In the 1960s, the term “gender” emerged in the academic literature to indicate the socially constructed nature of being a man or woman. The gender/sex binary soon became standard academic fare, with sex representing biology and gender representing sex’s social construct. However, in the 1980s feminists became concerned the gender/sex binary—by effectively designating sex as non-social—left room for biological determinism. These feminists made “gender trouble” in part by arguing biological sex was a social concept. The resulting scholarship on sex and gender enriched feminist thought and catalyzed civil rights through an expansion of legal protections.

An almost identical binary exists for disability, the disablement/impairment binary, in which writers characterize disablement as the social construct, and impairment as the disabled person’s body. This disability binary has received sparse critical attention; while few legal scholars have provided ringing endorsements, none have provided a systematic critique of the binary or examined the legal implications attendant to such a critique. Yet, just as with legal scholarship on gender and sex, there are important legal implications to making further sense of the meaning of disability.

In this Article, I make disability trouble by arguing disability is more socially constructed than acknowledged. In particular, and contrary to most literature, I argue that biological impairment is itself a social concept. Initially, I explain how impairment, according to those who coined the disability binary, appears to be little more than diagnosis. From there, I argue, using concrete examples, that both the creation of diagnoses and acts of diagnosis are social processes. Finally, I examine the legal implications of disability trouble. Understanding disability more as contingent and as having a social origin ought to lead to greater acceptance of legal solutions. Disability trouble may also support calls for less reliance by courts on medical diagnoses, especially in cases brought under the ADA. I then apply the insights of disability trouble to show how and why certain cases have been wrongly decided under the ADA.
# TABLE OF CONTENTS

**I. INTRODUCTION** .................................................................................................................. 1

**I. RETHINKING DISABILITY** .................................................................................................. 5  
A. Scholarship and Terminology .............................................................................................. 5  
B. The Disablement/Impairment Binary .................................................................................. 10  
C. The Gender/Sex Binary as Analogue ................................................................................. 13

**II. DISABILITY TROUBLE: IS IMPAIRMENT ONLY BIOLOGICAL?** ............................ 20  
A. Creation of Diagnoses ........................................................................................................ 23  
B. Acts of Diagnosis ................................................................................................................ 31  
C. The Role of Biology and Avenues for Further Research .................................................. 33

**III. LEGAL IMPLICATIONS** ................................................................................................. 34  
A. Greater Acceptance of Legal Solutions ............................................................................. 36  
B. Less Reliance on Medical Diagnoses ................................................................................. 38  
C. Synthesis & Application .................................................................................................... 43

**CONCLUSION** ....................................................................................................................... 46
DISABILITY TROUBLE

Bradley A. Areheart*

INTRODUCTION

In the late 1960s, the gender/sex binary emerged in the academic literature to indicate the socially constructed nature of living as a woman or man; within the distinction, sex was physiological, and gender, socially constructed.\(^1\) The gender/sex binary soon became standard learning and a central part of feminist thought. In the late 1980s, however, Judith Butler made “gender trouble”\(^2\) by leading a chorus of feminist scholars who questioned and criticized the gender/sex binary.\(^3\) These feminists were concerned the gender/sex binary—by effectively designating sex as non-social—left room for biological determinism. Butler and others thus made gender trouble in part by arguing biological sex was a social concept. Such critiques enriched feminist thought on what it means to be a woman—as well as scholarship regarding what it means to be a man, gay, trans, or to otherwise not conform to gender norms. It also catalyzed civil rights through a resulting expansion of legal protections.\(^4\) Work on the gender/sex binary has been fundamental to the development of feminist thought.\(^5\)

An almost identical binary exists for disability, the disablement/impairment binary (“disability binary”), in which disablement is the social construct, and impairment, the disabled person’s body. Yet the disability

\(^{1}\)See infra Part II for more explanation regarding why scholars coined the gender/sex binary.


\(^{3}\)Toril Moi notes Butler’s Gender Trouble was “by far the most important work on sex and gender in the 1990s.” Toril Moi, What Is A Woman? And Other Essays 45 (1999). See Alison Stone, An Introduction to Feminist Philosophy 30 (2007) (“[Butler’s] Gender Trouble [] is one of the most important and influential books in contemporary feminist philosophy.”).

\(^{4}\)See infra Part III (noting gender critiques led to an expansion of sex stereotyping jurisprudence and recognition of intersectionality under Title VII).

\(^{5}\)Stone, supra note __, at 30.
binary has received sparse critical attention; while few legal scholars have provided ringing endorsements, none have provided a systematic critique or examined the legal implications attendant to such a critique.\(^6\) Given the disability binary now commands considerable theoretical attention in scholarly discussions of disability, it is appropriate and timely to critically reassess the disability binary’s credentials.\(^7\)

A few disability scholars have emphasized a related point: The social model of disability (“social model”), from which the disability binary derives, has not been substantially developed or rethought since the 1970s.\(^8\) Other social movement ideologies such as feminism have developed and transformed substantially over time—responding to criticism and changing circumstances.\(^9\) But social disability theory has clung to a fairly narrow reading of its founding assumptions.\(^10\) There are a few possible reasons the social model, and the disability binary in particular, have not yet received much critical treatment.

One explanation is that disability has been theorized largely by advocates. The social model and the disability binary were an outgrowth of social movements and forged by disability rights advocates with policy preferences already in mind.\(^11\) In this light, the social model provided

---


\(^7\) Moira Gatens made a similar, introductory observation about the gender/sex binary before proceeding to examine that binary’s credentials. \textit{MOIRA G ATENS, IMAGINARY BODIES: ETHICS, POWER AND CORPOREALITY} 4 (1996).

\(^8\) SHAKESPEARE, \textit{supra note }__, at 2, 33–34; Tom Shakespeare, \textit{The Social Model of Disability, in THE DISABILITY STUDIES READER, supra note }__, at 197, 199 (“Many leading advocates of the social model approach maintain that the essential insights developed by UPIAS in the 1970s still remain accurate and valid three decades later.”), 202 (“While acknowledging the benefits of the social model in launching the disability movement, promoting a positive disability identity, and mandating civil rights legislation and barrier removal, it is my belief that the social model has now become a barrier to further progress.”). \textit{See also} Mairian Corker & Tom Shakespeare, \textit{Mapping the Terrain, in DISABILITY/POSTMODERNITY, supra note }__, at 1, 18 (noting disability studies has “suffered from a theoretical deficit”). This is also consonant with the recent general observation that “[t]he American disability rights movement has achieved a great deal, but progress has in many respects stagnated.” \textit{SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT} 149 (2009).

\(^9\) SHAKESPEARE, \textit{supra note }__, at 33–34.

\(^10\) SHAKESPEARE, \textit{supra note }__, at 34.

\(^11\) Adam Samaha, \textit{What Good is the Social Model of Disability?}, 74 U. CHI. L. REV. 1251, 1254 (2007) (noting disability rights advocates forged the social model “alongside a political platform”); \textit{id.} at 1255 (“[T]he social model was generated within a disability rights movement with policy objectives.”). Samaha writes:
intellectual justification for the goals of the disability rights movement. Later, as leaders of the disability rights movement became academics, “the social model became an intellectual export. It moved from interest group device to scholar’s tool.” Adam Samaha similarly shows the terms of the social model have found their way into legal scholarship—but without much scrutiny.

A second possible explanation for the lack of critical treatment is that disability scholarship is simply a generation behind other civil rights scholarship. Theorists of race, sex, and sexuality have all been dealing with the insights of postmodern theory and its underlying assumptions for decades. Disability, as an academic discipline, is younger and just now beginning to face similar questions as its key insights come under assault. This challenge represents a second wave of disability scholarship that is akin (but not identical) to the poststructuralist assault on essentialist formulations of race and sex.

Similar notions were percolating elsewhere, but a social model of disability was driven to the forefront by a movement of disabled people dissatisfied with existing institutions and policies. Participants sought to define disability, and thus the movement, in accord with their experience and objectives. . . . Given this history, it is not surprising that original proponents of the social model supported social reconstruction to ameliorate disadvantage. This goal was the inspiration for the model in the first place.

Id. at 1280–82.

12 Samaha, supra note __, at 1282 (noting the social model was “an accoutrement” to the disability rights movement); id. at 1269 (noting the regular connection between the social model and policy “might follow from affiliation with the disability rights movement”).

13 See Samaha, supra note __, at 1283.

14 See id. at 1252–53 (noting legal scholars have interjected a normative bias into their restatements of the social model).

15 Corker & Shakespeare, supra note __, at 13; COLIN BARNES & GEOFF MERCER, DISABILITY 2 (2003) (“Although gender and race were by the 1980s generally recognized as distinctive causes of social oppression, this was not true of disability.”).

16 See Carol Thomas, Disability Theory: Key Ideas, Issues and Thinkers, in DISABILITY STUDIES TODAY 38, 53–54 (Colin Barnes, Mike Oliver & Len Barton eds., 2002) (noting disability “is a young discipline” and “a considerable amount of research and theorizing lies ahead”); CAROL THOMAS, FEMALE FORMS: EXPERIENCING AND UNDERSTANDING DISABILITY 29 (1999) (“The development of social theory about disability is still in its infancy.”).

17 I am convinced meaningful contributions can be made under the guise of second wave theorizing without, for example, agreeing that the body is only language or discursive meaning. See infra Part ILC (moderating the poststructuralist approach to disability theory); SHAKESPEARE, supra note __, at 54–55 (advancing a critical realist perspective) (“Critical realism means acceptance of an external reality: rather than resorting to relativism or extreme constructionism, critical realism attends to the independent existence of bodies which sometimes hurt, regardless of what we may think or say about those bodies.”).
well-worn path.\textsuperscript{18}

In this Article, I make “disability trouble”\textsuperscript{19} by arguing disability is more socially constructed than acknowledged. In particular, and contrary to most literature, I argue that biological impairment is itself a social concept. While many legal articles have been fixated on suggesting doctrinal changes to the ADA, this Article takes a step back to avoid some of the polarization of this debate and to rethink the meaning of disability.\textsuperscript{20}

My argument proceeds as follows. Part I offers a case for rethinking disability. In this Part, I posit disability is now in a second stage of theoretical development. This observation has particular salience for legal scholarship, where disability has received less scrutiny than its closest civil rights analogues. I also examine the role of the disability binary and document how it was fashioned to challenge the idea disability was essentially a medical phenomenon. Also, the gender/sex binary is instructive for disability theory because of both the structural similarities between the binaries as well as the similarities between the civil rights movements. A few disability scholars have noted the connection between the gender/sex and disability binaries before, but without much examination.\textsuperscript{21} In this section, I make the analytical case for mapping feminist insights regarding the gender/sex binary onto the disability binary.

Part II forms the centerpiece of the discussion. In this Part, I argue impairment—though theorized as biologically asocial—is indeed a social concept. Impairment, according to those who coined the disability binary, appears to be little more than diagnosis. Diagnosis is a social process in at least two ways. First, examination of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) shows how many diagnoses themselves are political and social creations. Transient impairments also illustrate that diagnoses often depend on social norms. Second, the way psychological assessments are often administered function as “acts of diagnoses” that are social in nature. I conclude disability is more constructed, and less essential, than acknowledged to date.

Finally, in Part III, I examine the legal implications of disability trouble. Understanding disability more as contingent and as having a social origin

\textsuperscript{18} Samaha’s recent article on the social model is illustrative of a “second wave” of disability scholarship and an important contribution to questioning the assumptions of earlier disability theorists. \textit{See generally} Samaha, supra note __.

\textsuperscript{19} \textit{See infra} Part I.A (defining “disability trouble”).

\textsuperscript{20} Elizabeth F. Emens, \textit{The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA}, 94 GEO. L.J. 399, 408 (2006) (noting “the temptation to approach discussions of current doctrinal questions with a kind of ‘save the ADA’ mindset”).

\textsuperscript{21} \textit{See Samaha, supra note __}, at 1257 (noting this connection in passing); Shelley Tremain, \textit{On the Subject of Impairment}, in \textit{DISABILITY/POSTMODERNITY}, supra note __, at 32, 41 (same).
ought to lead to greater acceptance of legal solutions. Disability trouble may also support calls for less reliance by courts on medical diagnoses, especially in cases brought under the Americans with Disabilities Act (“ADA”). I then apply the insights of disability trouble to show how and why certain cases have been wrongly decided under the ADA.

I. RETHINKING DISABILITY

Now is a critical time to rethink the meaning of disability. Whereas legal protections for race, religion, sex, national origin, and age are relatively established, disability is still very much in a state of flux. For example, the ADA was amended via the ADA Amendments Act of 2008 (“ADAAA”), in part to expand the very scope of what constitutes disability. Moreover, as explained below, disability scholarship has been in a first wave of development. This first wave has helped establish the central terms and concerns of disability scholarship, but has not yielded the type of critical treatment other facets of identity (such as race, sex, and sexual orientation) have received. These observations support the idea that disability is very much under consideration and evolving within the academic, political, and legal spheres.

Section A serves two purposes. First, it attempts to explain the state of theoretical work on disability, including why disability has been slow to embrace postmodern approaches, and notes the trends of emerging second wave scholarship. Second, it outlines the meaning of certain terms for this Article, including my use of disability trouble. This next Section will lay the groundwork for the remainder of the Article.

A. Scholarship and Terminology

Twenty years ago, scholars were attempting to articulate the central concerns associated with disability. This “first wave” of knowledge-production was based principally upon the insights of the social model and has been largely accomplished. Scholars wrote about disability and its


23 Cf. Jeannette Cox, Crossroads and Signposts: The ADA Amendments Act of 2008, available at http://ssrn.com/abstract=1337651, at *3 (2009) (“Despite the ADAAA’s lack of attention to the ADA’s theoretical foundation, the amendments will nonetheless bring renewed attention and significance to this debate.”). Samuel Bagenstos has also recently observed “[t]he American disability rights movement has achieved a great deal, but progress has in many respects stagnated.” BAGENSTOS, supra note __, at 149.

nexus to history, literature, and art. Others wrote about the subjective experience of disability and the role of social networks. Still others examined identity politics and the role of disability within antidiscrimination norms.

