23, 2023

This matter is before the court on "Appellant's Petition for Rehearing and Rehearing En Banc." The petition for panel rehearing is denied. As it appears that there may be no quorum of circuit judges in regular active service who are not recused who may vote on petitioner's request for rehearing en banc, the request for rehearing en banc is also denied. See 28 U.S.C. § 46(d); 1st Cir. Loc. R. 35.0(a)(1). In any event, a majority of judges in regular active service do not favor en banc review.

By the Court:

Maria R. Hamilton, Clerk

cc:
Richard A. Frasca
Andrea Evans Zoia

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APPENDIX B

United States Court of Appeals
For the First Circuit

No. 22-1140

PROFESSOR RICHARD FRASCA, PH.D.,

Plaintiff - Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, Director of Human Resources; PROFESSOR PARIMAL PATIL, Department of South Asian Studies,

Defendants - Appellees.

Before

Lynch, Kayatta and Gelpí,
Circuit Judges.

JUDGMENT

Entered: December 29, 2022

Plaintiff Professor Richard A. Frasca, Ph.D., appeals from the district court's dismissal of the underlying age-discrimination lawsuit as time barred. After careful review of the record and the filings of the parties, we affirm. The district court properly deemed plaintiff's claims barred by the 300-day deadline to file a charge of discrimination with an appropriate federal or state agency, and the district court did not abuse its discretion by denying, without first conducting an evidentiary hearing, plaintiff's request for equitable tolling. See Melendez-Arroyo v. Cutler-Hammer de P.R. Co. Inc., 273 F.3d 30, 37 (1st Cir. 2001) (standard and general principles). On appeal, plaintiff does not sufficiently develop any other claim suggesting legal error or an abuse of discretion. See Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 30 (1st Cir. 2015) (this court "do[es] not consider arguments for reversing a decision of a district court when the argument is not raised in a party's opening brief"); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Richard A. Frasca
Andrea Evans Zoia

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Frasca

Plaintiff

CIVIL ACTION

V.

NO. 1:21-10125-WGY

President and Fellows of Harvard University et al

Defendants

ORDER OF DISMISSAL

YOUNG, DJ,

In accordance with the Court's ruling during hearing on defendants' motion to dismiss on February 8, 2022, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

February 14, 2022

Date

/s/ Jennifer Gaudet

Deputy Clerk

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

RICHARD FRASCA,
Complainant,

v.

DOCKET NO. 14BEM02272

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE,
Respondents.

ORDER

This matter comes before the Commission on Respondent President and Fellows of Harvard College's Motion to Dismiss On Time-Bar Grounds, filed on October 9, 2014. Complainant filed an opposition on the grounds of equitable tolling in light of his mental incapacity. For the reasons stated below, Respondent's Motion is **Granted**.

On August 28, 2014, Complainant filed a complaint against Respondent alleging that Respondent unlawfully discriminated against him on the basis of age (65 at the time of alleged discrimination) and retaliation in violation of G.L. c. 151B, section 4, paragraphs 1B, 4 and the Age Discrimination in Employment Act of 1967, as amended. On October 9, 2014, Respondent filed a Motion to Dismiss on the grounds that Complainant failed to file his MCAD complaint within the limitations period. On November 14, 2014, Complainant filed an opposition.

Discussion

On August 28, 2014, Complainant filed a complaint against Respondent alleging age discrimination and retaliation. By statute, a complaint citing violations of G.L. c. 151B must be filed with the Commission within 300 days of the act(s) of discrimination. G.L. c. 151B, § 5; 804 C.M.R. 1.10(2). The statutory period for complaining of discrimination begins to run when the

"employee has sufficient notice of [the] specific act." Wheatley v. American Telephone & Telegraph Co., 418 Mass. 394, 398 (1994).

By letter dated June 1, 2011, Respondent offered Complainant a renewal of his appointment as Preceptor for the 2011-2012 academic year. Also in this letter, Respondent notified Complainant that "the 2011-2012 academic year will be your eighth and final year as Preceptor or Teaching Assistant, taking into account the years you have already serviced in tutorial instruction." By letter dated June 2, 2011, Complainant accepted Respondent's offer to renew his appointment as Preceptor for the upcoming academic year.

In his MCAD complaint, Complainant claims that Respondent notified him in July 2012 that "the teaching position would not be renewed." In a subsequent affidavit dated November 13, 2014, Complainant identified the date of his non-renewal as occurring by email on July 25, 2012. Even if the date by which Complainant learned of his employment's termination or non-renewal is considered July 25, 2012, more than 300 days passed before he filed his MCAD complaint on August 28, 2014. This also includes his allegations of retaliatory threats of being "blacklisted" upon filing his August and September 2012 internal complaints with Respondent, and his subsequent vague and unspecified instances of ongoing threats by "members of the department" in 2013 and 2014.

The 300-day filing requirement is "akin to a statue of limitations that is subject to waiver, estoppel, and equitable tolling." Sanderson v. Town of Wellfleet Fire Department, 16 MDLR 1341 (1994); *see also* Rock v. Westinghouse, 1 MDLR 1262 (1979). Complainant argues equitable tolling applies in this instance because of his mental incapacity to file a complaint in a timely manner.

In his complaint, Complainant claims that he did not file a complaint earlier because he was intimidated by threats from an unidentified source and because he suffered from Depression. In December 2012, Complainant was hospitalized for depression and anxiety. In April 2013, Complainant was hospitalized for a second time for depression and anxiety.

Massachusetts courts have acknowledged that mental disability has been accepted as grounds for tolling the statute of limitations, sparingly, in circumstances where a person literally could not act, as in a coma, and that the type of disability is "any mental condition that precludes the plaintiff's understanding the nature or effects of his acts." Cherella v. Phoenix Technologies Ltd., 32 Mass.App.Ct. 919 (1992). *See also* Hornig v. Hornig, 6 Mass.App.Ct. 109, 11, 374 N.E.2d 289 (1978).

In the instant case, there is evidence that Complainant understood the nature and effects of his acts. From the time period between Complainant's notification of the non-renewal in July 2012 and his initial hospitalization on December 28, 2012, five months passed. During that period of time, Complainant communicated with former colleagues and with various members of Respondent's management. For instance, in his complaint, Complainant alleges that in August and September 2012, he complained internally to the then-Chair of his department as well as to other professors in the department. There are also emails exchanged in July 2012 whereby Complainant sets forth his arguments against Respondent's decision not to renew his appointment as Preceptor. On August 1, 2012, Complainant emailed Respondent's then-President complaining about the "improper and ungrateful treatment in terms of hiring practices" implemented by Respondent. Complainant and Respondent continued to communicate by email into September 2012.

In reviewing the communications exchanged during the months between the notice of his non-renewal and initial hospitalization and lack of evidence that Complainant was mentally incapacitated during this time, the evidence does not support a finding that Complainant possessed any mental condition that precluded his understanding the nature or effects of his acts. *See* Hornig, 6 Mass.App.Ct. at 111. Complainant's emails contain well reasoned, fact-based, articulate statements to Respondent against his dismissal, including breach of contract claims and Respondent's miscalculation of his actual years of work as Preceptor. One significant argument against his dismissal stemmed from his belief that Respondent had engaged in unfair hiring practices, the basis of which he filed the instant complaint two years later.

Based on the foregoing, equitable tolling does not apply in this instance. In addition, there is no other ground for tolling the statute of limitations. As such, Complainant's complaint is untimely and is hereby **dismissed**.

So Ordered, this 7th day of June, 2019.

Sunila Thomas George
Investigating Commissioner

APPENDIX E

No. 21-432

IN THE

Supreme Court of the United States

ADOLFO R. ARELLANO,

Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has an interest in ensuring that all statutes, including the important veterans' benefits statute at issue in this case, are interpreted in a manner consistent with their text and history, as well as applicable equitable principles. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Veterans of our nation's armed services, "who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), are entitled to monthly compensation for disabilities related to injuries or illnesses incurred during service, 38 U.S.C. § 1110; *see Walters v. Nat. Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985) (noting that Congress has historically "provided for him who has borne the battle"). The "effective date" of this compensation is generally the date on which the Department of Veterans Affairs (VA) receives the veteran's application for benefits, 38 U.S.C. § 5110(a)(1), but federal law provides for retroactive compensation, which begins on the date of the veteran's discharge

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

from service if the VA receives the application within one year of discharge, *id.* § 5110(b)(1).

Petitioner Adolfo Arellano served in the U.S. Navy for almost four years. During that time, he worked on the flight deck of the U.S.S. Midway, an aircraft carrier that collided with a freighter in the Persian Gulf during the Iranian Hostage Crisis. Pet. App. 119a. Petitioner Arellano watched the collision crush some of his shipmates and sweep others overboard. *Id.* at 119a-120a. After this traumatic experience, Arellano suffered from psychosis, delusions, schizoaffective disorders, paranoia, anxiety, and post-traumatic stress disorder, which, as the VA determined, rendered him "completely disabled." *Id.* at 113a.

Although Arellano's disability began the year after his discharge from the Navy, his mental illnesses prevented him from recognizing his disabilities and understanding his entitlement to and need for compensation until 2011. *Id.* at 128a. While the VA agreed that Arellano's service-connected injuries rendered him completely disabled in the year after his discharge, *id.* at 113a, it refused to award him retroactive benefits because he did not apply within one year of his discharge, *id.* at 116a. It held that circuit precedent categorically precluded equitable tolling of the deadline for "establishing an award of retroactive benefits," even if the facts of Arellano's case might otherwise justify tolling. *Id.* The Court of Appeals for Veterans Claims agreed. *Id.* at 4a. The Federal Circuit, sitting *en banc*, affirmed the judgment and divided equally on the question of whether to revisit its previous decisions concluding that equitable tolling is categorically unavailable in this context. *Id.* at 16a.

The decision of the court below is wrong. The doctrine of equitable tolling is "centuries old," *McQuiggin*

v. Perkins, 569 U.S. 383, 409 (2013) (Scalia, J., dissenting), and as this Court has recognized, has become a "traditional feature of American jurisprudence," *Boechler, P.C. v. Comm'r of Internal Revenue*, No. 20-1472, 2022 WL 1177496, at *5 (U.S. Apr. 21, 2022). Tolling permits courts to extend a deadline "because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute." *McQuiggin*, 569 U.S. at 409. As this Court has explained, equitable tolling is presumptively available in the context of all "statutory time limits," *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96 (1990), especially when those limits appear in statutory schemes that are designed to be "'unusually protective' of claimants," *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)), and serve "humane and remedial" purposes, *Burnett v. New York Central R. Co.*, 380 U.S. 424, 427-28 (1965).

Notwithstanding all of this, the court below concluded that equitable tolling was categorically unavailable here because, in its view, § 5110(b)(1) "is not a statute of limitations amenable to equitable tolling but merely establishes an effective date for the payment of benefits." Pet. App. 18a. Specifically, the court explained that § 5110(b)(1) does not have the "'functional characteristics'" of a statute of limitations" because it is not "triggered by harm from the breach of a legal duty owed by the opposing party," *id.* at 30a, does not "start the clock on seeking a remedy for [a] breach from a separate remedial entity," *id.* at 31a, and does not have the "practical effect" of "foreclos[ing] a veteran from all benefits," *id.* at 40a. But these rationales are wholly disconnected from the history of and traditional justifications for equitable tolling, as

well as this Court's precedents.

Significantly, equitable tolling has never been limited to statutes of limitations or deadlines that "start the clock on seeking a remedy for [a] breach," *id.* at 31a, as the court below held. At common law, courts invoked tolling principles whenever they were called upon to assess a defense grounded upon the "lapse of time." *Lupton v. Janney*, 38 U.S. 381, 385-86 (1839). For example, they applied tolling principles to equitable presumptions that were prompted by the passage of time, even though those presumptions were not triggered by "the breach of a legal duty," Pet. App. 30a. They also tolled statutes authorizing the redemption of property, although these enactments were not considered to be statutes of limitations and did not set a time limit on seeking a remedy for a breach, *id.* at 31a.

In accordance with this history, this Court has consistently recognized that equitable tolling is available in the context of provisions that serve the "basic policies furthered by all limitations provisions" and "prescribe[] a period within which certain rights . . . may be enforced." *Young v. United States*, 535 U.S. 43, 47, (2002). For "limitations principles" to apply, *Scarborough v. Principi*, 541 U.S. 401, 421 (2004), a deadline need only address "the end[s] served" by such a statute, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982).

That is exactly what § 5110(b)(1) does. As the provision's text and history make clear, § 5110(b)(1), which prescribes a period in which "certain rights"—that is, the right to benefits retroactive to a veteran's date of discharge—can be enforced, *Young*, 535 U.S. at 47, was enacted to encourage quick filing and forestall the evidentiary burdens imposed by "stale claims," *id.* Equitable tolling should be available here no less than

in other contexts in which statutory deadlines serve those purposes, especially because § 5110(b)(1) is located within the type of "humane," "remedial," and claimant-protective scheme to which the presumption of equitable tolling is most applicable, *Burnett*, 380 U.S. at 427-28.

Consistent with the long history of equitable tolling, and this Court's decisions holding that tolling is presumptively available to all "statutory time limits," *Irwin*, 498 U.S. at 95, this Court should conclude that equitable tolling is available here.

ARGUMENT

I. The Doctrine of Equitable Tolling Has Deep Roots.

A. Originally at common law, "there was no limitation as to the time within which an action might be brought," although actions at tort were limited to the "duration of the life of either party." 1 H.G. Wood, *Statutes of Limitations* § 1, at 2-3 (2d ed. 1893); James John Wilkinson, *A Treatise on the Limitation of Action* 2 (1829) ("It was a maxim that a right never dies . . . ."). But over time, the "abuses from stale demands became so great as to be unendurable," 1 Wood, *supra*, § 2, at 6, and English legislators created statutes of limitations—statutory periods in which "certain rights may be enforced," *id.* at § 1, at 1. When forming their own legal systems, American colonists "founded" their own statutes of limitations using these English statutes as a guide. *Walden v. Heirs of Gratz*, 14 U.S. 292, 297 (1816).

On both sides of the Atlantic, courts and legislators developed a set of justifications for their decision to "abridge[] the common law" by setting limitations periods. Wilkinson, *supra*, at 12. Statutes of

limitations "requir[ed] parties to settle their business matters within certain reasonable periods," 1 Wood, *supra*, § 4, at 8, "quiet[ed] men in the enjoyment of their estates and possessions," *Wall v. Robson*, 11 S.C.L. 498, 499 (S.C. Const. App. 1820), and punished the "indolence of those who [we]re dilatory in . . . claiming what is due to them," J.K. Agnell, *A Treatise on the Limitations of Actions at Law*, 5 (2d ed. 1846). They also "guard[ed] against suspicious and ill-founded claims," *id.*, by "compel[ling] the settlement of claims . . . while the evidence . . . is yet fresh in the minds of the parties or their witnesses," 1 Wood, *supra*, § 5, at 7; *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.D.N.H. 1828) (Story, J.) ("The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time.").

Despite the justifications for these limitation periods, courts of equity quickly began permitting exceptions to them, even when those exceptions were not "within the letter" of the statute. *Sherwood*, 21 F. Cas. at 1308; 1 Wood, *supra*, § 6, at 9. As an initial matter, when considering purely equitable matters, courts recognized that the "lapse of time, however long, [did] not deprive a party of his remedy thereon if there [wa]s a reasonable excuse for the delay." *Id.* § 59, at 146. And this was true even after "a considerable lapse of time." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 529, at 503 (1836). As Joseph Story instructed, "Courts of Equity [should] not refuse their aid in furtherance of the rights of the party," when there are "peculiar circumstances . . . excusing or justifying the delay." *Id.* at 503-04. Indeed, when a defendant raised a plaintiff's laches or delay as a defense to a claim, courts of equity considered factors specific to the

plaintiff that might excuse the late filing, including a plaintiff's service in the army, 4 John Bouvier, *Institutes of American Law* 214 n.b (1851), an office fire, 1 Wood, *supra*, § 59, at 146 (citing *Johnson v. Diversey*, 82 Ill. 446 (1879)), and any other "reasonable excuse for the delay" that was put forward, *id.* 146 n.2.

Moreover, when courts sitting in equity enforced statutes of limitation by "analogy"—that is, when those statutes would bar similar actions at law—they would still "interfere in many cases, to prevent the bar of the statutes, where it would be inequitable or unjust." 2 Story, *supra*, § 1521, at 906. In other words, despite a relevant statute of limitations, equity courts permitted plaintiffs to bring claims, however "long outstanding," when they "perceive[d] that a party ha[d] equitable rights." 1 Wood, *supra*, § 58, at 140. As long as a plaintiff could show "good faith[] and reasonable diligence," a court could still give relief. 2 Story, *supra*, § 896, at 210.

B. In the Founding era and afterwards, American courts followed these principles and permitted the tolling of statutory deadlines in equitable circumstances, provided that the plaintiff had exercised due diligence.

For example, courts tolled the statute of limitations when "inevitable necessity" prevented the plaintiff from filing suit. *Wall*, 11 S.C.L. at 499. In *Wall*, a South Carolina court considered a British subject's claim against an American citizen for non-payment of debt. *Id.* In defense, the defendant raised the statute of limitations, which had clearly run, and the plaintiff responded that the limitations period should be tolled for the duration of the War of 1812, when courts were "shut up against British creditors." *Id.* at 509.

The court concluded that the statute contained an

implied exception for "act[s] of God," including "storms, tempests, earthquakes, and other casualties of nature," *id.* at 500, as well as the "declaration of war," *id.* at 505. According to the court, statutes of limitations were not intended to "prevent a man who had never been guilty of any wilful[l] laches or delay . . . from pursuing his just rights." *Id.* at 499. Tolling would enable the court to "preserve the plaintiff's right" in this exceptional circumstance. *Id.* at 509; *see Braun v. Sauerwein*, 77 U.S. 218, 222-23 (1869) (noting that when "the creditor has been disabled to sue, by a superior power, without any default of his own," the "running of a statute of limitation may be suspended"); *Hanger v. Abbott*, 73 U.S. 532, 538-39 (1867) (concluding that tolling the limitations period during the Civil War would not "encourage laches or . . . promote negligence" and to do otherwise would make a "mockery" of the plaintiff's right to sue).

Similarly, courts suspended the application of statutes of limitations when the plaintiff did not recognize that he had a cause of action due to the defendant's "fraudulent concealment." *Sherwood*, 21 F. Cas. at 1303-05. In *Sherwood*, Justice Story, when riding circuit, considered a case involving a defendant who had defrauded the plaintiff when selling a ship, and managed to conceal the fraud for several years after the sale. *Id.* The applicable statute of limitations had expired, but Justice Story invoked the equitable exception for cases of fraud and mistake. *Id.* at 1304-07. Adopting this exception would be, in Story's words, consistent with "legislative intention," because the statute of limitations was enacted to "suppress," and not encourage, fraud. *Id.* at 1307; *First Massachusetts Tpk. Corp. v. Field*, 3 Mass. 201, 207 (1807) (when the "delay of bringing the suit is owing to the fraud of the

defendant" the statute could be tolled "until the plaintiff could obtain the knowledge that he had a cause of action"); *Clementson v. Williams*, 12 U.S. 72, 74 (1814) (noting that the defendant's belated "acknowledgement of a debt" could "take the case out of that statute of limitations").

Although the tolling doctrine originated in equity, courts later made clear that tolling should also be available in actions at law. *See Sherwood*, 21 F. Cas. at 1308; *Bailey v. Glover*, 88 U.S. 342, 349 (1875) ("[T]he weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity."). In *Bailey*, the plaintiff sought to set aside an allegedly fraudulent conveyance that he had received from the defendant before the defendant's bankruptcy, and that the defendant had "kept secret and concealed." 88 U.S. at 348. The Bankruptcy Act required certain suits to be brought "within two years from the time [when] the cause of action accrued," *id.* at 344 (quoting Bankruptcy Act of Mar. 2, 1867, ch. 176, § 2, 14 Stat. 518), with no exception for fraudulent concealment. Nonetheless, this Court tolled the two-year period, relying on the principle that the period would not run when the "party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Id.* at 348.

In more recent cases, this Court has reiterated that tolling is available in cases in which "hardships . . . arise from a hard and fast adherence to more absolute legal rules." *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248 (1944)); *see, e.g.*, *id.* at 631 (tolling one-year limitation for filing application for writ of habeas corpus); *Young*, 535 U.S. at 43 (tolling

three-year "lookback period" in bankruptcy proceedings); *Rotella v. Wood*, 528 U. S. 549 (2000) (tolling four-year period for filing civil suit under Racketeer Influenced and Corrupt Organizations Act); *Zipes*, 455 U.S. at 398 (tolling ninety-day deadline for filing charge with Equal Employment Opportunity Commission (EEOC)).

These examples demonstrate the long history of courts recognizing that tolling is appropriate when situations beyond a plaintiff's control make it difficult or impossible to meet a statutory deadline, even with the exercise of due diligence, such that it would be "inequitable or unjust" for the "bar of the statute" to apply, 2 Story, *supra*, § 1521, at 738.

II. Congress Drafts Statutes with Equitable Tolling as a Background Principle, and This Court Has Therefore Held that Many Different Kinds of Deadlines May Be Equitably Tolled.

A. The doctrine permitting tolling in equitable circumstances is so deeply embedded in the law that this Court has recognized that Congress drafts "statutory time limits," *Irwin*, 498 U.S. at 95, in "light of this background principle," *Young*, 535 U.S. at 49-50; *Irwin*, 498 U.S. at 95 (describing a "rebuttable presumption of equitable tolling"); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1945) (equitable tolling doctrine should be "read into every federal statute of limitations"); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) ("statutes of limitations must be read against the embedded practice of equitable tolling").

For instance, in *Holmberg*, several creditors sued a shareholder of a land bank under the Federal Farm

Loan Act. 327 U.S. at 393. Anticipating the defendant's statute of limitations defense, the creditors alleged that they did not learn of the defendant's ownership of the stock until 1942 because his ownership had been "concealed" under another name. *Id.* This Court agreed with the creditors. Citing *Bailey* and *Sherwood*, it described the "old chancery rule" that permitted tolling when "a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part." *Id.* at 397. Because that equitable doctrine "is read into every federal statute," this Court reasoned, it should apply in the Federal Farm Loan Act as well. *Id.*; *Sherwood*, 21 F. Cas. at 1307 (noting that the exception for fraud or mistake would have been "well known" to the lawmakers who framed the limitations period).

In *Irwin*, this Court extended the presumption of tolling to "suits against the United States." *Irwin*, 498 U.S. at 95-96. *Irwin* considered whether a thirty-day period for filing suit against a federal agency under Title VII of the Civil Rights Act of 1964 was subject to equitable tolling. *Id.* at 94 (citing 42 U.S.C. § 2000e-16(c) (1988)). In deciding that the deadline was subject to tolling, this Court affirmed the "rebuttable presumption of equitable tolling" applicable to any "time requirement in lawsuits between private litigants," *id.* at 95, and concluded that "the same rebuttable presumption of equitable tolling applicable against private defendants should also apply to suits against the United States," *id.* at 95-96.

This Court has explained that this presumption is doubly applicable to statutory deadlines contained in "humane and remedial Act[s]," *Burnett*, 380 U.S. at 427-28, that are designed to "aid claimants," *Honda v. Clark*, 386 U.S. 484, 496 (1967). In *Honda*, claimants

of property held under the Trading with the Enemy Act, which had permitted the seizure of assets from businesses owned by Japanese nationals during WWII, sought to toll the Act's sixty-day deadline for appealing an administrative claim schedule. *Id.* at 493. This Court tolled the limitations period during the pendency of related litigation because it was consistent with the statutory scheme and equitable principles to do so. *Id.* at 501. Specifically, the statute "was intended to provide a method for the fair and equitable distribution of vested enemy assets," and the limitations period was "designed to further this end—to aid claimants by expediting a final distribution," rather than to act "primarily as a shield for the Government." *Id.* at 495-96. Further, this Court emphasized, tolling the limitations period for some claims would not impact the "amount of others' claims" because other claimants had no interest in "the time of proof." *Id.* at 497. Finally, legislative history made clear that "the overall congressional purpose"—to address the country's "moral obligation" to compensate Japanese nationals with "proper claims"—was consistent with the application of tolling. *Id.* at 501.

Similarly, in *Bowen*, plaintiffs challenging a Social Security policy sought to toll the sixty-day deadline for appealing the Social Security administrator's denial of a claim for the period in which an allegedly illegal policy was "operative but undisclosed," 476 U.S. at 478. This Court held that the "application of the 'traditional equitable tolling principle'" to the deadline was "consistent with the overall congressional purpose" of the Social Security Act, *id.* at 480 (citing *Honda*, 386 U.S. at 501), to be "unusually protective of claimants" seeking benefits, *id.* at 480 (internal quotation marks omitted); *see also Urie v. Thompson*, 337 U.S. 163, 169-70

(1949) (application of tolling to Federal Employers' Liability Act (FELA) statute of limitations was available because the "humane legislative plan" suggested that a plaintiff should not "waive[] his right to compensation" because of "blameless ignorance"); *Burnett*, 380 U.S. at 427-28 (tolling available because FELA was a "humane and remedial Act," and "the interests of justice require[d] vindication of the plaintiff's rights"); *Boechler*, 2022 WL 1177496, at *6 (tolling is especially appropriate for limitations periods in statutes that were designed to allow "laymen, unassisted by trained lawyers" to initiate claims).

B. The availability of equitable tolling does not hinge on whether the provision at issue has the "functional characteristics of a statute of limitations," Pet. App. 33a, as defined narrowly by the court below. Historically, courts applied tolling principles in the context of many different kinds of time limits, even those that did not determine the timing for filing a suit and were not "triggered by harm from the breach of a legal duty owed by the opposing party," *id.* at 30a.

First, courts of equity analogized to tolling principles whenever they were called upon to assess a defense grounded upon the "lapse of time," even when there was no applicable statute of limitations. *Lupton*, 38 U.S. at 385-86. In *Lupton*, for example, this Court concluded that equitable tolling was available in the context of a "general rule" of equity courts that objections to the rulings of a Virginia Orphan's Court should be brought within a "reasonable time." *Id.* at 386 (noting that there could have been grounds to "justify or excuse" the delayed challenge). Although this "general rule" was an equitable practice adopted to protect the "acknowledged jurisdiction" of the Orphan's Court and was triggered by the decision of the

Orphan's Court, *id.* at 385, rather than "the breach of a legal duty owed by the opposing party," Pet. App. 30a, this Court concluded that equitable tolling was available because the "general rule" requiring filings within a "reasonable time" was grounded in the equitable principle of laches and an "analogy" to the statute of limitations for the common law claim of account, which itself could be tolled in equitable circumstances. *Lupton,* 38 U.S. at 385-86 (noting that the prayer of the bill sought "in effect" to open the accounts of an executor).

Similarly, even before statutes of limitations existed, courts "recogniz[ed] the injustice of enforcing stale demands" and presumed that a debt or bond had been paid after a period of twenty years, 1 Wood, *supra,* § 1, 3, and that a trust had been extinguished after a similar "lapse of time," Agnell, *supra,* at 172. These equitable presumptions were decidedly not statutes of limitations that ran from the accrual of a cause of action, but rather were "established rule[s] . . . derived by analogy from the English statute of limitations." *See* 1 Wood, *supra,* § 1, at 3 (citing *Gregory v. Commonwealth,* 121 Pa. 611 (1888)). Nevertheless, because equitable presumptions were sufficiently "analogous" to statutes of limitations, *Cape Girardeau Cnty., to Use of Rd. & Canal Fund v. Harbison,* 58 Mo. 90, 96 (1874), fraud would suspend the presumption just as it would a limitations period, *Sherwood,* 21 F. Cas. at 1307.

For example, in *Prevost,* this Court considered allegations that deceased defendants had participated in a secret trust. *Prevost v. Gratz,* 19 U.S. 481, 492 (1821). Because of the lapse of time and "antiquity of the transaction," this Court presumed that the trust had been "lawfully discharged or extinguished," *id.* at

493, but nevertheless noted that fraud, if "imputed and proved," would disturb the presumption, *id.* at 497; *see* 2 Wood, *supra*, § 275, at 706 (citing *Prevost* to describe the "imputation of fraud" alongside limitations cases); *Hughes v. Edwards*, 22 U.S. 489, 497-98 (1824) (describing equitable "circumstances" in which a mortgagee could rebut the presumption of discharge of a mortgage after a certain period of time); *Piatt v. Vattier*, 34 U.S. 405, 416 (1835) (noting the possibility of tolling or "overcom[ing]" the presumption created by a defendant's adverse possession).

