

UNIVERSITY OF PITTSBURGH LAW REVIEW

Vol. 81 • Winter 2019

DISABILITY LAW AND GENDER IDENTITY DISCRIMINATION

Jeannette Cox

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2019.676
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

DISABILITY LAW AND GENDER IDENTITY DISCRIMINATION

Jeannette Cox*

ABSTRACT

Transgender advocates have recently turned to disability law to obtain discrimination protections lacking elsewhere. Championing the American Psychological Association’s decision to substitute “gender dysphoria” for “gender identity disorder,”¹ they argue that using disability law to combat gender identity discrimination will not pathologize transgender people. Due to this claim, leading advocates conclude that “the overwhelming consensus among transgender rights advocates is strongly in favor of Americans with Disabilities Act coverage of gender dysphoria.”²

While this Article sympathizes with the pragmatic need to address gender identity discrimination, it questions the disability law approach. Despite the transformative potential of the social model of disability, current United States disability discrimination law requires plaintiffs to cooperate with the medicalization of gender dysphoria. It also requires them to characterize gender dysphoria as inherently negative. Disability law’s expressly anti-trans provisions further stigmatize transgender plaintiffs by conditioning discrimination coverage on a showing that gender dysphoria has a physical etiology. This exercise is intrusive, potentially costly, and reflects an assimilationist bias eager to blame people for their gender nonconformance. Even disability law’s innovative “regarded as disabled” coverage falls short of advocates’ expectations.³ Its exclusive focus on discriminators’ beliefs related to medical impairments obscures discriminators’ far more relevant beliefs about gender variation and nonconformance.

* Professor of Law and Director of Faculty Research and Development, University of Dayton School of Law. Special thanks to Bradley Areheart for invaluable comments.

¹ Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 *YALE L.J. F.* 373, 393 (2017) [hereinafter *A New Path*].

² *Id.* at 389.

³ *See infra* Part IV.

Table of Contents

Introduction	317
I. The Narrow Window for Addressing Gender Identity Discrimination with Disability Law	323
A. A Brief History of Disability Discrimination Law’s Transgender Exclusions	323
B. Recent Successes with Treating “Gender Dysphoria” as an ADA- Recognized Disability	325
C. Transgender Advocates’ High Hopes for Disability Discrimination Law’s Social Constructivist Approach	327
II. The Gap Between Disability Discrimination Law and Social Constructivist Expectations	327
A. “Disability” vs. “Impairment”	328
B. “Impairment” Still Means Disorder	330
C. Characterizing Gender Dysphoria as Benign Human Variation Removes It from Disability Discrimination Law	332
III. The Physical Cause Requirement’s Assimilationist Bias	334
A. An Individualized Inquiry into Whether Each Plaintiff’s Gender Dysphoria Has a Physical Etiology	334
B. An Inquiry Limited to Two Stigmatized Groups	336
C. The Blame Framework.....	337
IV. The ADA’s “Regarded As” Provision Falls Short of the Social Model	340
A. The Medicalized Approach to “Regarded As” Coverage.....	341
B. The Physical Cause Requirement Further Complicates “Regarded As” Claims	343
C. Disability Discrimination Law’s Exclusions Further Complicate “Regarded As” Claims	345
Conclusion.....	347

INTRODUCTION

Transgender advocates have recently turned to the Americans with Disabilities Act (“ADA”) to obtain discrimination protections lacking elsewhere.⁴ It is not hard to understand why. Discrimination against transgender people is pervasive.⁵ Legal protection is incomplete, particularly in geographical areas and institutional settings where discrimination is most severe.⁶ And the Equality Act, which would provide federal protection against gender identity discrimination, lacks sufficient support in the Senate.⁷

Accordingly, advocates are arguing that existing statutory frameworks already provide gender identity discrimination protections. One of those frameworks—sex discrimination law—is currently before the Supreme Court.⁸ However, transgender advocates argue that disability discrimination law coverage would be desirable even if the Supreme Court holds that sex discrimination law prohibits gender identity discrimination because disability discrimination law goes “where sex discrimination

⁴ Doe v. Mass. Dep’t of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018); see Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 754–55 (S.D. Ohio 2018); Blatt v. Cabela’s Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017); see generally Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25 (2019) [hereinafter *The Future*]; *A New Path*, supra note 1; Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016) [hereinafter *A Bare Desire*]; Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1 (2013) [hereinafter *Disabilityqueer*].