Where first wave approaches have helped provide structure for conceptualizing disability, second wave authors have a poststructural bent and prefer to question the presuppositions and assumptions of first wave approaches. In particular, the social model—a first wave model that has been at the heart of disability scholarship—is a natural target for constructive criticism. Advocates of the social model have adhered to narrow readings, which have been described as “inward-looking,” “sectarian,” and “fundamentalist.” While the terms of the social model have provided a useful vocabulary for discussing disability, those terms now merit greater scrutiny.

Second wave thinking appears yet to receive much attention within legal

---

25 See, for example, the essays in Part III (Arts and Embodiment) of GENDERING DISABILITY, supra note __, at 181–252. Also, see the essays in Part VI (Disability and Culture) and Part VII (Fiction, Memoir, and Poetry), of THE DISABILITY STUDIES READER, supra note __, at 355–404, 405–434.

26 See, for example, the essays in Part II (Experiencing Disability) of HANDBOOK OF DISABILITY STUDIES, 351–514 (Gary L. Albrecht et. al. eds., 2001).

27 See, for example, the essays in Part V (The Question of Identity) of THE DISABILITY STUDIES READER, supra note __, at 231–354.

28 See RAPLEY, supra note __, at 64–68 (chronicling how early second wave disability scholarship has been receptive to poststructuralist thought—an acknowledgement that disability is “the product of an array of discursive practices”).

29 Even where U.S. scholars have not expressly adopted the social model, “the overarching orientation” of U.S. disability scholars is “social and cultural, not medical or individualist.” SHAKESPEARE, supra note __, at 25.

30 RAPLEY, supra note __, at 66 (noting “[s]econd wave writers have identified a number of difficulties with the social model”).

31 SHAKESPEARE, supra note __, at 1, 33–34.

32 We are starting to see more critical scholarship. For example, some scholars have already identified tendencies within disability scholarship to essentialize disabled people through a narrow conception of disabled identity. See, e.g., Chris Bell, Introducing White Disability Studies: A Modest Proposal, in THE DISABILITY STUDIES READER, supra note __, at 275 (parodying disability scholarship’s neglect of race and ethnicity); Susan Wendell, Toward A Feminist Theory of Disability, in THE DISABILITY STUDIES READER, supra note __, at 243 (highlighting the absence of a feminist perspective from disability scholarship); Robert McRuer, Compulsory Able-Bodiedness and Queer/Disabled Existence, in THE DISABILITY STUDIES READER, supra note __, at 301 (showing disability and queer existence have a natural affinity, given their contraposition to both “compulsory able-bodiedness” and “compulsory heterosexuality”). Similarly, there have been calls to analyze disability from an intersectional perspective. See, e.g., GENDERING DISABILITY supra note __ (analyzing disability and its nexus with gender).
Most legal scholars have not been critical of the social science literature on disability—but have instead typically noted the social model as implicit support for policy and legal positions. Legal scholars have certainly written about the social model—and taken account of its centrality to disability scholarship—but few have been critical of the social model or investigated its tenets to produce legal insights.

Somewhat curiously—and due to at least some of the reasons noted in the Introduction—race and sex have been much more thoroughly examined than disability. Mounds of legal scholarship have been devoted to understanding the meaning of gender, sex, ethnicity, skin color, and sexual orientation. In particular, legal scholars have scrutinized many of the constructs associated with these aspects of identity (such as the gender/sex binary), resulting in meaningful advances in civil rights.

As explained in the Introduction, disability is a younger discipline than some of its closest analogues. Part of this relative youth is attributable to how much longer it took for disability to receive access and antidiscrimination protections under the law. For example, women received legally-mandated access to public spaces in the nineteenth century; minorities received a similar guarantee of access in the 1960s. Access for disabled people, however, was not ensured until the ADA passed in 1990. Similarly, people with disabilities were not brought into the antidiscrimination fold as a protected class in earnest until 1990—over 25

---

33 See Samaha, supra note __, at 1267 (noting that “in the law literature” the social model principally represents “a normative orientation emphasizing respect for people with disabilities” and “prescriptions for environmental restructuring regularly follow discussions of the social model”). But see Michael Ashley Stein, Disability Human Rights, 95 CAL. L. REV. 75, 88–91 (2007) (noting limitations of the social model)

34 See infra note __ (Crossley import FN).

35 See Samaha, supra note __, at 1253 (arguing legal scholars have failed to question the social model). Adam Samaha’s article on the social model suggests one explanation for the lack of critical work on the social model by legal scholars: their apparent belief the model necessarily entails a normative orientation. Id. at 1267–68. The social model may thus have a “herding” effect on scholars analyzing disability. Id. at 1269.

36 See, e.g., Rosemarie Garland-Thomson, Integrating Disability, Transforming Feminist Theory, in THE DISABILITY STUDIES READER, supra note __, at 257, 257 (“[J]ust as the now widely recognized centrality of gender and race analyses to all knowledge was unthinkable thirty years ago, disability is still not an icon on many critical desktops now.”); Elizabeth F. Emens, Intimate Discrimination: The State’s Role in the Accidents of Sex and Love, 122 HARV. L. REV. 1307, 1313 (2009) (“Race is arguably our primary category of antidiscrimination analysis under U.S. law, making it important in its own right and as a comparator for other categories. By contrast, disability has been relatively understudied in antidiscrimination law and theory.”).

37 This statement is premised on the receipt of antidiscrimination protection in private employment. Disability was of course a protected class under the Rehabilitation Act of 1973, but the Rehabilitation Act only prohibits discrimination on the basis of disability in
years after race, sex, religion, and national origin were receiving the same type of protection.\textsuperscript{38}

Another explanation for disability’s academic youth is that disability, historically, has not received the same amount of attention within universities as, for example, race, class, or gender.\textsuperscript{39} There are a few possible reasons for disability’s late arrival to the table of academic legitimacy. One reason might be the simple pervasiveness of discrimination and prejudice toward people with disabilities.\textsuperscript{40} Whereas, for example, the civil rights movement legitimized ethnicity as a topic for cultural study, the study of disability is often still seen as eccentric.\textsuperscript{41} A second, more complex reason for disability’s earlier neglect within academia was the historic “erasure” of disability (as a category for understanding famous writers, artists, and cultural icons) when other “stronger” categories were present.\textsuperscript{42}

The ultimate consequence of the foregoing is that disability has not been studied in the same way or to the same extent as other political minorities.

\textsuperscript{38}This observation also helps explain why disability has naturally had a much shorter period of examination and scrutiny within the legal academy.

\textsuperscript{39}See LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS 147–50 (2002) (hereinafter DAVIS, BENDING OVER BACKWARDS) (explaining there has been a cultural focus on race and sex at the expense of disability).

In 1997, Lennard Davis, in his \textit{Introduction} to \textit{The Disability Studies Reader} wrote, “it has been virtually impossible to have a person teaching about disability within the humanities” and noted collegiate opportunities to teach “disability studies” were virtually non-existent. Lennard J. Davis, \textit{Introduction}, in \textit{THE DISABILITY STUDIES READER} 1, 2 (Lennard J. Davis ed., 1st ed. 1997) (hereinafter Davis, DSR I). These observations were in stark contrast to the attention given at that time within colleges to cultural studies, women’s studies, and issues of class. \textit{Id.} at 1–2 (“[S]tudies about disability have not had historically the visibility of studies about race, class, or gender for complex as well as simple reasons.”). He later observed that within the humanities “there are no nationally known advocates of disability rights or scholars of disability studies who have anything remotely like the visibility of scholars who deal with race, gender, and postcoloniality.” DAVIS, BENDING OVER BACKWARDS, \textit{supra} note __, at 150.

\textsuperscript{40}Davis, DSR I, \textit{supra} note __, at 1.

\textsuperscript{41}Davis, DSR I, \textit{supra} note __, at 1. In response, Davis questioned “[w]hat is more representative of the human condition than the body and its vicissitudes?” \textit{Id.} at 2.

\textsuperscript{42}Davis, DSR I, \textit{supra} note __, at 4. Davis notes that unless a person was particularly known for his or her disability—such as Beethoven or Helen Keller—he or she was not typically thought of or discussed as a disabled person. \textit{Id.} He questioned, for example, whether most people would include John Milton, James Joyce, or Virginia Woolf within the category of disabilities. \textit{Id.} He further noted “the work of many talented writers, artists, photographers and so on who were disabled have had their work minimalized or suppressed in the same way that people of color or women have experienced.” \textit{Id.} The recovery of this work, he noted, is only now beginning. \textit{Id.}
Disability is thus naturally less theorized, less understood, and in an earlier wave of theoretical development. Similarly, scholars have indicated disability theory is generally in need of critique—and that emerging criticisms are a sign of progress. At least some of the critical scholarship on disability has recently come from within the legal academy, with legal scholars questioning the normative meaning of disability and analyzing models of disability that were previously resident within the humanities. Still, this work is young and far from developed. Second wave approaches to disability illuminate an area of legal scholarship that is largely untapped.

Before proceeding, I would like to define a few key terms for this Article. I have coined the phrase “disability trouble” to argue: (1) the meaning of disability is not fixed and has a way of transcending the disablement/impairment binary (which has become naturalized within disability studies and among disability advocates); and (2) that disability is more social and less biologically-laden than previously theorized. This use of disability trouble parallels Judith Butler’s use of the phrase “gender trouble.”

43 Samaha, supra note __, at 1262 (observing the emerging critiques of the social model are a “sign of progress for disability studies scholars”); see SHAKESPEARE, supra note __, at 9 (noting the “translation of ideas and ideologies [about disability] from activism to academia have not been accompanied by a sufficient process of self-criticism, testing and empirical verification”). See also PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 11 (2003) (noting the social model and minority group models of disability stand in need of critique).


45 See, e.g., Samaha, supra note __ (writing on the social model of disability); Areheart, supra note __ (writing on the entrenchment of the medical model of disability within the media and federal court jurisprudence).

46 RAPLEY, supra note __, at 66 (noting the limits of early second wave approaches).

47 BUTLER, UNDOING GENDER, supra note __, at 42 (“[W]hen one refers to ‘gender trouble’ . . . one is [] suggesting that gender has a way of moving beyond that naturalized binary.”). My primary use of the term gender trouble in this Article, however, is slightly different than Butler’s; given the time that has elapsed since Butler’s work on gender and the scholars who have tread in her wake, I use the term gender trouble to encompass the collective, critical scholarship on gender that has emerged over the last two decades from feminist and queer scholars writing on the subject.

One might challenge my invocation of Judith Butler. Her work has engendered many a controversy, and been challenged on several grounds. See, e.g., Martha C. Nussbaum, The Professor of Parody: The Hip, Defeatist Feminism of Judith Butler, NEW REPUBLIC, Feb. 22, 1999, at 37 (criticizing Butler’s radical social constructionism). See also Moi, supra note __, at 30–59 (critiquing poststructuralist account of gender and sex). It should suffice to note that I am not endorsing every one of her propositions—or every proposition from Gender Trouble. Indeed, Butler’s most controversial points in Gender Trouble are that all gender is performative and parodic performances constitute effective
to rethink sex and gender, it is my hope disability trouble evokes and invites new interpretations and ideas about the meaning of disability.

For purposes of this Article, “impairment” refers to the physical and biological traits associated with conditions commonly considered disabilities. By contrast, “disablement” refers to the experience or status of disability where it is closely associated with or borne out of culture (i.e., socially constructed). Additionally, use of the terms “disability binary” and “gender/sex binary” are intended to denote the presumed binary division between sex and gender on the one hand—and impairment and disablement, on the other.

In Section B, I situate the disability binary within scholarly discussions of disability and note the benefits of the social model’s constructionist account.

B. The Disablement/Impairment Binary

Disability, much like sex, has long been essentialized as a biological given. Because this perspective encouraged biological determinism and ignored the role of culture, disability advocates coined the social model of disability. The social model has been called the “the big idea” of the disability movement; it redefined disability as a social construct and distinguished it from physiological impairment. Disablement—in contrast

resistance of gender norms. See generally Nussbaum, supra note ___ (arguing such arguments by Butler leave much to be desired). What I am doing is employing her use of the term “trouble” and extrapolating from her (often-seen-as-seminal) work on how both gender and sex are socially informed. This latter point—that sex has social contours, which of course militates against the assumption sex is independent of gender—was advanced well before Butler and is relatively uncontroversial.

48 Though many social model theorists use “disability”—instead of “disablement”—to refer to disability that is socially constructed, I have used “disablement” for two reasons: First, this is a term used often by Michael Oliver, who formalized and popularized the disability binary within disability studies. Second, there is an analytic benefit to using “disablement” to denote disability that is constructed socially; doing so preserves “disability” as a holistic term that encompasses both impairment and disablement. In other words, using disablement to refer to the socially constructed component of the disability binary avoids confusion over whether disability is being discussed generally or as a dichotomous term. In this article, disability is always used as a non-dichotomous, holistic term.

49 My use of the word binary is not intended to denote the way gender, for example, might be a binary category (that plays host to masculine/feminine distinctions).

50 SHAKESPEARE, supra note ___, at 29.

51 A key moment in the Social Model’s intellectual and political history was in 1976, when the Union of the Physically Impaired Against Segregation (“UPIAS”) published its Fundamental Principles of Disability. UPIAS’s differentiation between impairment and disability would later form the basis of what Mike Oliver coined as “the social model of
to impairment—was “all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on.”

The disability binary has thus been the linchpin for a social model of disability. Indeed, Michael Oliver—who is credited widely with formalizing and establishing the social model in western academia—emphasized disability’s social nature precisely by distinguishing disablement from impairment. He later explained, “[d]isablement is disability.” See Michael Oliver, Understanding Disability: From Theory to Practice 1–2 (1996) (hereinafter Oliver, Understanding Disability) (“I should say at this point that the original simple idea underpinning my work was not my original idea but was an idea that I came across in encountering Fundamental Principles of Disability (UPIAS 1976) for the first time.”); id. at 28 (affirming impairment/disability distinction in Fundamental Principles of Disability as “valid to this day”). See also Shakespeare, supra note __, at 197 (“While the problems of disabled people have been explained historically in terms of divine punishment, karma or moral failing, and post-Enlightenment in terms of biological deficit, the disability movement has focused attention onto social oppression, cultural discourse, and environmental barriers.”); id. at 198–99 (explaining the “redefinition of disability itself” is what sets the social model apart from other socio-political approaches to disability).