Second, courts applied tolling principles to statutory deadlines creating a borrower's right of redemption—the right to re-purchase a property in a given period—even though redemption laws did not create or function as statutes of limitations, as defined by the court below. *Reynolds v. Baker*, 46 Tenn. 221, 229-30 (1869). In *Reynolds*, the Tennessee Supreme Court considered a statute that gave real estate debtors a two-year right of redemption. *Id.* at 223. The court considered the impact of a Civil War-era amendment to the state's constitution providing that "no statute of limitations" would be operative during the years of the war. *Id.* Because there were "essential differences" between the redemption law, which was "strictly a right to re-purchase . . . within the prescribed time," *id.* at 227, and a statute of limitations, which prescribed the time at which an "action . . . can be maintained," *id.* at 225, the court held that the redemption law was not a statute of limitations under the constitutional amendment, *id.* Nevertheless, the same court concluded that there should be exceptions to the "general rule" of the redemption period, including "where the debtor was prevented by the fraud of the purchaser[] from redeeming within the statutory time,"

and in cases of "duress, imprisonment, overwhelming power, and the like." *Id.* at 229.

Clearly, the period established by redemption laws was not "triggered by harm from the breach of a legal duty owed by the opposing party." Pet. App. 30a. A right of redemption was a right "to have a re-conveyance of the land" and ran from the initial conveyance. *Reynolds*, 46 Tenn. at 226. Further, redemption laws did not "start the clock on seeking a remedy" from a "remedial entity," Pet. App. 31a, but rather created a right to re-purchase the property from the purchaser. Nevertheless, courts routinely applied tolling principles in this context. 2 Wood, *supra*, § 233, at 548 n.3 (noting that a mortgagor's right to redeem could be tolled by "special circumstances" (citing *Skinner v. Smith*, 1 Day 124, 127 (Conn. 1803)); *id.* at § 231, 558 (noting that, in cases of fraud, "a court of equity will let the mortgagor in to redeem, although more than the statutory period has elapsed"); *Michoud v. Girod*, 45 U.S. 503, 561 (1846) (Louisiana statute allowing prescription, or acquisition of title after a certain period, could be set aside in "a case of actual fraud").[2]

As this history makes clear, courts have held that the doctrine of equitable tolling is available in a variety of circumstances, including in the context of deadlines other than statutes of limitations.

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[2] More recently, some courts have analogized redemption statutes to statutes of repose which cannot be tolled, *see, e.g.*, *Jones v. Saxon Mortg.*, 537 F.3d 320, 327 (4th Cir. 1998) (right to redemption in the Truth in Lending Act is a "statute of repose," so "the time period stated therein is typically not tolled for any reason"), but others continue to permit tolling of the right to redemption, particularly in cases of "fraud or irregularity," *see, e.g.*, *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 360 (6th Cir. 2013).

C. This history is consistent with this Court's recent cases, which have stated that tolling is presumptively available in the context of any statutory "[t]ime requirement," *Irwin*, 498 U.S. at 95, that addresses "the end[s] served by a statute of limitations," *Zipes*, 455 U.S. at 394.

In *Zipes*, this Court held that the time limit for filing charges with the EEOC under Title VII of the Civil Rights Act of 1964 could be equitably tolled. *Id.* at 398. As the Court explained, "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit, but a requirement . . . *like* a statute of limitations." *Id.* at 393 (emphasis added). The deadline was like a statute of limitations because legislators "described its purpose as preventing the pressing of stale claims, the end served by a statute of limitations." *Id.* at 394 (internal citations omitted). Furthermore, this Court explained that it would "honor the remedial purpose of the legislation as a whole" to permit "tolling when equity so requires." *Id.* at 398.

Similarly, in *Young*, this Court considered the application of *Irwin* (extending the presumption of tolling to suits against the United States, *see supra* at 11) to a statute establishing a three-year "lookback period" applicable to the Internal Revenue Service. Specifically, the statute entitled government entities to receive priority status for claims they made during a bankruptcy proceeding, provided that the claim was for a tax "due within three years before the bankruptcy petition was filed." *Young*, 535 U.S. at 46. As this Court acknowledged, the lookback period was "unlike most statutes of limitations." *Id.* at 47. First, it barred "only some, and not all, legal remedies for enforcing the claim." *Id.* Second, it was not, strictly speaking, triggered by "the breach of a legal duty owed by the

opposing party," Pet. App. 30a, because the period began at the filing of an individual debtor's bankruptcy petition, *Young*, 535 U.S. at 46.

Despite these distinctions, this Court held that the "lookback period" was a "limitations period" subject to equitable tolling. *Id.* at 49. This Court focused on whether the statute "prescribes a period within which certain rights . . . may be enforced," *id.* at 47 (citing 1 Wood, *supra*, § 1, at 1), and furthered the policies of "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *id.* (internal quotation marks omitted). These features mattered more than the statute's relationship to a breach of a legal duty. *Id.*

Finally, in *Scarborough*, this Court considered whether a timely application for attorneys' fees under the Equal Access to Justice Act (EAJA) could be amended after the thirty-day filing deadline. 541 U.S. at 406 (citing 28 U.S.C. § 2412(d)). It held that the deadline was not jurisdictional, and that a curative amendment could be allowed based on the "relation back" doctrine, *id.* at 417, an equitable "limitations principle[]" similar to equitable tolling. According to this Court, this equitable principle should generally apply to the government in the same way it applies to private parties. *Id.* at 421-22. The fact that the thirty-day period was not triggered by "the breach of a legal duty owed by the opposing party," Pet. App. 30a, but rather a final judgment in the action, *Scarborough*, 541 U.S. at 408, did not make *Irwin* inapplicable, *id.* at 422.

III. Equitable Tolling Should Be Available in the Context of § 5110(b)(1).

Section 5110 governs the "[e]ffective dates of awards" of compensation for veterans and provides that, unless "specifically provided otherwise . . . the effective date of an award . . . shall not be earlier than the date of receipt of application therefor" by the VA. 38 U.S.C. § 5110(a)(1). Section 5110(b)(1) provides an exception wherein the "effective date of an award . . . shall be the day following the date of the veteran's discharge," so long as the "application therefor is received within one year from such date of discharge or release" from the armed services. *Id.* § 5110(b)(1). In other words, § 5110(b)(1) creates a one-year "period within which certain rights"—namely, the right to retroactive compensation beginning at the date of discharge—"may be enforced," *Young*, 535 U.S. at 47.

The court below concluded that equitable tolling is categorically unavailable here because this statutory deadline does not function as a statute of limitations. This was wrong because, consistent with the long history of equitable tolling, this Court has held that equitable tolling is available for statutory deadlines that further the "same basic policies" as statutes of limitations, *id.*, even if they do not function exactly like a statute of limitations. Here, the history of the one-year period for filing retroactive claims makes clear that, much like a statute of limitations, it fosters "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities,'" *id.* (quoting *Rotella*, 528 U.S. at 555), and thus equitable tolling should be available, *id.*

In 1943, when lawmakers amended veterans' benefits laws to provide for retroactive benefits, they initially sought to provide for retroactive compensation

for service-related disabilities "notwithstanding the date of filing a claim therefor," *see* A Bill to Amend Veterans Regulations, H.R. 1551, 78th Cong. (1943). They believed that this provision would "increase the compensation of many veterans" by permitting retroactive benefits from the date of discharge, rather than the date of application. 89 Cong. Rec. 6213 (1943) (Rep. Robsion) (explaining that "[u]nder the present law [a veteran] can only secure compensation from the date he makes his application").

The VA pushed back, advocating for a one-year "limitation on the retroactive payment of compensation," *Effective Date for Entitlement to Pension or Compensation for Disability Resulting From Injury or Disability Incurred in Or Aggravated by Active Service*, Report on H.R. 1551 (July 27, 1943), in order to "prevent[] the pressing of stale claims," *Zipes*, 455 U.S. at 394. In accepting the VA's advice, Congress settled on the one-year limit because that limit furthered the "end[s] served by a statute of limitations," *id.* at 394. Significantly, § 5110(b)(1)'s one-year period was not enacted as a "shield for the government," *Honda*, 386 U.S. at 496; *see* Report on H.R. 1551, *supra*, at 2-3 (noting that the VA still anticipated making retroactive awards in the "far majority of cases," despite its advocacy for the one-year deadline), but rather to discourage claims that would be "difficult, if not impossible, to determine accurately," *id.* at 1. By preventing veterans from "defer[ring] any such claim as long as practicable," *id.*, lawmakers sought to establish "certainty about a plaintiff's opportunity for recovery," *Young*, 535 U.S. at 47, prevent plaintiffs from sleeping on their rights, *id.*, and prevent "fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within . . .

reach," *Sherwood*, 21 F. Cas. at 1307.

In short, the one-year limit serves the purpose of a statute of limitations—"to require the reasonably diligent presentation" of claims. *United States v. Kubrick*, 444 U.S. 111, 123 (1979). And as is the case with statutes of limitations, the limit does not serve that purpose when "extraordinary circumstances" prevent claimants who otherwise "diligently pursued" their claims from meeting the statutorily prescribed deadline, *Holland*, 560 U.S. at 663; *see Braun*, 77 U.S. at 222 (tolling appropriate when a party "has been disabled . . . by a superior power, without any default of his own").

In addition to serving the same "ends . . . [as] a statute of limitations," *Zipes*, 455 U.S. at 394, § 5110(b)(1) is housed within exactly the type of "humane," "remedial," and claimant-protective scheme in which the presumption in favor of tolling is most applicable, *Burnett*, 380 U. S. at 427-28. As this Court has acknowledged, Congress designed veterans' benefits statutes to be "'unusually protective' of claimants," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (citing *Heckler*, 467 U.S. at 106-07), "design[ing] [them] to function throughout with a high degree of informality and solicitude for the claimant," *id.* at 431, and anticipating that "the veteran [would] often [be] unrepresented during the claims proceedings," *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); Pet'r Br. 27-29.

Indeed, when legislators passed the benefits provision in 1943, during a "great and terrible war," 89 Cong. Rec. 6213 (1943) (Rep. Bennett), they planned to "simplify[] adjudicative practices and administrative procedure," and "correct certain inequalities arising under existing law," *id.* at 6210 (Rep. Rankin); *see id.*

at 6213 (Rep. Bennett) (describing a desire to "do all we can for those sturdy citizens who today are giving their all for the stars and stripes"). Lawmakers doubled down on that objective when they consolidated veterans' benefits laws into title 38 of the U.S. Code in 1958, Pub. L. No. 85-857, 72 Stat. 1226, again seeking to benefit disabled veterans by enabling them to "use [the law] with . . . confident understanding," H. R. Rep. No. 85-2259 (1958). In sum, the nature of the veterans' benefits provision—a remedial statute written with great solicitude for applicants who served their country—reinforces the conclusion that tolling should be available here.

Finally, as this Court recognized in *Honda*, the fact that tolling the limitations period for some claims would not affect the "amount of others' claims" also supports the view that equitable tolling should be available. 386 U.S. at 497. Here, a conclusion that tolling is available would not "affect the amount of others' claims," *id.*, as each veteran's entitlement to compensation is assessed independently.

* * *

Since our nation's Founding, courts have exercised the power to extend statutory deadlines when applying them "would be inequitable or unjust." 2 Story, *supra*, § 1521, at 738. Because of this "long history," *Holland*, 560 U.S. at 651, the presumption that equitable tolling is available has become "hornbook law," *Young*, 535 U.S. at 49, particularly for deadlines contained in "humane" and claimant-protective legislation, *Urie*, 337 U.S. at 170. The court below ignored this history, as well as this Court's precedent, making a "mockery" of Arellano's right to seek retroactive benefits, *Hanger*, 73 U.S. at 538. The decision of the court

below should not stand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX F

Coma scales

A historical review

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ABSTRACT

Objective: To describe the most important coma scales developed in the last fifty years. **Method:** A review of the literature between 1969 and 2009 in the Medline and Scielo databases was carried out using the following keywords: coma scales, coma, disorders of consciousness, coma score and levels of coma. **Results:** Five main scales were found in chronological order: the Jouvet coma scale, the Moscow coma scale, the Glasgow coma scale (GCS), the Bozza-Marrubini scale and the FOUR score (Full Outline of UnResponsiveness), as well as other scales that have had less impact and are rarely used outside their country of origin. **Discussion:** Of the five main scales, the GCS is by far the most widely used. It is easy to apply and very suitable for cases of traumatic brain injury (TBI). However, it has shortcomings, such as the fact that the speech component in intubated patients cannot be tested. While the Jouvet scale is quite sensitive, particularly for levels of consciousness closer to normal levels, it is difficult to use. The Moscow scale has good predictive value but is little used by the medical community. The FOUR score is easy to apply and provides more neurological details than the Glasgow scale.

Key words: coma, scales, consciousness, review.

Escalas de coma: uma revisão histórica

RESUMO

Objetivo: Apresentar as escalas de coma de maior relevância desenvolvidas nos últimos cinqüenta anos. **Método:** Foi realizado levantamento bibliográfico nos bancos de dados Medline e Scielo compreendendo o período de 1969 a 2009 de acordo com as palavras-chave: coma scales, coma, disorders of consciousness, coma score, levels of coma. **Resultados:** Foram encontradas cinco escalas principais, em ordem cronológica: Escala de coma de Jouvet, Escala de coma de Moscou, Escala de coma de Glasgow (GCS), Escala de Bozza-Marrubini e Escala FOUR (Full Outline UnResponsiveness), além de outras com menor repercussão e raramente usadas fora do seu país de origem. **Discussão:** Das cinco escalas principais, a GCS é, de longe, a mais usada. É de fácil aplicabilidade e bastante adequada para situações de trauma crânio encefálico (TCE), porém, apresenta falhas, como a impossibilidade de se testar o componente verbal em pacientes intubados, entre outras. A escala de Jouvet é bastante sensível, especialmente para níveis de consciência mais próximos do normal, no entanto, é de difícil execução. A escala de Moscou apresenta um bom valor preditivo, porém, é pouco usada pela comunidade médica. A escala FOUR é de fácil aplicação e fornece mais detalhes neurológicos se comparada à GCS.

Palavras-chave: coma, escalas, consciência, revisão.

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The state of consciousness is characterized by the ability to get in contact with reality, to recognize objects that are part of it and to interact with it. Consciousness has two main components: wakefulness and content. The first relates to the degree of consciousness, i.e., it represents a quantitative aspect. The second, on the other hand, is a qualitative aspect and is made up of functions mediated by the cortex; these include cognitive abilities such as attention, sensory perception, explicit memory, language, the execution of tasks, temporal and spatial orientation and reality judgment. There can be wakefulness without the content of consciousness, as occurs in the vegetative state. However, the content of consciousness can only exist in the wakeful state[1,2].

Although the neurological and anatomical aspects of consciousness have been exhaustively studied, many aspects remain unexplained. Wakefulness is related to the reticular activating system, a structure that originates in the tegmentum of the pons and mesencephalon and has projections into the diencephalon and cortical areas. The content of consciousness, on the other hand, depends on various cortical structures and their subcortical connections[1,3].

The spectrum of alterations in the level of consciousness varies progressively from obtundation, through delirium, torpor and stupor to coma. The last of these is the complete absence of wakefulness and content of conscience, which manifests itself as a lack of response to any kind of external stimuli[1]. A comatose state usually occurs in two circumstances: diffuse or extensive involvement of both hemispheres of the brain and situations in which there is a lesion in the brainstem[1,2]. Unilateral focal lesions very rarely lead to coma[1,4]. Coma can be caused by structural lesions (lesions of the central nervous system, such as ischemic and hemorrhagic lesions) or nonstructural ones (such as exogenous intoxication and metabolic disorders)[1,3]. It is potentially fatal and must be investigated quickly and systematically using a standardized neurological examination[3]. Certain clinical parameters can be used to correlate the anatomical and physiological aspects of coma with its etiology, such as state of consciousness, respiratory rhythmicity, pupillary size, eye movements, motor response, cranial nerves responses, evidence of trauma in neck or head, and optic fundi abnormalities[3-8]. Coma scales arose because of the need to standardize the language used and so make written and spoken communication of information related to coma between different health professionals easier. A further aim of coma scales is to provide a consistent system for following the evolution of the patient's level of consciousness. Lastly, they can also provide prognostic data, allowing treatment to be optimized and costs rationalized[6-8].

The aim of this study is to carry out a historical analysis of the most important and widely adopted coma scales developed in the last fifty years that have been of greatest importance and had the greatest impact.

METHOD

The literature in the Medline and Scielo databases and in journals between 1969 and 2009 was reviewed using the keywords coma scales, coma, disorders of consciousness, coma score and levels of coma, as well as specific terms for each scale. Studies that described or validated the scales were chosen.

RESULTS

We describe below the most important coma scales in the order in which they were published.

Jouvet scale

The Jouvet coma scale[9], which was published in 1969, evaluates two parameters: perceptivity and reactivity. The parameter reactivity is divided into three categories: specific, non-specific and autonomic. Perceptivity includes a set of acquired responses, which depend on the integrity of the cortical function as well as that of the thalamocortical system. It is assessed by means of the following tests: [1] asking the patient to obey a written order; [2] asking the patient where they are and what the day, month and year are; [3] asking the patient to obey a verbal command. The individual can be classified in one of five categories: P1: No loss of consciousness, neurologically normal as far as level of consciousness is concerned. P2: This represents obtundation. Patients in this category are disoriented in time or space or are unable to obey a written command but can obey a verbal one. P3: This represents torpor. This category includes individuals with poor understanding of language. A verbal command needs to be repeated many times for it to be obeyed, and even then it is carried out slowly. Blinking reflex is normal. P4: Patients who only have the blinking reflex. P5: A complete absence of perception, indicating an organic or functional impairment of the cortical neurons[9].

Reactivity is innate, or inborn, and is largely dependent on connections at the subcortical level. Non-specific reactivity is tested based on eye orientation and opening responses. If the patient has their eyes open, the examiner should say the patient's name out loud and observe whether the orienting response is present. If it is, the patient will first move their eyes in the direction of the sound and then their head. If the patient has their eyes closed, the examiner should call the patient's name out loud and observe whether there is an eye opening response (also known as the waking reaction). Based on this, the individual can be classified in one of three groups: R1: Positive orientation reaction with eyes open

and positive waking reaction if eyes are closed. R2: Eye opening but loss of orientation reaction with eyes open. R3: Loss of eye opening response[9].

Patient response to pain can be divided into four categories: D1: Normal response. Characteristic facial mimic, possibly with crying and limb withdrawal. D2: Loss of facial and vocal response to pain. Waking reaction when stimulated during sleep still present. Limb withdrawal. D3: Only limb withdrawal. D4: Absence of any response to pain[9].

Autonomic reactivity provides an assessment of the autonomous nervous system response to painful stimuli. Response to pain causes a period of apnea followed by tachypnea. Heart rate may increase or decrease. There are frequent vasomotor changes, causing rubor and sweating. Mydriasis is also common. This indicator can be used to include patients in one of two groups: V1: Autonomic responses to painful stimuli are present. V2: Absence of autonomic response to pain[9].

Lastly, the classic (tendon, cutaneous and swallowing) reflexes are tested. The final score on this scale is obtained by adding the numbers after the letters for each item assessed. The overall score varies between 4 (P1R1D1V1) and 14 (P5R3D4V2)[9].

Based on the above classifications, his own clinical observations and other cases reported in the literature, Jouvet identified four states related to deep coma. The first of these is reactive apathic hypoperceptive syndrome, which covers individuals in whom perception is altered but not eliminated (P3-P4). Autonomic reactivity and autonomic functions are also normal. The response to a painful stimulus, however, is partially altered. The second state corresponds to hyperpathic-hypertonic aperceptivity syndrome, which is equivalent to decortication. There is no perception at all (P5), and reactivity is normal. The rigidity and flexor posturing found in decortication are present. The third state, areactive apathic normotonic aperceptivity syndrome, is characterized by deep coma, in which survival is limited to a few weeks. Perceptiveness is absent (P5) and non-specific reactivity is altered (R2-R3), as is response to pain (D2-D3). However, autonomic responses are normal, and in most cases there is no hypertonicity. Finally, the last state, areactive apathic and atonic aperceptivity syndrome, corresponds to brain death (Coma Dépassé) and only exists because of resuscitation techniques[9] (Tables 1 and 2).

Moscow scale

The Moscow coma scale was developed by the Institute for Research into Neurosurgery at the USSR Academy of Medical Sciences[10]. It consists of a quantitative

Table 1. Levels of perceptivity in Jouvet's coma scale[9].

Perceptivity	Execution of written orders	Orientation in time and space	Execution of spoken order	Blinking to threat
P1	+	+	+	+
P2	–	+	+	+
P3	–	–	+/–	+
P4	–	–	–	+
P5	–	–	–	–

Table 2. Levels of reactivity in Jouvet's coma scale[9].

Unspecific reactivity	Orientation reaction	Eye opening reaction	–	–
R1	+	+		
R2	–	+		
R3	–	–		
Reactivity to pain	Facial mimic	Eye opening	Limb withdrawal	–
D1	+	+	+	
D2	–	+	+	
D3	–	–	+	
D4	–	–	–	
Autonomic reactivity	Respiratory variation	Vasomotor changes	Cardiac rhythm changes	Pupil size changes
V1	+	+	+	+
V2	–	–	–	–

scale for the findings of the neurological examination and a scale for classifying disorders of consciousness, thus allowing the findings of the examination to be correlated with certain clinical conditions.

It was shown in a study that there is a critical value corresponding to 15 points as all the patients in the study whose scores after assessment were less than this value died[10] (Tables 3 and 4).

Glasgow coma scale (GCS)

The Glasgow coma scale (GCS) is extensively used throughout the world by physicians and other health professionals. Since its introduction in 1974[11,12], it has proved to be particularly suitable for characterizing the severity of changes in consciousness, especially in patients suffering from traumatic brain injury. At the time the scale was published, the authors, Jennett and Teasdale, believed that the lack of guidelines for describing patients with altered consciousness caused difficulties with communication between different centers and also made it difficult to compare groups of patients treated using different methods[14]. Unlike Plum and Posner[1], who concentrated on explaining precisely and accurately the diagnosis of stupor and coma, Jennett and Teasdale limited themselves to developing a practical method for obtaining an overall idea of the level of consciousness[5].

The total score on the Glasgow scale is obtained by assessing the following three parameters: eye opening, best verbal response and best motor response. The score varies between 3 and 15 points, and values of 8 or less correspond to serious conditions requiring intubation[11,12] (Table 5).

Bozza-Marrubini scale

In 1983, Bozza-Marrubini reviewed the existing systems for classifying coma[13]. First, he separated them into systems using scales and those using scores. In systems in the former category (those using scales), the clinical parameters are considered to be dependent and continuous; for example, a verbal response cannot be viewed as separate from a motor response, as this would theoretically result in different levels of consciousness. In systems in the latter category (those using scores), this premise is no longer valid, as different aspects of the patient are analyzed, a score is assigned for each of these and the scores are then added to give a number corresponding to the patient's clinical condition. According to Bozza-Marrubini[13], the correct approach would be to use a system of scales that meets the three following basic requirements: it favors a common language that overcomes the barriers of time, space and specialty; it allows a series of patients to be assessed therapeutically; and it provides a means of predicting the clinical outcome and thus determining how to allocate resources to those patients

Table 3. Moscow coma scale: quantitative scale of alterations observed in neurological examination[10].

Findings in neurological examination	Score
Eye opening in response to sound or pain	10
Oculocephalic reflex	10
Obeys instructions	8
Answers to questions	5
Orientation in time and space	5
Bilateral mydriasis absent	5
Flaccidity absent	5
Respiration not disturbed	4
Corneal reflex present	4
Patelar reflex present	4
Pupil reaction to light	4
Cough reflex	3
Skew deviation absent	3
Spontaneous movements	3
Movement to pain stimuli	3
Total	75

Table 4. Moscow coma scale: classifications of consciousness levels[10].

	Neurologics findings						
Consciousness level	VOR	Open eyes to pain	Follows commands	Answers questions	Oriented	Non reactive bilateral mydriasis	Atonia
Total conscious	+	+	+	+	+	–	–
Moderate torpor	+	+	+	+	–	–	–
Deep torpor	+	+	+	–	–	–	–
Vegetative state	+	+	–	–	–	–	–
Moderate coma	+	–	–	–	–	–	–
Deep coma	–	–	–	–	–	–	+
Irreversible coma	–	–	–	–	–	+	+

VOR: vestibulo-ocular reflex.

Table 5. Glasgow coma scale[11].

Clinical parameter			Points
Eyes	Open	Spontaneously	4
		To verbal command	3
		To pain	2
	No response	–	1
Best motor response	To verbal command	Obeys	6
	To painful stimulus	Localizes pain	5
		Flexion withdrawal	4
		Flexion abnormal (decorticate rigidity)	3
		Extension (decerebrate rigidity)	2
		No response	1
Best verbal response	Oriented		5
	Confused		4
	Inappropriate speech		3
	Incomprehensible speech		2
	No response		1
Total			(3-15 points)

Table 6. Bozza-Marrubini's scale[13].

Level/reactivity reflexes	Reactivity to voice	Reactivity to pain	Brain stem reflexes (VOR/LR)
1	Answers	Localizes	Present
2	Obeys	Localizes	Present
3	No response	Localizes	Present
4	No response	Flexion	Present
5	No response	Extension	Present
6	No response	Any type or no response	Both absent or VOR disconjugate only
7	No response	None	Both absent

VOR: vestibulo-ocular reflex; LR: pupillary reflex.

who have the greatest chance of benefitting from them[23]. Based on this, he proposed a system of scales made up of 7 levels for classifying organic brain damage, which are described as: [1] The highest level, in which the patient is able to speak and obey commands, obviously not intubated; [2] Patient obeys commands. Eye opening is therefore only one criterion and can be substituted by a similar one if, for example, the patient has an eyelid edema that makes eye opening impossible; [3] Patient is able to locate pain; [4] From this level on, the patient is no longer able to locate a painful stimulus but responds to it with abnormal flexion; [5] Limb extends abnormally in response to pain; [6] From this level on, there is no brainstem reflex or only disconjugate vestibulo-ocular reflex, which does not happen in the levels above. In addition, there is no pattern of response to painful stimuli or no response. Stage preceding brain death; [7] Complete absence of response to pain, and no brainstem reflex. Stage corresponding to brain death[13] (Table 6).

Full Outline UnResponsiveness - FOUR Score

In 2005, Wijdicks et al. published a new coma scale, the FOUR score[14]. It involves assessment of the following four components, each on a scale with a maximum of four: eye response, motor response, brainstem reflexes and respiration. This scale is able to detect conditions such locked-in syndrome and the vegetative state, which are not detected by the GCS.

When assessing eye response, the best of three attempts is used. E4 indicates at least three voluntary movements in response to the examiner's commands (for example, asking the patient to look up, look down and blink twice). If the patient's eyes are closed, the examiner should open them and observe whether they track

Table 7. Full Outline of UnResponsiveness - FOUR Score[14].

	Findings	Score
Eye response	Eyelids open or opened, tracking, or blinking to command	4
	Eyelids open but not tracking	3
	Eyelids closed but open to loud voice	2
	Eyelids closed but open to pain	1
	Eyelids remain closed with pain	0
Motor response	Makes sign (thumbs-up, fist, or peace sign)	4
	Localizing to pain	3
	Flexion response to pain	2
	Extension response to pain	1
	No response to pain or generalized myoclonus status	0
Brainstem reflexes	Pupil and corneal reflexes present	4
	One pupil wide and fixed	3
	Pupil or corneal reflexes absent	2
	Pupil and corneal reflexes absent	1
	Absent pupil, corneal, and cough reflex	0
Respiration	Not intubated, regular breathing pattern	4
	Not intubated, cheyne-stokes breathing pattern	3
	Not intubated, irregular breathing	2
	Breathes above ventilator rate	1
	Breathes at ventilator rate or apnea	0

a moving object or the examiner's index finger. If one of the eyes is affected by eyelid edema or trauma, the response of the healthy eye alone may be used. If there are no horizontal movements, check for vertical movements. E3 indicates the absence of any tracking movement with eyes open. E2 indicates eye opening in response to a loud sound, and E1 corresponds to eye opening in response to a painful stimulus. E0 indicates no eye opening even after a painful stimulus[14].