⁵ See generally NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4 (2016) (“The findings reveal disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the United States population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates.”).

⁶ See *id.*

⁷ See Equality Act, H.R. 5, 116th Cong. (2019); see also John Bowden, *Pelosi Shows Off Poster of ‘McConnell’s Graveyard,’* THE HILL (June 13, 2019), <https://thehill.com/homenews/house/448376-pelosi-shows-off-poster-of-mcconnells-graveyard> (reporting Speaker of the House Nancy Pelosi’s statement that “[n]one of these things are going to pass . . . They’re not even going to be voted on” in connection with unveiling a poster depicting a “legislative graveyard” of bills stalled in the Senate, including the Equality Act).

⁸ See R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (granting certiorari on the question of whether Title VII’s prohibition on discrimination “because of sex” encompasses discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

law does not reach.”⁹ They note that the ADA would permit transgender inmates to challenge state prison policies regarding transgender medical care and gender-appropriate programs and facilities.¹⁰ It would also allow transgender persons to challenge private businesses that deny access to gender-appropriate facilities, such as restrooms.¹¹

Transgender advocates assuage concerns about associating transgender identity with disability by championing the Diagnostic and Statistical Manual of Mental Disorders’s (“DSM”) “gender dysphoria” diagnosis, adopted in 2013.¹² They emphasize that while earlier versions of the DSM considered “incongruence between one’s identity and assigned sex . . . a ‘disorder’ of identity, that is, something non-normative with the individual,”¹³ now “having a gender identity different from one’s assigned sex is no longer a ‘disorder’; it is perfectly healthy.”¹⁴ They note that the American Psychiatric Association (“APA”), which considered eliminating all forms of transgender diagnoses from the DSM, fashioned the gender dysphoria diagnostic code as a concession to the reality that many medical providers and insurance companies still require a diagnosis before providing access to sex affirmation surgeries and hormonal treatments.¹⁵

As further evidence that using disability discrimination law will not pathologize transgender people, transgender advocates emphasize that gender dysphoria’s diagnostic criterion of “clinically significant distress or impairment in social,

⁹ *A New Path*, *supra* note 1, at 393; *see also The Future*, *supra* note 4, at 50; *Disabilityqueer*, *supra* note 4, at 50.

¹⁰ *See A New Path*, *supra* note 1, at 376 (citing Complaint at ¶¶ 122–222, *Doe v. Dzurenda*, No. 3:16-CV-01934 (D. Conn. Nov. 23, 2016)).

¹¹ *Id.*

¹² AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-V].

¹³ *A Bare Desire*, *supra* note 4, at 518–19.

¹⁴ *Id.*

¹⁵ The American Psychological Association (APA) knew that while the international professional organization for transgender health practitioners’ Standards of Care now recommends informed consent for persons aged eighteen and above in lieu of a gender dysphoria diagnosis, many medical practitioners still require the diagnosis prior to providing gender-affirming healthcare, and insurance policies that cover such care also require a diagnosis. *See* Austin H. Johnson, *Normative Accountability: How the Medical Model Influences Transgender Identities and Experiences*, 9 SOC. COMPASS 803, 806–07 (2015).

occupational, or other important areas of functioning”¹⁶ does not apply to the large numbers of transgender people who do not experience distress or impairment. They stress that the medical diagnosis is conceptually separate from transgender identity, a healthy form of human diversity.¹⁷ Furthermore, they note that the APA acknowledges that the distress that typifies a gender dysphoria diagnosis arises from social stigma rather than from a mental health problem inherent in the individual.¹⁸ In the DSM itself, the APA observes that the prevalence of clinically significant distress amongst transgender people “differs among cultures” and thus is “related to differences in attitudes toward gender variance.”¹⁹