Oliver, Understanding Disability, supra note __, at 33. One of the most common illustrations for understanding disability as a social construct are the architectural barriers faced by wheelchair users. Samaha, supra note __, at 1258. “It is one thing to be unable to walk. It is quite another matter to be unable to enter a building unassisted because the architect preferred stairs to ramps.” Id at 1258–59. In such a situation, a person is disabled—or made to feel disabled—at least in part by factors outside of the person’s own body. Such factors may, under the social model, include physical, institutional, and attitudinal barriers. Areheart, supra note __, at 188.

Tom Shakespeare has explained one key to understanding the social model is a series of dichotomies: impairment is distinguished from disability (the disability binary); the social model is distinguished from the medical model of disability; and disabled people are distinguished from non-disabled people. Shakespeare, supra note __, at 198–99. In particular, under the disability binary, impairment is individual and private—while disablement is structural and public. Id. at 197. In this way, impairment might be seen as a remnant of the medical model of disability, an implicit paradigm that historically has focused on the impact of an individual’s own physical or mental impairments—rather than on factors that reside outside of the person’s body.

Barnes & Mercer, at 65; Rapley, supra note __, at 62 (noting the “fractioning of a monolithic ‘disability’ into notions of a (physical or mental) impairment, with concomitant disability caused by social barriers” is “central” to the social model) (emphasis in original).

Samaha, supra note __, at 1251–52 (noting although the social model’s causation story has been around since the 1970s, it was Michael Oliver who launched the social model in western academia in 1990); see Rapley, supra note __, at 62 (“[T]he social model as a formal statement of social scientific theory is usually held to originate in the work of Michael Oliver.”).
wholly and exclusively social . . . [and has] nothing to do with the body.”  

Impairment, however, is “nothing less than a description of the physical body.”  

Oliver used the disability binary to underscore the socially constructed nature of disability. The disability binary has since been consistently noted as key to the social model. 

The social model’s constructionist account has several benefits: (1) It dispels uncritical assumptions that disadvantage resulting from disability is natural or necessary; (2) it explains how social conditions that contribute to disability disadvantage are contingent and it indicates a pragmatic political solution of barrier removal; and (3) it liberates disabled persons by shifting the attention from an individual’s physical or mental deficits to the way society includes or excludes them. The social model has been discussed widely both as it pertains to the meaning of disability as well as a justification for certain policy and legal prescriptions. The social model (and the disability binary) has been ubiquitous in disability scholarship generally and solidified its place in legal disability scholarship within the last decade.
Yet the social model—by relying on a binary division between social disablement and physiological impairment—unwittingly underscores the idea that disability has a biological essence. In other words, although the social model was formulated to indicate disability’s constructed nature, it inadvertently reifies the idea that disability is built at least in part upon non-social, biological facts. It is this latter idea that warrants greater scrutiny and examination. Is disability rightly seen as predicated upon an essentially biological foundation?

In Section C, this Article will explore the disability binary’s nexus with the gender/sex binary. In particular, this Section provides a brief overview of the gender/sex binary and analyzes the strength of the analogy between the two binaries. To the extent the two are similar, feminist scholarship on the gender/sex binary may provide a roadmap for future disability scholarship.

C. The Gender/sex Binary as Analogue

Before examining the concept of physiological impairment, it is useful to examine briefly scholarship on the gender/sex binary, which is a useful

---

64 RAPLEY, supra note __, at 66 (noting impairment and disablement, under the social model, are paradoxically “reified as structurally given things”). In this way, impairment might be seen as a remnant of the medical model of disability, which posits biology as an essential characteristic of the disabled individual. Id.

65 Scholarship on the gender/sex binary has been exhaustive and this Article is not intended to duplicate that work. For scholarly exposition on the gender/sex binary within the law literature, see, for example: Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1 (1995) (arguing sex and gender have no necessary causal relation and they should be disaggregated within sex discrimination jurisprudence); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. PA. L. REV. 1 (1995) (arguing gender and sex are bundled concepts and thus sex ought not to factor in the legal determination regarding whether adverse workplace action was taken because of a person’s gender). Outside the law literature, consider: BUTLER, GENDER TROUBLE, supra note __; PROKHOVNIK, supra note __ (arguing dichotomies, such as the gender/sex dichotomy, have sustained exclusionary norms and practices); ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM x (1994) (arguing sex “cannot be adequately understood as ahistorical, precultural or natural [] in any simple way”); ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT MEN AND WOMEN (1985) (arguing scientific, essentialist claims about men and women often do not hold when subjected to critical scrutiny); MOL, supra note __, at 4 (arguing the gender/sex binary is “irrelevant to the task of producing a concrete, historical understanding of what it means to be a woman”); GATENS, supra note __, at viii, 11–14 (arguing gender may be explained by reference to “imaginary bodies”—“those ready-made images and symbols through which we make sense of social bodies” and construct subjectivity).
analogue to the disability binary. In particular, understanding the gender/sex binary’s trajectory over the last forty years may help chart a path for future disability scholarship.  

Though most people use sex and gender interchangeably, feminist scholars have distinguished between the terms since the late 1960s. While the term sex has long been in use, the term “gender” was coined to emphasize the socially-constructed nature of sex and counter the biologically-determinist viewpoint that biology is destiny. This distinction made theoretical sense

---

66 Rosemarie Garland-Thomson has lamented many disability scholars are unversed in the (related) critical enterprises that have come before. Garland-Thomson, supra note __, at 257. She notes that women’s studies and race studies established a model in the academy for identity-based scholarship, including gender studies, queer studies, and a proliferation of ethnic studies. Id. She observes, however, that disability scholars’ general lack of knowledge of related disciplines has led to “a great deal of wheel reinventing.” Id.

This Article picks up on that critical insight; in particular, advances in feminist thought may well hold the promise of insights for disability given some of the intuitive similarities between certain aspects of feminist and disability scholarship.

67 Moi, supra note __, at 86 (noting interchangeable usage of sex and gender has become “increasingly accepted in everyday life”). In 1995, Mary Ann Case noted “the word ‘gender’ had come to be used synonymously with the word ‘sex’ in the law of discrimination.” Case, supra note __, at 2. 10. She lamented this result was in large part due to Ruth Bader Ginsburg’s litigation of constitutional sex discrimination cases in the 1970s. Id. at 9–10. Ginsburg had been concerned the term sex conjured up various associations that distracted from the cases at bar. Id. at 10. Accordingly, Ginsburg began to use gender in place of sex, which resulted in a bit of “analytic confusion.” Id. The tendency to use gender in place of sex—to avoid mentioning sex, which may suggest sexual activity—has persisted and expanded to become a mainstream practice. Stone, supra note __, at 32.

68 Stone, supra note __, at 31; Moi, supra note __, at 3; Case, supra note __, at 2 (noting “the two terms have long had distinct meanings, with gender being to sex what masculine and feminine are to male and female”).

69 Mari Mikkola, Feminist Perspectives on Sex and Gender, Stanford Encyclopedia of Philosophy (May 12, 2008), http://plato.stanford.edu/entries/feminism-gender; Moi, supra note __, at 5. See Joan W. Scott, Gender: A Useful Category of Historical Analysis, in COMING TO TERMS: FEMINISM, THEORY, POLITICS 81, 82 (Elizabeth Weed ed., 1989) (“In its most recent usage, ‘gender’ seems to have first appeared among American feminists who wanted to insist on the fundamentally social quality of distinctions based on sex. The word denoted a rejection of the biological determinism implicit in the use of such terms as ‘sex’ or ‘sexual difference.’”). An earlier version of biological determinism appears to be the nineteenth-century idea of “pervasive sex,” in which biological difference was thought to “seep[] out from the ovaries and the testicles and into every cell in the body until it has saturated the whole person.” Moi, supra note __, at 11. Toril Moi explains: “[It is the encounter with the pervasive picture of sex that the need for something like the sex/gender distinction is born.” Id. at 12. Moi later notes that gender, historically situated, “may be pictured as a barricade thrown up against the insidious pervasiveness of sex.” Id. at 15.

The notion that gender was socially constructed prompted diverse views about what exactly was constructed. Some understood gender to involve claims about women’s
DISABILITY TROUBLE

for psychologists attempting to explain transsexuality; \textsuperscript{70} feminists also found the distinction useful since it allowed them to argue perceptions and expectations of women were produced socially and thus subject to change. \textsuperscript{71} The resulting insight was that one’s biological sex does not determine one’s social gender. \textsuperscript{72}

In the binary’s early stages, sex and gender were thought to complement one another much like a coat on a coat rack, with gender cloaking (and complementing) sex. \textsuperscript{73} This view, however, implied too much of a causal socialization and concomitant expectations. \textit{See Kate Millett, Sexual Politics} 29 (1971) (emphasizing gender’s cultural basis). Others took it to describe personalities; one might have a more masculine or feminine personality, depending on parental identification. \textit{See generally Nancy Chodorow, Reproducing Mothering} (1978) (emphasizing the role of parenting in the development of feminine and masculine personalities). Still others interpreted the term gender to address the issue of sexuality, a social meaning associated with—but not determined by—sex. \textit{See generally Catherine MacKinnon, Toward A Feminist Theory of State} (1989) (locating sexuality at the core of gender). The diversity of views that emerged is illustrative of the value that came just from questioning whether women’s experiences were based on something more than biology.

\textsuperscript{70} Mikkola, \textit{supra} note __. The gender/sex distinction achieved traction with the publication of Robert J. Stoller’s book, \textit{Sex and Gender}, in 1968. \textit{Gatens, supra} note __, at 5. Stoller, a contemporary psychoanalyst, was attempting to make sense of hermaphrodites, neuters, transvestites, and transsexuals, and he did so through developing and systematizing the distinction between sex and gender. \textit{Id.} He explained that a person’s gender is largely a result of postnatal psychological influences and contended these influences on gender identity could “completely override the biological fact of a person’s sex.” \textit{Id.} at 6. Stoller’s work instantly medicalized sex and situated gender as a purely psychological category. \textit{MoI, supra} note __, at 22–23.

\textsuperscript{71} Mikkola, \textit{supra} note __; \textit{Stone, supra} note __, at 56. Feminists quickly seized upon Robert Stoller’s work since it seemed to offer a “theoretical justification for the right to equality for all independently of sex.” \textit{Gatens, supra} note __, at 6–7. \textit{See MoI, supra} note __, at 22–23 (noting Stoller’s concepts in \textit{Sex and Gender} “were quickly appropriated by feminists”).

\textsuperscript{72} \textit{Stone, supra} note __, at 31 (“[Feminists] valued the [sex/gender] distinction because it implied that gender expectations and ideas are products of culture and society, and so can be changed. This challenged the view—widely held at the time—that women’s and men’s biology causes them to have the social positions and statuses that they do.”). Stone later explains,

We can now be more precise about what it means to say that sex does not determine gender. Namely, when people form particular ideas about gender, or behave in typically masculine or feminine ways, or understand themselves as masculine or feminine, none of these activities is caused by features of those individuals’ biology such as their hormone levels. \textit{Id.} at 34.

\textsuperscript{73} Mikkola, \textit{supra} note __; \textit{See Ian Hacking, The Social Construction of What?} 7 (1999) (“Gender was, in the first analyses, thought of as an add-on to physiology, the contingent product of the social world.”). The coat-rack view of gender is still sometimes expressed within contemporary scholarship. \textit{See, e.g., Case, supra} note __, at 10 (noting “sex” refers to anatomical and physiological distinctions between men and women;
relation. The more common view now is that gender is discrete from sex.\textsuperscript{74}

In the late 1980s, feminists—many of whom might be counted as poststructuralists—began to register concerns about the gender/sex binary and, over time, built to a host of scholars who questioned whether the distinction was worth retaining.\textsuperscript{75} Some were skeptical of introducing and systematizing yet another dichotomy since dualistic thinking had historically proved detrimental for women.\textsuperscript{76} Others were concerned the gender/sex binary distorted what it meant to be a woman by advancing a uniform conception of gender.\textsuperscript{77} Many questioned whether sex and gender were truly distinct in the first place, with some focusing on whether sex classification was solely a question of biology,\textsuperscript{78} and others focusing on whether gender was only social.\textsuperscript{79} Finally, some scholars questioned whether the gender/sex distinction was even useful.\textsuperscript{80} In sum, the criticisms that emerged deepened and strengthened feminist theory, as well as inspired entirely new schools of thought.\textsuperscript{81}

‘gender,’ by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions.”).

\textsuperscript{74} Mikkola, supra note __.

\textsuperscript{75} Moll, supra note __, at 3 (noting that from the late 1980s on, the gender/sex binary has been subjected to “merciless critique”).

\textsuperscript{76} Prokhorovnik, supra note __, at 41 (noting one problem with dichotomy is that “it leads specifically to the denigration of women”).

\textsuperscript{77} See Elizabeth Spelman, Inessential Woman 159 (1988) (criticizing feminists for essentializing women by assuming all share certain traits); Butler, Gender Trouble, supra note __, at 19 (arguing feminists have defined woman in a normative way, implying there is a correct way to be gendered) (“[T]he insistence upon the coherence and unity of the category of women has effectively refused the multiplicity of cultural, social, and political intersections in which the concrete array of ‘women’ are constructed.”).

\textsuperscript{78} See infra Part II (canvassing feminists’ resistance to the claim sex was solely biological). See also Fausto-Sterling, supra note __ (analyzing scientific claims about men and women); Gatens, supra note __, at 3–17 (questioning whether sex may be understood without reference to “imaginary bodies,” a socially-constructed notion of the body).

\textsuperscript{79} See Prokhorovnik, supra note __, at 137 (arguing gender roles issue from identification with the bodies of men and women); Gatens, supra note __, at 13 (arguing the relation between sex and gender is contingent—but not arbitrary); Moll, supra note __, at 29 (“To deny that biology grounds social norms is to deny that our sexed bodies produce any gender norms in whatever context.”) (emphasis in original).