Motor response is assessed preferably at the upper extremities. A test is performed to determine if the patient is able first to abduct their thumb and simultaneously flex their four fingers (thumbs up), flex their fingers and thumb together (fist) and then extend just their index and middle fingers (V sign). If they are able to do this, the patient is classified as M4. If the patient's only response is localization to pain, they are classified as M3. Flexor response to pain is classified as M2, extensor response as M1 and a complete lack of response or generalized myoclonus status is classified as M0[14].

The brainstem reflexes tested are the pupillary and corneal reflexes. The corneal reflex is tested by applying two or three drops of sterile saline solution from a distance of 4 to 6 inches (to minimize corneal trauma as a result of repeated examinations). Cotton swabs can also be used. When both (pupillary and corneal) reflexes are absent, the cough reflex is also tested. B4 indicates the presence of pupillary and corneal reflexes. B3 indicates that one of the pupils is wide and fixed. B2 indicates the absence of one of the reflexes. B1 corresponds to the absence of both reflexes. B0 indicates that all the reflexes are absent, including the cough reflex[14].

For respiration, non-intubated patients with a normal breathing pattern are classified as R4, non-intubated patients with a Cheyne-Stokes breathing pattern as R3 and non-intubated patients with an irregular breathing pattern as R2. Patients on mechanical ventilation are classified in R1 if they are breathing above the ventilator rate (indicating that the respiratory center is still working) and in R0 if they are breathing at the ventilator rate or have apnea[14].

If the patient scores zero in all the categories, the examiner should consider the possibility of a diagnosis of brain death[14] (Table 7).

DISCUSSION

Coma scales have been developed throughout the world to standardize both the communication between

members of health teams and the assessment of the clinical evolution of severely affected patients. By far the most commonly used scale is the Glasgow coma scale. Various other scales have been developed, some of which are seldom used outside their country of origin[14]. Examples of these are the Innsbruck coma scale[6] and the Japanese scale[15]. They all generally involve assessing the patient and awarding a score that gives an overall idea of their level of consciousness.

The main advantage of the Jouvet scale is that it allows anatomo-clinical correlations to be established. However, the scale is complex, difficult to use and time-consuming and thus unsuitable for emergencies such as TBI. Compared with the Glasgow scale, it is more sensitive for levels of consciousness that are close to normal.

The Moscow scale is rarely used nowadays. Only one paper about this scale was found in our review of the literature[10]. In the study described in the paper, 58 traumatic brain injury (TBI) victims with Glasgow scores of three were also assessed with the Moscow scale. Of these 58 patients, only 69% died, whereas all those who had scores of less than 15 on the Moscow scale died. This finding led to the definition of a critical value of 15 points, below which the prognosis is brain death. The study concluded that the Moscow scale has good predictive value[10].

The Glasgow scale was developed using simple parameters for the specific purpose of allowing less experienced doctors and other health professionals to produce an accurate report of a patient's state of consciousness. Nevertheless, it has become the target of various criticisms in recent decades, and a number of studies have already described its strengths and weaknesses[5]. Eye opening, for example, is considered to indicate wakefulness, but it should be remembered that eye opening does not mean that the content of consciousness is intact (as in a persistent vegetative state). The fact is that the Glasgow scale does not provide either a sufficient number of or suitable tools to cover the whole spectrum of changes in consciousness. Rather, it is limited to diagnosis of the state of coma and does not allow more precise distinctions between the other states of consciousness to be made.[5] Because of this its usefulness for inferring a prognosis is limited, especially in patients with intermediate scores. As it lacks precision, the Glasgow scale is not suitable for monitoring changes of certain magnitudes in the state of consciousness[5,14,16,17].

In addition, Jennett and Teasdale specified that the score should be calculated based on examination of the patient six hours after the traumatic brain injury[18]. Patients with TBI are stabilized much sooner, and neuromuscular blocking drugs are often used to make it easier to transport and intubate agitated patients. All these circumstances interfere in the validity of the initial score obtained[19-21].

Another problem when applying the Glasgow scale is that the verbal component cannot be tested in intubated patients. Some physicians use the lowest score possible[1], while others infer the verbal response based on other findings of the neurological examination. Furthermore, abnormal brainstem reflexes, altered breathing patterns or the need for mechanical ventilation can indicate the severity of the coma, but the Glasgow scale does not cover these parameters[14].

The Bozza-Marrubini scale was an attempt to combine the standardized language of the Glasgow scale with exact descriptions of each clinical level. It is worth highlighting the efforts made by Bozza-Marrubini to find alternative ways to assess the same item, as in the case of the response to a verbal command, where the commands can include the alternatives "close your eyes" and "stick your tongue out", as seen in level 2 of the scale.[13]

Lastly, the FOUR score is easy to use and provides more neurological details than the Glasgow score, partly because it includes brainstem reflexes. Another advantage is that it allows different stages of herniation and other disorders such as locked-in syndrome and the vegetative state to be identified. It does not include verbal response and therefore has a higher predictive value for patients in intensive care[14]. A recent study showed that the scale can be used successfully by different professionals from outside the field of neurosciences[22].

Although scales are of tremendous importance in assessing disorders of consciousness, it should be stressed that instruments intended to assess something as complex as consciousness naturally have certain limitations. For some authors the items on a scale and the values assigned to them are still not able to consistently specify and quantify in all possible clinical coma situations the extent to which the various cerebral cortical functions related to the level of consciousness have been affected[1,5,7,14].

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REFERENCES

1. Posner JB, Saper CB, Schiff ND, Plum F. Plum F, Posner JB. Diagnosis of Stupor and Coma. 4th edition. Contemporary Neurology Series. Oxford University Press, New York, 2007.
2. Bateman D. Neurological assessment of coma. J. Neurol Neurosurg Psychiatry 2001;71(Suppl 1):S13-S17.
3. Stevens RD, Bhardwaj A. Approach to the comatose patient. Crit Care Med 2006;34:31-41.
4. Liao YJ, So YT. An approach to critically ill patients in coma. West J Med 2002;176:184-187.
5. Segatore M, Way C. The Glasgow coma scale: time for change. Heart Lung 1992;21: 548-557.
6. Benzer A, Mittrtschiffthaler G, Marosi M, et al. Prediction of non-survival after trauma: Innsbruck Coma Scale. Lancet 1991;338: 977-978.
7. Muniz ECS, Thomaz MCA. Utilização da escala de coma de Glasgow e escala de Jouvet para avaliação do nível de consciência. Rev Esc Enf USP 2007;2: 287-303.

8. Adukauskiene D, Budryte B, Karpec D. Coma: etiology, diagnosis and treatment. Medicina (Kaunas) 2008;44:812-819.
9. Jouvet M. Coma and other disorders of consciousness. Handbook of Clinical Neurology. North-Holland Publishing Company. Amsterdam, 1969.
10. Shakhnovich AR, Mamadaliev AM, Abakumova LIa. The prognosis of the outcomes of comatose states in the first 24 hours following craniocerebral trauma. Zh Vopr Neirokhir Im N N Burdenko 1991;6:11-12.
11. Teasdale G, Jennett B. Assessment of coma and impaired consciousness: a practical scale. Lancet 1974;2:81-84.
12. Jennett B. The history of Glasgow coma scale: an interview with Professor Bryan Jennett. Interview by Carole Rush. Int J Trauma Nurs 1997;3: 114-118.
13. Bozza-Marrubini M. Classifications of coma. Intensive Care Med 1984;10: 217-226.
14. Wijidicks E, Bamlet WR, Maramatton BV, Manno EM, McClelland RL. Validation of a new coma scale: The FOUR Score. Ann Neurol 2005;58: 585-593.
15. Sakai K, Iwahashi K, Terada K, Gohda Y, Sakurai M, Matsumoto Y. Outcome after external decompression for massive cerebral infarction. Neurol Med Chir (Tokyo) 1998;38:131-135.
16. Starmark JE, Stalhammar D, Holmgren E, Rosander B. A comparison of the glasgow coma Scale (GCS) and the reaction level scale (RLS85). J Neurosurg 1988;69: 699-706.
17. Balestreri M, Czosnyka M, Chatfield DA, et al. Predictive value of Glasgow coma scale after brain trauma: change in trend over the past ten years. J Neurol Neurosurg Psychiatry 2004;75:161-162.
18. Jennett B, Teasdale G, Galbraith S, et al. Severe head injuries in three countries. J Neurol Neurosurg Psychiatry 1977;40:291-298.
19. Marion DW, Carlier PM. Problems with inicial Glasgow coma scale assessment caused by prehospital treatment of patients with head injuries: results of a national survey. J Trauma;1994;36:89-95.
20. Wiese MF. British hospitals and different versions of the Glasgow coma scale: telephone survey. BMJ 2003;327:782-783.
21. Stuke L, Dias-Arrastia R, Gentilello LM, Shafi S. Effect of alcohol on Glasgow coma scale in head-injured patients. Ann Surg 2007;245:651-655.
22. Stead LG, Wijidicks E, Bhagra A, et al. Validation of a new coma scale, the FOUR score, in the Emergency Department. Neurocrit Care 2009;10: 50-54.

APPENDIX G

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Workers, Dignity, and Equitable Tolling

Duane Rudolph

Workers, Dignity, and Equitable Tolling

Duane Rudolph*

When workers allege that mental illness prevented the timely filing of a federal employment discrimination lawsuit, courts subject them to extreme standards at the equitable tolling stage, which ends workers' lawsuits against their employers. Such an approach to workers suffering from mental illness is indicative both of judicial misunderstanding of equitable remedies and judicial ignorance of equity's historical engagement with those afflicted with mental illness. More importantly, subjection of workers to high threshold requirements at equity is an affront to workers' dignity. Dignity, like equity, has a powerful moral basis that focuses on the individual. Dignity requires that workers alleging that mental illness foreclosed a timely filing of a federal employment discrimination lawsuit be heard and that they not be humiliated.

My contribution to the scholarly literature is three-fold. First, I introduce dignity to the scholarly literature on equity and reject arguments by prominent readers of American equity as unresponsive to the kinds of dignitary treatment that vulnerable plaintiffs should expect from courts sitting at equity. Second, I extend judicial discussion of dignity and equity to encompass federal remedies law and federal employment discrimination law. Third, I contribute to the literature on disabilities by looking at the treatment of afflicted workers at a particular point in the federal adjudicatory process. My policy prescriptions explore possible legal and equitable responses to the humiliating experience awaiting workers who allege that mental illness prevented the timely filing of a federal employment discrimination lawsuit.

* Reginald F. Lewis Fellow for Law Teaching and Lecturer on Law, Harvard Law School. My thanks to: the Reginald F. Lewis Foundation; the Reginald F. Lewis Fellowship Committee at Harvard Law School; Dean Thomas Graca and his office; Dean Susannah Barton Tobin and her reading group, "Becoming a Law Professor"; the Editorial Board of the Northwestern Journal of Human Rights, Christine Desan, I. Glenn Cohen, Jill Crockett, Daniel Farbman, Susan Fendell, Lynn Girton, John Goldberg, James Greiner, Tom Hennes, Paul Horwitz, Elizabeth Papp Kamali, David Luban, Gerald Neuman, Jane Nitze, Aziz Rana, Todd Rakoff, Ian Samuel, Jill Silverstein, Joseph Singer, Henry Smith, and Chetan Tiwari. I dedicate this essay to Gertrude, Marcellus, Messalina, and Frank Rudolph. All errors are my own.

I am asking you to please consider allowing me to file suit in Federal court and forgive my untimeliness in filing, as I have been 'inc[apac]itated' due to mental illness and medication.[1]

INTRODUCTION

Consider, for a moment, the following three examples of workers suffering from mental illness who requested equitable tolling of the statutory limitations period[2] on the basis of mental incapacity.[3] Equitable tolling allows a court to resuscitate untimely claims and proceed on the merits against a defendant despite a countervailing statute of limitations.[4] In only one of the

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[1] Milam v. Nicholson, No. 5:07-CV-00609, 2009 U.S. Dist. LEXIS 3629, at *4 (S.D. W. Va. Jan. 20, 2009) (equitable tolling denied).

[2] *See generally* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014) (articulating a "central distinction" between statutes of limitation and repose: statutes of limitation are subject to equitable tolling while statutes of repose, which reflect a legislative cutoff after which the defendant cannot be sued, generally are not).

[3] With some reservations, I use "mental incapacity" when referring to legal arguments. Because mental illness is a complex phenomenon, any term is likely reductive and/or mere shorthand. Andrew Scull's profound study of mental illness over time, for example, groups all mental illness under "madness." ANDREW SCULL, MADNESS IN CIVILIZATION: A CULTURAL HISTORY OF INSANITY FROM THE BIBLE TO FREUD, FROM THE MADHOUSE TO MODERN MEDICINE 11 (2015); *see also generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-5 xli (5th ed. 2013) (observing that "mental disorders do not always fit completely within the boundaries of a single disorder. Some symptom domains, such as depression and anxiety, involve multiple diagnostic categories and may reflect common underlying vulnerabilities for a larger group of disorders").

[4] Equitable tolling is generally distinguished from a number of related doctrines that also deal with the timing of a lawsuit: (1) adverse domination, (2) continuing violation, (3) *contra non valentem*, (4) discovery rule, (5) equitable estoppel, (6) fraudulent concealment, (7) legal tolling, and (8) waiver. By way of background, I describe each briefly. (1) Unlike equitable tolling, adverse domination is a common law doctrine that suspends the running of the statute of limitation applicable to a corporation's lawsuit against its directors until they are no longer in charge. *See* Michael E. Baughman, Note, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Purpose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1066, 1077 (1995). (2) The continuing violation doctrine is a common law accrual doctrine that, unlike the defense of equitable tolling, considers a chain of events—some of whose links may lie outside the limitations period—and extends the accrual date back in time to encompass the events lying outside the limitations period. *See* Heard v. Sheahan, 253 F.3d 316, 319 (7th Cir. 2001). (3) *Contra non valentem agere non currit praescriptio* ("prescription does not run against a person unable to act") is a Roman, French, and possibly Spanish equitable creation that tolls the running of a statute of limitation under Louisiana law. Benjamin West Janke & François-Xavier Licari, *Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LOUISIANA L. REV. 504, 506–07, 537 (2011); *see also generally* Prevo v. State ex rel. Dep't of Pub. Safety & Corr. Div. of Prob. & Parole, 187 So. 3d 395, 398 (La. 2015) (*contra non valentem* is "based on the equitable notion that no one is required to exercise a right when it is impossible for him or her to do so"). *But see* BLACK'S LAW DICTIONARY 586 (10th ed. 2009) (indicating that *contra non valentem* arose in 1938 and is common law in origin). (4) While equitable tolling focuses on the timing of a lawsuit, the discovery rule is concerned with when the injury underlying the lawsuit became apparent. *See* MRL Dev. I, LLC v. Whitecap Inv. Corp., 823 F.3d 195, 205 (3d Cir. 2016). Thus, equitable tolling can be granted because a worker discovered the discriminatory action at a later point. *E.g.*, Sterrett v. Mabus, No. 11-CV-1899, 2013 U.S. Dist. LEXIS 21261, at *12–13 (S.D. Cal. Feb. 15, 2013) (equitable tolling sufficiently pleaded where worker "did not realize the [adverse] employment decision was the result of gender discrimination until her [later] discovery of [a] similarly situated male [treated differently]"). (5) Equitable tolling is generally distinguished from equitable estoppel in that equitable estoppel focuses on another individual or entity's actions that prevented the worker from filing on time. *See* BARBARA T. LINDEMANN ET AL., II EMPLOYMENT DISCRIMINATION LAW 27–52 (5th ed. 2012 & Supp. 2015). (6) Fraudulent concealment is related to equitable tolling insofar as it is often a precondition for grants of equitable tolling. *E.g.*, Berry v. Allstate Ins. Co., 252 F. Supp. 2d 336, 345 (E.D. Tex. 2003) (equitable tolling denied where workers failed to prove fraudulent concealment of relevant facts

following federal employment discrimination cases did the court grant equitable tolling. In which cases did courts *deny* equitable tolling? Why does that matter?

The army veteran in the first case had been exposed to bomb blasts in Iraq and suffered brain injuries, "chronic pain, cognitive difficulties, impaired vision, and post traumatic (sic) stress disorder."[5] He worked for an Army contractor[6] as a Recruiting Operations Officer,[7] where many of his requested accommodations were denied,[8] and coworkers referred to him as a "retard," "junior varsity," and "the weakest link."[9] Unable to thrive in such an environment, he resigned.[10] He sued for failure to accommodate his injuries under the Americans with Disabilities Act (ADA) and for a hostile work environment.[11] He had 300 days from the last discriminatory act he suffered to contact the relevant agency and initiate proceedings against his employer; he filed 18 days late.[12] The veteran requested equitable tolling because, after he resigned, he "fell and suffered a serious head injury"[13] that occurred 242 days after he resigned from his job[14] and "fully incapacitated" him for 47 days.[15]

In case two, a radiologist sued the United States Department of Veterans Affairs (VA). There, a coworker had "touched her and other female workers, [had] made sexually suggestive comments on a regular basis, [had] inappropriately texted female workers outside of work hours, and . . . [had] exposed his penis to [her] and touched her breast when she attempted to get up and

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by employer since they provided no proof to support that concealment had occurred). (7) Unlike equitable tolling, "legal tolling is derived from the normal process of statutory construction, and, in the context of class actions, occurs any time an action is commenced and class certification is pending." Christine E. Turner, Note, *First Rejection, Then Dismissal: Reconsidering American Pipe Tolling for Securities Class Actions*, 64 DUKE L. J. 99, 108 (2014) (citation marks omitted). (8) Finally, "waiver" refers to a decision not to raise the statute of limitations as a defense to an otherwise tardy prosecution of a lawsuit, either by agreement or some other affirmative action. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 734 (3d Cir. 2013) (conviction vacated where, inter alia, trial court did not accept plea agreement waiving statute of limitations). Nevertheless, despite these distinctions, "[c]ourts sometimes use terms such as fraudulent concealment, the discovery rule, equitable tolling, and equitable estoppel interchangeably . . . ." SEC v. Microtune, Inc., 783 F. Supp. 2d 867, 875 (N.D. Tex. 2011).

[5] Southall v. Prairie Quest, Inc., No. 3:15-cv-02222-HZ, 2016 U.S. Dist. LEXIS 52634, at *1 (D. Or. Apr. 16, 2016).

[6] *See* PRAIRIE QUEST CONSULTING, http://www.pqcworks.com/about/ (last visited May 6, 2016) ("We provide innovative cost-effective solutions that make a significant impact for clients such as the Army, the Navy, IBM, Raytheon and the State of Indiana.").

[7] *Southall*, 2016 U.S. Dist. LEXIS 52634 at *1. As the case was decided at the Motion to Dismiss stage, where "the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party," *id.* at *3, I cite only to the worker's facts.

[8] Although Mr. Southall provided the relevant documentation to support his accommodation requests, Compl. at 3, *id.*, the contractor only accommodated his request for a telephone with the larger keys and screen. *Id.* Mr. Southall's complaint indicates that he made the following accommodation requests:

> The accommodations he requested included: being able to conduct work in a quiet area, away from distractions; being able to take breaks during tasks; being able to have additional time to complete tasks; a telephone with larger than normal keys and screen; adjusted lighting on his computer screen and office lighting to reduce glare; an uncluttered work area; assignment to instructor duty rather than recruiter duty.

Id. at 3–4.

[9] *Id.* at 4, 5 (supervisor told veteran that he "viewed [the veteran] as if he were an alcoholic").

[10] *Id.* at 5.

[11] *Southall*, 2016 U.S. Dist. LEXIS 52634, at *1.

[12] *Id.* at *4.

[13] Compl. at 6, *id.*

[14] *Southall*, 2016 U.S. Dist. LEXIS 52634, at *7.

[15] Compl. at 6, *id.*

walk out of the room."[16] The coworker accepted a plea for indecent exposure.[17] For her discrimination suit to proceed against the VA,[18] as a federal employee the radiologist had to contact an Equal Employment Opportunity Counselor (EEO Counselor) within 45 days of the last discriminatory act that she had suffered.[19] She had also to "file a Formal Complaint within 15 days of receiving her Notice of Right to File" in federal district court.[20] The radiologist surpassed the 45 day period by 29 days[21] and did not file the Formal Complaint within 15 days of receiving Notice of Right to File.[22] She requested equitable tolling on the basis of severe depression, Post-Traumatic Stress Disorder (PTSD), and anxiety caused by the traumatic events at work.[23] She also argued that she did not file a Formal Complaint because representations from the EEO Counselor had led her to believe that she had satisfied the 15-day filing requirement.[24]

In the third case, a Nuclear Medicine Supervisor suffered from a deteriorating condition that caused blood to collect in his legs.[25] The hospital at which he worked transferred him to another hospital, allegedly with less pay.[26] After he resigned, he was hospitalized for an infection that led to cardiac problems requiring heart surgery.[27] The worker "lapsed into a coma for several weeks and suffered temporary multi-organ system failure . . . ."[28] He recovered and sued the hospital under the ADA,[29] alleging that the hospital's transfer[30] and failure to accommodate his deteriorating medical condition were discriminatory.[31] To initiate proceedings against the hospital, the Nuclear Medicine Supervisor had 300 days from the last discriminatory act to contact the relevant agency;[32] he filed his complaint some 295 days late.[33] He requested equitable tolling on the basis of his "mental incompetence, depression, and extended comatose state [which] prevented him from timely filing his charge."[34]

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[16] Kuriakose v. Veterans Affairs Ann Arbor Healthcare Sys., No. 14-12972, 2015 U.S. Dist. LEXIS 66208, at *6 (E.D. Mich. May 21, 2015).

[17] *Id.* at *6.

[18] The radiologist sued for discrimination (i) on the basis of sex; (ii) hostile work environment; (iii) negligence; (iv) retaliation. *Id.* at *6–7.

[19] *Id.* at *8.

[20] *Id.*

[21] *See id.* at *27.

[22] *Id.* at *20–21.

[23] *Id.* at *7.

[24] *Id.* at *8.

[25] Eber v. Harris County Hosp. Dist., 130 F. Supp. 2d 847, 850 (S.D. Tex. 2001).

[26] *Id.* at 850.

[27] *Id.*

[28] *Id.* at 850–51.

[29] Mr. Eber sued under both titles I and II of the ADA. Title I deals with employment discrimination, and Title II with discrimination in the provision of public services. *Id.* at 854. Neither statutory provision includes explicit limitations periods. *Id.* at 863. Courts apply the limitations period in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, to Title I claims (300 days), *Eber*, F. Supp. 2d at 854, and the forum state's limitations period to Title II claims (two years). *Id.* at 869, 870. As my article focuses on employment discrimination claims, I focus solely on Mr. Eber's Title I claim.

[30] *Id.* at 850.

[31] *Id.* at 851.

[32] *Id.* at 863.

[33] *Id.* at 851.

[34] *Id.* at 866.

None of the workers was permitted to sue the employer on the merits. In the veteran's case, the court denied equitable tolling on the basis of mental incapacity.[35] The court denied the veteran an opportunity to amend his complaint, which it dismissed.[36] The radiologist in the second case fared no better as the court denied her request for equitable tolling[37] on the basis of "psychological trauma."[38] The court converted the employer's motion to dismiss to one for summary judgment and dismissed the radiologist's complaint.[39] The Nuclear Medicine Supervisor in the final case fared marginally better as the court refused to suspend the limitations period for anything but his comatose period.[40] Before granting summary judgment to his employer,[41] the court said that "a long line of federal cases explicitly holds that mental disability, *even rising to the level of insanity,* simply does not toll a federal statute of limitations."[42]

These decisions are an affront to the dignity of the American worker suffering from mental illness.[43] Through their refusal to grant equitable tolling to vulnerable workers, the decisions humiliate such workers. Equitable tolling is a savior in American law. The doctrine can be traced to eighteenth-century English law.[44] As part of the equitable canon since at least colonial times, equitable tolling has allowed the court to rely on its discretion and proceed to evaluate a resurrected case on the merits. Generally, the Supreme Court of the United States has "followed a tradition in which courts of equity have sought to relieve hardships, which, from time to time, arise from a

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[35] While some cases mention the specific nature of the plaintiff's affliction, others do not. *Compare* Smith v. Shinseki, 716 F. Supp. 2d 556, 560 (S.D. Tex. 2009) ("bipolar illness" and "depression"), *with* Hood v. Sears Roebuck & Co., 168 F.3d 231, 232 (5th Cir. 1999) ("mental illness," "mental incompetence," and "mental incapacity").

[36] *See Southall*, 2016 U.S. Dist. LEXIS 52634, at *9–10.

[37] *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *12.

[38] *Id.* at *1.

[39] *Id.* at *12.

[40] *Eber*, 130 F. Supp. 2d at 866–67.

[41] *Id.* at 872.

[42] *Id.* at 869 (emphasis added).

[43] By "American" I mean any worker employed in the United States that is protected by federal employment discrimination laws. I am aware that, in some quarters, my definition will be read to impute, at the very least, citizenship status, which will be found objectionable. Nevertheless, my definition is consistent with federal law, which often conflates citizens and non-citizens for workers' rights purposes. *E.g.*, National Labor Relations Act, 29 U.S.C. § 152(3) (2015) (defining "employee" as "any employee," and not including undocumented workers in its exemptions); Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1) (2015) ("'employee' means any individual employed by an employer"); Title VII § 2000e(f) (defining "employee" as "an individual employed by an employer," and not excluding undocumented workers); U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 2-III(A)(4) (2000), http://www.eeoc.gov/policy/docs/threshold.html ("Individuals who are employed in the United States are protected by the EEO statutes regardless of their citizenship or immigration status."); *see also* Pattern Makers' League v. NLRB, 473 U.S. 95, 133 (U.S. 1985) (Blackmun, J., dissenting) (referring to "the American worker" in its discussion of the National Labor Relations Act); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893–94 (1984) (defining "American workers" in immigration terms, but holding that undocumented workers are "employees" under the National Labor Relations Act); Solis v. Cindy's Total Care, Inc., No. 10 Civ. 7242(PAE), 2011 U.S. Dist. LEXIS 125501, at *3 (S.D.N.Y. Oct. 31, 2011) ("By its terms, the FLSA applies to 'any individual' employed by an employer, as the term 'employer' is defined by the Act. 29 U.S.C. § 203(e)(1). The Act contains no exception or exclusion for persons who are not U.S. citizens or who are in this country illegally."); For bringing some of the materials that I have cited above to my attention, I am grateful to TEX. P'SHIP FOR LEGAL ACCESS, EMPLOYMENT RIGHTS OF UNDOCUMENTED WORKERS (2013), http://texaslawhelp.org/files/685E99A9-A3EB-6584-CA74-137E0474AE2C/attachments/72479B16-CB87-4F1A-8B62-917F8FB74295/undocumented-workers-final-draft2-eff-pa.pdf.

[44] McQuiggin v. Perkins, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting) (citing John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 52 (2001)).

hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity."[45] Equitable tolling suspends the running of the limitations period against the party who filed late through no fault of her own.

Equitable tolling receives scant attention in treatises and casebooks. Treatises on equity (and even remedies casebooks) often omit equitable tolling, [46] as do leading civil[47] and criminal procedure casebooks and treatises.[48] Almost all employment discrimination casebooks similarly overlook equitable tolling,[49] and scholarly treatment of the subject has largely focused on the complexities of equitable tolling outside the employment discrimination context.[50] Indeed, only

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[45] Holland v. Florida, 560 U.S. 631, 650 (2010) (holding that § 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposing a 1-year limitations period was subject to equitable tolling and that the Eleventh Circuit's standard (requiring a showing of bad faith, dishonesty, divided loyalty, and mental impairment to grant tolling to a pro se death-row inmate whose counsel failed to file habeas petition within 1-year limitations period imposed by AEDPA, despite repeated entreaties and letters from inmate urging counsel to do so and correcting counsel's misunderstanding of the law, causing pro se litigant to file his own habeas petition in federal district court roughly five weeks after limitations period had elapsed) was "too rigid").