Transgender advocates seeking ADA coverage observe that this destigmatization of transgender identity dovetails with the social model of disability, which aims to characterize “disability” not as a problem inherent in an individual, but instead as the cumulative effects of social practices that exclude variant people.²⁰ Transgender advocates believe that the social model of disability will enable transgender people to obtain discrimination protections via disability discrimination law without risking restigmatization.²¹ They argue that concerns that using the ADA will pathologize transgender people reflect “prejudice toward people with disabilities” and a lack of understanding of the social model.²²

Transgender advocates further argue that disability discrimination law’s innovative coverage of persons merely perceived to be impaired will benefit the large numbers of transgender people who lack a gender dysphoria diagnosis.²³ This group

¹⁶ DSM-V, *supra* note 12, at 452–53.

¹⁷ *See id.* at 451.

¹⁸ *Disabilityqueer*, *supra* note 4, at 11 (quoting language from the APA working group that suggests “it is ‘stigma’ that causes distress . . . and that the desire ‘to be rid of body parts that do not fit one’s identity is, in the absence of data,’ not ‘inherent[ly] distress[ing].’” (citations omitted)); *see also id.* (quoting language from the proposed revision stating that the “‘desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender’ may not only not be distressing—it may well be liberating.”).

¹⁹ DSM-V, *supra* note 12, at 459.

²⁰ MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990).

²¹ *A New Path*, *supra* note 1, at 393 (“Notwithstanding the well-intentioned concerns of some transgender rights advocates, disability rights coverage of gender dysphoria does not pathologize transgender identity.”).

²² *The Future*, *supra* note 4, at 50.

²³ *Id.* at 56 (“People who transition are typically perceived as having gender dysphoria because transition is the recognized form of medical treatment for gender dysphoria.”); *A New Path*, *supra* note 1, at 389

includes transgender people who face significant financial and geographic barriers to diagnosis.²⁴ It also includes transgender people who do not meet the diagnostic criterion of experiencing clinically significant distress or impairment.²⁵ Additionally, it includes the increasing numbers of transgender people, including many of the thirty-five percent who identify as nonbinary,²⁶ for whom the DSM's gender dysphoria diagnosis, which requires "a strong desire to be of the *other gender*," is simply inappropriate.²⁷ Many prefer to live outside the traditional gender binary.²⁸ And even those whose gender identities fit within the binary may nonetheless eschew medical diagnosis and intervention.²⁹ Transgender advocates expect disability law's

("Transgender litigants who . . . are erroneously *perceived* as having gender dysphoria (i.e., those who do not experience distress but who are transgender)—might now consider bringing ADA claims."); *Disabilityqueer*, *supra* note 4, at 49 ("A transgender man who does not seek out a GID diagnosis or otherwise avail himself of medical interventions (and would not qualify for a GID diagnosis even if he did), and who is not functionally limited in any way, but who dresses in traditionally male clothing and is discriminated against as a result, is most likely 'regarded as' having GID.").

²⁴ See NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 5, at 5 (reporting on "large economic disparities between transgender people in the survey and the U.S. population. Nearly one-third (29%) of respondents were living in poverty, compared to 14% in the U.S. population. A major contributor to the high rate of poverty is likely respondents' 15% unemployment rate—three times higher than the unemployment rate in the U.S. population at the time of the survey (5%)."); see also NICHOLAS H. TEICH, TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE 52 (2012) (noting that transgender surgery of any type "always takes an immense financial commitment. Health insurance covers transgender surgeries in very few cases. Since most people pay out of pocket, the costs can be astronomical. Because of this, many transpeople never have surgery. Some people have fewer surgeries than they would like because of the high prices.").

²⁵ *Gender Dysphoria Fact Sheet*, AM. PSYCHIATRIC ASS'N (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf ("Gender nonconformity is not in itself a mental disorder."); see also DSM-V, *supra* note 12, at 458 ("Given the increased openness of atypical gender expressions by individuals across the entire range of the transgender spectrum, it is important that the clinical diagnosis be limited to those individuals whose distress and impairment meet the specified criteria.").

²⁶ See ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> (estimating that 1.4 million adults identify as transgender).