\textsuperscript{80} Stone, supra note __, at 51 (analyzing whether the distinction between sex and gender is worth retaining); See Moll, supra note __, at 5 (arguing “feminists managed to make a convincing case against biological determinism long before they had two different words for sex to choose from”); Prokhorovnik, supra note __, at 114 (“Once the basis of the dichotomous force of the sex/gender distinction (biology/social construction) is exposed as false, then it can be seen that there is only one (multiple) thing at issue here, and that its character and features need to be retheorised.”).

\textsuperscript{81} Queer theory is one such example; scholars within this movement found the term
With this abbreviated history as a preface, it is appropriate to now ask whether the disability binary is on a familiar path. Is the disability binary like the gender/sex binary and thus in a position to glean from prior feminist insights? Or is disability sufficiently different to warrant only a look at where feminists have tread—and then a new path?

The disability and gender/sex distinctions have intuitive similarities. Both sex and disability have historically been seen as mere questions of biology. In this context, gender and disablement were terms fashioned by advocates with political objectives in mind—and for similar effect: to counter biological determinism and galvanize the civil rights of women and disabled people. In present form, the binaries present a natural parallel. Sex is much like impairment, with both terms said to represent biological traits. Similarly, gender is much like disablement, with both terms representing socially constructed traits.

Additionally, the biological component for the gender/sex and disability binaries is unique and makes sense in a way that has little import for other identity groups. Generally speaking, some biological differences act as an impediment to equality and must be taken into account when crafting policy. In other words, the law must sometimes treat people differently to achieve equality. This is a salient dynamic for both women and people.

“gender” (and its resulting applications) provided a much-needed (and liberating) vocabulary for describing gays, lesbians, bisexuals, and transsexuals. See also Stone, supra note __, at 27 (“[P]hilosophical thinking and rethinking of new concepts such as gender and sexual difference can lead feminist philosophers to produce new form of feminism.”).

See Shakespeare, supra note __, at 29 (“Redefinition of disability in the social model parallels feminism’s redefinition of women’s experience in the early 1970s.”); Samaha, supra note __, at 1280–82 (arguing the terms of the social model were fashioned by disability advocates with policy objectives in mind).

None of the analysis comparing the gender/sex and disability binaries (and, at some level, women and disability) is intended to obscure the intersectional fact these concepts are interrelated for women with disabilities. Scholarship at the intersection of disability and women is emerging and making a valuable contribution to understanding disability. See, e.g., Gendering Disability (Bonnie G. Smith & Beth Hutchinson eds., 2004). The intersection of women and disability is not, however, the focus of this Article.

In contrast, race and national origin may embrace a model of formal equality since they have long been considered (entirely) socially-constructed; indeed, this insight was a defining tenet of critical race theory. Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 7 (2001) (noting a defining tenet of critical race theory is the social construction thesis, “that race and races are products of social thought and relations”).

with disabilities. For example, feminists have found it necessary to account for women’s biological capacity to bear children via the Pregnancy Discrimination Act. Similarly, biology must be taken into account for disability via the access and accommodation requirements under the ADA.

Yet differential legal treatment may both further and hinder equality. Taking account of biological differences can help level the playing field. However, given the strong (and often unspoken) ideological bent toward formal equality, differential treatment is often perceived as special treatment. And such treatment can birth or sustain stereotypes that militate against genuine equality. This is a distinct challenge shared by both women and people with disabilities.

Another similarity concerns the plurality and complexity of what and who is covered by the gender/sex and disability binaries. Both sex and gender are terms that cover a broad range of practices and meanings, and neither is reducible to a single definition. For example, sex may be defined as reproductive capacity, sexual activity, sexual orientation, the body, or power. Similarly, gender may implicate gender identity, sexual identity, and/or social norms. Impairment and disablement are also diverse; one need only consider the breadth of disabled persons to recognize the complexity in discussing impairment and disablement. Physical disabilities, learning disabilities, and mental illnesses are all commonly understood as disabilities.

Despite the similarities between the disability binary and gender/sex distinction, a couple of differences are worth considering.

First, there may be a slight difference in the types of barriers identified by advocates of the binaries. In particular, some have argued while nothing is intrinsically problematic about being a woman—remove social discrimination and most females will flourish—the barriers disabled people face are more complex. Such barriers are said to involve both discrimination as well as some measure of intrinsic limitations. As an

---

86 While some feminist and disability scholars have taken the view that biology is irrelevant, most have concluded there is something biological about being disabled or a woman that cannot be explained entirely through social forces. This ever-present tension may help explain why both the disability and gender/sex binaries have been central to disability and feminist thought, respectively. See Mot, supra note __, at 3 (“The sex/gender distinction provides the basic framework for a great deal of feminist theory . . . .”). As explained above, the disability binary effectively structures the social model of disability, which has been the defining school of thought for disability theory. See generally supra Part I.

87 PROKHOVNIK, supra note __, at 141.

88 Id.

89 E.g., Shakespeare, supra note __, at 202.

90 Id.
example, some limitations would exist for a visually impaired person even if all physical, institutional, and attitudinal barriers could be eliminated; the inability to see would persist and limit that individual’s ability to function.

Yet this argument may assume too much. Women do arguably have some limitations built into their physical stature. Most of these have to do with physical strength and size, but there are also the myriad contingencies associated with the capacity to reproduce. Accordingly, it is not as simple as saying that ending discrimination ensures women will flourish in the marketplace.

Additionally, this argument overlooks feminist scholarship that suggests the built environment can indeed constitute a barrier for women when spaces are constructed with the male body in mind. Women may thus face more architectural barriers than most people realize. Moreover, the idea that remedying all social barriers for disabled people might only be a piecemeal solution (since intrinsic limitations remain) does not diminish the established goal of providing equality of opportunity as far as practically and legally possible.

A second difference is that gender may be chosen, while disablement is rarely volitional. Feminists have championed the claim that sex does not determine gender; one may choose a gender that does not conform to traditional sex roles. While the matter of escaping biology (however it is understood) is not simple in the context of either binary, volition is certainly a complex phenomenon for disabled persons. While one diagnosed with a debilitating disease may choose her/his attitude in internalizing a condition, some impairments may be seen as unavoidably disabling. For example, a paraplegic’s attitude—and how she mentally and emotionally constructs her condition—matters, but will have a limited effect on her degree of disablement. There will remain for her certain inevitable and disabling realities.

While differences between the binaries and their constituents exist, none make the binaries sufficiently dissimilar to merit comparison. The most important elements of the analogy hold: (1) each binary is predicated on a nature/culture split—where one component of the binary is said to represent that which is natural and biological and the other is said to represent that which is socially constructed; (2) each dichotomy represents groups that have historically been oppressed; and (3) each binary was fashioned to further the same objective: illuminating the socially constructed nature of what it means to be a woman, on the one hand, or disabled, on the other. In sum, the disability binary is sufficiently like the gender/sex binary to

---


92 For example, a biological male may choose a feminine gender.
warrant examination into where feminists have tread.\(^9^3\)

In the next Part, this Article approaches the disability binary with the feminist insight that biological concepts may well have social contours. In particular, I explain how conditions often identified as impairments are produced socially. I hope to show that impairment—like sex—is constructed and a relatively fluid concept.

II. DISABILITY TROUBLE: IS IMPAIRMENT ONLY BIOLOGICAL?

As explained above, feminists made gender trouble in part by arguing sex was a social concept and thus not fully capable of being distinguished from social gender. These troublemakers suggested new ways of thinking about gender and sex that resisted the old assumptions that sex was one thing, gender was another, and neither was much like the other. Similar concerns may be voiced about the disability binary. One legal scholar has noted in passing, “insofar as both impairment and [disablement] are socially constructed, disabilities scholarship might miss something important.”\(^9^4\) In sum, it matters if the assumed distinction between disablement and impairment turns out to be no distinction at all.\(^9^5\) But is there in fact no distinction?

While social modelists have focused on the meaning of disablement, impairment has been sorely neglected\(^9^6\)—and for an obvious reason: the social model was expressly formulated to address social disablement, which was merely contrasted with physiological impairment. Indeed, Oliver expressed his belief a theory of impairment should be developed separately from a theory of disablement.\(^9^7\) While some disability scholars have

\(^9^3\) Of course, this Article represents only a partial effort to do so. While this Article borrows from how feminists argued sex was a social concept, there are many connections between the feminist and disability movements that remain to be explored.

\(^9^4\) Samaha, supra note __, at 1267.

\(^9^5\) Id. at 1266 (noting this postmodern critique has some force). See also Butler, GENDER TROUBLE, supra note __, at 9–10 (“If the immutable character of sex is contested, perhaps this construct called ‘sex’ is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.”).

\(^9^6\) Barnes & Mercer, supra note __, at 67 (“There has been little debate in the disabilities studies literature about the formulation of impairment in terms of biomedical characteristics.”); Carol Thomas & Mairian Corker, A Journey Around the Social Model, in DISABILITY/POSTMODERNITY, supra note __, at 18, 24. See Dan Goodley & Mark Rapley, Changing the Subject: Postmodernity and People with ‘Learning Difficulties,’ in DISABILITY/POSTMODERNITY, supra note __, at 127, 139 (noting “impairment is up for grabs in the discursive world”).

\(^9^7\) Oliver, UNDERSTANDING DISABILITY, supra note __, at 42 (“So let’s develop a
recently focused on impairment as an important aspect of a disabled person’s phenomenology, my project is different and more theoretical. I explore impairment as diagnosis to show how the body—understood as biology—is still often socially constructed.

Notably, feminists strongly resisted the idea that sex was only biological. They first did so through arguing strict sexual dimorphism could be seen as a contemporary phenomenon—the product of social forces. Intersexed individuals have been important to this debate since they offer a visible challenge to a strict and natural division between biological males and females. Similarly, some scholars identified the social nature of sex determination by arguing the criteria in more ambiguous cases were not yet ordered decisively. Additionally, scholars have noted gendered habits and traits relating to diet, stress, and activity all can alter hormone levels and at least some sex characteristics. Contemporary feminists have also explained that scientific views about sex social model of impairment to stand alongside a social model of disability . . . “). Of course, this position only further underscored the presumed separateness between the body and social practices. See Thomas & Corker, supra note __, at 29 (“My worry is that if the social theorization of impairment is carried out this way, and is conducted within the modernist dichotomies of mind/body, individual/society and structure/culture, for example, what will happen is what, historically, has always happened . . . . There will continue to be a physicalist emphasis . . . ”).

98 Although the gender/sex binary was appropriated to counter sexism and biological determinism, feminists became concerned the sex part of the binary indicated there was a biological essence associated with being a woman. If one goal of the gender/sex binary was to illuminate the social nature of being a woman—but the presumed, non-social part of being a woman (sex) was indeed social—the binary might underestimate the degree to which being a woman is culturally informed.

99 See PROKHOVNIK, supra note __, at 131 (arguing strict sexual dimorphism “was consolidated only in the twentieth century with the entrenchment of a biological notion of a natural sex difference based on the presence of X and Y chromosomes, which was taken as providing explanatory force”). The point advanced by feminists is not that, historically, there was no distinction between males and females, but rather, the biological distinctions that existed were more varied and less militantly enforced. Id. at 130–32. See also Case, supra note __, at 15 n.35 (explaining chromosomal taxonomy has complicated sexual dimorphism in recent years).

100 STONE, supra note __, at 38–41.

101 “[T]here is as yet no decisive specification of the criteria for the biological basis of sex determination: should it rely upon observable genitalia, reproductive capacity, genetic chromosome formation, hormonal makeup, all of these or some of these?” PROKHOVNIK, supra note __, at 132.

102 STONE, supra note __, at 35 (noting research that suggests sexual dimorphism is exaggerated in western industrial societies due to mating practices), 80 (noting exercise may reduce the size of female breasts and hips or male gonads, and diet may cause children to start puberty early or stop altogether).
change over time and are influenced by expectations about gender.  

Second, scholars explored how biological processes unique to women may be so severely colored by medical interventions, as well as social preconceptions, that it is impossible to disaggregate biology from sociology. For example, menstruation and childbirth—although “natural” processes—vary widely from culture to culture both because of how they are addressed by medical institutions, as well as because of the culturally-specific connotations associated with each. This has two implications: First, medical institutions’ guiding assumptions and methods have tangible effects on the bodies studied and diagnosed. That is to say, knowledge claims about the body are normative and often affect how people act. Second, the full meaning of any “natural” activity or experience is derived only from understanding cultural conventions and practices.

In sum, feminists resisted the idea that sex is non-social because social forces affect biology and medical disciplines (which claim to speak authoritatively about biology). Because of the way both sex and impairment feature the body, it will be useful to recall some of these insights below.

Returning to the disability frame, is impairment solely biological? Put another way: Is impairment devoid of social input? To answer these questions, we must first ask what is denoted by impairment. As Oliver stated, impairment is the (disabled person’s) physical body. This is also consistent with restatements of the meaning of impairment. Yet such a definition begs the question of who is disabled in the first place. What or who tells us whether someone is disabled?

Here, it seems the issue of diagnosis emerges since the disabled person’s body is mediated and identified as impaired principally through medical diagnoses. Without diagnoses, many disabilities would not be understood.

103 STONE, supra note __, at 37.

104 PROKHONNIK, supra note __, at 130 (“The physiological dimension of sex is not isolable from the network of social conventions and practices which influence the meaning of sex”), 135 (explaining how natural drives—such as motherhood and sexuality—are mediated through social practices).

105 See GATENS, supra note __, at 9 (arguing “some bodily experiences and events, though lacking any fixed significance, are likely, in all social structures, to be privileged sites of significance. . . . Menstruation is likely to be one of these privileged sites.”).

106 GROSZ, supra note __, at xi (“Bodies are not inert; they function interactively and productively.”).

107 PROKHONNIK, supra note __, at 115.

108 Supra note __ and accompanying text.

109 Crossley, Disability Kaleidoscope, supra note __, at 657 (contrasting “bodily impairments” with “disability,” under the social model); Areheart, supra note __, at 188 (noting the impairment/disability distinction as foundational to the social model); Shakespeare, supra note __, at 197 (noting the dichotomy between biological impairment and social disability as key to the social model).
as such by the person diagnosed—or others. Whereas sex and diagnosis typically converge only at the time of birth—when the sex of a child is pronounced by medical professionals—most disabled persons interface with medical professionals who diagnose them throughout their lives. Diagnoses may change over time or be complicated by additional diagnoses. And diagnoses are often difficult to escape, given that psychiatric records seem to have an unusually long shelf life. In short, impairment, understood as the physical traits associated with conditions commonly considered disabilities, seems to be little more than diagnosis.