[46] *See, e.g.*, ZECHARIAH CHAFEE, JR. ET AL., CASES AND MATERIALS ON EQUITY (4th ed. 1958); DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993); RICHARD L. HASEN, REMEDIES (3d ed. 2013); CANDACE S. KOVACIC-FLEISCHER ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS (8th ed. 2010); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS (8th ed. 2010); EMILY SHERWIN ET AL., AMES, CHAFEE, AND RE ON REMEDIES (2012); WILLIAM M. TABB & RACHEL M. JANUTIS, REMEDIES IN A NUTSHELL (2d ed. 2012) .

[47] *See, e.g.*, JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE CASES AND MATERIALS (11th ed. 2013); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: CASES AND MATERIALS (11th ed. 2015).

[48] *See, e.g.*, ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE (2d ed. 2013); JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (5th ed. 2013); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, & QUESTIONS 906–07 (14th ed. 2015) (discussing prosecutorial consideration of equitable factors but not equitable tolling).

[49] *See, e.g.*, DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE (11th ed. 2010); MARION C. CRAIN ET AL., WORK LAW: CASES AND MATERIALS (3d ed. 2015); TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS (2d ed. 2011); MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND NOTES 520–27 (2012) (discussing the statutory filing period but not equitable tolling); MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW (7th ed. 2011); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (8th ed. 2012). *But see* JOEL W. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 452–71, 599–722 (8th ed. 2011) (discussing equitable tolling and other remedies in some detail); LINDEMANN ET AL., *supra* note 4, at 27–52 (same); DONALD R. LIVINGSTON & REED L. RUSSELL, EEOC LITIGATION AND CHARGE RESOLUTION 141–68 (2d ed. 2014) (same).

[50] *See, e.g.*, Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1 (2005) (bankruptcy); G. Robert Blakey, *Time-Bars: Rico-Criminal and Civil-Federal and State*, 88 NOTRE DAME L. REV. 1581 (2013) (Organized Crime Control Act of 1970); Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174 (2000) (Federal Tort Claims Act); Lynn M. Daggett et al., *For Whom the School Bell Tolls But Not The Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J. L. REFORM 717 (2005) (Individuals with Disabilities Education Act); Mark C. Dillon, *An Overview of Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 315 (2010) (state statutory war tolls); Nicole Fontaine, *Don't Stop the Clock: Why Equitable Tolling Should Not Be Read Into the Hague Convention on International Child Abduction*, 54 B.C. L. REV. 2091 (2013) (Hague Convention on the Civil Aspects of International Child Abduction of 1980); Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587 (1993) (Securities Exchange Act of 1934); James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589 (1996) (federal environmental laws); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the*

five student notes have narrowly dealt with equitable tolling in the employment discrimination context and none deals with issues of mental illness and/or human dignity.[51]

Equitable tolling raises complex questions about the identity, conduct, and timing of the parties[52] and the court.[53] Societal interests in equitable tolling include adjudication of meritorious claims and the promotion of transactional security and judicial integrity.[54] While a statute of limitations works in the defendant's favor to thwart stale claims,[55] equitable tolling asks the court to prevent a miscarriage of justice on a case-by-case basis where circumstances beyond plaintiffs' control prevent them from filing on time.[56] Equitable tolling is so important that when courts abolish equitable tolling plaintiffs can be exposed to "purposeful manipulation of a limitation period by the more powerful party."[57] Equitable tolling is about "fundamental fairness."[58]

Because the plaintiffs are often poor and are compelled to represent themselves in federal court, workers' rights are a compelling area in which to study equitable tolling. Many workers

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Context of Reparations Litigation, 74 GEO. WASH. L. REV. 68 (2005) (civil rights); Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829 (1983) (fraudulent concealment generally); Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797 (2000) (tax); Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545 (2009) (Antiterrorism and Effective Death Penalty Act of 1996); E. Rebecca Ballard, Note, *It's About Time: Enforcing Human Rights Through Equitable Tolling*, 32 N.C. J. INT'L L. & COM. REG. 311 (2006) (Alien Tort Claims Act of 1789 and Torture Victims Protection Act of 1991); David J. Council, Note, *Equitable Tolling Revisited in Michigan: The Dangerous Abolition of a Necessary Insurance Doctrine*, 54 WAYNE L. REV. 1389 (2008) (Michigan insurance law); Damon W. Taaffe, Comment, *Tolling the Deadline for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel*, 68 U. CHI. L. REV. 1065 (2001) (Immigration and Nationality Act); Matthew L. Weidner, Note, *A Webb of Confusion: Equitable Tolling in Tax Refund Suits*, 53 WASH. & LEE L. REV. 1571 (1996) (Tax).

[51] *See, e.g.*, Ruben H. Arredondo, Note, *Different Strokes for Different Folks: Balancing the Treatment of Employers and Employees in Employment Discrimination Cases within the Tenth Circuit Court of Appeals*, 16 BYU J. PUB. L. 261 (2002) (relying on Tenth Circuit employment discrimination cases arising under Title VII, the ADEA, and the ADA involving equitable tolling to argue "for a more evenhanded (sic) approach by courts within the Tenth Circuit toward employees."); Jim Beall, Note, *The Charge-Filing Requirement of the Age Discrimination in Employment Act: Accrual and Equitable Modification*, 91 MICH. L. REV. 798 (1993) (arguing in favor of a change to the standard applicable for equitable tolling of an untimely lawsuit under the ADEA); Joseph F. Cascio, Note, *Are All Roads Tolled? State Sovereign Immunity and the Federal Supplemental Jurisdiction Tolling Provision*, 73 U. CHI. L. REV. 965 (2006) (equitable tolling in the context of sovereign immunity defenses raised by state employers); Jack E. Fernandez, Note, *Equitable Tolling of Title VII Time Limits in Actions Against the Government*, 74 CORNELL L. REV. 199 (1988) (arguing in favor of equitable tolling where "institutionalized procedure exists that results in active deception sufficient to invoke the powers of equity that in fact misled or lulled the plaintiff into inaction"); Jeremy A. Weinberg, Note, *Blameless Ignorance? The Ledbetter Act and Limitations Periods for Title VII Pay Discrimination Claims*, 84 N.Y.U. L. REV. 1756 (2009) (equitable tolling in discussion of employer fraud under the Lilly Ledbetter Fair Pay Act).

[52] *See generally* Blakey, *supra* note 50.

[53] *See* Weidner, *supra* note 50, at 1575.

[54] McGovern, *supra* note 50, at 802–03.

[55] *See* Malveaux, *supra* note 50, at 79.

[56] Blakey, *supra* note 50, at 1730–31.

[57] Council, *supra* note 50, at 1410 (decrying the Michigan Supreme Court's 2005 abolition of equitable tolling in private contracts).

[58] Taaffe, *supra* note 50, at 1065 (citation and quotation marks omitted).

proceed against corporations[59] or against the federal government.[60] Some are recent immigrants,[61] some illiterate,[62] and some have difficulty with English.[63] Often, they do not know the law, and they always depend on the court's equitable discretion to revive their claims. Their facts underscore the necessity of individualized attention to pleadings at equity.

My argument benefits from the work of several readers of American equity over the past roughly 25 years.[64] Laycock's seminal 1990 article, *The Death of the Irreparable Injury Rule*,[65] which gave way to a book by the same title the following year, has both informed my work on equity and is most inconsistent with the notion of equity that I espouse.[66] Even if I were to accept Laycock's rejection of the distinction between law and equity (which I do not),[67] his argument

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[59] *See, e.g.*, Kempton v. J.C. Penney's Co., No. C-13-121, 2013 U.S. Dist. LEXIS 65714 (S.D. Tex. Apr. 18, 2013); Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244 (S.D. Ohio 1984); Guevara v. Marriott Hotel Servs., No. C 10-5347 SBA, 2013 U.S. Dist. LEXIS 38847 (N.D. Cal. Mar. 20, 2013).

[60] *See, e.g.*, Branch v. Donahoe, No. 11-2912 SECTION "F", 2012 U.S. Dist. LEXIS 78376 (E.D. La. June 5, 2012) ; Leong v. Potter, 347 F.3d 1117 (9th Cir. 2003); *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *1.

[61] *E.g.*, Teemac v. Henderson, 298 F.3d 452, 457–58 (5th Cir. 2002) (recent immigrant with limited fluency in English who had failed to find counsel and had worked for 39 days for the United States Postal Services denied equitable tolling).

[62] *E.g.*, EEOC v. Willamette Tree Wholesale, Inc., No. CV 09-690-PK, 2011 U.S. Dist. LEXIS 25464, at *23 (D. Or. Mar. 14, 2011) ("monolingual, illiterate Spanish speaker unrepresented by legal counsel" raped repeatedly in the workplace granted equitable tolling on the basis of mental incapacity).

[63] *See, e.g.*, Pena v. Anatole, No. 3-03-CV-1814-AH, 2004 U.S. Dist. LEXIS 14712, at *1 n.1 (N.D. Tex. July 29, 2004) (pro se worker who submitted complaint in Spanish had to re-plead); *see also Teemac*, 298 F.3d at 458 ("lack of English fluency" does not toll limitations period).

[64] While my focus is primarily on the work of scholars who have engaged with equity as an institution, the implication is not that the work of scholars who do not directly engage with the institution—but who have nonetheless made major contributions to our understanding of equitable remedies in general—is less important. *See, e.g.*, Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 62 (2016) (injunctive relief in prisoners' rights litigation in California before and since the passage of the Prison Litigation Reform Act of 1996); Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515, 515 (2010) (proposing litigation clearinghouses as a response to the fact that "notwithstanding the individual and collective importance of all these injunctions, they languish in practical obscurity, unavailable to all but the extraordinarily persevering researcher who joins inside information with abundant funds"); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 551 (2006) (rejecting the view that use of the civil rights injunction declined in the 1980s and 1990s to argue that, while the Prison Litigation Reform Act of 1996 (PLRA) had a constraining effect on such litigation, "ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes"); *see also* CIVIL RIGHTS LITIGATION CLEARINGHOUSE, http://www.clearinghouse.net (last visited Aug. 29, 2016).

[65] Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

[66] DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 4–5, 19 (1991) (attacking the distinction between legal and equitable remedies by arguing that courts have abandoned the reputed rigor of the irreparable injury rule, which only permits entry into equity for the purposes of obtaining an injunction if monetary damages are inadequate as courts almost invariably permit entry into equity for injunctive purposes by finding damages almost always inadequate (except when fungible goods need to be replaced "or routine services in an orderly market"), in such cases "damages and specific relief are substantially equivalent").

[67] *See* Laycock, *supra* note 65, at 693 ("Law, equity, and similar conceptual categories are historical rather than functional . . . . I seek to complete the assimilation of equity, and to eliminate the last remnant of the conception that equity is subordinate, extraordinary, or unusual."); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53 (1993) ("I sense a certain segregationist spirit in the planning of this symposium. Not only should equity be preserved, but it should be preserved separate and self-conscious. In Delaware they do it right, with a separate court and high-ranking official called the Chancellor of Delaware. Chancellor Quillen described the office as preserving 'a

about equity (which I consider in greater detail below) tells us very little about the kinds of dignitary treatment that vulnerable plaintiffs should expect either at law or at equity.[68] Henry Smith's functional approach to equity as targeting opportunistic conduct similarly does not account for the kinds of dignitary treatment that sympathetic plaintiffs, like those alleging that mental incapacity prevented a timely filing, might expect from courts,[69] nor does Samuel L. Bray's equitable system.[70] My essay fills this gap in the scholarly literature.

Dignity requires that courts not humiliate workers suffering from mental illness. Non-humiliation means that equitable courts should take American workers' mental suffering seriously enough to credit the documentation of their suffering, that courts should hear such workers' stories, and that such workers should not be treated as malingerers. Non-humiliation means changing the ways in which courts envision an equitable defense. It is a mistake to automatically privilege the operation of a statutory limitations period against an equitable defense, especially when the worker raising that defense (equitable tolling) may suffer from a debilitating mental condition as a result of which he or she may have been mistreated in the workplace.

My goal is thus to highlight and correct judicial engagement with *part* of equity. While others have offered totalizing theories of equity, my focus is on a threshold equitable concern affecting the lives of American workers as they face courts hostile to their allegations of mental illness.[71] While others have explored courts' hostility to those suffering from mental illness, I extend that observation to federal remedies law and criticize courts at equity.[72] A critical approach to courts' engagement with equity is consistent with that of other scholars. Laycock, for example, indicates that lawyers and judges do not understand references to equity and law.[73] Smith has similarly criticized the Supreme Court in this regard,[74] and has noted that "the Court has no theory of what doing equity means."[75] Bray similarly says that, when it comes to equity, the Supreme Court "has

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touch of royalty to the judiciary.' Perhaps it was only sound republican sensibilities that precluded calling this unique judge the Lord High Chancellor of Delaware.").

[68] *See infra* Part II(B)(1).

[69] *See infra* Part II(B)2.

[70] *See infra* Part II(B)3.

[71] *See supra* notes 69–70 and accompanying text.

[72] *See, e.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003) (proposing the eradication of distinctions between workers with physical and mental disabilities under the ADA because such distinctions further disparage those workers suffering from mental illness); Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. J. 527 (2014) (observing that City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), denying heightened scrutiny to those suffering from mental disabilities, continues to be noxious to the efforts of those suffering from mental disabilities to achieve equal rights at the state and federal levels).

[73] Laycock, *supra* note 67, at 81.

[74] Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012) (criticizing the Supreme Court for misconstruing equitable remedies).

[75] Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, [at *21] (Harvard Public Law, Working Paper No. 15-13, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413 [hereinafter Smith, *Opportunism*]; *see also* Henry E. Smith, *Equity and Administrative Behaviour, in* EQUITY AND ADMINISTRATION 326, 356 (P.G. Turner ed., 2016):

> Some doctrines of remedies trace back—at least in theory—to equity jurisdiction. Most prominent is the law of injunctions, which the Supreme Court has done much to confuse recently. It should be said at the outset that it is generally regarded as uncontroversial that the same standards for injunctions apply across substantive areas and that those principles draw on the traditions of equity. The problem is that in our post-fusion world, those traditions are subject to misinterpretation, by no less than the US Supreme Court.

sometimes made clear errors."[76] My critical treatment thus reflects scholarly concerns about the state of judicial engagement with equitable remedies.

Although I criticize courts' misunderstanding of equity, the objective is not to erase remaining distinctions between law and equity but to illuminate why equity still matters even when courts err. My addition to the literature is three-fold. First, I make explicit the dignitary arguments of workers suffering from mental illness and introduce dignity's centrality to the scholarly literature on equity. Second, as courts have mentioned that contempt proceedings (an equitable remedy) evoke dignitary concerns, I extend judicial discussion of dignity beyond contempt to encompass federal remedies law and employment discrimination law. Third, I add to the literature on disabilities by looking at the treatment of afflicted workers at a particular point in the federal adjudicatory process.

The argument proceeds in four parts. In Part I, for the non-specialist I provide an overview of how workers bring employment discrimination lawsuits in the United States and at which points they may encounter delays. The process is far from intuitive. Its complexities present multiple opportunities for workers to encounter a number of legally significant errors that their employer may use to defeat their request to be heard on the merits. Part II defines dignity as non-humiliation of human beings, and it argues that scholars do not account for dignity's injunction against humiliation of the vulnerable. Part III shows how humiliation unfolds in federal employment discrimination cases and how scholarly defiance might be an antidote to humiliation. Part IV proposes legal and equitable responses to the humiliating experience awaiting workers who allege that mental illness prevented the timely filing of a federal employment discrimination lawsuit. My conclusion follows.

I. EQUITABLE TOLLING

For the non-specialist, I provide an overview of how a worker who believes that her workplace mistreatment is legally significant must proceed before she has her proverbial day in court. She faces several legal hurdles. The legal system imputes to her knowledge that she:[77]

- Understands and communicates in English;[78] *and*
- Has a colorable legal claim against her employer;[79] *and*
- Will initiate her lawsuit by contacting the relevant federal or state agency;[80] *and*
- Will do so within the appropriate statutory limitations period;[81] *and*

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[76] Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAN. L. REV. 997, 1000 (2015).

[77] Because some of these factors can occur simultaneously (initiating a lawsuit by contacting the relevant agency while attempting to secure legal representation) while others are chronological (contacting the relevant agency before requesting permission to proceed as a pauper in civil court), the points that follow are not listed in strict chronological order; they generally summarize what must be done before the worker has her day in court.

[78] *See Pena*, 2004 U.S. Dist. LEXIS 14712, at *3 n.1 (pro se worker who had requested permission to proceed as a pauper was ordered to amend her complaint, originally drafted in Spanish, and to resubmit it in English, which she did by submitting a letter).

[79] *See* Pierce v. Avondale Indus., No. 99-1947, 1999 U.S. Dist. LEXIS 17772, at *14 (E.D. La. Nov. 15, 1999) (worker who filed workplace discrimination suit outside the limitations period had "fail[ed] to raise a colorable claim"); Stewart v. Rock Tenn CP, LLC, No. 3:13-cv-02147-AC, 2015 U.S. Dist. LEXIS 54196, at *2 (D. Or. Apr. 24, 2015) (worker "did not plead facts sufficient to establish the timeliness of his claims or raise a colorable argument for tolling the ninety-day filing deadline").

[80] LINDEMANN ET AL., *supra* note 50, at 26-20 n.109, 26-23, 26-24.

[81] *Id.* at 27-7, 27-8.

- Will wait to hear from the relevant agency;[82] *and*
- When permitted by the relevant federal or state agency, will sue her employer:[83]
  - In the appropriate federal court;[84]
  - In the appropriate limitations period stipulated in the agency's letter to her;[85] *and*
- If she cannot afford or find an attorney to represent her, she will represent herself.[86]

She will represent herself either by:

- Contacting the court and learning about the pro se process, which she must follow; [87] *or*
- Asking the court to exercise its discretion in her favor and appoint an attorney to represent her; [88] *and*

- If she cannot afford filing and other fees associated with her lawsuit, she can apply to proceed as a pauper:[89]

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[82] *See id.* at 26-45.

[83] Once the EEOC has completed its investigation of her employment discrimination charge, the worker may "either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether discrimination occurred. If [she] asks the agency to issue a decision and no discrimination is found, or if [she] disagree[s] with some part of the decision, [she] can appeal the decision to EEOC or challenge it in federal district court." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal/fed_employees/hearing.cfm (last visited April 29, 2016).

[84] *See* Landry v. Tex. Youth Comm'n, No. 1:13-CV-424, 2014 U.S. Dist. LEXIS 147854, at *8 (E.D. Tex. Oct. 16, 2014); Valenzuela v. Kraft, Inc., 801 F.2d 1170, 1174 (9th Cir. 1986).

[85] *See* LINDEMANN ET AL., *supra* note 4, at 26-46.

[86] *See id.* at 26-48.

[87] *See* LINDEMANN ET AL., *supra* note 4, at 26-48; *see also* United States Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures (2016), https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/HandbookMarch2016Final.pdf; United States Court of Appeals for the First Circuit, Rulebook (2016), http://www.ca1.uscourts.gov/sites/ca1/files/rulebook.pdf; United States Court of Appeals for the Second Circuit, Federal Rules of Appellate Procedure and Local Rules and Internal Operating Procedures of the Second Circuit (2016), http://www.ca2.uscourts.gov/clerk/case_filing/rules/rules_home.html; The Bar Association for the Third Federal Circuit, U.S. Court of Appeals for the Third Circuit Practice Guide (2012), http://thirdcircuitbar.org/documents/third-circuit-bar-practice-guide.pdf; United States Court of Appeals for the Fourth Circuit, Federal Rules of Appellate Procedure, Local Rules, Internal Operating Procedures of the Second Circuit (2015), http://www.ca4.uscourts.gov/docs/pdfs/rules.pdf; Clerk's Office, United States Court of Appeals for the Fifth Circuit, Practitioner's Guide to the United States Court of Appeals for the Fifth Circuit (2014), http://www.ca5.uscourts.gov/clerk/docs/pracguide.pdf; Counsel to the Circuit Executive, United States Court of Appeals for the Seventh Circuit, Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2014), http://www.ca7.uscourts.gov/Rules/handbook.pdf; United States Court of Appeals for the Eighth Circuit, Local Rules (2010), http://media.ca8.uscourts.gov/newrules/coa/localrules.pdf; Ninth Circuit Appellate Lawyer Representatives, The Appellate Lawyer Representatives' Guide To Practice in the United States Court of Appeals for the Ninth Circuit (2015), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf; Office of the Clerk, United States Court of Appeals for the Tenth Circuit, Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit (2016) http://www.ca10.uscourts.gov/sites/default/files/clerk/NEW%20FINAL%20VERSION%20Practitioner%27s%20Guide%2005-02-2016_0.pdf; Clerk of Court, United States Court of Appeals for the Eleventh Circuit, Eleventh Circuit Rules and Internal Operating Procedures (2014), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/RulesDEC14.pdf.

[88] *See* LINDEMANN ET AL., *supra* note 4, at 26-49.

[89] *See* FED. R. CIV. P. 24 ("Proceeding in forma pauperis").

- She will need to obtain the relevant application forms from the court and supply the necessary proof to the court's satisfaction;[90]
- She may also need to wait for the court's decision about whether she can proceed as a pauper before her lawsuit can proceed.[91]

A worker might contact the relevant federal or state agency after the statutory limitations period has lapsed. The relevant agency might itself delay its decision regarding her case or misinform her about her rights.[92] The worker might sue in the wrong court, and so on. But for equity, her late suit would be dismissed. Given these preconditions to filing a federal employment discrimination lawsuit, it is unsurprising that a pro se litigant would argue that she filed late because "she was overcome by 'the sheer weight of these proceedings.'"[93] As a commentator has observed, "the run-up to a Title VII suit is a procedural minefield, which is especially unfortunate given that the structure is designed to be initiated by individuals without the assistance of private attorneys."[94]

As employment discrimination law is federal, the Supreme Court generally requires a worker requesting equitable tolling to show that she diligently pursued her rights and that some extraordinary circumstance prevented her from filing on time.[95] Federal circuit courts apply these requirements, as they understand them, to workers in their respective jurisdictions.

Federal courts often toll the statutory limitations period on a number of bases. Tolling often applies where either: (1) the worker filed suit in the wrong forum;[96] *or* (2) the worker requested appointment of counsel (tolled during adjudication of eligibility);[97] *or* (3) the worker asked to proceed as a pauper (tolled during adjudication of eligibility);[98] *or* (4) the employer concealed

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[90] *See, e.g.*, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *Motion for Leave to Proceed on Appeal in Forma Pauperis* (2010), https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Motion+for+Leave+to+Proceed+on+Appeal+In+Forma+Pauperis+and+Affadavit+in+Support/$FILE/Motion%20for%20IFP%20with%20Affidavit%20Form.pdf; UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, *Form 4: Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis* (2014), http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents-clerks-office/forms-and-samples/financialaffidavit.pdf; UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, *Motion for Pauper Status*, http://www.ca6.uscourts.gov/sites/ca6/files/documents/forms/IfpForm4.pdf; UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, *Form 4: Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis* (2013), http://www.ca9.uscourts.gov/forms/.

[91] *See, e.g.*, Walwyn v. Precision Tube Tech., 2006 U.S. Dist. LEXIS 28196 (S.D. Tex. May 1, 2006) (equitable tolling appropriate where worker's request to proceed as a pauper was adjudicated 12 days after filing period had elapsed).

[92] *See* Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 504 (2010) ("Although the statute seems to anticipate that the [EEOC] will typically process a[n employment discrimination] charge to conclusion within 180 days of filing, that rarely happens. Delays have been endemic in the EEOC since its founding.").

[93] Houser v. Rice, 151 F.R.D. 291, 295 (W.D. La. 1993) (equitable tolling denied).

[94] Sullivan, *supra* note 92, at 507.

[95] Holland v. Florida, 560 U.S. 631, 649 (2010) (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[96] *E.g.*, Valenzuela v. Kraft, Inc., 801 F.2d 1170, 1175 (9th Cir. 1986); Pizio v. HTMT Global Solutions, 555 Fed. Appx. 169, 176 (3d Cir. 2014); Deblanc v. St. Tammany Parish Sch. Bd., 2016 U.S. App. LEXIS 2812, at *4 (5th Cir. Feb. 18, 2016).

[97] *E.g.*, Dixon v. Veterans Admin., 1988 U.S. App. LEXIS 6809, at *3 (6th Cir. 1988); Bell v. Gibson Container Div., 1996 U.S. Dist. LEXIS 21322, at *3 (N.D. Miss. Feb. 9, 1996); Robinson v. Pac. Mar. Ass'n, 2012 U.S. Dist. LEXIS 171249, at *8 (W.D. Wash. Nov. 30, 2012).

[98] *See* Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998); Walwyn v. Precision Tube Tech., 2006 U.S. Dist. LEXIS 28196, at *7 (S.D. Tex. May 1, 2006); Turner v. Power Servs., 2012 U.S. Dist. LEXIS 61824, at *10–11

relevant facts from the worker;[99] *or* (5) the EEOC[100] misled the worker.[101] Some federal circuits also toll where (6) the relevant state agency made an error that prevented the worker from filing on time.[102] Others toll where (6) attorney error caused the filing delay;[103] and they *may* toll where (7) an unsophisticated plaintiff fails to understand filing requirements.[104] Still others toll where (6) the worker filed prematurely in an attempt to preserve her rights;[105] and where (7) the worker, proceeding pro se, was misled by defense counsel about filing requirements.[106]

As generous as these provisions seem, they do not focus on the worker. These provisions focus on procedural mechanisms external to the worker and on events external to the worker.[107] As such, the provisions fail to unearth those factors in a particular worker's life that prevented her from filing on time since they privilege the worker's relationship with the legal process or the worker's relationship with someone else as key to resuscitation of a dead case. Did the worker file in the wrong court? Did the pendency of procedural requirements prevent a timely filing? Was the worker wronged by a court, agency, or attorney? Was she wronged by an employer in obtaining relevant facts? These are the questions that matter.

It is unsurprising, then, that courts regard cases alleging that mental incapacity prevented a timely filing with some skepticism. As "a leading treatise"[108] on which federal courts rely[109] indicates, "[c]ourts continue to reject most efforts to argue that a plaintiff's mental incapacity tolls the 90-day filing period."[110] The cases in which courts do grant equitable tolling on the basis of mental incapacity present some of the most egregious facts as they may involve a coma,[111]

(D. Nev. May 3, 2012).

[99] *See* Chiaramonte v. Santa Cruz Big Trees & Pac. Ry. Co., 325 Fed. Appx. 575, 575 (9th Cir. 2009); *Pizio*, 555 Fed. Appx. at 176; *Deblanc*, 2016 U.S. App. LEXIS 2812, at *4; Damron v. Yellow Freight Sys., 18 F. Supp. 2d 812, 826 (E.D. Tenn. 1998).

[100] Created by an act of Congress in 1964 "as part of Title VII of the Civil Rights Act of 1964", the EEOC enforces Title VII, the ADA, ADEA, EPA, the Lilly Ledbetter Fair Pay Act of 2009, and the Genetic Non-Discrimination Act of 2008. LINDEMANN ET AL., *supra* note 4, at 26-3 to 26-6.

[101] *See* Alsaras v. Dominick's Finer Foods, Inc., 2000 U.S. App. LEXIS 30183, at *5 (7th Cir. Nov. 22, 2000) (collecting cases); Josephs v. Pac. Bell, 432 F.3d 1006, 1014 (9th Cir. 2005); Garcia v. Penske Logistics, L.L.C., 2015 U.S. App. LEXIS 19273, at *10 (5th Cir. Nov. 2, 2015).

[102] *E.g.*, Brown v. Crowe, 963 F.2d 895, 900 (6th Cir. 1992).

[103] *E.g.*, Granger v. Aaron's, Inc., 636 F.3d 708, 713 (5th Cir. 2011).

[104] *See* Teemac v. Henderson, 298 F.3d 452, 457 (5th Cir. 2002) (quoting Rowe v. Sullivan, 967 F.2d 186, 192 (5th Cir. 1992)) (denying equitable tolling).

[105] *E.g.*, Forester v. Chertoff, 500 F.3d 920, 931 (9th Cir. 2007).

[106] *E.g.*, McCoy v. Army Corps of Eng'rs, 789 F. Supp. 2d 1221, 1228 (E.D. Cal. 2011).