²⁷ DSM-V, *supra* note 12, at 452 (emphasis added).

²⁸ See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 908–09 (2019) ("[S]ome nonbinary people may not seek medical treatment because they do not wish to 'pass' as men or women."); see also *id.* at 938–39.

²⁹ See Johnson, *supra* note 15, at 803–13 ("[N]ot all transgender people identify with the medical model or require medical interventions.").

“regarded as” coverage to provide discrimination protection to these individuals without requiring them to label their difference as a “disorder.”³⁰

This Article tests these optimistic expectations against the realities of disability discrimination law. It demonstrates that, despite advocates’ hopes, current disability discrimination law requires participation in an impairment-disorder framework. While disability discrimination law aligns with a social constructivist view of *disability*, disability discrimination law forecloses a social constructivist view of *impairment*, the foundational, gatekeeping term for statutory coverage. Despite the reality that social and political factors contribute to which human traits receive the label “impairment,” disability discrimination law continues to define “impairment” to mean “disorder.” And in the words of the Iowa Supreme Court, a “condition must independently come within the definition of impairment before attitudes of others can be said to make the condition a [disability].”³¹

Additionally, the ADA’s anti-transgender provisions amplify the negative connotations of “impairment.” Fueled by late 1980s animus toward transgender people, the ADA’s text expressly excludes from discrimination coverage “gender identity disorders not resulting from physical impairments.”³² Accordingly, transgender plaintiffs seeking to use the ADA must prove that their gender dysphoria has a physical etiology. This additional hurdle, not required for most ADA plaintiffs, reflects the unstated judgment that gender identity discrimination protection should be available only for people physically unable to conform to traditional gender norms. This framework reflects moral opprobrium against transgender people. Additionally, by forcing transgender plaintiffs to frame their gender identity as biologically determined, it fails to account for the experiences of individuals who view gender as fluid, relational, or involving some degree of self-determination.

At first blush, disability discrimination law’s innovative coverage of persons merely *perceived* to be impaired would appear to benefit the large numbers of transgender people unable or unwilling to characterize themselves as having a physical impairment. However, in practice, “regarded as” claims require plaintiffs to prove that the discriminator regarded them as having a physical impairment covered by disability discrimination law.³³ This requirement poses numerous practical problems. Most fundamentally, discriminators are unlikely to know how gender dysphoria differs from the outdated transgender diagnoses that the ADA expressly

³⁰ See *infra* Part IV.

³¹ *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 476 (Iowa 1983).

³² 42 U.S.C. § 12211 (2018).

³³ See *infra* Part IV.

excludes. Discriminators typically respond to a person's lack of conformity to traditional gender norms rather than a perception that a person has gender dysphoria. In this way, disability law's medicalized approach is a poor fit for much of the discrimination transgender people experience.

This argument proceeds as follows. Part I briefly outlines the history of federal disability discrimination law's exclusions of transgender-related diagnoses. It also describes the confluence of recent events that have enabled advocates to begin avoiding these exclusions. It then focuses on the two most crucial aspects of transgender advocates' expectations about disability discrimination law: (1) the claim that disability discrimination coverage will not pathologize gender dysphoria, and (2) the claim that disability law's "regarded as" coverage will extend to transgender people who do not have a gender dysphoria diagnosis.

The remainder of the Article argues that these claims are incompatible with current disability discrimination law. Part II demonstrates that current disability discrimination law will require transgender plaintiffs to cooperate with a medicalized approach to discrimination coverage. This approach views gender dysphoria as inherently negative and internal to the individual. Characterizing gender dysphoria in other terms, such as benign human variation, gender identity, or distress resulting from animus, is incompatible with current disability discrimination law.

Relatedly, Part III explores how the "physical cause" requirement for gender dysphoria reflects the unstated judgment that discrimination protection should be available only for people physically unable to conform to traditional social norms. Early transgender cases suggest that courts will not be satisfied with generalized proof about causation.³⁴ Instead, each transgender plaintiff must demonstrate that his, her, or their gender dysphoria has a physical cause. This intrusive, and potentially costly, exercise will further stigmatize transgender people.