We may thus pose a second, closely-related question: Is diagnosis based solely on biology? To explore the aforementioned questions, and to avoid abstraction, it is instructive to examine some concrete examples.

A. Creation of Diagnoses

One way to question whether impairment is solely biological is to examine the issue of diagnoses that involve discretion or have been heavily subject to cultural influences. While it may seem uncontroversial to note diagnoses are not divined from nature and entail the input of medical professionals and researchers, it may be surprising to examine the degree to which many diagnoses involve great subjectivity or have issued directly from social interests. The argument in this Part is not the Foucaultian claim that every disability is a socio-political construct. This view has traction in some philosophical circles, but requires an inordinate amount of poststructural abstraction. My argument, rather, proceeds more concretely by attempting to show specifically how medical diagnoses are spurred along by political negotiation and financial incentives.

---

110 In *Madness, Distress, and Postmodernity,* Anne Wilson and Peter Beresford document their status as “psychiatric system survivors” and chronicle how medical and psychiatric records may restrict future life opportunities, understandings, rights, and possibilities. See generally Anne Wilson & Peter Beresford, *Madness, Distress and Postmodernity: Putting the Record Straight,* in DISABILITY/POSTMODERNITY, supra note __, at 143. In particular, they note that since medical records are ineradicable, “they serve to make permanent and immutable the ostensible psychopathological difference or ‘disorder’ of those diagnosed ‘mentally ill.’” *Id.* at 149. They explain that psychiatric system survivors “may face discrimination when applying for life insurance, mortgages, visas to travel or work abroad, when making applications to become registered childminders, foster or adoptive parents, or when seeking fertility treatment.” *Id.* (citations omitted).

Of course, there are reasons for psychiatric records’ staying power. In particular, such records are needed for insurance coverage and there is always a risk a person’s symptoms will return if he ceases medication or therapy. *Emens,* *supra* note __, at 405. If such symptoms return, medical records facilitate re-prescription of the discontinued medication or therapy.
1. The Diagnostic and Statistical Manual of Mental Disorders (“DSM”)

The DSM is not some obscure reference book. As the authoritative manual of the American Psychiatric Association (“APA”), the DSM defines, classifies, and describes what the APA says are mental illnesses. Moreover, insurance carriers require a DSM diagnostic label and code for insurance reimbursement. Given that nearly every mental health professional consults the DSM, and given the financial incentives built into the book, the DSM has become central to all things psychiatric. The DSM is the bible of mental illness.

Some scholars have argued the DSM is itself a scientific façade for social ideas and normative judgments. While nearly all would claim at least some phenomena should be recognized as mental disorders, the breadth of diagnoses in the DSM has raised questions. Indeed, the DSM reaches a wide array of socialized behaviors, including how people respond to stress, how much anxiety or sadness one should feel, and when and how persons should sleep, eat, and express themselves sexually. Such aspects of life are profoundly social and normative.

Many critics have turned their attention to the process by which diagnoses are approved. Each time a new edition of the DSM is

---

112 KUTCHINS & KIRK, supra note __, at x.
113 KUTCHINS & KIRK, supra note __, at 12.
114 KUTCHINS & KIRK, supra note __, at 16 (arguing “science is often subordinated to social and political influences in the development and use of the diagnostic categories contained in the DSM”); Deirdre M. Smith, The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans With Disabilities Act, 17 GEO. MASON U. CIV. RTS. L.J. 79, 90 (2006) (arguing “although the DSM diagnoses bear the stamp of ‘objective’ medical expertise, they are particularly prone to the social dimensions of classification”). See also ROBERT A. ARONOWITZ, MAKING SENSE OF ILLNESS: SOCIETY AND DISEASE (1998) (examining how illness is constituted socially).
115 Even Kutchins and Kirk—after detailing their many criticisms of the DSM—acknowledge they are not arguing “there are no such phenomena as mental disorders, that their existence is all a myth or psychiatric hoax.” KUTCHINS & KIRK, supra note __, at 264. Their point, rather, is that (genuine) mental illness constitutes a small subset of the conditions included in the DSM. Id.
116 KUTCHINS & KIRK, supra note __, at 15.
117 KUTCHINS & KIRK, supra note __, at 15; SHAKESPEARE, supra note __, at 35 (“[W]hat counts as impairment is a social judgment . . ., for example, dyslexia may not become a problem until society demands literacy of its citizens.”). See also RAPLEY, supra note __, at 36 (“[I]t appears that people who will not, or can not, meet societal expectations about the discharge of social responsibilities—of proper conduct—can, potentially be diagnosable as intellectually disabled.”).
forthcoming, expert panels are established to meet over an extended period of time and deliberate about what diagnoses should be included and excluded. The members of these panels are subject to social pressures in at least two ways.

First, special interest groups often make the inclusion or exclusion of a diagnostic category into a political battle. Past examples include the exclusion of homosexuality, the inclusion of Post-Traumatic Stress Disorder, and the proposal and rejection of the gender-biased Self-Defeating Personality Disorder. Each of these aforementioned decisions was deeply cultural and ultimately effected by pressure from political constituencies—demonstrating far more was at work than just biology and science.

Presently, with the Fifth iteration of the DSM forthcoming in 2012, heated battles have begun, involving various political and legal interests. For example, many transgendered persons are already fighting the current diagnostic categories of Gender Identity Disorder and Transvestite Fetishism. Binge Eating, Internet Addiction, and Parental

---

118 See Kutchins & Kirk, supra note __, at 18, 55–99 (explaining how protests by gay activists led to elimination of homosexuality from DSM-II in 1974).

119 See Kutchins & Kirk, supra note __, at 18, 100–25 (explaining how Vietnam veterans fought for and achieved inclusion of Post-Traumatic Stress Disorder in DSM—despite the opposition of many leading psychiatric experts). “Veterans fought hard for the inclusion of [Post-Traumatic Stress Disorder] in DSM not because they were enthusiastic about identifying their problems as a mental disorder but because they needed recognition of the fact that the war had done bad things to them and that they needed help in overcoming its aftereffects. The price they paid was to be identified as mentally ill.” Id. at 125.

120 See Kutchins & Kirk, supra note __, at 19, 126–75 (explaining how feminism fought the inclusion of Masochistic Personality Disorder, which was later relabeled and rejected as Self-Defeating Personality Disorder).

121 See Kutchins & Kirk, supra note __, at 24 (“[L]ike a large and popular mutual fund, DSM’s holdings are constantly changing as the managers’ estimates and beliefs about the value of those holdings change.”).

122 Benedict Carey, Psychiatrists Revise the Book of Human Troubles, N.Y. TIMES, December 18, 2008 (noting the DSM-related debate over gender identity “is already burning hot among transgender people”); Arline Kaplan, DSM-V Controversies, 26 PSYCHIATRIC TIMES (2009), available at http://www.psychiatrictimes.com/display/article/10168/1364926. Still, transgender people are divided about inclusion in the DSM. Id. Some demand transgender-related diagnoses be dropped; others prefer inclusion in the DSM since a doctor’s diagnosis is required to obtain insurance coverage for treatment or surgery. Id.

123 Michael First, professor of psychiatry at Columbia who helped edit the fourth edition of the manual, notes many people are pushing for the inclusion of binge eating and there is some research that indicates drugs can help. Carey, supra note __. “But,” he notes, “binge eating is also a normal behavior, and you run the risk of labeling up to 30 percent of people with a disorder they don’t really have.” Id.
Alienation Syndrome\textsuperscript{125} are also tentative diagnostic categories likely to engender great controversy. Categories like these risk pathologizing behavior that falls squarely within the ambit of normal.

The second way decisions to include or exclude certain diagnoses might issue from social pressures is via the influence of pharmaceutical companies. While the role of pharmaceutical companies in the development of diagnoses has historically been less publicized than some of the political interests noted above, the connection between Big Pharma and the DSM is starting to receive more press. Because pharmaceutical companies require generally-accepted diagnostic categories for the prescription (and purchase) of many of their products, and given the substantial funding pharmaceutical companies provide to the APA,\textsuperscript{126} the relationship has always been implied.\textsuperscript{127} However, more direct evidence has surfaced within the last five years.

In 2006, researchers at the University of Massachusetts (Boston) and Tufts University published a study entitled, “Financial Ties Between DSM-IV Panel Members and the Pharmaceutical Industry.”\textsuperscript{128} This study provided empirical support for what many had suspected all along: pharmaceutical money was connected to the creation of the DSM’s diagnostic categories. In particular, the study found the majority of DSM panel members for the most recently-published edition of the DSM had financial ties to one or more pharmaceutical companies.\textsuperscript{129} Even the APA’s

\textsuperscript{124} See Kaplan, \textit{supra} note __ (noting Internet Addiction as a proposed addition to DSM that will likely receive great attention).


\textsuperscript{126} “Pharmaceutical companies provide substantial funding for conventions, journals, and research related to what is included in the DSM, because what is considered diagnosable directly impacts the sale of their drugs.” Lisa Cosgrove et al., \textit{Financial Ties Between DSM-IV Panel Members and the Pharmaceutical Industry}, 75 \textit{PSYCHOTHERAPY AND PSYCHOSOMATICs} 154, 155 (2006); \textit{KUTCHINS \& KIRK, supra note __, at 13. See also Benedict Carey & Gardiner Harris, \textit{Psychiatric Group Faces Scrutiny Over Industry Ties}, \textit{N.Y. TIMES}, July 12, 2008 (noting in 2006, the latest year for which data was available, the pharmaceutical industry accounted for 30\% of the APA’s $62.5 million in financing).}

\textsuperscript{127} E.g., \textit{KUTCHINS \& KIRK, supra note __, at 13 (implying pharmaceutical companies play a role in the development of diagnostic categories).}

\textsuperscript{128} Cosgrove et al., \textit{supra note __.}

\textsuperscript{129} Cosgrove et al., \textit{supra note __, at 156. Of the 170 DSM panel members (revisions of the DSM are organized around working groups or panels), 95 (56\%) had one or more
President later acknowledged publicly such ties exist and could not be fully eliminated. Indeed, in 2008, the Center for Science in the Public Interest found that more than half of the 28 members of the DSM-V task force (for the forthcoming edition) have ties to the drug industry.

Ties between DSM panel members and pharmaceutical companies are significant because drug companies have a general financial interest in expanding the amount of diagnostic categories (and concomitantly, the total number of persons who can be diagnosed) as well as a particular financial interest in medical practitioners prescribing companies’ specific medications. Due to these concerns, in 2008, Congress launched an investigation into the APA’s funding and doctors’ financial arrangements financial ties to a company in the pharmaceutical industry. However, even this statistic is understated since DSM panels for diagnostic categories where pharmacological interventions are standard treatment had much higher percentages of financial ties to the pharmaceutical industry. For example, 100% of the panel members for the “Mood Disorders Work Group” (8 out of 8) and the “Schizophrenia and Other Psychotic Disorders Work Group” (7 out of 7) had financial ties to the pharmaceutical industry.

The authors conclude that while receiving financial support from a pharmaceutical company should not disqualify a person from serving on a DSM panel, “the public and mental health professionals have a right to know about these financial ties, because pharmaceutical companies have a vested interest in what mental disorders are included in the DSM.”

Kaplan, supra note __ (quoting APA President Nada Stotland: “We have anticipated and addressed questions about conflicts of interest in the DSM process. The abolition of conflict is a myth. . . . what we can do is to be very clear about what those interests are.”).

Psych Working Group Again Rife With Conflicts of Interest, INTEGRITY IN SCIENCE WATCH WEEK OF 05/05/08, available at http://cspinet.org/integrity/watch/200805051.html#4.

KUTCHINS & KIRK, supra note __, at 13. One forensic psychologist cynically writes:

It’s a tried-and-true formula: Do a quick-and-dirty study or two. Find a huge, perhaps escalating, problem that has heretofore been overlooked. Create a product label (aka diagnosis). And, voila! The drug companies will take it from there. A diagnosis that was once just a twinkle in the eye of a creative researcher becomes reified as a concrete entity.

Franklin, supra note __.

Since the first edition of the DSM, the number of disorders has tripled—an increase paralleled by the increase in sales of drugs. Grossman, supra note __.

See also Carey & Harris, supra note __ (noting, on average, psychiatrists who received at least $5,000 from newer-generation antipsychotic drugs wrote three times as many prescriptions to children for said drugs than psychiatrists who received less money or none).
with drug makers.\textsuperscript{134}

One final way diagnosis can be seen as less objective and more social than previously theorized is the way in which the DSM’s diagnoses involve considerable subjectivity on the part of medical practitioners. Psychiatry is not like cardiology or nephrology, where the basic diseases are well understood and identifiable by objective and independently-verifiable criteria.\textsuperscript{135} No blood tests exist for the disorders in the DSM.\textsuperscript{136} Rather, patients rely on judgments from practitioners, who in turn rely on subjective phenomena and the manual.\textsuperscript{137} Yet once subjective phenomena (such as finding difficulty in practical life tasks or not doing well on IQ tests) are redescribed as symptoms, a cultural condition is immediately transformed into a medically-identifiable pathology.\textsuperscript{138} There have even been published studies in which psychiatrists, trained in using the DSM, cannot agree on a class of diagnosis—such as personality disorder—much less reach agreement on a specific diagnosis.\textsuperscript{139} Some disagreement as to application is, of course, natural; still, disagreement illuminates the way diagnosis is a process that is not immune from social influences.\textsuperscript{140} In short, the DSM illustrates concretely how diagnoses cannot be extricated neatly from social context.\textsuperscript{141}

\textsuperscript{134} See Carey & Harris, \textit{supra} note ___ (describing Congressional investigation into APA and its ties to pharmaceutical industry).

\textsuperscript{135} Benedict Carey, \textit{Psychiatrists Revise the Book of Human Troubles}, N.Y. TIMES, December 18, 2008 (quoting Edward Shorter, History Profession at University of Toronto); RAPLEY, \textit{supra} note __, at 41 (“[W]ith mental retardation, we are dealing not with what is presented to us, simply, as a factual matter about a ‘real’ disorder or ‘disability’ that \textit{is} in the world (like syphilis or measles) but rather, like ‘schizophrenia’, ‘multiple sclerosis’ or ‘diabetes’, an \textit{hypothetical construct}.”).