[107] Thus, filing in the wrong court, being misled, and lacking sophistication regarding filing requirements are likely procedural. An employer might argue that it withheld relevant information that would form the basis for an employment discrimination suit against it on the basis of its own internal procedures.

[108] St. Andre v. Henderson, 2000 U.S. Dist. LEXIS 16359, at *5 (N.D. Cal. Nov. 6, 2000) (referring to a previous edition of LINDEMANN ET AL., *supra* note 4 as "[a] leading treatise argues that mental incapacity is 'theoretically, but rarely practically, available as a basis for tolling the charge-filing period.' BARBARA LINDEMANN AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1369 (3d. ed. 1996). Many courts, it appears, have declined to allow equitable tolling in the case of alleged mental incapacity.").

[109] *See, e.g.*, Martin v. Alamo Cmty. College Dist., 353 F.3d 409, 410 n.1 (5th Cir. 2003); *St. Andre*, 2000 U.S. Dist. LEXIS 16359, at *5; Johnston v. O'Neill, 272 F. Supp. 2d 696, 703 (N.D. Ohio 2003).

[110] LINDEMANN ET AL., *supra* note 4, at 27-85.

[111] *E.g.*, Eber v. Harris County Hosp. Dist., 130 F. Supp. 2d 847, 867 (S.D. Tex. 2001).

dementia,[112] homelessness and paranoid schizophrenia,[113] or rape[114] in the workplace.[115] While I agree with the application of equitable to such extreme cases, I argue for an extension of equitable tolling to "less extreme" cases like those involving the veteran, the radiologist, and the comatose worker in which individuals suffer, often as a result of what happened in the workplace, and ask courts to hear their cases on the merits. My argument is thus *not* that equity never tolls on the basis of mental incapacity; it does. My argument is that equity sets impossibly high barriers to entry for tolling to attach, which is injurious to workers who may have suffered in the workplace. Because dignitary concerns require it, equitable tolling should apply to workers alleging less extreme facts than those accepted by the most egregious cases.

II. EQUITY AS DIGNITY

In this definitional section, I explore first the links between equity and dignity, articulate what non-humiliation requires, and, finally, explain how approaches proposed by other readers of contemporary American equity make salient the need for a dignitary approach to vulnerable plaintiffs at equity.

A. Defining Dignity

Both dignity and equity draw from a common historical pool, focus on the individual, and both are morally inflected. Dignity powerfully articulates what we should *not* do when faced with vulnerable human beings in our legal system.[116] Dignity requires that we not humiliate workers who allege that they suffer from a mental illness. I explore these points in turn.

Equity and dignity have roots in Antiquity,[117] and their evolution through the Middle Ages[118]

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[112] *E.g.*, Hardy v. Potter, 191 F. Supp. 2d 873, 881 (E.D. Mich. 2002).

[113] *E.g.*, Nunnally v. MacCausland, 996 F.2d 1, 6 (1st Cir. 1993) (describing worker "as 'nearly a street person,' the psychiatrist diagnosed her as probable paranoid schizophrenic"). *But see* DaCosta v. Union Local 306, IATSE, 2009 U.S. Dist. LEXIS 91468, at *33–35 (S.D.N.Y. Aug. 12, 2009) (recommending denial of equitable tolling to pro se homeless former worker who had received treatment for paranoid schizophrenia).

[114] *E.g.*, Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999).

[115] By stating that the standard is high I am neither arguing that the worker whose facts gave rise to the standard should be blamed, nor am I arguing that the case was wrongly decided. I am instead arguing that the standard should be relaxed on a dignitary basis to accommodate less egregious facts.

[116] For discussion of "dignity skeptics" (unsure of dignity's utility) and "antidignitarians" (certain of its uselessness), *see* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011) (offering an empirical study of Supreme Court opinions to argue that dignity implies five related concepts).

[117] That is, both have Greco-Roman origins. For equity, *see* MARÍA JOSÉ FALCÓN Y TELLA, EQUITY AND LAW 11–33 (2008) (discussing equity ("*epieikeia*") in Ancient Greek philosophy and equity ("*aequitas*") in Roman law); *see also* Smith, *Opportunism*, *supra* note 75, at 22 (referring to Aristotle's definition of equity). For dignity, *see* David Luban, *Human Rights Pragmatism and Human Dignity*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 263, 264 (Massimo Renzo, Rowan Cruft, & Matthew Liao, eds., 2015) [hereinafter Luban, *Human Rights Pragmatism*] ("For Cicero, who appears to have introduced the term, our dignity comes from our reason, the quality that sets us apart from beasts."); David Luban, *Human Dignity, Humiliation and Torture*, 19 KENNEDY INST. ETHICS J. 211, 213 (2009) [hereinafter Luban, *Humiliation and Torture*]; ROSEN, DIGNITY: ITS HISTORY AND MEANING, 11 (2012) (discussing Cicero's "immensely influential" work).

[118] Both equity and dignity bear the imprint of medieval thought. For equity, *see* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675–84 (5th ed. 1959); *see generally* CONWAY ROBINSON, HISTORY OF THE HIGH COURT OF CHANCERY: AND OTHER INSTITUTIONS OF ENGLAND FROM THE TIME OF CAIUS JULIUS CAESAR UNTIL THE ACCESSION OF WILLIAM AND MARY (IN 1688-9) (1882). For dignity, *see* Ruedi Imbach, *Human Dignity in the Middle Ages (Twelfth to Fourteenth Century)*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 64–73 (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds.,

was inflected, at least in part, by Catholic thought.[119] Samuel Moyn finds that Catholic natural law theories helped enshrine dignity in the Irish constitution in 1937 where "[i]ndividual human dignity entered global constitutional history in an unexpected place and at a surprising time."[120] Depending on one's view, equity either succumbed[121] or triumphed in 1937.[122] Either way, equity and dignity track each other across time. Both focus on the individual[123] and both are deeply rooted in morality.[124] Unsurprisingly, courts indicate that equitable remedies incorporate dignitary

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2014); Dietmar Mieth, *Human Dignity in Late-Medieval Spiritual and Political Conflicts*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 74–84.

[119] Catholic thought, reflected in medieval scholasticism, shaped both equity and dignity in powerful ways. For dignity, *see* ROSEN, *supra* note 117 at 16–17 ("That most seminal of Catholic thinkers, St. Thomas Aquinas, gives us an explicit definition of dignity . . . ."); *see also* Luban, *Humiliation and Torture*, *supra* note 117, at 213. *But see* Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 816 (2005) [hereinafter Luban, Lawyers as Upholders] ("The concept of human dignity sprouts from theological roots in the Abrahamic traditions."). For equity, *see* DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 26 (2010) (noting that the likely "predominant position [is] that Chancery principles were based on, or influenced by, canon law"). For dignity in other religious traditions, see Miklós Maróth, *Human Dignity in the Islamic World*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES, *supra* note 119, at 155–62; Jens Braarvig, *Hinduism: The Universal Self in a Class Society* in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES, *supra* note 118, at 163–69; *Buddhism: Inner Dignity and Absolute Altruism* in *id.* at 170; Luo An'Xian, *Human Dignity in Traditional Chinese Confucianism* in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES, *supra* note 119 at 177–81; Qiao Qing-Ju, *Dignity in Traditional Chinese Daoism* in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES, *supra* note 118, at 182–87.

[120] SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS 26–27, 31–32 (2015) (correcting the false "popular view [that dignity's] prominence is essentially due to World War II's aftermath, when in the shadow of genocide the light of human dignity shone forth").

[121] *See* DOBBS, *supra* note 46, at 51 (rejecting the identification of independent "equitable" remedies as "anomalous" post-merger); Laycock, *supra* notes 66–67 and accompanying text; Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923, 925, 974 (1987) (arguing that a deliberate and expansive "equity mentality" permeates the Federal Rules of Civil Procedure, which were adopted in 1937, and that equity has "swallowed the law," which has led to "unwieldy cases, uncontrolled discovery, unrestrained attorney latitude, and judicial discretion").

[122] *See* Subrin, *supra* note 121.

[123] For dignity, *see* Luban, *Human Rights Pragmatism*, *supra* note 118, at 271 (noting that "human rights individualizes"); *see also generally* MOYN, *supra* note 120. For equity, *see* Smith, *Opportunism*, *supra* note 75, at 37 (discussing the maxim that "equity acts in personam, not in rem" and arguing that "[t]he focus on the individual allows for evaluation of personal conduct from the moral point of view").

[124] On equity's morality, *see* DOBBS, *supra* note 121, at 55 ("One group of ideas associated with the term equity suggests fairness and moral quality. The law of fiduciary and confidential relationships developed by equity courts and carried on today in many forms, derived from equity's early emphasis on moral rectitude."); Irit Samet, *What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13, 13 (2012) (proposing a Kantian reading of equity's conscience such that "the doctrines of Equity are there to introduce moral norms to dealings among strangers"); Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903 (2012) (presenting a "reconstruction of the traditional approach to equity" to argue that equity targets opportunism, which "is a moral notion like theft and fraud"); Gergen et al., *supra* note 74, at 238 (arguing, in part, that traditional injunctive relief targets opportunism); Henry E. Smith, An Economic Analysis of Law Versus Equity 25–26 (March 12, 2012) (unpublished manuscript) (on file with Yale Law School) (arguing that equity is "a decision making mode that is directed against hard-to-prove opportunism"); Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2015) (noting that an alternative approach to "equity might be characterized as a model of decisionmaking (sic) that emphasizes case-specific judgment, moral reasoning, discretion, or antiopportunism (sic)"); Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 69 (2004) (noting, in the context of a discussion of nineteenth-century state courts' engagement with moral obligation,

concerns.[125] It is fitting to discuss equity and dignity together.

Dignity has at least three semantic threads, all of which have a moral foundation.[126] Dignity's most radical form asserts that an individual is "intrinsically valuable"[127] and her dignity "permanent and unchanging, not transitory or changeable."[128] Gerald L. Neuman identifies another iteration as "differential dignity."[129] For those who subscribe to this version, an individual's social rank or status defines her dignity.[130] Others read this iteration to mean that an individual has dignity when she acts in a "dignified" manner,[131] can plan her future, act on her own behalf, and so on.[132]

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that "notions of morals and ethics imbedded in equity would have contributed since many American jurisdictions had operated under fused or partially-fused courts of law and equity from statehood"); Manning, *supra* note 45, at 120 ("the point is simply that if statutes in our constitutional system are untempered by the external moral judgments of equity, they (unlike their English counterparts) are nonetheless tempered by the external constraints codified in a written Constitution"); Bradley M. Elbein, *The Hole in the Code: Good Faith and Morality in Chapter 13*, 34 SAN DIEGO L. REV. 439, 484–85 (1997) ("equity can be characterized as informal, idiosyncratic, and moral. It is certainly not surprising that an area of law descended from equity might contain traces of these elements. Nor is it particularly surprising that an equity court's analysis should take on a moral dimension"). On dignity's moral underpinnings, *see generally* Düwell, *supra* note 118, at 32 (noting resistance to evocations of morality in the law, and responding that the legal understanding of dignity would be frustrated by a failure to understand its moral underpinnings); Luban, *Human Rights Pragmatism*, *supra* note 117, at 6 (arguing that "without a connection with moral human rights, ILHRs [international legal human rights will fail as legal rights"]); MOYN, *supra* note 120 (discussing the powerful influence exerted by Catholic morality over legal earlier articulations of dignity).

[125] *See, e.g.*, Laguna v. Coverall N. Am., Inc., 753 F.3d 918, 932 (9th Cir. 2014) (emphasis added) ("while it is true that equitable relief sometimes is not capable of quantitative valuation (for example, where equitable relief is directed to *dignity interests* such as privacy rights)"); Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting) (emphasis added) ("Because it is intended to protect *the integrity of the judicial process*, [judicial estoppel] is an equitable doctrine invoked by a court at its discretion."); Sword v. Sweet, 140 Idaho 242, 252 (2004) (same); Deon v. H & J, Inc., 157 Idaho 665, 668 n.2 (2014) (same); Winebrenner v. Winebrenner, No. 96-L-033, 1996 Ohio App. LEXIS 5511, at *9 (Ct. App. Dec. 6, 1996)(emphasis added) ("In the exercise of that discretion in a civil contempt proceeding, the court has the ability to either exercise its equitable powers in fashioning a coercive remedy designed to achieve compliance with the court's orders, or, it can determine that the claimed contempt did not, in fact, violate the authority and *dignity of the court*."); Citimortgage, Inc. v. Kurt, 2014 Fla. Cir. LEXIS 21528, *8 (Fla. 6th Cir. Ct. Oct. 27, 2014) (emphasis added) ("The Court finds that Plaintiff has established that it has an equitable lien *superior in dignity* to all defendants herein . . . ."); Parolisi v. Beach Terrace Improvement Ass'n Inc., C. A. File No. 78-2751, 1980 R.I. Super. LEXIS 79, at *8 (R.I. Super. Ct. May 9, 1980) (emphasis added) ("Ordinarily, matters of contempt are addressed to the sound discretion of the court of equity, to be exercised in accordance with particular facts and findings as to extent and willfulness (sic) of defendants' contempt for authority and *dignity of the Court*.").

[126] *See* ROSEN, *supra* note 118, at 6 (three definitions of dignity). *But see* Alan Gewirth, *Human Dignity as the Basis of Rights* in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 11–14 (Michael J. Meyer & William A. Parent eds., 1992) (two definitions of dignity); Henry, *supra* note 117, at 177 (five conceptions of dignity).

[127] Gewirth, *supra* note 127, at 12. I say "radical" because this view of dignity is in sharp contrast to the historical understanding of status-based dignity that operated "in a universe of aristocratic and hierarchical values". MOYN, *supra* note 121, at 33.

[128] Gewirth, *supra* note 126, at 12.

[129] Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 250–51 (Dieter Sion & Manfred Weiss eds., 2000) ("The idea of intrinsic human dignity should be distinguished from a related idea, that of differential dignity. In some societies, differing levels of dignity (or none at all) have been attributed to different individuals in accordance with their rank, class, office, or achievements.").

[130] Neuman, *supra* note 130, at 250–51; *see also* Henry, *supra* note 117, at 192; Luban, *Lawyers as Upholders*, *supra* note 118, at 839.

[131] *See* ROSEN, *supra* note 118, at 6; Gewirth, *supra* note 127, at 12.

[132] *See* Gewirth, *supra* note 127, at 12.

Under this reading, "human dignity is *consequent upon* the having of rights and hence is not the *ground* for rights."[133] A third thread, and extension of these iterations, subordinates our understanding of dignity as a practical matter to context.[134] Thus, David Luban argues that dignity is its use by courts, lawyers, and those involved in human rights.[135] We might understand evocations of institutional dignity in this light.[136] In this article, dignity fundamentally attaches to each human being and is intrinsic. To the extent that others pursue other formulations, I relate them to the other views of dignity that I have enumerated.

Commentators have shown that dignity requires non-humiliation of human beings.[137] Of at least three definitions of humiliation,[138] Luban's approach is the most persuasive as it focuses on the individual subject: "I am humiliated when I am *wrongly* taken down a peg—when others treat me as a lesser sort than I really am. Humiliation is an affront to my dignity."[139] That is, the subjective "I," the individual's experience of conduct, omissions or speech that abases her, matters.

But how might individuals be wrongly abased? They might be denigrated when their

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[133] *See* Gewirth, *supra* note 127, at 12.

[134] *See* ROSEN, *supra* note 117, at 6; Luban, *Human Rights Pragmatism*, *supra* note 118, at 274–78.

[135] Luban, *Human Rights Pragmatism*, *supra* note 118, at 275.

[136] *See* Henry, *supra* note 117, at 190–99.

[137] *See* BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 317 (2014); Luban, *Lawyers as Upholders*, *supra* note 120, at 838–40; Luban, *Humiliation and Torture*, *supra* note 117, at 214–25; David Luban, *The Rule of Law and Human Dignity: Re-examining Fuller's Canons*, 2 HAGUE J. ON RULE L. 29, 44 (2010) [hereinafter Luban, *Fuller's Canons*]; Kenji Yoshino, *The Meaning of the Civil Rights Revolution: The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076 (2014); AVISHAI MARGALIT, THE DECENT SOCIETY 1 (1996); *see generally* WILLIAM IAN MILLER, HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE (1993).

[138] While Bruce Ackerman, David Luban, and Kenji Yoshino explore dignity's non-humiliation requirement in the legal context, Avishai Margalit explores non-humiliation more generally, and William Ian Miller explores humiliation primarily in the context of Norse sagas. Ackerman's definition of non-humiliation begins with the personal where it requires that there be "*a face-to-face insult.*" ACKERMAN, *supra* note 138, at 138 (emphasis in original) ("We have reached the moment of humiliation, which I define as a *face-to-face insult in which the victim acquiesces in the effort to impugn his standing as a minimally competent actor within a particular sphere of life.*"). Ackerman finds that institutionalized humiliation is more powerful than personal humiliation. *Id.; see also* Yoshino, *supra* note 138, at 3079 (applying Ackerman's definition). Margalit's definition, on the other hand, requires that the individual have "a sound reason . . . to consider his or her self-respect injured." MARGALIT, *supra* note 138, at 9. For Margalit, human actions and omissions and life conditions are "sound reasons" to feel humiliated but these "reasons," outside identified examples of rights violations, appear somewhat difficult to isolate. *Id.* at 9 *et seq.* I reject both Ackerman's and Margalit's definitions humiliation as too narrow. Regarding Ackerman's definition, since there are disturbing situations in which the humiliated individual is not aware of her humiliation, Ackerman wrongly predicates his grant of personal humiliation on awareness. Luban, for example, offers the example of a female student who passes out after drinking too much, is undressed and her exposed body "exhibit[ed]" "to everyone" before she is clothed again and is never told about what happened as proof of humiliation as "not merely subjective." Luban, *Humiliation and Torture*, *supra* note 118, at 219. As for Margalit's definition, his focus on a "sound reason," in which he includes violations of human rights, can be read to attribute to people other than the humiliated individual the decision about whether feeling humiliated is justified. *See* MARGALIT, *supra* note 138, at 9, 39–40.

[139] Luban, *Lawyers as Upholders*, *supra* note 118, at 839.

"ontological heft"[140] is denied solely on the basis of the individual's alleged inferiority.[141] Under this understanding, dignity's non-humiliation injunction mandates that institutions[142] provide counsel, for example, that facilitates the hearing of that particular litigant's story no matter who she is so that her subjectivity is honored:[143]

> Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. Knowing no law, they may omit the very facts that make their case, or focus on pieces of the story that are irrelevant or prejudicial. They may be unable to utilize basic procedural rights such as objecting to their adversary's leading questions. Their voices may be nails on a chalkboard or too mumbled to understand. They may speak a dialect, or for that matter know no English. None of this should matter. Human dignity does not depend on whether one is stupid or smooth. Hence the need for the advocate. Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece.[144]

The individual's story is a reflection of that individual's "ontological heft." When that individual's ability to tell her story is denied, the denial "fundamentally denigrates [that individual's] status in the world."[145] Kenji Yoshino implicitly extends this insight when he argues that in the civil rights context the opportunity to be heard allows individuals to testify regarding the institutional humiliation that they have encountered and allows them to have experts contextualize their testimony—all subject to adversarial testing.[146] Non-humiliation thus requires attention to the subjective voice and experience of the marginalized, subject to adversarial testing.

But why focus non-humiliation as proof of dignity? Why offer a negative definition of a positive state? As his argument is about a "decent society . . . one whose institutions do not humiliate people," Avishai Margalit's response is useful. Margalit identifies moral, logical, and cognitive reasons for privileging discussions of non-humiliation. Morally, Margalit argues, removal of negative attributes like humiliation is preferable in itself to creating "enjoyable benefits."[147] Logically, humiliating acts are more easily identifiable and eradicable (such as

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[140] An individual's "ontological heft" is denied when her subjectivity is overlooked:

> Intuitively, it seems plain that, elusive or not, our own subjectivity lies at the very core of our concern for human dignity. To deny my subjectivity is to deny my human dignity. Obviously, only a psychotic or a solipsist really thinks 'the world revolves around me.' But, tautologically, my world revolves around me; that is, I am the one necessary being in my world. This is what some have called the 'egocentric predicament.' Human dignity is in some sense a generalization from the egocentric predicament. Human beings have ontological heft because each of us is an 'I', and I have ontological heft. For others to treat me as though I have no ontological heft fundamentally denigrates my status in the world. It amounts to a form of humiliation that violates my human dignity.

Luban, *Lawyers as Upholders*, *supra* note 119, at 821.

[141] *Id.* at 821, 822.

[142] *Id.* at 819; Luban, *Fuller's Canons*, *supra* note 137, at 40–41; Luban, *Humiliation and Torture*, *supra* note 118, at 214.

[143] Luban, *Lawyers as Upholders, supra* note 119, at 826 ("[W]hat I care about is central to who I am, and to honor my human dignity is to take my cares and commitments seriously.").

[144] *Id.* at 819.

[145] *Id.* at 821.

[146] Yoshino, *supra* note 137, at 3093; *see also generally* Kenji Yoshino, *The City and the Poet*, 114 YALE L. J. 1836 (2005) (exploring the enduring power of storytelling in the law).

[147] MARGALIT, *supra* note 137, at 4.

"spitting in someone's face") than identifying enjoyable benefits, which often arise as "by-products of other actions."[148] Cognitively, "it is easier to identify humiliating than respectful behavior, just as it is easier to identify illness over health."[149] Thus, moral, logical, and cognitive reasons compel focus on non-humiliation of human beings in an argument about human dignity.

Non-humiliation is a powerful antidote to the treatment encountered by the millions of Americans who suffer from mental illness. Recent estimates indicate that almost 44 million American adults suffer from mental illness; almost 10 million from a serious mental illness, which is a complex phenomenon that varies by sufferer.[150] In some cases of mental illness, an individual's ability to reason may encounter severe difficulties.[151] Solely on the basis of their mental illness, sufferers may be ignored and/or encouraged to commit suicide.[152] Those with mental illness "still remain the most stigmatized population of people with disabilities."[153] "[They] are seen as shameful, dangerous, and irresponsible . . . ."[154] An admission of mental illness, even in private, often marks an individual as afflicted in such a way as to make that person appear less reliable, diligent, and less disciplined.[155] Public admissions of mental illness, like those in complaints and open court, often supported by medical evidence, similarly mark an individual as afflicted in disconcerting ways.[156] Thus, a veteran, radiologist, or worker who has lapsed into a coma and who alleges that mental illness prevented a timely filing exposes herself to potential adverse treatment

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[148] MARGALIT, *supra* note 137, at 4–5.

[149] *Id.* at 5 ("Health and honor are both concepts involving defense. We defend out honor and protect our health. Disease and humiliation are concepts involving attack. It is easier to identify attack situations than defense situations, since the former are based on a clear contrast between the attacker and the attacked, while the latter can exist even without an identifiable attacker.").

[150] THE NATIONAL INSTITUTE OF MENTAL HEALTH, NATIONAL SURVEY ON DRUG USE AND HEALTH (2014), http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.htm.

[151] *See* ELYN R. SAKS, THE CENTER CANNOT HOLD 13 (2007) (observing in a memoir about schizophrenia that "[c]onsciousness gradually loses its coherence. One's center gives way. The center cannot hold. The 'me' becomes a haze, and the solid center from which one experiences reality breaks up like a bad radio signal. There is no longer a sturdy vantage point from which to look out, take things in, assess what's happening. No core holds things together, providing the lens through which to see the world, to make judgments and comprehend risk. Random moments of time follow one another. Sights, sounds, thoughts, and feelings don't go together. No organizing principle takes successive moments in time and puts them together in a coherent way from which sense can be made. And it's all taking place in slow motion."); MARYA HORNBACHER, MADNESS: A BIPOLAR LIFE 118 (2008) ("When you are mad, mad like this, you don't know it. Reality is what you see. When what you see shifts, departing from anyone else's reality, it's still reality to you.").

[152] *See* Eyal Press, *Madness*, THE NEW YORKER, May 2, 2016, at 38, 73 (documenting violence and verbal abuse perpetrated with impunity by prison guards against those with mental illness at a Florida prison and observing that New York City inmates presenting mental health issues are often treated just as egregiously).

[153] Waterstone, *supra* note 72, at 536.

[154] Korn, *supra* note 72, at 587.

[155] *See generally* Nicolas Rüsch et al., *Do People with Mental Illness Deserve What They Get? Links Between Meritocratic Worldviews and Implicit Versus Explicit Stigma*, 260 EUR. ARCHIVES OF PSYCHIATRY AND CLINICAL NEUROSCIENCE 617 (2010) (study of 85 participants in Chicago, IL finding that meritocratic worldviews (Protestant work ethic which values personal responsibility and hard work; and "belief in a fundamentally just and fair world") were associated with more discriminatory attitudes, including toward those with mental illness, particularly among those who subscribed to the Protestant work ethic).

[156] *See* Janet R. Cummings et al., *Addressing Public Stigma and Disparities Among Persons with Mental Illness: The Role of Federal Policy*, 103 AM. J. OF PUBLIC HEALTH 781, 784 (2013) (noting that "individuals with mental illness might not seek protection from discrimination out of fear of becoming more publicly identified as having mental illness and the stigma that may ensue").

by alleging that an exceptional condition over which she exercises no control affected her engagement with the judicial process. By upholding that worker's dignity, equity should aid and not prevent such a worker from proceeding on the merits against her employer.

B. Why Dignity Matters

That dignity matters for equity is underscored by a review of the work of prominent readers of American equity. Equity scholars have responded to Douglas Laycock's salvos directed at the remaining distinctions between law and equity. I explain why Laycock's functional argument is unhelpful when considering the dignitary plight of workers suffering from mental illness and also explore why Henry Smith's and Samuel Bray's functional arguments similarly fail to yield an account of how vulnerable workers should be treated at equity.

1. Laycock's Dead Equity

Applying Laycock to the case of veteran, the radiologist, and the comatose worker would be unhelpful for a number of reasons. First, Laycock's statement of the governing law, issued in 1991, may no longer be correct. Second, Laycock's paradigm does not tell us about the dignitary treatment that workers alleging that mental illness prevented them from filing on time should expect at equity.

Laycock attacks equity by targeting the injunction's irreparable injury rule, "modern equity's premier remedy."[157] The irreparable injury rule is a threshold inquiry in requests for injunctions[158] that requires the plaintiff to show that monetary damages (available at law) are not enough (which gets the plaintiff into equity).[159] Courts find ways of surmounting or sidestepping the inadequacy of damages requirement in requests for injunctive relief, which means that a litigant gets equitable relief if she wants it.[160] The language of irreparable injury is an historical label that tells us nothing about what judges actually do.[161] The distinction between law and equity is "obsolete,"[162] and Laycock "seek[s] to complete the assimilation of equity, and to eliminate the last remnant of the conception that equity is subordinate, extraordinary, or unusual."[163]

Applying Laycock, "equitable tolling" might be the label that courts use to dispense with a class of cases containing, for example, highly subjective allegations that are costly and difficult to verify.[164] Deciding (1) whether the worker has been diagnosed with a mental illness; (2) by whom; (3) when; (4) whether that diagnosis credibly suggests that the worker was incapacitated; and (5) whether the incapacitation overlapped with the requisite statutory limitations period, can tax judicial and other resources.[165] Given that courts labor under burdensome caseloads, and that

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[157] Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1644 (1992) (reviewing LAYCOCK, *supra* note 66). *But see* F.W. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 23 (1909) ("Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.").

[158] LAYCOCK, *supra* note 66, at 10 ("Adequacy seems to imply an absolute standard: Does the legal remedy reach the threshold of adequacy?").

[159] *Id.* at 4.

[160] *Id.*

[161] *Id.* at 7 ("Irreparable injury rhetoric has survived only as a label, to be affixed to opinions after the court has chosen the remedy.").

[162] *Id.* at ix.

[163] *Id.* at vii.

[164] On the costliness of equitable remedies, *see* Subrin, *supra* note 121, at 921, 925, 937, 983 & 986–87.