Part IV demonstrates that "regarded as" coverage, while seemingly championing a socially constructed approach to disability, is also a poor vehicle to address gender identity discrimination. As currently interpreted by many courts, the ADA's "regarded as" prong would reach only a very narrow category of persons who discriminate against transgender people: those that discriminate based on a perception that the plaintiff has an impairment within the meaning of disability discrimination law.³⁵ This medicalized approach permits discriminators to escape liability under disability discrimination law by self-servingly championing the depathologization of transgender people. Accordingly, the ADA's "regarded as"

³⁴ *Id.*

³⁵ *Id.*

prong is unlikely to empower transgender people without a gender dysphoria diagnosis to bring successful discrimination claims under the ADA.

The Article concludes with a recommendation that Congress add a provision to the proposed Equality Act that would amend disability discrimination laws to make clear that transgender identity is not an impairment within the meaning of disability law.³⁶ This adjustment to the ADA, when enacted simultaneously with the Equality Act's substantive provisions, will provide discrimination protection for transgender people while avoiding disability law's impairment-disorder framework.

I. THE NARROW WINDOW FOR ADDRESSING GENDER IDENTITY DISCRIMINATION WITH DISABILITY LAW

A. *A Brief History of Disability Discrimination Law's Transgender Exclusions*

No ADA discrimination claim based on transgender identity succeeded until 2017 because two amendments added to the ADA prior to its passage aimed to exclude virtually all transgender persons. The first provides that “the term ‘disabled’ or ‘disability’ shall not apply to an individual solely because that individual is a transvestite.”³⁷ At the time of the ADA's passage in 1990, “transvestite” likely referred not solely to people who experience sexual pleasure from cross-dressing, but also to many people that would identify as transgender in today's nomenclature.³⁸ In another section, the ADA again excludes “transvestism” as well as other outdated diagnoses closely tied to today's conception of transgender identity: “transsexualism” and “gender identity disorders not resulting from physical impairments.”³⁹

Moral opprobrium against transgender people fueled these exclusions.⁴⁰ Socially conservative members of Congress were keenly aware of two cases that had

³⁶ Equality Act, H.R. 5, 116th Cong. (as passed by House, May 17, 2019).

³⁷ 42 U.S.C. § 12208 (2018).

³⁸ See 134 CONG. REC. S10,470 (daily ed. Aug. 1, 1988) (statement of Sen. Helms); *Blackwell v. U.S. Dep't of Treasury*, 830 F.2d 1183, 1183 (D.C. Cir. 1987); Nikki Sullivan, *The Role of Medicine in the (Trans)Formation of 'Wrong' Bodies*, 14 BODY & SOC'Y 105, 108 (2008) (explaining that each psychologists and psychoanalysts historically used the term transvestism “to refer both to cross-dressing and to what we now call transsexualism”).

³⁹ 42 U.S.C. § 12211.

⁴⁰ For a detailed treatment of the legislative history of the exclusions, see Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 49–50 (2004).

interpreted the Rehabilitation Act, the predecessor statute to the ADA, to include transsexualism and transvestism.⁴¹ Similarly, Senator Jesse Helms argued that permitting disability discrimination law to apply to transgender people would “eliminate the entire concept of a moral qualification for any job, position, or privilege.”⁴² Senator Steve Symms called the Rehabilitation Act’s protection of transgender people a failure of Congress’s “moral authority to legislate rules for the rest of society.”⁴³

The text of the ADA exclusion (also incorporated into the Rehabilitation Act via amendment⁴⁴) reflects this moral opprobrium. The exclusion associates transgender people with heavily stigmatized illegal conduct, like pedophilia. It provides:

Under this chapter, the term “disability” shall not include-

- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) compulsive gambling, kleptomania, or pyromania; or
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.⁴⁵

In addition to associating transgender people with illegal behavior, the catchall “other sexual behavior disorders” strongly implies that Congress considered

⁴¹ See *Blackwell*, 830 F.2d at 1183; *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446, at *1 (D.D.C. June 12, 1985).