\textsuperscript{136} Dan Vergano, \textit{Study: Medical Manual’s Authors Often Tied to Drugmakers}, USA TODAY, April 19, 2006 (quoting Lisa Cosgrove, Law Professor at University of Massachusetts).

\textsuperscript{137} Vergano, \textit{supra} note __.

\textsuperscript{138} RAPLEY, \textit{supra} note __, at 43–44.

\textsuperscript{139} KUTCHINS & KIRK, \textit{supra} note __, at 52–53. \textit{See also} Lars Noah, \textit{Pigeonholing Illness: Medical Diagnosis as a Legal Construct}, 50 HASTINGS L.J. 241, 248 (1999) (“[M]ental health professionals often express greater disagreements about an appropriate diagnosis for a particular patient because the relevant symptoms tend to be non-specific, which means that any number of mental illnesses could account for the particular complaint.”).

\textsuperscript{140} See KUTCHINS & KIRK, \textit{supra} note __, at 53 (“Serious confusion about distinguishing mental disorders from nondisordered conditions and the inability of clinicians to use the manual reliably make the development and use of DSM vulnerable to a host of nonscientific pressures.”).

\textsuperscript{141} Blindness might also be an example. Who is blind? We certainly do not live in a world with two types of people: the blind and the sighted. Most people can acknowledge that we all fall somewhere on the spectrum of how well we see. Accordingly, who is (said to be) blind—as a matter of diagnosis—is not simply an issue of the body, but is informed
2. Transient Diagnoses

A similar way of examining whether diagnosis is a social creation might be to ask whether diagnoses are new or transient, i.e., they exist or have existed only at certain times and in certain places. For example, consider anorexia nervosa (“anorexia”), a disease characterized by low body weight and body image distortion, in which one has an obsessive fear of gaining weight. While eating disorders (understood broadly as exertion of control over food and over/binge eating) have been prevalent over time and locations, anorexia is found only in certain societies—namely contemporary ones that extol a distinct version of beauty. It is thus a transient mental illness, which flourishes only at specific times in specific places—and for reasons one may suppose are connected with the culture of those times and places. Indeed, anorexia seems to rest on a complex matrix of social factors that include bodies, body images, and cultural notions of beauty.

Or consider learning disabilities. Much like the diagnoses discussed above under the DSM, the dozen or so conditions lumped together under the umbrella term LD have been legitimated largely by economic and political interests. The term “learning disabilities” was invented in 1963 directly by medical practitioners who tell us who’s blind. See generally Tanya Titchkosky, Cultural Maps: Which Way to Disability?, in DISABILITY/POSTMODERNITY, supra note __, at 101, 101–11 (exploring the ways blindness is socially constructed). This example might also apply to other conditions that involve variation.

In his book on social constructionism, Ian Hacking has a chapter on mental illness in which he notes this point—even in a different context and for a different purpose. Hacking, supra note __, at 100–24. He explains that some mental illnesses are transient, in that “they show up only at some times and some places, for reasons which we can only suppose are connected with the culture of those times and places.” Id. at 100.

See http://en.wikipedia.org/wiki/Anorexia_nervosa (“Anorexia nervosa is a psychiatric illness that describes an eating disorder characterized by extremely low body weight and body image distortion with an obsessive fear of gaining weight. Individuals with anorexia are known to control body weight commonly through the means of voluntary starvation, excessive exercise, or other weight control measures such as diet pills or diuretic drugs.”). Hacking, supra note __, at 2, 100 (noting anorexia surfaced in the modern world in the early 1960s and is “quite local in its history”). Hacking, supra note __, at 2, 100.

by a psychologist attempting to expand the circle of students who could be
diagnosed as “disabled,” and thus entitled to federal protections and
funding. \textsuperscript{148} By the 1970s and 80s, learning disability (“LD”) diagnoses
were soaring and the numbers continue to grow today. \textsuperscript{149} The scope of
what constitutes an LD has continued to widen since the term’s inception,
thereby subsuming an increasing number of Americans.

The salient question might be “why?” While some media outlets have
loosely attributed the growth to factors such as diet, exposure to chemicals,
and sedentary lifestyles, \textsuperscript{150} most scholars examining the issue have
concluded the growth is due to distinct political and financial interests. Just
like the DSM diagnoses discussed above, many interests drive this trend:
LD educators (who obtain federal aid for each student diagnosed as LD);
psychologists (who charge thousands of dollars to diagnose students); LD
researchers (who are incentivized by the lure of federal grants); attorneys
(who can win judgments in ADA cases); and pharmaceutical companies
(who have pocketed billions of dollars from medicines that target learning
disabilities). \textsuperscript{151} These various interests might be said to constitute “a
veritable LD industry.” \textsuperscript{152} Carl Elliott, a professor of bioethics, has
similarly argued the ballooning of such diagnoses is not because people
have suddenly detected conditions that were hidden for hundreds of years.
Rather, he notes it is because “all mental disabilities, even those with
biological roots, have a social component.” \textsuperscript{153}

A slightly different case would be diagnoses that are transient. In other
words, the predicate physical conditions have always existed, but have not
always been diagnosed as impairments. For example, hip fractures, spinal

\textit{Politics of Learning Disabilities, 21\ LEARNING DISABILITY Q. 245, 245 (1998); see}
Kathleen Ross-Kidder, \textit{Interventions with Comorbid Emotional/Behavioral Disordered
Children, in CONTEMPORARY INTERDISCIPLINARY INTERVENTIONS FOR CHILDREN WITH
EMOTIONAL/BEHAVIORAL DISORDERS 559, 560 (David A. Sabatino & Benjamin L. Brooks
eds., 1998) (examining the quandary faced by parents of seemingly intelligent children who
had “unmet educational needs” and their perceived need for those children to receive some
type of educational intervention).}

\textsuperscript{148} Lerner, \textit{supra} note __, at 1058.
\textsuperscript{149} Lerner, \textit{supra} note __, at 1071–73.
\textsuperscript{150} Lerner, \textit{supra} note __, at 1074.
\textsuperscript{151} Lerner, \textit{supra} note __, at 1077.
\textsuperscript{152} Lerner, \textit{supra} note __, at 1076.
\textsuperscript{153} Carl Elliott, \textit{Costing an Arm and a Leg}, SLATE, July 10, 2003, at

Mental retardation might be an additional example of a diagnosis constituted by
social norms. With ever-changing criteria and tests, one might reasonably see mental
retardation as “a historically contingent way of talking about people who appear to be in
need of assistance and who are not very good at IQ tests.” \textit{RAPLEY, supra} note __, at 42
(emphasis in original). Mental retardation is, in this way, a relative concept and a social
judgment of sorts. \textit{Id.} at 42, 202–03.
deformities, and loss of height were all once thought of as normal by-products of aging. They were not considered impairments (or physical traits that fell within the scope of being disabled) or diagnosed in any meaningful way. However, since 1994, the World Health Organization has classified osteoporosis as a disease that can be diagnosed, prevented, and treated. Such an institutional shift has significant consequences because it affects medical norms, which in turn affects the process of diagnosis. From this standpoint, normality and disease do not issue from an unmediated form of biology; instead, biological data are interpreted and recast through existing knowledge of the body and in accordance with cultural standards.

B. Acts of Diagnosis

A related way of challenging the assumption that impairment is only biological is through examining the degree to which a diagnosis is interactional or relies on psychological assessments. To the extent acts of diagnosis require interaction and interpretation, it may be unavoidable that social norms get involved.

For example, in the case of depression, the medical practitioner is often relying on the patient’s psychological (self-)assessment, which will almost necessarily be informed by social meanings. A depressed person, to be understood and diagnosed as such, must be a person who communicates. Instead of simply listing off symptoms, the depressed subject must often produce a narrative of her depression. To produce such a narrative, the person will likely have ideas about what certain symptoms mean or have preconceptions relating to depression or other forms of mental illness.

The very formation of depression as an impairment thus depends upon patients’ internalization of their distress and later articulation to a medical professional. In this sense, the diagnosis of depression involves an

---

155 Scully, *supra* note __, at 48.
156 See Scully, *supra* note __, at 48 (noting there are significant consequences for such classification).
158 Anna Mollow, “*When Black Women Start Going on Prozac . . .*: The Politics of Race, Gender, and Emotional Distress in Meri Nana-Ama Danquah’s Willow Weep for Me”, in *THE DISABILITY STUDIES READER*, supra note __, at 283, 290.
159 Mollow, *supra* note __, at 290.
160 Mollow, *supra* note __, at 290 n.30 (noting “the formation of depression as an impairment category has depended in large part upon patients’ verbal articulations of their distress”).
aggregation of social norms, a person’s view of her own symptoms, and a narrative dispensed to the medical professional. Any effort to isolate the part of depression that is impairment (versus disablement) would seem artificial at best.

Another way psychological assessments might compromise the claim that impairment is solely biological is when the assessment is administered in such a way that it projects the qualities required for certain impairments onto the very subjects being assessed. Mark Rapley, a professor of psychology, has explored how intellectual disabilities are constructed through the psychological assessments intended to diagnose them. He notes this is in part due to an “acquiescence bias,” in which it is assumed intellectually disabled people are incapable of reporting on their own subjectivity. One result of this bias for assessments is that an interviewee may be shepherded into apparently inconsistent answers by a range of interactional phenomena: the need to reformulate responses to questions; the interviewer’s pursuit of “correct” answers (based on preexisting expectations); and the interviewer’s desire to obtain an answer in the official vocabulary of the interview schedule. In such cases, inconsistencies or agreements are produced by the logic of the interviewer’s demands. Rapley illustrates these discrete phenomena through extensive use of cases studies. He concludes that such methods of diagnosis necessarily shift intellectual disability from the realm of individual problem to social/ interactional product.

161 See, e.g., RAPLEY, supra note __; Goodley & Rapley, supra note __.
162 RAPLEY, supra note __, at 78–110.
163 Because the normal question-and-answer means of verbal exchange is suspended, the imbalance may produce pseudo-acquiescence. RAPLEY, supra note __, at 93–94. Rapley writes:

Interviewees, if they are competent conversationalists, will, in the face of demands set up by the utterances of the interviewer, change their position (and thereby seem to be ‘acquiescing’ in the motivated sense) until such time as the trouble brought about by these factors has been either averted or resolved. And as we will see below one tactic used by interviewees of whatever ‘level’ of ability is, simply, to allow difficulties to pass by.

Id. at 94.

164 An interviewer may often not accept a respondent’s first answer and push the interviewee into what appears to be a self-contradictory response. RAPLEY, supra note __, at 95. However, closer inspection may well reveal that the contradiction is a logical consequence of the convoluted path of questioning. Id. at 94–96.

165 RAPLEY, supra note __, at 96–101. Interviewers may suggest improvements to answers to “shepherd[] the respondent’s answer into more acceptably official shape.” Id. at 205.

166 RAPLEY, supra note __, at 89–90.
167 See generally RAPLEY, supra note __.
168 RAPLEY, supra note __, at 202 (“[Competence is very much a relative concept and
Having attempted to identify how the disabled body is constructed through social practices, it seems a general postscript regarding the role of biology is in order. While I have chronicled some specific examples above, I would like to make a few general observations and then note some additional questions that remain to be answered.

Social constructionism has, in recent years, become a trendy and often obtuse way to discuss a subject.169 For example, many poststructuralists have argued the body is only language or discursive meaning. In contrast, I have tried to employ social constructionism usefully by showing concretely how disabled bodies are produced by diagnoses, which are themselves often produced and influenced by social norms and practices. This is a much more specific argument than simply claiming all bodies are mediated by social norms and practices.

I have not argued biology is entirely or even predominantly constructed. Setting aside the fact that social practices might be said to shape everything, it seems sensible to acknowledge many diagnoses are relatively quantifiable and not socially produced. These might include deafness, blindness, HIV-AIDS, and spinal cord injury or paralysis. My argument is based upon the specific interplay of biology and culture that produces impairment. Moreover, the bodies we have matter; and while culture shapes some aspects of our bodily existence, it does not shape all.170 In sum, the body is neither pure nature, nor pure meaning.171 The result for disability theory and disability law is that both empiricism and idealism have a place in crafting a realistic way forward.172

A number of possibly fruitful avenues for examining the relationship

---

169 See e.g., HACKING, supra note __, at vii–viii, 1–3 (arguing social constructionism has been overused and, often, obscured the subject being discussed); RAPLEY, supra note __, at 1–2 (noting social constructionism has become commonplace and that “[i]t is a book that seeks to retrieve something of the utility of the notion of social construction”).

170 Nussbaum, supra note ___ (“We might have had the bodies of birds or dinosaurs or lions, but we do not; and this reality shapes our choices. Culture can shape and reshape some aspects of our bodily existence, but it does not shape all the aspects of it.”). See also STONE, supra note __, at 34 (explaining how biology itself may influence social arrangements).

171 Mot, supra note __, at 69.

172 Mot, supra note __, at 69.
between the gender/sex and disability binaries remain and I note three of them here. First, more work might be done to document how impairments—other than those discussed in this Article—are constructed through social inputs. Second, it might be fruitful to further deconstruct the disability binary by examining disablement. In particular, this might involve asking how disablement—much like gender—is not only social, but also has a noteworthy relation to the biological body. A third possible area of exploration concerns the aspect of reconstructing the concept of disability. If disability is deconstructed and shown to be more fluid and less dichotomous than previously thought, what is left of the term? In the gender/sex context, feminists have taken a variety of approaches to this question, including Natalie Stoljar’s resemblance nominalism, Linda Alcoff’s positionality, and Sally Haslanger’s social subordination. Any or all of these approaches could be applied in the disability context to reconstruct what exactly is meant, and who exactly is encompassed, by the term disability.

In Part III, this Article will examine some of the possible legal implications of disability trouble. In particular, if impairment (and thus, disability) is a broader, more socially-constructed concept than originally theorized, what does this mean for legal theory and practice?