[165] *See Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1180 (6th Cir. 1995) (observing that "[t]he mental

budget cuts threaten the American model of a thriving judiciary, it may be that whether we call it "equitable tolling," "tolling," or (to use a neologism) "A Petition to Proceed on the Merits" is functionally meaningless.[166] What really matters, as Laycock finds, is what courts are doing beneath the label (despite the label's reputed equitable history and content) and why. That is, courts may be dispensing with cases, like those of the veteran, the radiologist, and the comatose worker whose mental claims they find are costly and/or dubious and/or difficult to verify.

Mental illness at law may also support Laycock's contention that distinctions between law and equity are untenable. An equitable maxim states that equity follows the law. Where there is a clear legal rule that targets opportunistic conduct, "then there is no call for equity to backstop the law."[167] The Fifth Circuit's coma case indicates that while equity refuses to do so, the law may toll on the basis of mental illness.[168] As Laycock might observe, why maintain atavistic distinctions between law and equity when those distinctions may not redound to the veteran's, the radiologist's, and the comatose worker's benefit?

Despite the appeal of Laycock's argument, the Supreme Court's recent equitable jurisprudence undermines his argument, and the utility of Laycock's argument to workers alleging that mental illness foreclosed a timely filing is undermined by equity's moral and individualized attention to particular facts, which compels a dignitary approach to cases of mental illness.

Fifteen years after Laycock's 1991 argument, the Supreme Court upheld equitable principles in *eBay Inc. v. MercExchange, L.L.C.*[169] In that case the court held that the Patent Act requires a plaintiff requesting a permanent injunction to show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[170]

eBay has been read into a number of other areas of the law.[171] As Bray has found in his analysis of the Supreme Court's equitable jurisprudence, "in remedies, the Court has insisted with vigor on the historic division between law and equity."[172] Despite Laycock's antagonism to equitable remedies, therefore, it is fitting to discuss equitable tolling in the context of an argument

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instability of an individual is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, as reasonable professionals can disagree as to an individual's mental state."); *see also generally* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 571, 572–77 (2016) (discussing high costs at equity); Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCH. PUB. POL. AND L. 1, 2 (2011) (observing that competency to stand trial in criminal cases involve significant monetary outlays, including "costs associated with competency evaluations should they be conducted poorly.").

[166] *See* JOHN ROBERTS, CHIEF JUSTICE'S 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY, Dec. 2013, at 1 *et seq.*; ADMIN. OFFICE OF THE U. S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, JUDICIAL CASELOAD INDICATORS—JUDICIAL BUSINESS 2014, http://www.uscourts.gov/statistics-reports/judicial-caseload-indicators-judicial-business-2014 (last visited Mar. 4, 2016); *see also* ROBERTS, CHIEF JUSTICE'S 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, Dec. 2015, at 10 (noting that judges are "[f]aced with crushing dockets".).

[167] Smith, *supra* note 75, at 36.

[168] *Eber*, 130 F.Supp.2d at 864.

[169] 547 U.S. 388 (2006).

[170] *eBay Inc.*, 547 U.S. at 391.

[171] *See* Gergen et al., *supra* note 74, at 205.

[172] Bray, *supra* note 77, at 1000.

underscoring the continuing appeal of equitable remedies.

Laycock's argument similarly fails since it does not tell us how vulnerable individuals should be treated at equity. Unlike the irreparable injury cases in which Laycock found that the plaintiff often got the remedy of her choice, in equitable tolling cases in which workers allege that mental incapacity prevented a timely filing, judges install a high barrier between workers alleging that mental illness foreclosed a timely filing and their ability to proceed on the merits against their employers. While Laycock's argument tells us what judges might be doing under the guise of "equity" and why distinctions between law and equity might be problematic, Laycock's argument does not tell us how vulnerable workers should be treated at equity. Laycock's argument fails in these regards.

2. Smith's Anti-Opportunism

Henry Smith's functional approach to equity similarly fails to account for such workers. Smith argues that opportunists find loopholes in the system, which they exploit. Opportunists are creative thinkers against whom equity's ex post analysis is particularly adept at "keep[ing] the ex ante environment safe from opportunists' misuse and manipulation."[173] Opportunists often engage in "behavior that is technically legal but is done with a view of securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others."[174] Equity "is reserved for as-yet-undreamed-of opportunism."[175]

Judicial concern about opportunism may compel courts to use the limitations period as a sword against workers whose inability to substantiate claims of mental illness is likely proof of the invalidity of such workers' claims that mental illness prevented a timely filing.[176] In such cases, the worker cannot provide the requisite proof because she likely was not mentally ill in the first place. It may thus be that courts inured to opportunistic players denied equitable tolling to the veteran, the radiologist, and the worker who lapsed into a coma not because courts are hostile to workers suffering from mental illness but because they are hostile to opportunists attempting to use employment discrimination cases to game the system.

Since workers may opportunistically sit on their claims to harass their employers, by rejecting equitable tolling on the basis of mental incapacity to the comatose worker, the radiologist, and the veteran, courts may have implicitly invoked the maxim that equity aids the diligent and vigilant. The worker who lapsed into a coma filed his complaint roughly 295 days late;[177] the radiologist failed to meet a first deadline by 29 days[178] and, by never filing, missed the second deadline entirely;[179] and the veteran filed 318 days late.[180] The equitable tolling standard set by the Supreme

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[173] Smith, *supra* note 76, at 6.

[174] *Id.* at 15.

[175] *Id.* at 10.

[176] *See, e.g.*, Kerver v. Exxon Production Research Co., 1986 U.S. Dist. LEXIS 25480, at *5–6 (S.D. Tex. May 15, 1986) ("This comports with Plaintiff's deposition testimony in which he indicated that he was at all times capable of handling his own affairs and never considered himself mentally or emotionally ill. Most importantly, Plaintiff does not claim that he was at any time legally incompetent."); *see also* Hartnett v. Chase Bank of Tex. Nat'l Ass'n, 59 F. Supp. 2d 605, 614 (N.D. Tex. 1999) (explaining that a medical assessment did not support the worker's claim).

[177] *Eber*, 130 F. Supp. 2d at 851, 866.

[178] *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *27.

[179] *Id.* at *20–21.

[180] *Southall*, 2016 U.S. Dist. LEXIS 52634, at *4.

Court requires a showing of diligence for tardy plaintiffs to toll the limitations period at equity.[181] As Smith notes, the problem with some late filings is that they may be filed deliberately late to the prejudice of the defendant.[182] Equity may thus implicitly deploy its doctrine of laches, which targets delays, against such claimants.

Despite the appeal of Smith's argument, however, it has limitations to which I now turn. Smith's anti-opportunism tells us little about the kinds of treatment that particular litigants, like those alleging mental illness, should expect from their judicial system (apart from the detection of opportunistic misconduct, which Smith aligns with immoral conduct, bad faith conduct, manipulation, exploitation and scheming, among others).[183] In the three employment discrimination cases, we encounter a woman who has been subjected to sexual misconduct in the workplace and suffers from resulting mental illnesses, a veteran with severe traumatic injuries and mental illness, and a worker whose near-death experience gave rise to mental illness. These workers represent three vulnerable constituencies: women, veterans, and those ill and unable to work. Anti-opportunism does not tell us how they should be treated at equity.

Because vulnerable constituencies have seen their place in our society change when courts upheld their narratives, these three categories of workers matter in a discussion of equity and dignity. Equity's own history shows that widows were favored,[184] women relied on equity for assertion of their property interests,[185] and racial minorities sued and won at equity in a Supreme Court case that has been called the most important case decided at equity in the United States.[186] As Gary L. McDowell has noted (albeit with disapproval), "equity, which was originally understood as a judicial means of offering relief to individuals from 'hard bargains' in cases of fraud, accident, mistake, or trust, and as a means of confining the operation of 'unjust and partial laws,' has lately been stretched to offer relief to whole social classes."[187] Thus, while anti-

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[181] *See Holland*, 560 U.S. at 649 (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[182] Smith, *supra* note 76, at 49.

[183] *See id.* at 26.

[184] *See* Duane Rudolph, *How Equity and Custom Transformed American Waste Law*, 2 PROP. L. J. 1, 22–23 (2015) [hereinafter Rudolph, *Equity and Custom*] (citing to Justice Story for the proposition that "it was 'extremely difficult' to object to a widower's dower at equity.").

[185] *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 357 (2009) ("Chancery's manipulation of the trust device to create and expand protections for the property of married women was among the court's most notable doctrinal achievements across the seventeenth and eighteenth centuries."); *see also generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015) (Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) ("As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.").

[186] PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 4 (1990) ("*Brown* [*v. Board of Education*] was and remains the greatest 'equity' suit in our country's history, perhaps in the history of equity."); *see also* Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J. L. & POL'Y 11, 12 (2004) ("The most famous decision of the United States Supreme Court, *Brown v. Board of Education* stands both as the 'landmark' emblem of social justice and the symbol of the limitations of court-led social reform."); Charles J. Russo, *Encyclopedia of Education Law* xxxi (2008) ("*Brown v. Board of Education of Topeka* (1954) is the most important education-related case in the history of the United States, perhaps the most important decision of all time, regardless of subject matter."); ACKERMAN, *supra* note 138, at 317 (*Brown v. Board of Education* was "the greatest judicial opinion of the twentieth century"). *But cf.* Randall L. Kennedy, *The Meaning of the Civil Rights Revolution: Ackerman's Brown*, 123 YALE L.J. 3064, 3069 (2014) (observing that while *Brown* may be the "greatest" opinion in terms of "consequentiality," its "Delphic ambiguity" leaves it "deficient in important respects").

[187] GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC

opportunism implies that the ex post suppression of morally dubious conduct will purge some of that conduct in the ex ante arena, it does not tell us what those who are not acting opportunistically can and should expect in proceedings at equity.

Smith's anti-opportunism thesis, like Laycock's argument, thus does not account for the dignitary treatment that workers alleging that mental illness affected their ability to bring a timely claim should expect at equity.

3. Bray's Equitable System

Bray's functional equity similarly overlooks the power of dignitary arguments. Bray's insight is that equity is a rational system that compels action and inaction.[188] As a system, it includes remedies, managerial devices, and flexible equitable constraints to mitigate against high costs and potential abuse at equity.[189] The equitable system is both useful and rationally distinct from the legal system, and its structural integrity should be maintained.[190]

While absent from Bray's equitable taxonomy, equitable tolling is implicit in Bray's treatment of equitable defenses.[191] Echoing Smith's concern with opportunism, Bray argues that equitable defenses reflect "equity's refusal to allow the power of these remedies to be used on behalf of a plaintiff who acts unjustly."[192] As such, the courts' conclusions in the cases of the veteran, the radiologist, and the comatose worker may be the result of judicial concern with unjust plaintiffs who might manipulate the legal process. Like Smith's opportunism, Bray's application of equitable defenses against unjust plaintiffs helps us see that the workers in the three cases may have been acting "unjustly," which is why equitable tolling was denied on the basis of mental incapacity.

Bray's approach to equity as a system also allows us to see that both the worker and employer can avail themselves of equity, evoking notions of fairness.[193] The veteran suffering from traumatic brain injuries and PTSD whose employer denied accommodation of his disabilities requested equitable remedies in the form of declaratory[194] and injunctive relief.[195] His employer, the army contractor, raised the limitations period against the veteran, and argued against the worker's invocation of equitable tolling, with which the court agreed.[196] The equitable system is thus one of weights and counterweights in which both workers' and employers' interests are balanced against each other, meaning that the system is not inherently opposed to any position since it empowers either party to raise the strongest claims on her own behalf.

Despite these attributes, the limitations of Bray's equitable system impair its utility to workers alleging that mental illness prevented timely filing of their federal employment discrimination lawsuits. While Bray's equitable taxonomy allows us to tell the veteran, the radiologist, and the comatose worker why their claims appear to have been denied (a statutory defense was

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POLICY 4 (1982) (noting with disapproval equity's extension to embrace "sociological" understandings of the term).

[188] *Id.* at 533, 534, 536, 553, 562, 563 & 593.

[189] *See* Bray, *supra* note 125, at 532.

[190] *Id.* at 593.

[191] *See id.* at 581–82.

[192] *Id.* at 581.

[193] *See id.* at 532; *see also* Smith, *supra* note 76, at 46.

[194] On declaratory relief, *see generally* Bray, *supra* note 125, at 542 ("One other remedy, the declaratory judgment, though not easy to classify, should typically be seen as a non-equitable remedy.").

[195] Compl. at 7, *Southall*, 2016 U.S. Dist. LEXIS 52634.

[196] *See Southall*, 2016 U.S. Dist. LEXIS 52634, at *4.

successfully raised against them and equity balanced their claims against those of their employers), Bray's approach lacks the subjective dimension provided by a dignitary approach. Bray's taxonomy cannot tell a worker that, even though she suffered sexual improprieties in the workplace and will now not be heard on the merits regarding that workplace mistreatment, the court did not humiliate her when it denied her equitable defense in the face of her mental illness. It cannot tell a veteran that the court's refusal to hear his argument that major depression or PTSD or traumatic brain injuries prevented a timely feeling does not institutionalize the prejudice that those suffering from mental illness have faced and continue to face in the legal system. It cannot tell workers that courts' privileging of the most extreme facts at equity implies that their suffering is not severe enough. Bray's system thus cannot tell a worker why it is significant that the court did not get to hear her story and why that matters given that worker's mental illness and the workplace environment in which she worked.

Thus, just like Laycock's and Smith's accounts of equity, while Bray's equitable system argument is appealing, it fails to account for the kinds of treatment that dignity requires of courts, notably non-humiliation of vulnerable workers.

III. HUMILIATION AND DEFIANCE

A. Humiliation

Recalling Luban's insight that a human being is humiliated when she is wrongly treated as inferior, we might now examine how humiliation operates at the equitable tolling stage in federal employment discrimination cases.[197]

Humiliation implies abasement, which makes itself explicit in equitable tolling cases when courts raise the bar so high that all but what courts identify as the most extreme cases of mental suffering are rendered unsuccessful.[198] The standard announced in the extreme coma case (granting

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[197] *See Luban, Lawyers as Upholders, supra* note 118, at 839.and accompanying text.

[198] Courts are aware that employees can be humiliated. *See, e.g.*, Craig v. D.C., 74 F. Supp. 3d 349, 371 (D.D.C. 2014) (citation omitted) ("Even after [worker] stepped back, she alleges that [co-worker] continued advancing towards her while pointing his finger in her face and calling her a 'fucking bitch . . . .' Both of these incidents, when described in full and considered alongside [co-worker's] other allegations, suggest the kind of serious and objectively 'physically threatening or humiliating' conduct that supports a hostile work environment claim."); Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810 (11th Cir. 2010) ("Calling a female colleague a 'bitch' is firmly rooted in gender. It is humiliating and degrading based on sex. *Cf. Harris*, 510 U.S. at 23 (holding that, to prove a hostile work environment, courts may consider whether conduct is humiliating)."); Ault v. Oberlin Coll., 620 Fed. Appx. 395, 401 (6th Cir. 2015) (holding that where supervisor "stood directly against [worker] so that she could feel his penis, trapping her in position and remaining there despite [worker's] telling him to remove himself" was "egregious enough to create a hostile work environment"); Mayes v. Office Depot, Inc., 292 F. Supp. 2d 878, 895 (W.D. La. 2003) ("Neither a discriminatory failure to promote nor mere humiliation can support a case of constructive discharge."); Williams v. GMC, 187 F.3d 553, 563 (6th Cir. 1999):

> First, Williams's own supervisor, Ryan, made her the target of unwanted and humiliating sexual innuendo. On one occasion he looked at her breasts and said, 'You can rub up against me anytime,' adding, 'You would kill me, Marilyn. I don't know if I can handle it, but I'd die with a smile on my face.' On another occasion, he put his arm around her neck and placed his face against hers, and noticing that she had written 'Hancock Furniture Company' on a piece of paper, said, 'You left the dick out of the hand.' Finally, one day while bending over, he came behind her and said, 'Back up; just back up.' These incidents, which must be taken as fact for purposes of summary judgment, were not merely crude, offensive, and humiliating, but also contained an element of physical invasion.
>
> Second, contrary to the district court's conclusion, we do not view a co-worker's saying 'Hey, slut' as merely 'foul language in the workplace.' In addition, hearing 'I'm sick and tired of these fucking women' while the target of a box thrown by a co-worker is not merely 'mean and annoying treatment by co-workers.' These actions could be

equitable tolling for a coma but not for the resulting major depression) is good law 15 years after it was decided.[199] Other courts impose a "profound mental incapacity" standard on which basis they hold that workers proceeding pro se who suffer from PTSD and depression do not merit equitable tolling.[200] Other courts require an "inability to engage in rational thought,"[201] and others recognize dementia (causing "total" disability) as warranting equitable tolling.[202] In the veteran's case, the court interpreted the governing standard to require the veteran to analogize his experience to that of a worker raped in the workplace who had suffered subsequent mental illness.[203] The court also implied that the employer against whom equitable tolling is sought must be the cause of the conditions underlying the mental illness on which basis equitable tolling is sought.[204]

Recalling the facts of the rape case to which analogy was required helps underscore the nature of the institutional humiliation facing workers at the equitable tolling stage. While the court in the veteran's case referred to one case, there were in fact two cases in which the worker had been repeatedly raped[205] and otherwise abused in the workplace,[206] which resulted in a number of

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viewed by a jury as humiliating and fundamentally offensive to any woman in that work environment, and they go to the core of Williams's entitlement to a workplace free of discriminatory animus.

[199] *See Eber*, 130 F. Supp. 2d at 866, announcing but not systematically applying the following factors:

> When determining whether a given mental disorder justifies the tolling of limitations, courts have focused on such factors as: (a) the plaintiff's representation by counsel; (b) the plaintiff's capacity to work; (c) the plaintiff's ability to execute legal documents; (d) the degree to which the plaintiff was able to interact with others; (e) medical evidence 'regarding any mental, emotional or psychological problem' that the plaintiff endured; and (f) an adjudication of incompetency or a hospitalization for mental incapacity.

[200] Deweese v. Colvin, No. 3:15-16210, 2016 U.S. Dist. LEXIS 82268, at *10–11 n.6 (S.D. W. Va. June 24, 2016) (citations and internal quotation marks omitted) ("the Fourth Circuit has previously held that equitable tolling based on mental health issues is only appropriate in cases of profound mental incapacity, including institutionalization or adjudged mental incompetence. For example, in [one case] the Court held that the plaintiff's mental conditions, schizoaffective disorders and generalized anxiety disorder, were not a sufficient basis for equitable tolling").

[201] Nunes v. Butler, No. 14-378L, 2015 U.S. Dist. LEXIS 117819, at *15–16 (D.R.I. July 17, 2015) ("This standard[]—[]the inability to engage in rational thought and deliberate decision such that an applicant is unable understand or act on his rights[]—[]has been applied [for over two decades] as the test for equitable tolling in this Circuit.").

[202] *E.g., Hardy*, 191 F. Supp. 2d at 881 (granting equitable tolling to worker diagnosed with dementia, living with family).

[203] *See Southall*, 2016 U.S. Dist. LEXIS 52634, at *9 ("He alleges no facts detailing an inability to function similar to that of the plaintiff in *Stoll*."). The veteran relied on the rape case for the general proposition that "Equitable tolling should apply in the case at hand, because Plaintiff alleges facts in his complaint which constitute 'extraordinary circumstances' beyond his control and which made it impossible for him to file a charge with the EEOC within 300 days." Pl.'s Resp. at 6, Southall, 2016 U.S. Dist. LEXIS 52634 (No. 3:15-CV-02222). In holding against the veteran, the court accepted the employer's reading of the case to require that there be "severe sexual harassment and assault at the hands of supervisors and co-workers leading to various psychological disorders, that is, her incapacity was directly caused by defendants' alleged conduct." Def's Reply Mem. at 6, Southall, 2016 U.S. Dist. LEXIS 52634 (No. 3:15-CV-02222).

[204] *Id.* at *8 ("Plaintiff argues that this form of equitable tolling should apply to him because he too alleges facts which constitute extraordinary circumstances. Pl's. Resp. at 6. I disagree. First, the *Stoll* court focused on the defendants' creation of extraordinary circumstances.").

[205] *See Stoll*, 165 F.3d at 1239; *Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464, at *22.

[206] In *Stoll*, coworkers and supervisors:

> commented on [the worker's] body, shot rubber bands at her backside, asked her to wear lacy black underwear for them, bumped and rubbed up against her from behind, pressed their erect penises into her back while she was sorting mail and unable to get away, followed her into the women's bathroom, asked her to go on vacations . . . . [A supervisor] refused [her] request to leave her workstation to go to the ladies' room because she was menstruating heavily. Instead, he forced her to remain at her letter-sorting console and bleed all over herself.

psychiatric illnesses,[207] suicide thoughts[208] or attempts,[209] and the workers proceeded pro se.[210] In one case, the victim was a Spanish speaker who proceeded pro se and could not read.[211] In the other, the abuse was so extreme that it resulted in an inability to "concentrate well enough to read,"[212] an inability to relate to her sons,[213] and an inability to communicate with her lawyer as she was "totally psychiatrically disabled."[214] In that case, the court held that "if ever equity demanded tolling a statute of limitations, it does so here."[215] Subordination to extreme standards that require workers to have been subjected to extraordinary forms of suffering humiliates vulnerable workers.

Compelling workers to appeal to extreme narratives demeans workers since some workers' mental illness is held as a prohibitive exemplar to others. Courts implicitly create a hierarchy of psychological suffering, rejecting those that they deem not incapacitated enough no matter the depth of their suffering. As one court indicated, there are a variety of "lesser forms of mental and physical impairment" that simply do not warrant equitable tolling:

> Lesser forms of mental and physical impairment have not been found to be sufficient to equitably toll statutes of limitations. *See, e.g., Lawrence v. Florida,* 421 F.3d 1221, 1226-27 (11th Cir. 2005) (IQ of 81); *Sosa,* 364 F.3d at 513 (schizoaffective disorder and generalized anxiety disorder); *Fisher v. Johnson,* 174 F.3d 710, 715 (5th Cir. 1999) (PTSD attack and temporary legal blindness); *United States v. Flores,* 981 F.2d 231, 236 (5th Cir. 1993) (illiteracy); *Nesbit-Harris v. Jackson,* 3:07-cv-696, 2008 U.S. Dist. LEXIS 43324, at *11 (E.D. Va. June 3, 2008) (anxiety and depression); *London v. Johnson,* 2:04-cv-746, 2005 U.S. Dist. LEXIS 10348, at *7-*9 (E.D. Va. May 27, 2005) (severe head trauma); *cf. Farabee v. Johnson,* 129 Fed. Appx. 799, 803 (4th Cir. 2005) (dicta) (institutionalization to prevent party from hurting himself or others).[216]

Courts thus recognize "greater forms" of suffering as a result of which they grant equitable tolling. Establishment of greater suffering humiliates workers afflicted with mental illness who are implicitly told that they are not suffering enough to warrant equitable tolling.

Judicial hostility to cases alleging that mental illness prevented a timely filing is also visible in judicial rejection of workers' documentation of their suffering. The court in the coma case rejected the worker's psychiatrist's statement that the worker "became significantly depressed and

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Stoll, 165 F.3d 1239. In *Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464, at *22, the abuser told the worker not to report the sexual assaults or her family would be harmed.

[207] In *Stoll*, the worker suffered from "severe major depression and severe generalized anxiety disorder, as well as somatic form pain disorder." *Stoll*, 165 F.3d at 1240. In *Willamette Tree Wholesale, Inc.*, the worker suffered from "severe depression, post-traumatic stress, suicidal ideation, social isolation and panic attacks." 2011 U.S. Dist. LEXIS 25464, at *22.

[208] *Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464, at *22.

[209] *Stoll*, 165 F.3d at 1240.

[210] *Id.* at 1241; *Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464, at *23.

[211] *See Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464, at *23.

[212] *Stoll*, 165 F.3d at 1240.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 1242.

[216] *Milam*, 2009 U.S. Dist. LEXIS 3629, at *7.

could not physically work or function in daily activities."[217] Why? Because other courts had rejected psychiatric evaluations,[218] because the worker only saw his psychiatrist once,[219] because the worker could form a narrative about his suffering and could be hopeful,[220] because two medical doctors (themselves not psychiatrists) had found him fit to work before he had gone to the psychiatrist.[221] Similarly, the radiologist's court rejected her psychiatrist's evaluation as "just the type of conclusory and vague claim[s] . . . [of] paranoia, panic attacks, an depression[that are] insufficient to invoke equitable tolling, without a particularized description of how her condition adversely affected her capacity to function generally or in relationship to the pursuit of her rights."[222] Rejection of supporting medical documentation eviscerates the authenticity of the plaintiff's story and demeans her by not taking her story seriously.

Humiliation is thus the experience of one's legal system as made by others for others so that one's subjectivity is denied. For those suffering from mental illness, it amounts to the recognition that the law is made by the "sane" for the "sane," and the "sane" are only willing to accommodate those "unlike them" whose stories are extreme.[223] This produces arguments that should not have to be made. Take, for example, the coma case. There the worker, possibly aware that his coma would toll the limitations period but his subsequent major depression would not, argued that "[f]or many months [he] could not do tasks such as driving a car, shopping for groceries, paying bills and in fact [he] was in a zombie-like state and unable to function."[224] To the layperson "zombie-like state and unable to function" may not be far from a coma. But the analogy between zombies and mental illness risks trivializing the genuine nature of the worker's suffering, especially when the court can rebuff the analogy by saying that the worker was able to diet, sleep well, drive to the state worker's compensation office, "walking across the parking lot to another building after learning that [his] first stop was erroneous, and applying for unemployment compensation."[225] Humiliation means that those untouched by mental illness can require those afflicted by it to dishonor the true nature of their suffering and appeal to extreme narratives that do not coincide

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[217] *Eber*, 130 F. Supp.2d at 867.

[218] *Id.* ("Similar affidavits of physicians characterizing a plaintiff as incapacitated during the limitations period have been deemed insufficient to toll the running of the statute, especially when refuted by evidence to the contrary.").

[219] *Id.*

[220] *Id.* ("Dr. Flowers's notes from Eber's sole visit on September 9, 1998, indicate that although Eber reported that he was depressed, was having problems with his memory, and could not concentrate, he was able to give Dr. Flowers a fairly detailed description of his prior medical history as well as his family, employment, and educational history. He also reported that he was 'sleeping well' and was 'dieting,' reducing his weight from 300 to 234 pounds. Eber further stated that he was at times energetic, that he was using a treadmill, and that his mood varied, sometimes feeling that 'everything would be alright.'").

[221] *Id.* at 869.

[222] *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *32–34 (alterations in original) (quotation marks omitted) (rejecting psychiatrist's assessment that the radiologist suffered from "depression and PTSD," was "withdrawn and anxious" and that "people who suffer sexual assault are often ashamed of reporting abuse and 'incapable of coming to terms with what happened to them'").

[223] *See generally* 1-1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §1-2.2.6 (2d. ed. 2005) (identifying "sanism as an irrational prejudice of the same quality and character as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry that permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses").

[224] *Eber*, 130 F.Supp 2d at 851.

[225] *Id.* at 867, 868.

with their own.

Extending Smith's opportunism argument to courts, humiliation means that an American worker alleging mental illness is compelled to disabuse himself of the view that the court is a forum amenable to claims like hers. Predatory conduct—and opportunism can be about predation—becomes not only the province of bad faith litigants, but also of tribunals that close equity's doors to some of the most marginalized workers.[226] Even if it were the case that courts do not target those with mental illness—and judicial antipathy to those proceeding pro se[227] or as paupers may support this view[228]—rejection of mental illness claims underscores widespread judicial antipathy to those suffering from mental illness,[229] resulting in damaging precedent that continues to marginalize this most stigmatized disability group nationwide.[230]

Humiliation thus means that courts establish high barriers at equity that prevent workers suffering from mental illness from proceeding on the merits against their employers. Such high standards require workers to trivialize the nature of their suffering and conform to extreme narratives. Courts thus establish a hierarchy in mental illness cases that privileges only the most extraordinary examples of mental incapacity, which is damaging to workers whose predicament is already vulnerable. Such humiliation requires a response, to which I now turn.

B. Defiance

Defiance counters humiliation by refusing to allow humiliation to stand. Here, I explore the assuredly controversial notion of what scholarly defiance of institutionalized humiliation might mean for equitable tolling cases in which workers alleged that mental illness prevented a timely

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[226] On opportunism and predation, *see* Smith, Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, at *21 (Harvard Public Law Working Paper No, 15-13, 2015) at 7–11 (founding and concluding his discussion of opportunism at equity with *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889) in which the grandson poisoned his grandfather to prevent him from amending his will in favor of his grandfather's new spouse so that the grandson might take title to his portion of the estate under the old will).