⁴² 134 CONG. REC. S4236 (daily ed. Mar. 17, 1988) (statement of Sen. Helms); see also *id.* at S4235 (“[D]o we really want private institutions, particularly schools and day care centers to be prohibited from refusing to hire a transvestite because some Federal court may find that this violates the transvestite’s civil rights to wear a dress and to wear foam, that sort of thing? Do we really want to prohibit these private institutions from making employment decisions based on moral qualifications?”).

⁴³ 135 CONG. REC. S19,853 (1989); see also 134 CONG. REC. S4248 (1988) (statement of Sen. Armstrong) (objecting to “provid[ing] a protected legal status to somebody who has such disorders, particularly those who might have a moral content to them”).

⁴⁴ 29 U.S.C. § 705(20)(F)(i) (2018).

⁴⁵ 42 U.S.C. § 12211.

transgender identity to be a “sexual behavior disorder.”⁴⁶ This approach was not prompted by the then-existing version of the DSM, which had, three years before the ADA’s enactment, removed “Gender Identity Disorders” from the “Sexual Disorders” classification.⁴⁷

Due to the ADA’s exclusions, no transgender plaintiff succeeded in obtaining ADA coverage prior to 2017.⁴⁸ Even plaintiffs who attempted to show that their “gender identity disorder[] . . . result[ed] from physical impairments” did not succeed.⁴⁹ For example, one court reasoned that because the terms “transsexualism” and “gender identity disorders” were frequently used interchangeably at the time of the ADA’s enactment, the ADA’s complete exclusion of “transsexualism” excludes all “gender identity disorders,” even if they have a physical etiology.⁵⁰

B. Recent Successes with Treating “Gender Dysphoria” as an ADA-Recognized Disability

Starting in 2017, a handful of transgender plaintiffs began obtaining ADA coverage by capitalizing on the confluence of three changes in law and medicine. First, developments in equal protection caselaw led plaintiffs to accompany their ADA claims with equal protection challenges to the ADA’s exclusions.⁵¹ They

⁴⁶ *Id.*

⁴⁷ Compare AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III-R 27, 71 (1987), with AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III 261–66 (1980).

⁴⁸ See, e.g., *Gulley-Fernandez v. Wis. Dep’t of Corr.*, No. 15-CV-995, 2015 WL 7777997, at *2 (E.D. Wis. Dec. 1, 2015); *Mitchell v. Wall*, No. 15-CV-108-WMC, 2015 WL 10936775, at *1 (W.D. Wis. Aug. 6, 2015); *Diamond v. Allen*, No. 7:14-CV-124 (HL), 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at *4 (D. Ariz. June 3, 2004).

⁴⁹ See, e.g., *Doe v. United Consumer Fin. Servs.*, No. 1:01-CV-1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

⁵⁰ *Id.* at *6; see also *John Doe v. Northrop Grumman Sys. Corp.*, No. 5:19-CV-00991-CLS, 2019 WL 5390953, at *8 (N.D. Ala. Oct. 22, 2019) (“[A] condition of ‘gender dysphoria’ (formerly described as a ‘gender identity disorder’) that does not result from a physical impairment is expressly excluded from the definition of disabilities covered by the Americans with Disabilities Act.”).

⁵¹ See Memorandum of Plaintiff in Opposition to Defendant’s Partial Motion to Dismiss Plaintiff’s First Amended Complaint, 5:14-CV-04822, 2015 WL 1360179 (E.D. Pa. Jan. 20, 2015); *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (“This [c]ourt should find the ADA’s exclusion of ‘transsexualism . . . [and] gender identity disorders not resulting from physical impairments’ (collectively referred to as ‘GID exclusion’) unconstitutional and inapplicable to

argued that the ADA's exclusion of diagnoses associated with transgender people violated equal protection law.⁵² Courts chose to avoid this constitutional question by reading the ADA to cover gender dysphoria.⁵³ Second, plaintiffs enlisted emerging research that suggests gender dysphoria has a physical etiology.⁵⁴ They emphasized that the DSM-V includes a section entitled "genetics and physiology," which discusses the possible genetic and hormonal factors that may contribute to gender dysphoria.⁵⁵ This allowed plaintiffs to evade the ADA's exclusion of "gender identity disorders not resulting from physical impairments."⁵⁶