III. LEGAL IMPLICATIONS

Disability trouble raises several legal implications. As noted above, the concept of disability is in a unique stage of theoretical development and the evolution of its meaning may alter both society’s and the judiciary’s perceptions. In particular, the medical model of disability has been


174 See LINDA MARTIN ALCOFF, VISIBLE IDENTITIES: RACE, GENDER, AND THE SELF 147–49 (2006) (arguing woman is “a position one occupies and from which one can act politically”); id. at 172 (explaining “women and men are differentiated by virtue of their different relationship of possibility to biological reproduction”) (“Those classified as women will have a different set of practices, expectations, and feelings in regard to reproduction, no matter how actual their relationship of possibility is to it.”).

175 See Mikkola, supra note __ (explaining Haslanger’s argument that “gender is a matter of occupying either a subordinate or a privileged social position”).

176 Indeed, it seems part of how consensus has been built for protecting subordinated groups under the guise of race and sex has been through first advancing a scholarly
entrenched as the standard paradigm for understanding disability in both the media and the federal judiciary. Accordingly, as the meaning of disability turns further to social explanations, this may well effect legal change.

One particularly concrete example of this process is found in returning to the gender/sex binary. As noted in Part I.C, work analyzing the gender/sex binary was in full swing by the late 1980s. Much of this scholarship had sociological, philosophical, and anthropological underpinnings, and there were legal consequences to such theorizing. One result was at least four generations of sex stereotyping jurisprudence, which, as explained by Mary Anne Case, were effected by a gradual expansion of Title VII to protect various permutations of gender and sex. Similarly, Kimberlé Crenshaw’s and other scholars’ theoretical work on intersectionality helped dialogue about what it means to be, for example, queer, Latina, or a woman who defies gender norms.

177 See generally Areheart, supra note __.
178 See Areheart, supra note __, at 208–09 (explaining the judiciary’s paradigm of disability is influenced by cultural understandings).
179 The first generation of cases targeted sex stereotyping that, which has resulted in the exclusion of all members of one sex from a type of job; for example, an employer could not refuse to hire on the blanket assumption that men are less capable of assembling intricate equipment or women are less capable of aggressive salesmanship. Case, supra note __, at 38–39. Second-generation sex stereotyping focused on the application of sex stereotyping to individual members of a particular sex. Even in the absence of a blanket ban on hiring men or women for a particular type of job, employers could not rely on gender stereotypes—that might or might not have actual application—to refuse to hire an individual person. Id. at 39–40. The third generation focused on individuals who were penalized because their gender behavior did not conform to (implicitly-prescribed) sex-specific stereotypes. Case noted Price Waterhouse v. Hopkins, in which Price Waterhouse exaggerated Ann Hopkins’ lack of gender fit by relying on stereotypes, provides an example of third-generation sex stereotyping. Id. at 41.

Case observed that although Title VII had seen three generations of sex-stereotyping cases that covered behavior targeting sex and gender, a fourth generation of sex stereotyping cases was required to target the assumption, present in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), that qualities corresponding with the masculine gender are essential to success in a particular job. See Case, supra note __, at 37 (“Fourth-generation stereotyping claims, of the sort I endorse in this Article, might take on the stereotyping of the job and its requirements rather than of the person holding or applying for it . . . .”). Case claimed this protection would require only a reconceptualization of the existing law; in particular, interpreting sex more broadly to cover gender issues. Id. at 4, 75 (“I do not propose adding gender to the prohibited forms of discrimination under Title VII and other antidiscrimination laws. This is in part because it seems better to work within existing categories whenever possible.”).

180 See Case, supra note __, at 37 (“The [Supreme] Court, as it was faced with increasingly subtle and complex barriers to the equality of the sexes, has gradually broadened its conception of impermissible sex stereotyping, lumping together under the same general heading several related but conceptually distinguishable phenomena.”).
pave the way for intersectional protection under Title VII.\textsuperscript{181} In short, history seems to indicate there are legal consequences to rethinking identity—especially where sociology suggests a broader conception is necessary.

Before proceeding, it may also be useful to note the argument in Part II—that impairment is often constructed socially—does not mitigate the central insight of the social model.\textsuperscript{182} Rather, this argument strengthens disability scholars’ claims about the essentially social character of disability.

\textbf{A. Greater Acceptance of Legal Solutions}

Disability trouble ought to increase acceptance of legal solutions for disabled persons and disrupt the perceived divisions between disabled and non-disabled.

While equality and antisubordination norms should be reason enough to justify policies that help disabled persons, it may as a practical matter be useful to provide other reasons.\textsuperscript{183} Indeed, many people seem to view policies directed toward helping people with disabilities achieve equality of opportunity as a form of unwarranted, preferential treatment.\textsuperscript{184} This hostility may even increase if the ADAAA has its intended effect of

\textsuperscript{181} Minna J. Kotkin, \textit{Diversity and Discrimination: A Look at Complex Bias}, 50 WM. & MARY L. REV. 1439, 1486 (2009) (“Crenshaw, Abrams, and Cunningham all provide highly valuable insights into the nature of complex claims, and their work, whether acknowledged or not, has undoubtedly influenced courts’ increasing acceptance of intersectional theory.”).

\textsuperscript{182} See Samaha, \textit{supra} note __, at 1267 (noting deconstructive efforts do not eliminate the central insight of the social model); RAPLEY, \textit{supra} note __, at 208–09 (arguing second wave thinking on the social model strengthens arguments about the social character of disablement).

\textsuperscript{183} See Michelle A. Travis, \textit{Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities}, 76 TENN. L. REV. 311, 312 (2009) (“While ideally the goals of equality and self-sufficiency for individuals with disabilities should be enough to justify the ADA, and the majority’s self-interest should not determine disability policy, practical politics may require identifying and highlighting benefits to nondisabled workers to help maintain support for the law.”).

\textsuperscript{184} Travis, \textit{supra} note __, at 312; see Areheart, \textit{supra} note __, at 190 (“[M]any people seem to view discrimination against disabled people as rational—the result of their own bodies’ deficiencies—and distinguishable from other forms of discrimination. The result is that even people who avoid other forms of discrimination may be apt to rationalize disability discrimination.”). See also Samuel R. Bagenstos, \textit{Implicit Bias, ‘Science,’ and Antidiscrimination Law}, 1 HARV. L. & POL’Y REV. 477, 491 (2007) (noting the adverse reaction to the ADA is centrally about the fact it “targets rational employer conduct”)(emphasis in original).
increasing the scope of the ADA.\textsuperscript{185} The big-picture insight of disability trouble is that disability has even more of a social origin than acknowledged. And a social origin at least arguably implies social responsibility.\textsuperscript{186} The more that theorizing illuminates the way disability disadvantage flows from social structures and practices, the view society has some responsibility to remedy that disadvantage may follow more naturally.\textsuperscript{187} Indeed, the idea that social cause justifies social responsibility may be traced back to the civil rights movements of the 1960s. In particular, once people recognized racial divisions had their primary bases in social practices—and not biological difference—there was an increase in support for social and political solutions. This increase in support issued from a sense of what was just.

And while the central insights of the social model are still in the early phase of being integrated into academic curriculums and other educational forums, each step in the direction of understanding disability as a social construction is a step away from biological determinism. And leaving biologically-determinist thinking (whether conscious or unconscious) far behind is critical in apprehending the promise of equality of opportunity for disabled people.\textsuperscript{188}

Similarly, understanding disability as more socially constructed may disrupt the perceived divisions between disabled and non-disabled. Much of this division comes from people viewing disability as simply and utterly biological; in particular, a biologically-reductionist view allows a non-disabled person to differentiate herself from those considered disabled more easily. Yet as disability is shown to be more constructed and less fixed, society should begin to understand increasingly the contingency in being labeled disabled. This idea—that no huge gulf exists between people designated as disabled and those not so designated—is also a critical and necessary step in the direction of equality.

One might question, however, whether disability trouble might have the effect of decreasing support for legal protections. In particular, if disability is less biological and more socially constructed (less objective and more subjective), is it not just as likely people will be more skeptical toward legal protections for people with disabilities? Similarly, one might question whether social accounts of causation—which highlight certain diagnoses,

\textsuperscript{185} Travis, supra note __, at 320.

\textsuperscript{186} But see generally Samaha, supra note ___ (arguing the causation account of the social model prescribes no normative response).

\textsuperscript{187} Areheart, supra note __, at 189 (citing Crossley, Reasonable Accommodation, supra note __, at 877).

\textsuperscript{188} See generally Areheart, supra note ___ (exploring how biologically-reductionist accounts of disability stymie disability rights).
such as learning disabilities—make people less sympathetic toward people with disabilities (and thus less likely to support legal interventions).

While biologically reductionist accounts, as a practical matter, may encourage greater sympathy and persuade more people to favor disability protections, popular support is only one goal of the disability rights movement. Also, the argument society ought to account for the ills it helps create, is (in part) a normative argument about what is just—which may or may not correspond to what seems fair to the majority of the population. Additionally, sympathy is a double-edged sword. While sympathy may yield formal support for disability protections, in practice it is often difficult for people to pity disabled persons and also view them as having the same entitlement to rights as people without disabilities.\footnote{Areheart, supra note __, at 201; Lisa Eichhorn, \textit{Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability” Definition in the Americans with Disabilities Act of 1990}, 77 N.C. L. REV. 1405, 1417 (1999); see Michael Ashley Stein, \textit{Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination}, 153 U. PA. L. REV. 579, 625–26 (2004) (observing that recognizing disabled persons as equal “requires a general transformation in social attitudes, most especially acknowledgement of disability rights as rights rather than as a product of goodwill”). \textit{See also} Harlan Hahn, \textit{Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?}, 21 BERKELEY J. EMP. & LAB. L. 166, 181–82 (2000) (noting that in many respects, “paternalism may be an even more formidable obstacle in the struggle for equality than direct conflict or hostility” and discussing the “hegemony of paternalism”).} More generally, the charity/sympathy rationale relies upon the medical model of disability’s precepts, which are hazardous for a whole host of reasons.\footnote{See \textit{generally} Areheart, supra note __ (explaining how the medical model of disability, ensconced within the media and federal court jurisprudence, represents a dangerous paradigm for understanding and interpreting disability).} In short, sympathy is a dangerous liaison to disability rights and the causation account I proffer is normative.

\textbf{B. Less Reliance on Medical Diagnoses}

Disability trouble may also support calls for less reliance by courts on medical diagnoses, especially in cases brought under the ADA.\footnote{\textit{See, e.g.}, Noah, supra note __, at 303–06 (calling for courts and agencies to reduce reliance on medical diagnoses); Deirdre M. Smith, \textit{Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability}, 82 TUL. L. REV. 1 (2007) (calling for courts to reduce their reliance on medical evidence).} There are a few reasons why.

First, disability trouble dispels the notion that medical labels and diagnoses are objective, or devoid of subjective inputs. The discussion in Part II explains how many conditions that stand to qualify as disabilities under the ADA do not involve tests that are in some way definitive, but
rather, depend on subjective phenomena.\textsuperscript{192} Also, many diagnostic labels are themselves social creations, which are devised in response to economic and political circumstances.\textsuperscript{193} Additionally, medical professionals—by their acts of diagnoses—may create the very symptoms constitutive of the conditions for which they are testing.\textsuperscript{194} In sum, one key insight of disability trouble is that impairment and diagnoses are less objective and thus less reliable (since objectivity and reliability are commonly equated) than presumed.\textsuperscript{195} Second, disability trouble—through identifying the reliance, for many diagnoses, on patient input—suggests that disabled persons are capable of testifying about their conditions and the effect they have on major life activities.

Before examining the reliance on medical diagnoses, it may be useful to examine the prima facie requirements under the ADA. To be protected under the ADA, an individual must have an actual disability, a record of a disability, or be regarded as having a disability.\textsuperscript{196} The actual disability prong is where the issue of medical evidence typically arises; this prong is defined to require “a physical or mental impairment that substantially limits one or more major life activities.”\textsuperscript{197} Broken out, actual disability contains three separate requirements: first, there must be a physical or mental impairment; second, the impairment must be substantially limiting; and third, the impairment must substantially limit a major life activity. But it is the second requirement—that the impairment substantially limit a major life activity—that has garnered the majority of federal courts’ attention.\textsuperscript{198}

Though the definition of actual disability does not require any evidence beyond what would be known first-hand by the plaintiff,\textsuperscript{199} courts often impose a requirement of medical evidence upon plaintiffs.\textsuperscript{200} Indeed, courts rely heavily on medical diagnoses for determining whether plaintiffs satisfy the threshold determination regarding actual disability\textsuperscript{201} and have been

\textsuperscript{192} Supra Part II.A.1.
\textsuperscript{193} Supra Part II.A.1–2.
\textsuperscript{194} Supra Part II.B.
\textsuperscript{195} This argument fits under the broader Foucaultian claim that medical institutions operate under a veneer of objectivity, but are in fact social institutions that rest on social knowledge and social judgments. See generally Foucault and the Government of Disability (Shelley Tremain ed., 2005).
\textsuperscript{197} \textit{Id.}, § 12102(1)(A).
\textsuperscript{198} Areheart, supra note \textemdash, at 211–12.
\textsuperscript{199} Smith, supra note \textemdash, at 35.
\textsuperscript{200} Smith, supra note \textemdash, at 19–24.
\textsuperscript{201} Smith, supra note \textemdash, at 20 (“[T]he dominant trend . . . is to assign a central and indispensable role to medical professionals in establishing disability for purposes of the ADA.”). Smith notes some courts have taken an intermediate approach—in which the necessity of medical evidence depends upon the type of disability claimed and whether it is
willing to grant summary judgment solely because plaintiffs did not present medical evidence in support of their disabilities.\textsuperscript{202}

This reliance on medical evidence touches the DSM as well, with courts sometimes placing a large emphasis on whether an ADA plaintiff’s claimed condition is included in the DSM.\textsuperscript{203} Courts’ reliance on medical diagnoses may even increase since the ADAAA has made it easier for an individual seeking protection under the ADA to establish she has a disability within the meaning of the ADA—and courts may feel retaining the medical evidence hurdle helps counterbalance the recent, statutorily-imposed loosening of the ADA’s threshold requirements.