[227] *See, e.g.*, *Milam*, 2009 U.S. Dist. LEXIS 3629, at *9 ("Plaintiff's pro se status and mental condition represent a garden variety example of excusable neglect, but they do not amount to extraordinary circumstances that prevented her from complying with the statute of limitations."); Hedges v. United States, 404 F.3d 744, 753 (3d Cir. 2005) (severe depression combined with pro se status do not justify equitable tolling); Flores v. Ashcroft, No. C 00-21168 JF, 2001 U.S. Dist. LEXIS 16572, at *8–9 (N.D. Cal. Sept. 12, 2001) (worker's claim to tolling on the basis of pro se status inconsistent with circuit precedent); Williams v. West, No. C 95-2546 SI, No. C 95-2547 SI, 1997 U.S. Dist. LEXIS 20648, at *8 (N.D. Cal. Dec. 16, 1997) ("Furthermore, courts have not tolled the statute of limitations merely because a plaintiff is *pro se.*"); White v. Bethlehem Steel Corp., 900 F. Supp. 51, 53 (E.D. Tex. 1995) ("Simply neglecting to heed a limitations period will not serve to invoke equitable tolling; this is true even when the plaintiff is proceeding pro se.").

[228] *See, e.g.*, Womack v. Teleplan, No. 3:03-CV-0034-M, 2003 U.S. Dist. LEXIS 8540, at *5 (N.D. Tex. May 20, 2003), *accepted by* 2003 U.S. Dist. LEXIS 9057, at *1 (N.D. Tex. May 29, 2003) (denying equitable tolling to a worker who claimed that filing was late because he could not afford counsel); Crowder v. Caddo Parish Sch. Bd., NO. 08-0947, 2008 U.S. Dist. LEXIS 77174, at *4 (W.D. La. Sept. 30, 2008) (denying equitable tolling to worker who argued that she had consulted two attorneys but circumstances compelled her to proceed as a pauper); Norbisrath v. Holland Am. Line, No. C13-1274-JCC, 2014 U.S. Dist. LEXIS 78312, at *7 (W.D. Wash. June 9, 2014) (denying equitable tolling to pro se worker proceeding as a pauper because worker's "complaint contains no alleged facts whatsoever which would allow the Court to find that equitable tolling is appropriate").

[229] *See* Korn, *supra* note 72.

[230] *See* Waterstone, *supra* note 72 (observing that City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) denying heightened scrutiny to those suffering from mental disabilities continues to be noxious to the efforts of those suffering from mental disabilities to achieve equal rights).

filing.[231]

Ackerman states that "[i]t's only if you go along that your humiliation is complete. If you defy your [offender] instead, he hasn't succeeded in humiliating you."[232] Humiliation is thus a process that is complete only if left un-defied.[233] In other words, the offensive act, omission, or comment opens an "intersubjective encounter" in which one party announces his hostility to the other based on his belief in the other's inferiority on which basis he will humiliate the other party.[234] As an act of defiance, therefore, we might respond to judicial humiliation of vulnerable workers by unearthing ways in which courts misunderstand equity and its requirements. Courts misunderstand equity when they misconstrue the meaning of an "extraordinary" remedy, which they sometimes conflate with "extreme." They also misunderstand equity when they overlook equity's historical treatment of those afflicted with mental illness. Defiance permits the conclusion that the holdings in cases like those of the veteran, the radiologist, and the comatose worker were not inevitable. This section lays the foundation for the next (and final) section of my article in which I propose changes to judicial application of the equitable tolling doctrine when workers suffer from mental illness.

Given courts' requirement of "extraordinary" and "extreme" cases to which they grant equitable tolling, we should examine the meaning of "extraordinary," a word on which courts often rely without any sense of what the word means. Courts in jurisdictions where the coma case, the radiologist's case, and the veteran's case, respectively, arose provide that "equitable tolling is an extraordinary remedy."[235] Under Supreme Court precedent, workers requesting an extraordinary equitable remedy like equitable tolling must show "extraordinary circumstances."[236] Workers requesting an extraordinary remedy must thus show extraordinary circumstances.

What does "extraordinary" mean? Some courts align it with "exceptional,"[237] some with "rare

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[231] Courts are attentive to defiance of their institutional dignity. *See, e.g.*, Ortega-Rodriguez v. United States, 507 U.S. 234, 246 (U.S. 1993) ("It is the District Court that has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain."); United States v. Giovanelli, 897 F.2d 1227, 1232 (2d Cir. 1990) ("Although the contempt power should not be used in a manner that impinges on legitimate advocacy, a judge need not tolerate disrespect or a deliberate show of defiance in open court. To affront the dignity of the court the misbehavior need not insult the judge personally, but may consist of threats, disrespect or other like behavior."); Scott v. Hughes, 106 A.D.2d 355, 356 (N.Y. App. Div. 1st Dep't 1984) (citation omitted) ("Conduct which manifests an intent to defy the dignity and authority of the court may properly be adjudged contemptuous.").

[232] ACKERMAN, *supra* note 137, at 139.

[233] *See id.* ("It's only if you go along that your humiliation is complete. If you defy your [offender] instead, he hasn't succeeded in humiliating you.").

[234] *Id.*

[235] *E.g.*, *Eber*, 130 F.Supp.2d at 865 (citation and quotation marks omitted) ("equitable tolling is an extraordinary remedy appropriate only in a narrow class of fact situations"); Lazerson v. Colvin, No. 4:13-cv-02832-YGR, 2014 U.S. Dist. LEXIS 29979, at *14 (N.D. Cal. Mar. 6, 2014) ("equitable tolling is an extraordinary remedy [applicable] in certain rare cases"); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003) (quoting Aluminum Workers International Union Local Union No. 215 v. Consolidated Aluminum Corp., 696 F.2d 437 (6th Cir. 1982)) ("Precisely because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy.").

[236] *See supra* note 95 and accompanying text.

[237] *E.g.*, Cadieux v. Donahoe, No. 5:11-cv-185, 2012 U.S. Dist. LEXIS 98419, at *16–17 (D. Vt. July 13, 2012) ("As with all equitable tolling, tolling due to a mental disorder is limited to exceptional circumstances."); Lloret v. Lockwood Greene Eng'rs, Inc., No. 97 Civ. 5750 (SS), 1998 U.S. Dist. LEXIS 3999, at *6 (S.D.N.Y. Mar. 27, 1998) ("Whether a mental disorder may be the basis for tolling in a civil rights action is decided upon principles of equity

and exceptional,"[238] some with "so extraordinary,"[239] and still others with "extreme."[240] They misunderstand. The first and original meaning of "extraordinary" is "extra-ordinary," which is descriptive rather than normative. An equitable remedy is extra-ordinary in the denotative sense that it is "[o]ut of the usual or regular course or order."[241] The common law is the regular course or order, and equity's jurisdiction is irregular by comparison.[242] Blackstone,[243] Justice Story,[244]

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and is limited to exceptional circumstances.").

[238] *E.g.*, Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, at 615 (S.D.N.Y. Mar. 9, 2016) (citation and internal quotation marks omitted) ("Equitable tolling is only appropriate in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising [his] rights."); *George*, No. H-10-3235, 2012 U.S. Dist. LEXIS 94318, at *32 (alteration in original) (citation and internal quotation marks omitted) ("[E]quitable tolling applies only in rare and exceptional circumstances."); Harris v. Boyd Tunica, Inc., 628 F.3d 237, 239 (5th Cir. 2010) (same); *see also* Bray, *supra* note 76, at 1002, *et seq.*

[239] *E.g.*, Vlad-Berindan v. LifeWorx, Inc., No. 13 CV 1562 (LB), 2014 U.S. Dist. LEXIS 58741, *22 (E.D.N.Y. Apr. 28, 2014) (citing Kantor-Hopkins v. Cyberzone Health Club, No. 06 Civ. 643, 2007 U.S. Dist. LEXIS 66820, 2007 WL 2687665 at *7 (E.D.N.Y. Sept. 10, 2007)) ("Whether equitable tolling should be applied is not a question of the illness' severity and it is not a question of hospitalization; rather, the issue is whether a party can show that the illness was so extraordinary that it functioned as a complete bar to the procedural steps required to file suit in a timely fashion throughout the entire period in question.").

[240] *E.g.*, *Nunes*, 2015 U.S. Dist. LEXIS 117819, *15 (citations and internal quotation marks omitted) ("the plaintiff's assertion of mental incapacity must be accompanied by a proffer sufficient to overcome the reality that equitable tolling is available only in the most extreme cases."); Stewart v. Rock Tenn CP, LLC, No. 3:13-cv-02147-AC, 2015 U.S. Dist. LEXIS 54196, *25–26 (D. Or. Apr. 24, 2015) (alteration in original) (citation and quotations marks omitted) ("A statute of limitations is subject to the doctrine of equitable tolling, which courts apply in extreme cases . . . in a case-by-case analysis."); Fresquez v. County of Stanislaus, No. 1:13-cv 1897-AWI-SAB, 2014 U.S. Dist. LEXIS 66466, at *21 (E.D. Cal. May 13, 2014) ("Equitable tolling is applied in extreme cases only . . . ."); Luong v. U.S. Bank N.A., No. 3:12-cv-01220-HU, 2013 U.S. Dist. LEXIS 116433, at *11–12 (D. Or. June 20, 2013) ("This case is not 'extreme' and equitable tolling premised on mental incompetence would not be appropriate."); Ellison v. Northwest Airlines, 938 F. Supp. 1503, 1510 (D. Haw. 1996) (citation and quotations marks omitted) ("The Ninth Circuit has held that the 90 day filing requirement is subject to equitable tolling, although the doctrine is available only in only extreme cases and is to be applied sparingly.").

[241] *Extra-ordinary*, V OXFORD ENGLISH DICTIONARY 614 (J. A. Simpson and E.S.C. Weiner, eds. 2d ed. 1989).

[242] *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62 [hereinafter 1 BLACKSTONE, COMMENTARIES] (University of Chicago Press, 1979) (1769) ("And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law."); F.W. MAITLAND, FORMS OF ACTION AT COMMON LAW 19 (2d ed. 1936) ("if the legislature had passed a short act saying 'Equity is hereby abolished', we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and of possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, 'Common Law is hereby abolished', this decree if obeyed would have meant anarchy"); Smith, *supra* note 75, at *36 (relying on Maitland to argue that "that equity follows the law in part because it *presupposes* the law. It is 'law about law.' A safety valve has to be a safety valve on something else").

[243] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 48, 49 (1769) [hereinafter 3 BLACKSTONE, COMMENTARIES] (distinguishing between "this ordinary, or legal, court" and "the extraordinary court, or court of equity, [which] is now become the court of the greatest judicial consequence").

[244] 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 33 (1839) [hereinafter STORY, COMMENTARIES] (referring to "equitable or extraordinary jurisdiction of the Court of Chancery").

John Norton Pomeroy,[245] Roscoe Pound,[246] Edward D. Re,[247] and Laycock all refer to the chancellor's or equity's extraordinary jurisdiction.[248] Smith's opportunism argument relies on Maitland to advance this view of equity.[249] "Extraordinary" merely means "separate, apart from, or distinct from common law."[250]

The problem arises when "extraordinary" takes on particular (predictive) normative valence. Under this reading, equitable tolling and the facts giving rise to it are "extraordinary" not because they are unavailable at common law, but because they are subsumed under another iteration of "extraordinary," that is, "[o]f a kind not usually met with; exceptional; unusual; singular."[251] The court might then find itself "expressing astonishment, strong admiration or the contrary."[252] As we have seen, that equity has moral basis is uncontentious.[253] When equity's extraordinary nature is conflated with "exceptional," "unusual," "rare," "extreme," however, it raises concern since equity then requires workers suffering from mental illness to cross an elevated threshold for courts to accept a worker's plea for judicial intervention on the basis of mental incapacity. This is visible in the veteran's case in which the court required analogy to workplace rape case[254] and in the radiologist's case in which the court marveled at the nature of radiologist's mental illness.[255] In such cases, equity identified some facts as morally endorsable while it rebuffed others, which redounded to the employer's benefit. A defiant posture rejects such readings of equitable tolling.

Defiance would similarly require us to appeal to equity's historical treatment of mental illness to undermine the contention that antagonism to individuals suffering from mental illness has always characterized proceedings at equity. If that contention on its own did not compel change, we might then advert to nineteenth-century precedent, which shows that courts of equity paid particular solicitude to individuals suffering from mental illness. The English Lord Chancellor had jurisdiction over a class of propertied individuals suffering from mental illness who were unable to take care of their person and property.[256] After an inquisition held by the Master in Lunacy, the Lord Chancellor would determine if the afflicted individual and his property would be subject to

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[245] JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 17 (1907); I ROSCOE POUND, JURISPRUDENCE 444 n.18 (The Lawbook Exchange, Ltd. 2008) (1959).

[246] POUND, *supra* note 244, at 444 n.18 (referring also to equity's grants of "extraordinary relief in certain restricted categories on the ground of inadequacy at law").

[247] EDWARD D. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 434 (1975) (emphasis in original) ("*Specific* redress or relief, as the cases and materials in this book illustrate, required a resort to equity for an *equitable remedy.* Hence, the phraseology that the specific relief or remedy in equity was *extraordinary.*").

[248] Laycock, *supra* note 66, at viii (arguing in favor of dispensing with the conception that equity is subordinate, extraordinary, or unusual.").

[249] *See* Smith, *supra* note 75, at *35 (emphasis in original) ("Important for the theory of equity as anti-opportunism is that mostly equity serves as a safety valve. This means that equity follows the law in part because it *presupposes* the law. It is 'law about law.' A safety valve has to be a safety valve on something else . . . . In [Maitland's] famous formulation, 'equity without common law would have been a castle in the air, an impossibility.").

[250] *See supra* note 240 and accompanying text.

[251] *Extra-ordinary*, V OXFORD ENGLISH DICTIONARY, *supra* note 241, at 614.

[252] *Id.*; *see also, e.g.*, *Stoll*, 165 F.3d at 1242 (holding that "if ever equity demanded tolling a statute of limitations, it does so here").

[253] *See supra* note 124 and accompanying text.

[254] *See supra* notes 203–14 and accompanying text.

[255] *Kuriakose*, 2015 U.S. Dist, LEXIS 66208, at *35.

[256] Chantal Stebbings, *Re Earl of Sefton (1898)*, *in* LANDMARK CASES IN EQUITY 453–72 (Charles Mitchell & Paul Mitchell, eds. 2012).

Chancery jurisdiction as a Chancery lunatic.[257] The goal was to "ensure the protection of [the lunatic's] person and property."[258] "The guiding principle of the Lord Chancellor in his dealings with the property of lunatics was to ensure that, should they recover, they would find their estates exactly as they were when they became insane."[259] More recently, a California appellate court held that "[i]t is well established that incompetency is a basis for equitable relief and that equity will relieve an incompetent from a judgment taken without an adversary hearing."[260] Given equity's historical and more recent approaches to mental illness, hostility to mental illness at equity is not inevitable.

Indeed, even if equity's history were antagonistic to those raising claims on the basis of mental incapacity, the Supreme Court's recent dignity cases are instructive. The cases support the proposition that dignity breaks the chain of discrimination against a vulnerable constituency, no matter how deeply-rooted the animosity toward that constituency. In a case involving prisoners afflicted with mental illness[261] who over at least two decades[262] did not receive adequate care in the state's penal system,[263] writing for the majority Justice Kennedy upheld a far-reaching structural injunction[264] targeting conditions inimical to the prisoners' inherent dignity.[265] Similarly, in response to arguments grounded in historical hostility to gays' intimate lives,[266] Justice Kennedy held for the majority "that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[267] In a more recent same-sex marriage opinion, Justice Kennedy found that marriage inequality humiliates members of the lesbian and gay community.[268] To reach this finding, Justice Kennedy accepted the plaintiffs' argument that an antagonistic history can be acknowledged but "cannot end there."[269] The Supreme Court's dignity jurisprudence[270] thus suggests that a history of judicial antagonism to Americans suffering from mental illness is reason to oppose and not

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[257] Stebbings, *supra* note 256 at 456–59.

[258] *Id.* at 457.

[259] *Id.* at 459.

[260] Sanchez v. Sanchez, 273 Cal.App.2d 159, 163–64 (1969).

[261] *See* Brown v. Plata, 563 U.S. 493, 503 (2011); *see also generally*, Schlanger, *supra* note 65.

[262] Brown v. Plata, 563 U.S. at 506.

[263] *Id.* at 503–04.

[264] *Id.* at 545.

[265] *See id.* at 510 (citation omitted) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[266] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[267] *Id.* at 567.

[268] *See Obergefell*, 135 S. Ct. at 2590, 2601–02 (finding that laws restricting the definition of marriage to heterosexual couples "humiliate", "harm", "demean", and "stigmatize" gays, lesbians, and their children). On dignity as a powerful antidote to stigma, *see generally* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015).

[269] *Obergefell*, 135 S. Ct. at 2594.

[270] *See generally* Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG (May 31, 2011, 9:52 AM), http://www.bloombergview.com/articles/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman (discussing Justice Kennedy's "favorite constitutional concept: dignity" and observing that "[i]t's Justice Anthony Kennedy's country[—]the rest of us just live in it. Or so it sometimes feels when the U.S. Supreme Court's most important and decisions come down from Mount Olympus, aka 1 First Street, NE, where the justices preside in their white marble temple in Washington").

perpetuate such mistreatment.[271]

Opposition to the mistreatment of those suffering from mental illness requires that we hear the stories of workers like the veteran, the radiologist, and the worker who fell in to a coma. Their stories carry particular power at equity. Equity, after all, is about more than the vindication of monetary interests. We see this in equitable tolling, which is a threshold defense raised by the worker so that her case might proceed on the merits; no money requested. True, workers sue for any number of remedies, including back pay, front pay, compensatory and punitive damages, and liquidated damages, among others.[272] Outside the employment discrimination context, money is also generally available at equity, for example, in restitution or unjust enrichment cases. But workers also sue for injunctions against their employers.[273] That is, equity, even in the employment discrimination context, is more often than not about non-monetary matters. Workers at the equitable tolling stage want the opportunity to proceed to the telling of their stories, and, at the injunction stage, they want to live their stories in a workplace free from the discrimination that brought them to court in the first place. Equity is about more than money.

Might workers simply be paid not to tell their stories? Luban reminds us that, in their quest for justice the most vulnerable often ask for more than money from the judicial process.[274] Responding to commentators who argue that the poor would rather receive a lump sum than legal representation, Luban unearths the constraints of this monetary argument.[275] There are areas of the law in which cash cannot replace (or would be an inadequate substitute) for the right that would be forfeited: parental rights, immigration status, cessation of domestic violence, having a home.[276]

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[271] *See generally* PERLIN, *supra* note 223, §§ 1-2.1.1 (observing how some state courts are granting rights to those with mental illness on a dignitary basis).

[272] LINDEMANN ET AL., *supra* note 50, § 41-3.

[273] *Id.* §§ 40-1 to 40-40.

[274] *See* Luban, *Lawyers as Upholders*, *supra* note 119, at 840–41.

[275] *See id.*

[276] Luban's dignitary response merits full replication:

> Prospective Client #1: The city is trying to terminate my parental rights and take my child away. Can you help me?
>
> [Professors] Silver and Cross: That's a twenty-hour job. We won't represent you, but we'll give you $ 3,000.
>
> They are honoring her autonomy. Which does she prefer, the money or the child? It's her call. After she leaves, clutching the child to her, the next client comes in:
>
> Prospective Client #2: Immigration is trying to deport me back to my home country. I'll be arrested if I'm sent back, maybe tortured and killed. Can you represent me at my asylum hearing?
>
> Silver and Cross: Oh sure. But that will take at least forty hours to do right. Tell you what: We'll give you $6,000 instead. That should get you across the Canadian border in style!
>
> Next comes Client Number Three:
>
> Prospective Client #3: Last week my boyfriend beat me up and broke my arm. Now he's threatening to kill me. My cousin told me that you could help me get a court order to keep him away.
>
> Silver and Cross: We could. It would take about four hours. But what if we give you $600 instead? Now you can buy a gun and take yourself out to dinner with the change.
>
> And now the last:
>
> Prospective Client #4: My landlord is trying to evict me, and I haven't got the money for a new apartment. He has no right to evict me[—]I've always been a good tenant and paid the rent on time. He just doesn't like me. My eviction hearing is next week. Can you help me?
>
> Silver and Cross: Here's the money for a new apartment.
>
> It's been a good day's work at the alms factory. Instead of foisting legal services on clients, they have honored the clients' autonomy by giving them money they can spend on anything they wish. The professors apparently believe that the four prospective clients will be grateful for their response. My own prediction is rather different. Even if

I would add to this list the ability to have one's story heard, especially when one suffers from mental illness. As Andrew Scull observes in his powerful study of millennia of severe abuse targeting those who have mental illness,[277] "(e)xcept in very occasional circumstances, however, our knowledge of how patients responded to asylumdom is almost always filtered through the eyes and ears of their doctors."[278] Similarly, in the judicial sphere courts and employers often frame the judicial history of those suffering from mental illness, especially when their stories are not heard.[279]

Dignity, too, is about more than money. Gewirth observes in his discussion of inherent dignity that:

> This is a concept that sets peculiarly stringent moral requirements. In this sense, dignity is contrasted by Kant with *price.* If a thing has a price, then it can be substituted for or replaced by something else of equivalent value, where *value* signifies, as in Thomas Hobbes, a worth that is relative to a person's desires or opinions. Thus Hobbes recognizes only a certain version of the empirical concept of dignity, which he defines as 'the publique worth of a man, which is the value set on him by the Commonwealth.' In contrast, inherent dignity cannot be replaced by anything else, and it is not relative to anyone's desires or opinions. It is such inherent dignity that serves as the ground of human rights.[280]

Money can neither vest nor divest dignity. Dignity requires us to take seriously the stories of those who approach equity and document mental illness that prevented them from filing on time. It requires that we not humiliate them even if they might not be aware of it because of their mental

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Prospective Client Number Four will be happier with the money for a new apartment than with legal assistance, I suspect she will also be angered and humiliated by the offer.

Id. at 841.

[277] Those suffering from mental illness have been subjected to the following treatments that reflect both the deep-seated hostility that they have faced and the depth of their suffering over time: "spitting and isolation"; exorcism; "ingestion of toxic heavy metals"; chaining to walls; beating; "[b]lood-letting, cupping, vomits and purges"; "trials, tortures and executions"; hanging, drowning, dismemberment, crushing to death under piles of rocks; being made objects of financial speculation and investment; binding to chairs restricting movement; binding to swinging chairs producing "an instant discharge of the stomach, bowels, and bladder, in quick succession"; rape; dragging; sterilization; public entertainment; electric shocks to mouths and genitals; infection with bacterium causing fevers and illness; infection with malaria (Nobel Prize in 1927); removal of teeth and tonsils; partial or entire removal of cervixes, colons, spleens and stomachs; use of barbiturates to induce prolonged sleep; "injection of horse serum into spinal canals to produce meningitis"; lowering of body temperatures to dangerous levels; injection of cyanide, colloidal calcium, or strychnine; lobotomy (Nobel Prize in 1949); electro-convulsive therapy; "insulin shock therapy"; "injections of camphor in oil"; injections of drugs resulting in "joint dislocations, fractures, heart damage, permanent brain trauma, and even an occasional death." SCULL, *supra* note 4, at 32; 43, 77, 177–79; 47; 65, 97; 65, 191; 66, 92, 171; 86; 86; 134–140; 156–57; 158; 191; 191; 266; 280; 298; 300; 300–301; 306; 306; 308; 309; 309; 309; 318; 309; 310; 311; 311.

[278] *Id.* at 232.

[279] *See generally* Douglas Laycock, *Injunctions and the Irreparable Injury Rule,* 57 TEX. L. REV. 1065, 1076–77 (1979) (reviewing OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978)) (observing in a discussion of Fiss's "understat[ed] . . . objection" to economic efficiency that "[l]aw in a democracy must reflect the values of the people, and although efficiency is undoubtedly important to Americans, so are other values, such as personal autonomy, fairness, morality, and distributive justice. These values lack the illusion of mathematical precision that surrounds the analysis of efficiency, and their policy implications are not always clear. But they are strongly and widely held, and they underlie the widespread resistance to making efficiency the touchstone of legal analysis").

[280] Gewirth, *supra* note 127, at 13.

illness.[281]

Equity remains powerful in this regard because it often acts as a gatekeeper to the judicial system. It represents an American worker's only hope for judicial reprieve from the creation of conditions giving rise to or exacerbating the effects of mental illness, which may be aggravated by poverty and the requirement that she proceed alone through the legal system if she cannot find a lawyer to represent her. In such cases, equity matters because, as Blackstone reminds us of equity's particular individuated approach:

> Equity thus depending, essentially upon the particular circumstances of each individual cases, there can be no established rules and fixed precepts of equity laid down, without destroying it's very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge.[282]

Perhaps, then, equity's individuated approach requires judges to approach the most vulnerable in a conscientious fashion. Perhaps for a worker alleging failure to meet the limitations period on account of mental illness, a conscientious approach to her allegations of mental suffering would be extraordinary.

IV. AN EXTRAORDINARY EQUITY

But what would amount to an extraordinary approach to mental illness at equity? Would it be extraordinary inasmuch as it deferred to the law? Might it be extraordinary insofar as it adopted a balancing of the hardships approach that allowed workers suffering from mental illness to proceed on the merits against their employers? I first explore potential procedural and statutory responses at law before examining an equitable response. My conclusion follows.

A. A Legal Response

Since equity is an engraftment onto the law, if non-humiliation requires that workers suffering from mental illness be heard, we might begin with a procedural proposal whose effect would not be to endow judges with greater discretion at equity.[283] To do this, courts might simply refuse to decide timeliness issues in mental illness cases at the motion to dismiss stage and require that they be resolved instead at the summary judgment stage. The fix would be procedural and not equitable, which might be responsive to concerns about equitable "swallowing" of the rule of law.[284]

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[281] *See* Luban, *Humiliation and Torture, supra* note 119, at 219.

[282] 1 BLACKSTONE, COMMENTARIES, *supra* note 243 at 61–62.

[283] On the resistance to equity's discretion, *see* JAMES M. FISCHER, UNDERSTANDING REMEDIES 205 (3d ed. 2014) (noting that equity is often associated with "'discretionary decision making . . . .' Many modern scholars view discretion with distaste. It has been suggested that where law ends, discretion begins, paraphrasing William Pitt's famous aphorism 'where law ends, tyranny begins.'"); Bray, *supra* note 76 at 1040–41 ("Discretion, too, is deeply rooted in the tradition of equity. Much of the literature on equity over the last five hundred years has focused on this characteristic, and the arguments are predictable. Critics, such as John Selden or more recently Daniel Farber and John Yoo, have objected that equity is a cloak for arbitrary judicial policymaking."); see *also generally* LANGBEIN ET AL., *supra* note 185, at 268, 316–17 (2009) (referring to Cardinal Wolsey (c. 1473-1530) who abused his office as chancellor in England and used "his arrest power to pursue personal and political vendettas"); AZIZ RANA, TWO FACES OF AMERICAN FREEDOM 33, 40 (2010) (showing how in American history discretion in general smacks of abuse since it also evokes "discretionary and absolute royal authority" over native, slave, and settler populations, whose "striking brutality" Rana details).