Yet the de facto requirement of medical evidence for establishing a prima facie case under the ADA is unprincipled. As an initial matter, neither the ADA, nor the Equal Employment Opportunity Commission’s regulations require such evidence.\textsuperscript{204} Additionally, no list of presumptive

\footnotesize

found by the court to be within the comprehension of an average lay juror—and have considered this to be the “majority rule.” \textit{Id.} at 24 n.96. However, Smith notes, based upon her survey and compilation of cases, that the Second Circuit approach (of requiring medical evidence to establish a prima facie case under the ADA) is the majority or dominant approach. \textit{Id.}

\textsuperscript{202} Smith, \textit{supra} note __, at 40.


One of the reasons the DSM is an imperfect proxy for ADA coverage is because the DSM includes disorders and conditions that may not limit a major life activity. The ADA, moreover, expressly excludes the following DSM-related conditions from the definition of “disability”: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; and psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b) (2009).

Still, the DSM may be useful where an ADA claim is brought under the “regarded as” prong. As illustrated in Part II, a DSM diagnosis “is, among other things, a reflection of society’s current views of an individual’s outward behavior.” Smith, \textit{supra} __, at 146.

Accordingly, a DSM diagnosis may well lend support to a (“regarded as”) ADA plaintiff since the diagnosis may be indicative of how a person’s mental state is generally understood and how it squares with society’s standards for normalcy \textit{Id.}

\textsuperscript{204} The EEOC does suggest medical documentation may be useful for an EEOC investigator. This may especially be the case if the claimed disability is not “obvious” to the investigator or the investigator has difficulty evaluating the duration and impact of an impairment. Smith, \textit{supra} note __, at 18–19 (citing Equal EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL §§ 902(b), 902.4(d) (2001)). Notably, though, no courts have referred to such provisions in requiring medical evidence. \textit{Id.} at 19.
(or per se) disabilities exists. Qualifying under actual disability, instead, depends on the functional effect an impairment has on the life of the individual; a particular impairment may be disabling for some people, but not others. These (individual) effects are facts about which the plaintiff is uniquely suited to testify. For example, a plaintiff is particularly equipped to testify regarding whether his back pain or medication prevents him from performing certain major life activities. A physician would only be able to testify authoritatively as to the general effect on people—which is in stark contrast to the individualized query mandated under the ADA. Yet courts often require medical evidence—not for whether an impairment is present, but—on the issue of whether the impairment is substantially limiting. The reason typically provided for relying on such evidence is the need to corroborate plaintiff’s claimed disability with objective evidence. This rationale is insufficient.

Regarding the desire for “objective” evidence, the insights of disability trouble—discussed above—apply. Additionally, imposing a requirement of medical evidence risks implying that disabled persons are not even capable of testifying about the life effects of their own conditions. Such an implication stymies efforts by disability scholars to reframe disability as less of a medical phenomenon and more of a social creation.

The stated desire to corroborate a plaintiff’s claimed disability is even more invidious. Indeed, courts frequently refer to a plaintiff’s testimony regarding her impairment as “self-serving.” While contexts exist in which courts appropriately require medical evidence (such as medical malpractice litigation or tort claims that involve complex questions of causation), in no other context is medical evidence required to corroborate a plaintiff’s condition. Moreover, medical literature suggests physicians are poor at corroborating the truth of claims about physiological conditions (i.e., detecting malingering).

---

205 Smith, supra note __, at 67.
208 Smith, supra note __, at 71.
210 Smith, supra note __, at 61–62, 64.
211 Smith, supra note __, at 53–54 (citing multiple studies in which physicians were
42

DISABILITY TROUBLE

creates an additional burden by forcing doctors to focus less on their therapeutic role and more on conclusive diagnoses.\textsuperscript{212} Eliminating this burden may thus have the additional benefit of improving health care.

Finally, and notably, the foregoing discussion is about establishing a prima facie case—what is required to make it to a fact finder—and not about what is ultimately persuasive to a fact finder.\textsuperscript{213} It may well be appropriate (and persuasive) for a jury to consider medical evidence and testimony as part of a plaintiff’s case.\textsuperscript{214} The argument in this Part is that a plaintiff ought to create a fact issue on the substantiality requirement by her testimony alone. Requiring medical evidence at the summary judgment stage essentially delegates what should be a jury’s credibility determination to physicians.\textsuperscript{215} Such a requirement places an additional hurdle in front of ADA plaintiffs not required by the statute or its regulations.

One might question whether allowing plaintiffs to create a fact issue on the substantiality of their impairments would further incentivize plaintiffs to internalize their limitations—a type of self-fulfilling prophecy. A couple of responses are in order. First, plaintiffs who litigate on the basis of

\textsuperscript{212} Noah, supra note __, at 248 (noting mental health professionals typically take a patient’s complaints at face value, without any means of verifying the nature or severity of symptoms).

\textsuperscript{213} See Smith, supra note __, at 75 (clarifying this point).

\textsuperscript{214} See Smith, supra note __, at 62 (“A plaintiff who proceeds to trial without some medical evidence to support her claims of harm does so at her own peril, but, of course, courts allow imperiled claims to go to trial all the time.”). Still, this does not mean an ADA plaintiff requires testimony from a physician. Indeed, it appears such a plaintiff ought to be able to testify regarding her conditions and limitations without running afoul of evidentiary limitations. Deirdre Smith has examined this issue with regard to the personal knowledge and hearsay evidentiary rules. She writes:

\[\text{It is not logical or practical to push the personal or hearsay rules to an absurd point. There is something inherently odd about not permitting a person with cancer to utter the words ‘I have cancer’ or likewise for an individual to testify ‘I have a broken leg’ or ‘I have diabetes’ if she has such conditions. Of course, in the most literal sense, she does not really ‘know’ she has a tumor, and that is something that her physicians could not themselves discern until they ran a scan, X-ray, or blood tests. She can certainly testify that she has pain, fatigue, and physician-imposed restrictions on her activities, but why should she not state the reason for such pain, fatigue, and restrictions? She can testify that she goes to the hospital once a week and has an intravenous drip; she should not be precluded from testifying that such treatment is ‘chemotherapy.’ . . . There is unquestionably a point at which a person’s subjective knowledge of her illness becomes melded with her personal knowledge and awareness based upon information from reliable sources. . . . [I]t seems courts must take a more reasonable approach to the admissibility of such evidence in ADA claims.}

\textit{Id.} at 70.

\textsuperscript{215} Smith, supra note __, at 41.
disabilities are already incentivized to internalize and testify regarding the severity of their impairments. Second, the requirement of medical evidence to show substantiality appears to operate more as a “gotcha” in ADA litigation—not a requisite of which plaintiffs and counsel are typically cognizant (and thus most would not be knowledgeable of the requirement to internalize it in the first place).

More generally, one might also question whether, on the heels of my recommendation and the ADA amendments, too many plaintiffs would survive summary judgment. First, a broad approach to interpreting disability under the ADA accords with the treatment of civil rights under other major statutes. Why should it be much more difficult to survive summary judgment under the ADA than, for example, Title VII or the Age Discrimination in Employment Act (where it is typically not necessary to prove one’s identity)? In any such case, the plaintiff still must prove they were qualified and that discrimination on the basis of a protected trait was the reason for an adverse employment decision. Moreover, in a case under the ADA seeking accommodation, the plaintiff must show her request is reasonable and will not cause the employer undue hardship. Here, it is important to recall the broad remedial intent of the original ADA, which is underscored by the recent amendments.

It may also be useful to stay focused on the types of remedies sought in ADA cases. Possible abuses in ADA litigation are unlike those in large tort actions, where millions of dollars are often involved. The remedy typically sought in, for example, Title I actions is that the claimant be provided accommodation or allowed to keep their job or compensated for wrongful termination. Accordingly, the net effect of expanding the scope of ADA protection, even with inevitable abuses, will be that employers become more accommodating and attuned to various employees’ particular limitations. This type of result should be beneficial for everyone.

C. Synthesis & Application

Finally, I would like to synthesize the insights of disability trouble to show how ADA cases are wrongly decided and judicial discussion of disability is often poor. In Baerga v. Hospital for Special Surgery, Luis Baerga filed suit under the ADA after he was terminated from his position
Baerga claimed he was fired because of his disability, which resulted largely from depression and panic attacks. Baerga worked on the first floor exclusively during his first year of employment, but was later reassigned to work on the fourth floor of the radiology department. This change resulted in a major increase in stress and anxiety, aggravating his depression- and stress-related symptomology. The plaintiff sought accommodation to return to the first floor, but was denied. Finally, Baerga was terminated, allegedly because of his requests for accommodation and a panic attack he experienced the day before he was fired.

The defendant moved for summary judgment on the ground that the plaintiff was not disabled under the ADA.

The court quickly determined Baerga had created a fact issue on whether he had a physical or mental impairment and whether it affected major life activities. The court then turned its attention to whether Baerga’s impairments substantially limited the major life activities of sleeping, thinking, and interacting. For sleeping, the plaintiff explained how he was often unable to fall asleep, woke up numerous times throughout the night, and had violent nightmares. The court called these explanations “self-serving” and “uncorroborated.” It then concluded that because this requirement was shown only by “self-reporting,” it was insufficient to create a fact issue as a matter of law. The court explained: “[W]hen a plaintiff fails ‘to offer any medical evidence substantiating the specific limitations to which he claims he is subject due to his condition,’ he cannot establish that he is disabled within the meaning of the ADA.”

The court similarly dispensed of the plaintiff’s testimony on the issue of thinking. Baerga explained that his panic attacks prevented him from focusing and resulted in disorientation, jumbled and confused thoughts, and difficulty concentrating. Baerga also complained that his limited ability to concentrate required him to repeat to himself simple statements and to

---

222 Id. at *2–5.
223 Id. at *2–3.
224 Id. at *3–4.
225 Id. at *5.
226 Id.
227 Id. at *1–2.
228 Id. at *9–14.
229 Id. at *14.
230 Id. at *16.
231 Id. at *15–16.
232 Id. at *17–18, *19.
233 Id. at *18.
234 Id. at *20.
check and double-check directions.\textsuperscript{235} The court similarly characterized these statements as “self-serving” and found once again that he failed to make a sufficient showing for the substantiality requirement.\textsuperscript{236} Accordingly, the court granted the defendant’s motion for summary judgment.\textsuperscript{237}

Before applying the arguments in Parts II and III to examine this decision, recall that the plaintiff’s arguments were examined simply to determine whether they created a fact issue for the jury. The examination by the court was not about what was ultimately persuasive, but rather, whether a jury should be allowed to weigh the plaintiff’s claim for wrongful termination.

Returning to \textit{Baerga}, the impairment was tied to depression and panic attacks. Both of these conditions are ones discussed in the DSM, which initially suggests they are social creations, driven by social and economic interests. For example, panic attacks fall under the scope of anxiety-based disorders, the meaning of which has been officially changed three times since 1979.\textsuperscript{238} And the identifying symptoms are—as one might suppose—far from definitive. Defining criteria include fear of losing control, excessive worry, restlessness, irritability, muscle tension, and so on.\textsuperscript{239} The broader point is that defining when anxiety or sadness has crossed into being a mental disorder involves seemingly arbitrary boundary-setting and discretion.\textsuperscript{240} There simply is no definitive test for either diagnosis. Additionally, a diagnosis of depression or an anxiety-based disorder will rely heavily on the input of the patient—which for both conditions is likely to be influenced by cultural views and taboos.\textsuperscript{241}

The example of Luis Baerga, and his depression- and stress-related symptomology, illustrates how the division between one diagnosed with a disability and one not so diagnosed is blurry. Two people might experience great anxiety, but only one of them may be labeled as having an anxiety-based disorder. Disability advocates have long argued that (ability and) disability exists on a continuum, and Baerga’s particular conditions are illustrative of how that may be the case. Accordingly, understanding the contingency in being labeled as disabled ought to engender a more generous approach towards persons who are diagnosed with or claim to have a disability. Additionally, understanding Baerga’s conditions as having a

\textsuperscript{235} \textit{Id}.

\textsuperscript{236} \textit{Id. at }*20–21.

\textsuperscript{237} \textit{Id. at }*29.

\textsuperscript{238} \textit{Kutchins & Kirk, supra note }__, at 24.

\textsuperscript{239} \textit{Kutchins & Kirk, supra note }__, at 26.

\textsuperscript{240} \textit{Kutchins & Kirk, supra note }__, at 27.

\textsuperscript{241} \textit{See supra Part II.B} (explaining how, for example, a diagnosis of depression is fraught with social meanings).
distinctly social origin ought to engender a sense of social responsibility towards protecting his claim of disability. Courts should thus interpret the scope of the ADA generously—and be slower to frame a plaintiff’s statements as “self-serving” or “uncorroborated.”

Accordingly, there should have been no requirement of medical evidence for Baerga to reach a jury. The Court was satisfied he had an impairment and that it limited major life activities. As to the degree of limitation, only Baerga could explain how substantially the conditions affected his sleep or thinking—and he did. As noted above, while a doctor would be able to testify regarding the effect of depression on the average person, only Baerga could testify as to the effect on himself. Anything the doctor would have said about Baerga, specifically, would have been received second-hand. The same is true for the effect on thinking. This type of case ought to reach a fact-finder.

CONCLUSION

Disability scholarship is now in a critical stage. Theoretically, work on disability is young and entering a second wave of development. Jurisprudentially, there will soon be a material shift in how courts interpret the provisions of the ADA. Arguably, it is more important than ever to rethink the meaning of disability and this requires attention to the disability binary, the core explanatory construct in disability scholarship.

This Article advances the conversation about disability identity in a way that is useful and attentive to related areas of scholarship, such as feminist work on the gender/sex binary. In this way, disability scholarship may draw on the richness of others’ contributions and avoid wheel reinventing. There are also legal implications to rethinking disability identity and this Article identifies a few of them. Hopefully, others will build upon these insights to further bridge disability theory and practice. Finally, there are various challenges ahead for work on disability (especially when it comes to educating the public and judiciary), but disability is also an area full of promise. Each step toward understanding disability as a social construct is also a step in the direction of a more inclusive and accessible society. And this type of progress is beneficial for everyone.

242 Indeed, the ADAAA included a rule of construction that now provides expressly for broad coverage of individuals under the ADA. See 42 U.S.C. § 12102(4)(A) (2009) (“The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”).