[284] *E.g.*, Subrin, *supra* note 122 and accompanying text; see *also generally* Lawrence B. Solum, *Equity and the Rule*

As radical as the proposal may sound, some federal courts already require that mental illness concerns be resolved at the summary judgment stage. "The Second Circuit has held it is error for a district court to resolve [] the fact-specific equitable tolling issue on a motion to dismiss when mental capacity is at issue."[285] As a court in the Second Circuit has reasoned:

> [T]o secure the benefits of equitable tolling plaintiff must present evidence that supports more than a conclusory and vague claim of mental incapacity. Rather, the evidence must provide a particularized description of how [his] condition adversely affected [his] capacity to function generally or in relationship to the pursuit of [his] rights. Nonetheless, the possibility makes dismissal at this stage inappropriate. Such a fact-specific inquiry should not be resolved on a motion to dismiss; rather, the best practice is to analyze a question of mental incapacity in the context of summary judgment . . . . Defendants' motion to dismiss is denied without prejudice to renewal as a motion for summary judgment following discovery.[286]

A trial court in the Ninth Circuit has similarly stated that "issues surrounding [the plaintiff's] mental competence needed to be addressed in a motion for summary judgment or at trial—where the Court is not limited to consideration of the pleadings."[287] Thus, a change in the procedural approach implies that the veteran's case, decided in the Ninth Circuit, could have proceeded to the summary judgment stage at which point the veteran would have benefited from the discovery process's depositions, interrogatories, and document production, on which basis he might have developed his narrative in a way that was impossible at the motion to dismiss stage.[288]

Despite the appeal of a procedural deferral to the summary judgment stage, the radiologist's and comatose worker's cases show the limitations of the summary judgment approach since workers suffering from mental illness would still encounter high barriers at equity to a pursuit on the merits of their employment discrimination lawsuits. In the radiologist's case, the court converted the employer's motion to dismiss to one for summary judgment and dismissed the radiologist's complaint.[289] In the comatose worker's case, the court said that "a long line of federal cases explicitly holds that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations"[290] and granted summary judgment to the employer.[291] Thus, summary judgment may simply delay the application of extreme standards to workers alleging that

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of Law, in THE RULE OF LAW: NOMOS XXXVI 120, 136 (Ian Shapiro, ed.) (offering an Aristotelian virtue-centered argument in favor of equity's particularized justice as "consistent with the rule of law"); *contra* Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation, in id.* at 148–78 (rejecting Solum's attempt to reconcile the rule of law and equity as "theoretical" and "unsuccessful" due to its "inattention to politics"); Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, in *id.* at 178–205 (denying that Solum has reconciled the rule of law and equity and proposing judicial reasons grounded in "conventional law" as a means of doing so).

[285] Kalola v. IBM, No. 13 CV 7339 (VB), 2015 U.S. Dist. LEXIS 27444, at *13 (S.D.N.Y. Feb. 3, 2015) (quoting Mandarino v. Mandarino, 180 F. App'x 258, 261 (2d Cir. 2006) (nevertheless, equitable tolling on the basis of mental incapacity granted at the motion to dismiss stage but "[t]his finding is without prejudice to defendants' right to challenge plaintiff's alleged mental incapacity at the summary judgment stage or thereafter.")).

[286] Carelock v. United States, 2015 U.S. Dist. LEXIS 110955, at *22–23 (S.D.N.Y. Aug. 20, 2015) (lawsuit arising under the Federal Torts Claim Act).

[287] Reyes v. Officer Sotelo, 2013 U.S. Dist. LEXIS 97547, at *2 (N.D. Cal. July 10, 2013) (granting summary judgment to prison officials in civil rights action arising under 42 U.S.C. § 1983).

[288] *See Southall*, 2016 U.S. Dist. LEXIS 52634, at *9–10.

[289] *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *1.

[290] *Eber*, 130 F. Supp. 2d at 850.

[291] *Id.* at 869.

mental illness prevented the timely filing of a federal employment discrimination lawsuit, which would be an affront to workers' dignity.

Given that it would ensure that mental incapacity cases face no timeliness bar, congressional abrogation of the statutory limitations period for such cases may be a sounder approach.[292] Abrogation or absence of statutes of limitations at both the federal and state levels might inform such an approach. Congress has eliminated statutes of limitation applicable to the collection of student loan debts.[293] At the state level, there has been a strong movement both in favor of abolition of statute of limitations for rape cases[294] and against.[295] States have no statutes of limitations for mortgage foreclosures,[296] quiet title actions,[297] "a capital felony, a life felony, or a felony that resulted in a death,"[298] "murder, arson, forgery[,] or treason,"[299] and for fraud perpetrated on the court.[300] Therefore, property and monetary issues(student loans, quiet title, and mortgages) and serious felonies (arson, capital or life felonies, fraud, murder, rape and treason) may provide the basis for congressional action in favor of workers suffering from mental illness.

A congressional response is unlikely for a number of reasons, however. While the House of Representatives recently passed the Helping Families in Mental Crisis Act of 2016 by a vote of 422–2,[301] which "make[s] available needed psychiatric, psychological, and supportive services for individuals with mental illness and families in mental health crisis, and for other purposes," the Act has no visible impact on federal employment discrimination laws.[302] Indeed, the Act must still pass the Senate and be signed into law by the President before it has any legal effect. Second, senators balk at the possible abolition of the statute of limitations in employment discrimination actions; on the basis of such fears, they were ready to defeat the Lilly Ledbetter Fair Pay Act of 2009.[303] Finally, mental illness—no matter its seriousness—is unlike the property, monetary, and criminal issues that prompt widespread concern and outrage informing the abrogation or absence of a statute of limitations. It is unlikely that Congress will lift the statute of limitations for federal employment discrimination cases that have a mental illness component.

Congressional action in this regard may also be imprudent. Lifting the statute of limitations

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[292] *See generally* Title VII, 42 U. S. C. §§ 2000e-5(e) (stipulating timeliness requirements for federal employment discrimination lawsuits).

[293] *See* Higher Education Technical Amendments, 20 U.S.C. § 1091a (2016).

[294] *See* Jordan Michael Smith, *These Laws Let Accused Rapists Off the Hook*, MOTHER JONES (Nov. 20, 2014, 7:00 AM), http://www.motherjones.com/politics/2014/11/rape-sexual-assault-statutes-limitations-laws.

[295] *See* George Joseph, *US Catholic church (sic) has spent millions fighting clergy sex abuse accountability*, GUARDIAN (May 12, 2016, 14:32), https://www.theguardian.com/us-news/2016/may/12/catholic-church-fights-clergy-child-sex-abuse-measures; see *also* James Herbie DiFonzo, *In Praise of Statutes of Limitation in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1279 (2004) ("the disequilibrium caused by eliminating limitations periods in sex offense cases will cause untold harm by facilitating conviction of the innocent, by allowing the State to cease active criminal investigations too early, and perhaps even by endlessly prolonging the trauma for rape victims").

[296] *See* Boyd v. Boyd, 2015 Conn. Super. LEXIS 1335, at *14 (Conn. Super. Ct. May 19, 2015) (alteration in original) (citation and internal quotation marks omitted) ("[T]he rule in Connecticut, as far back as the early nineteenth century, is that a statute of limitations does not bar a mortgage foreclosure.").

[297] *See* Ehrenberg v. Roussos (In re Roussos), 541 B.R. 721, 737 (Bankr. C.D. Cal. 2015).

[298] Morris v. State, 909 So. 2d 428, 432 (Fla. Dist. Ct. App. 5th Dist. 2005).

[299] People v. Watson, 338 Ill. App. 3d 765, 778 (Ill. App. Ct. 1st Dist. 2003).

[300] *Ehrenberg*, 541 B.R. at 737.

[301] *See* CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/2646/actions (last visited Aug. 6, 2016).

[302] Helping Families in Mental Crisis Act of 2016, H.R. 2646, 114th Cong. (2016).

[303] *See* Sullivan, *supra* note 92, at 530–31.

specifically for those suffering from mental illness may recreate the statute of limitations in practice. To prevent opportunistic workers and lawyers fearing malpractice actions from including a mental illness claim (no matter how weak), courts would likely require workers (if the abrogation did not) to show that they were actually mentally ill to benefit from the elimination of the statute of limitations, recreating many of the same issues that workers, employers and courts currently face. The alternative might be to lift all statutes of limitations in employment discrimination actions, whose effect would be to disturb any notion of repose for the worker, the employer, and the judicial system. Congressional action in this regard may be unwise for these reasons.

Given that changes to the rules would either leave the current extreme standards in place or would not receive requisite support to pass, I now turn to a possible equitable response.

B. An Equitable Response

When faced with requests for equitable tolling on the basis of mental illness, courts might engage in a balancing of the hardships analysis that would permit workers alleging that mental illness prevented a timely filing of a federal employment discrimination lawsuit to proceed on the merits against their employers.

Dobbs's treatise on remedies law supports this line of argument for plaintiffs who filed late:

> [T]he balancing of equities and hardships looks at the conduct of both parties and the potential hardships that might result from a judicial decision either way. For example, the plaintiff's delay might, when viewed as a defense, simply bar the plaintiff's claim altogether. If the delay is not sufficient to bar the plaintiff, that delay may nevertheless be considered in the total balance of all factors affecting the equities. The equities in favor of, as well as those against the plaintiff would be considered in balancing, and the equities in favor of and against the defendant are likewise considered. So, the plaintiff's delay, coupled with minimal prejudice to the defendant might lead the court to strike the balance of equities in the plaintiff's favor and permit the claim to proceed.[304]

Dobbs notes that balancing can weigh good faith,[305] the public interest,[306] and can involve an analysis in which "[t]he costs and benefits are not necessarily quantifiable or expressed in money terms."[307] That is, equitable relief might issue where the benefit sought "has no market value."[308] Balancing of the equities would thus apply in cases in which a plaintiff failed to file a lawsuit on time and would take a number of factors into account, like good faith and the public interest.

Some courts already adopt this approach when applying federal employment law. In an overtime wages case arising under both the Fair Labor Standards Act of 1938 and state law, the Eastern District of New York recently held that the balance of the equities favored a grant of equitable tolling to a class of workers from the date of their Motion to Certify the class action and not from the date that equitable tolling was requested.[309] The court reasoned that the class had shown "overall steadfast due diligence during the pendency of these motions."[310] That the court

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[304] DOBBS, *supra* note 46, at 109.

[305] *Id.*

[306] *Id.* at 111.

[307] *Id.* at 166.

[308] *Id.*

[309] Chime v. Peak Sec. Plus, Inc., 137 F. Supp. 3d 183, 187–88 (E.D.N.Y. 2015) (declining to accept the recommendation regarding equitable tolling made in *Chime*, 137 F. Supp. 3d 183 at 205).

[310] *Id.* at 188.

cited scant precedent for the proposition that "there is no bright line rule for equitable tolling as to length of tolling" may imply the accepted nature of a balancing of the equities approach and why courts refuse to impose arbitrary cutoffs beyond which a case may not be resuscitated.[311] Other courts show that a balancing of the equities approach can apply as well in cases alleging mental illness where the public interest can be invoked to deny equitable relief to an individual with a violent criminal record.[312]

Applying a balancing of the equities approach to the case of the veteran would require that the case proceed on the merits so that the veteran might tell his story. In the veteran's favor, since other federal courts had extended the limitations period where a medical condition had intervened to prevent the worker from enjoying the full statutory period, a good faith analysis might show that the veteran's equitable tolling request to extend the filing deadline by the 47 days in which he had suffered a serious head injury was supported by other cases.[313] That the veteran sued under the Americans with Disabilities Act, a remedial statute that attempts to prevent discrimination against those with disabilities, might allow courts to read the substantive content of the relevant law into its equitable analysis as indicative of the public interest.[314] Such public interest might require particular attention to the severity of the veteran's injuries sustained during service while the nation was at war. It might take into consideration that the United States has over 21 million veterans,[315] over 4 million of whom have "a service-connected disability."[316] Significant numbers

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[311] Chime, 137 F. Supp. 3d at 188 (citing *Kassman v. KPMG LLP*, 2015 U.S. Dist. LEXIS 118542 (S.D.N.Y. Sept. 4, 2015)).

[312] *E.g.*, Abdusalam v. Kane, 2012 U.S. Dist. LEXIS 132209, at *3 (D. Ariz. Sept. 13, 2012).

[313] *Eber* supports this conclusion. There, the worker had 300 days from the discriminatory event to initiate his lawsuit at the EEOC. *Eber*, 130 F. Supp.2d at 863. Mr. Eber's job transfer on September 10, 1997 was the alleged discriminatory event that triggered the running of the limitations period. *Id.* at 866. July 7, 1998 was 300 days from then. *Id.* Mr. Eber's first hospitalization was on April 14, 1998—216 days after the alleged discriminatory event. *Id.* Mr. Eber's second hospitalization was on June 6, 1998, when he underwent heart surgery and his coma ensued shortly thereafter. *Id.* He was finally discharged from hospital on July 26, 1998. *Id.* at 867. Mr. Eber's coma happened during his second hospitalization, not during his first. Yet the court "most generously" suspended the entire limitations period from his *first* hospitalization on April 14, 1998 to his final discharge on July 26, 1998 (*after* his second hospitalization and coma, which it didn't have to do). *Id.* The court thus chose to overlook the 103 days beginning with Mr. Eber's first hospitalization. *Id.* By skipping those 103 days, which include days on which Mr. Eber was in a "conscious state," *id.*, the 300 statutory days ended on October 18, 1998—84 days after Mr. Eber was finally discharged from hospital (216 days from his job transfer to his first hospitalization + 84 days from his final hospital discharge = October 18, 1998). Mr. Eber thus initiated his lawsuit 191 days after October 18, 1998, and 295 days after the limitations period had ended (if his hospitalizations are excluded). The veteran could have similarly had 47 days added to the end of his incapacitation, which, in his case, would have allowed the court to toll.

[314] *See* Nunnally v. MacCausland, 996 F.2d 1, 5 (1st Cir. Mass. 1993) on looking at the substantive content of the relevant statute in adjudication of equitable tolling:

> In holding that mental illness provides an available ground for equitable tolling here, we note that we are dealing with a broad remedial statute, the Rehabilitation Act of 1973. Cf. Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244, 1246–47 (S.D. Ohio 1984) (mental incompetence is more appropriate basis for equitable tolling under ADEA than under Federal Tort Claims Act). Moreover, we deal with a case in which mental illness or instability is "the very disability that forms . . . the basis for which the claimant seeks [relief]." Canales v. Sullivan, 936 F.2d 755, 758 (2d Cir. 1991)(quoting Elchediak v. Heckler, 750 F.2d 892, 894 (11th Cir. 1985)) (SSDI benefit proceeding). Under these circumstances, we think an absolute rule barring equitable tolling for a plaintiff's insanity might conflict with the substantive purposes of the Act. Finally, we deal with a very short filing period, thirty days.

[315] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *VETERANS*, https://www.census.gov/topics/population/veterans/about/veterans-day.html (last visited May 9, 2016).

[316] Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Employment Situation of Veterans Summary* (March 22, 2016), http://www.bls.gov/news.release/vet.nr0.htm.

of veterans suffer from post-traumatic stress disorder in a given year[317] and veterans are at higher risk of suicide than the rest of the U.S. population, with male veterans being at even higher risk.[318] As a matter of public policy we may want to purge the workplace of discrimination against veterans, by allowing their lawsuits to proceed on the merits, especially when they allege that mental illness prevented a timely filing.

Contra we might say that the veteran acted in bad faith by not filing during the 242 days preceding his serious head injury, as a result of which he filed 18 days late.[319] The public interest may require that all workers (including veterans) prosecute their claims on time, failing which the congressional statute of limitations—reflecting its own balance of the equities—would be rendered meaningless. Were that to occur, employers would be unable to plan their affairs accordingly, and the stability, predictability, and efficiency promoted by rules would be eviscerated.[320] Nevertheless, given the severity of the veteran's injuries, the fact that precedent supported his claim for equitable tolling, the public interest in hearing his story, and that his lawsuit was only 18 days late, the balancing of the equities might strongly favor a hearing of his story about how he was denied reasonable accommodations for his injuries in the workplace where coworkers referred to him as a "retard," "junior varsity," and "the weakest link," and a supervisor told the veteran that he "viewed [the veteran] as if he were an alcoholic."[321]

A similar result might be reached in the radiologist's and the comatose worker's cases. Good faith might require a different approach to the radiologist's case where even the court agreed that the EEOC's representations to the radiologist about her filing were "ambiguous and potentially confusing."[322] Good faith might similarly apply in the comatose worker's case to defeat application of the statute of limitations where the court's dictum that even insanity did not toll a statute of limitations had been undermined by precedent that the court overlooked.[323] As for the veteran, public interest might weigh against dismissing the radiologist's lawsuit by looking at the substance of her claim: a coworker had "touched [the radiologist] and other female workers, [had] made sexually suggestive comments on a regular basis, [had] inappropriately texted female workers outside of work hours, and . . . [had] exposed his penis to [her] and touched her breast when she attempted to get up and walk out of the room."[324] The coworker accepted a plea for indecent exposure.[325] Courts in both the radiologist's and the comatose worker's cases could also have weighed in their balancing the severity of the workers' mental illness claims and their supporting documentation. In their employers' favor, the courts might have weighed the time delay and the necessity of imposing strict constructions of the statute of limitations.

Indeed, broader iterations of a balancing of the equities approach might be supported under what Dobbs refers to as "the total balance of all factors affecting the equities."[326] As part of an

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317 U.S. DEP'T OF VETERAN'S AFFAIRS, *How Common is PTSD?*, http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp (last visited May 9, 2016).

318 U.S. DEP'T OF VETERAN'S AFFAIRS, *Suicide Risk and Risk of Death Among Recent Veterans*, http://www.publichealth.va.gov/epidemiology/studies/suicide-risk-death-risk-recent-veterans.asp (last visited May 9, 2016).

319 *See Southall*, 2016 U.S. Dist. LEXIS 52634, at *6.

320 *See generally* Macedo, *supra* note 284, at 156.

321 Compl. at 4–5, *Southall*, 2016 U.S. Dist. LEXIS 52634.

322 *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *23.

323 *See Nunnally*, 996 F.2d at 5.

324 *Kuriakose*, 2015 U.S. Dist. LEXIS 66208, at *6.

325 *Id.* at *6.

326 DOBBS, *supra* note 46, at 79.

holistic approach to factors that are currently atomized at equity, when any worker requests equitable tolling, we might take into account pro se status, pauper status, *and* mental illness, among other factors. In the employer's favor, we might weigh the amount of time that has elapsed since the alleged discriminatory practice, the availability of relevant records and evidence, and whether remedial steps have been taken to address similar or the same issues in that particular workplace in the intervening time. A balancing of the equities approach would thus de-emphasize antipathy to mental illness claims on the basis of strict application of statutory limitations periods and would interpolate a broader approach to equitable tolling than is currently practice. Such an holistic approach would uphold workers' dignity by allowing those afflicted with mental illness to tell their stories.

CONCLUSION

Because equity raises its drawbridge as they approach, workers suffering from mental illness lose to their employers even before they have had a chance to tell their stories. Such vulnerable workers are often isolated as a result of their mental illness, which often prevents them from participating fully in many socially relevant activities that many Americans enjoy (even outside the workplace) and possibly take for granted. As Todd Rakoff generally reminds us in his work on time:

> The ability of workers to participate jointly in activities other than work is not merely a matter of individual happiness; it has important social consequences as well. Participatory groups build the skills and norms needed for trust, accommodation, and cohesion among members of a society, and also provide the springboard for movements for social change. Groups do exist, of course, in which members each do their activities on their own time. But these tend to be rather passive affairs. The socially more valuable groups thrive on activities that the members do together.[327]

Workers alleging mental incapacity are thus at triple risk: from the effects and the perception of their mental condition in the workplace, from judicial engagement with that illness, and from their illness's ability to hinder their full participation in those activities that so many others enjoy and take for granted. This is why equity is so important. Equity can and should intervene in at least one area of that worker's experience where it can affirm that worker's dignity.

[327] TODD RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 46–47 (2002).

App.89

APPENDIX H

Depression can cause some areas of the brain to shrink – and the damage can last, even when the disease has stopped. (Photo: Colourbox)

Depression can damage the brain

People suffering from depression run the risk that their brains shrink and will remain smaller after the disease is over. The discovery provides new knowledge about the brain and new understanding of how antidepressants work.

Sybille Hildebrandt

Thursday 01. December 2011 - 05:21

A depression not only makes a person feel sad and dejected – it can also damage the brain permanently, so the person has difficulties remembering and concentrating once the disease is over. Up to 20 percent of depression patients never make a full recovery.

These are the conclusions of two projects conducted by Professor Poul Videbech, a specialist in psychiatry at the Centre for Psychiatric Research at Aarhus University Hospital.

In one of the projects he scanned the brains of people suffering from depression, and in the other he conducted a systematic review of all the scientific literature on the subject.

"My review shows that a depression leaves its mark on the brain as it results in a ten percent reduction of the hippocampus," he says. "In some cases, this reduction continues when the depression itself is over."

Antidepressants can help

> *"For many years, people thought that antidepressants worked primarily because they affected the neurotransmitter serotonin. But the latest research indicates that antidepressants influence neurogenesis by starting the formation of new nerve cells.*
>
> Professor Poul Videbech

While depression can have serious consequences for the patient, Videbech says there is hope as the brain can be forced to heal itself in many cases.

Treatment with antidepressants and electroshock seem to be able to start the formation of new nerve cells, so areas that have shrunk can be built up again. Videbech expects that future studies will document the same effects with psychotherapy.

Studies at the Centre for Psychiatric Research, where people suffering from depression have been followed for more than ten years through brain scans, certainly show that shrinking of the hippocampus is reversible if the depression is treated.

Experience from own practice

Videbech started his studies after he had diagnosed and treated many depression patients at the hospital. A symptom typical of the disease is difficulty in concentrating and remembering.

The Hippocampus (Latin, from the Greek for seahorse), is a convolution of the brain, located in the medial temporal lobe. The hippocampus is important for our short-term memory.

But he discovered that the symptoms often continued when the patient had officially recovered.

"Their symptoms were very uncomfortable, at times crippling, and after I had heard the same story many times I started wondering about the cause,. So I started scanning their brains."

The brain scans revealed intense activity in the hippocampus, which contains the memory function and regulates the body's various stress functions. The scans also showed that this area was often reduced considerably in depressive patients, especially if they had several long-lasting depressions. The worst cases were in patients whose depressions had not been treated.

Studied all the literature

The discovery came as something of a surprise, and Videbech thought that other researchers may have made the same discovery in recent years.

Many studies show that electroshock therapy triggers neurogenesis. However, no studies have yet documented that psychotherapy triggers neurogenesis, but Poul Videbech is convinced that

So he started to study many different scientific databases to find and read all previous studies on the subject. The correlation between depression and a reduction of the hippocampus appeared in report after report.

He concluded that when looking at people with depression as a group, there was, on average, a ten percent reduction of the hippocampus.

Stem cells form new nerve cells

One question that Videbech wanted an answer to was why some patients regain their previous ability to remember and concentrate after their depression was over.

His theory was that this was due to the brain's plasticity – the brain can not only degrade itself, but also rebuild damaged brain tissue by forming new brain cells.

This ability to regenerate itself – neurogenesis – was discovered in 1996. Although the discovery is over a decade old, only a limited number of researchers know about it, he says.

Why neurogenesis only occurs in some people is not known, but it is believed that the process is started by stem cells in the hippocampus; these cells can divide and form new nerve cells.

In healthy people the two processes, degradation and regeneration, are constantly in balance. But some diseases, such as various forms of dementia and depression, lead to greater degradation than regeneration.

Animal trials have shown that neurogenesis is vital for making 'depressed' rats healthy. The same applies to humans, says Videbech. Antidepressants and electroshock are effective ways of triggering neurogenesis.

Antidepressants influence neurogenesis

Comprehensive studies of the relevant literature show that antidepressants have a beneficial effect on depression, but the reason for this is not yet fully understood. This lack of knowledge has been used as an argument for not using this form of medicine. The neurogenesis theory can perhaps be a key to solving the problem.

"For many years, people thought that antidepressants worked primarily because they affected the neurotransmitter serotonin," he says. "But the latest research indicates that antidepressants influence neurogenesis by starting the formation of new nerve cells."

He supports his theory by referring to trials with mice. A condition resembling depression is induced in the mice, so they get a characteristic behaviour pattern. The mice are then given antidepressants and start to behave normally again. If the mice are subjected to radiation, which is known to corrupt the formation of new nerve cells in the brain, the antidepressants suddenly stop working and the mice continue their 'depressed' behaviour.

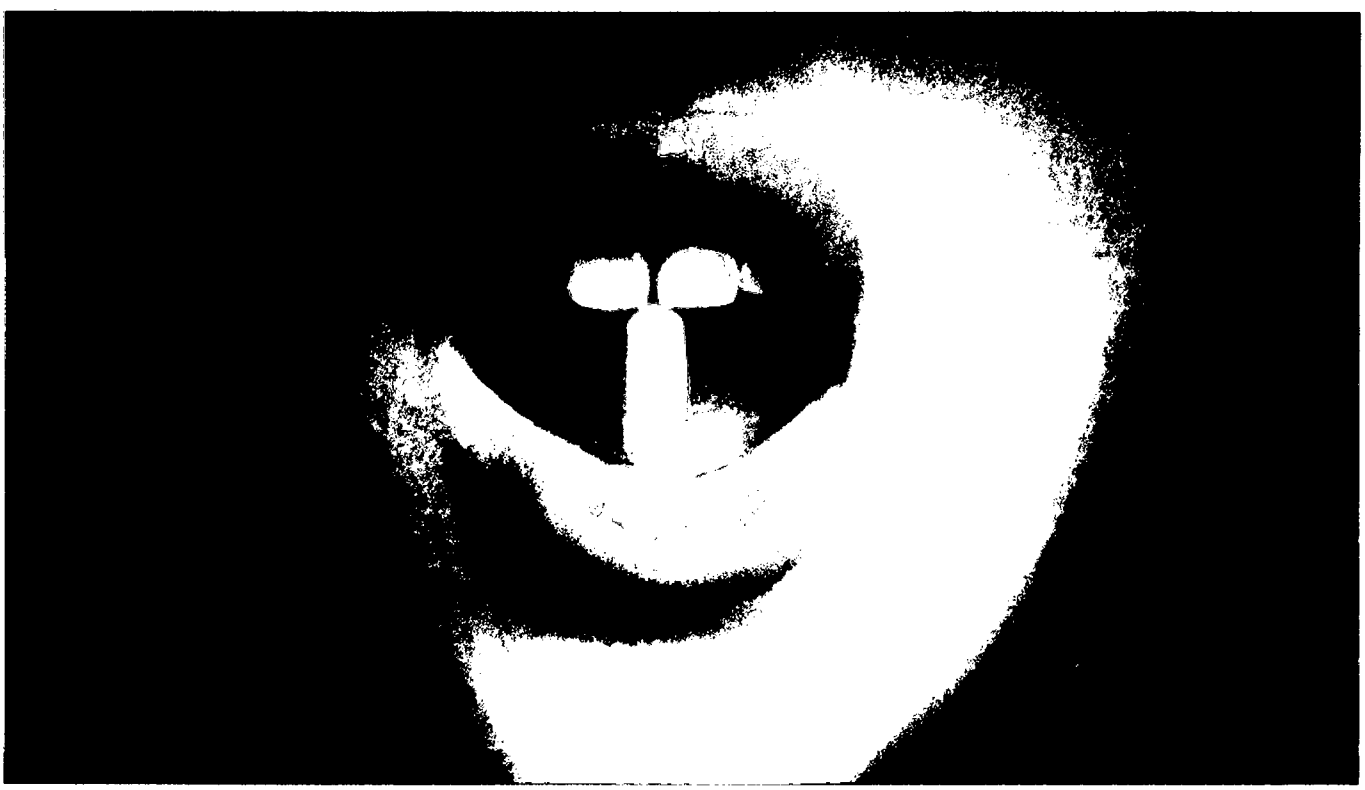
A possible explanation is that the antidepressants started the formation of new nerve cells in the brains of the mice, says Videbech.

"This could indicate that treating depression medicinally triggers neurogenesis. Other treatments, such as electroshock and psychotherapy, appear to have the same effect."

Videbech believes the idea of brain plasticity is very interesting and worthy of furth er research. "But I also believe it is interesting that you can develop new forms of treatment that can lead to neurogenesis and prevent further degradation of nerve tissue and at the same time force the brain to repair itself," he says.

How stress can cause depression

Studies with rats and humans reveal how chronic stress can result in a depression.



New key to better drugs

Researchers have uncovered an important mechanism that will result in more effective drugs.

Stress and exercise repair the brain after a stroke

New research reveals that a combination of stress and exercise can shorten the rehabilitation period after a stroke.

Antidepressants can cause heart failure

Antidepressants containing the active ingredient Citalopram can cause potentially serious heart rhythm disturbances, a new study shows.

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