The third, and perhaps the largest, explanation for the sudden success in ADA gender dysphoria claims is that the 2013 change to the DSM made transgender advocacy groups more comfortable using the ADA.⁵⁷ Acknowledging that "[p]art of removing stigma is about choosing the right words," the APA explained that "[r]eplacing 'disorder' with 'dysphoria' in the diagnostic label . . . removes the connotation that the patient is 'disordered.'"⁵⁸ This change led transgender advocates

Plaintiff Blatt, as it stands in clear violation of the Equal Protection Clause of the Fourteenth Amendment . . ."); *see generally A Bare Desire*, *supra* note 4, at 516–19.

⁵² *See Blatt*, 2017 WL 2178123, at *4.

⁵³ *See id.* ("Because this interpretation allows the Court to avoid the constitutional questions raised in this case, it is the Court's duty to adopt it. Accordingly, Blatt's condition is not excluded by § 12211 of the ADA . . .").

⁵⁴ *Doe v. Mass. Dep't of Correction*, No. CV 17-12255-RGS, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018) ("While medical research in this area remains in its initial phases, Doe points to recent studies demonstrating that GD diagnoses have a physical etiology, namely hormonal and genetic drivers contributing to the in utero development of dysphoria.").

⁵⁵ *See The Future*, *supra* note 4, at 45 ("[T]he diagnosis of gender dysphoria in the DSM-5 rests upon a growing body of scientific research showing that gender dysphoria has a physical cause related to the interaction of the developing brain and sex hormones.") (citing DSM-V, *supra* note 12, at 457); *A Bare Desire*, *supra* note 4, at 515 ("A growing body of medical research suggests that the incongruence between a person's gender identity and assigned sex at birth is caused by 'genetics and/or in utero exposure to the "wrong" hormones during the development of the brain, such that the anatomic physical body and the brain develop in different gender paths.'").

⁵⁶ 42 U.S.C. § 12211.

⁵⁷ *See, e.g., The Future*, *supra* note 4, at 51.

⁵⁸ *Gender Dysphoria Fact Sheet*, AM. PSYCHIATRIC ASS'N (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf.

to believe that plaintiffs could bring disability discrimination claims based on gender dysphoria without significant risk of stigmatization.⁵⁹

*C. Transgender Advocates' High Hopes for Disability
Discrimination Law's Social Constructivist Approach*

Arguing that “[u]nder the social model, ‘disability’ connotes oppression,”⁶⁰ transgender advocates have concluded that “disability rights coverage of gender dysphoria does not pathologize transgender identity.”⁶¹ They expect that plaintiffs will be able to characterize the distress that contributed to their diagnosis as externally imposed.⁶² They dismiss concerns that the ADA will pathologize transgender people as “prejudice[d] toward people with disabilities.”⁶³ They expect that the ADA’s “regarded as” provision will permit the large numbers of transgender people who do not want or cannot afford a gender dysphoria diagnosis to challenge gender identity discrimination. Due to these expectations, leading advocates observe that “the overwhelming consensus among transgender rights advocates is strongly in favor of ADA coverage of gender dysphoria.”⁶⁴

II. THE GAP BETWEEN DISABILITY DISCRIMINATION LAW AND SOCIAL CONSTRUCTIVIST EXPECTATIONS

Unfortunately, disability discrimination law fails to live up to transgender advocates’ expectations in significant ways. Most crucially, a person with gender dysphoria seeking to bring a claim under the ADA would have to characterize gender dysphoria as an “impairment” and a “disorder.” Characterizing gender dysphoria as an aspect of identity is incompatible with current ADA caselaw and regulations.

⁵⁹ See, e.g., *The Future*, *supra* note 4, at 51 (“[A]lthough some disability laws rely on a stigmatizing definition of ‘disability’ rooted in the medical model, laws like the ADA and Section 504 do not; they are instead premised on the social model . . .”).

⁶⁰ *Id.*

⁶¹ *A New Path*, *supra* note 1, at 393 (“Notwithstanding the well-intentioned concerns of some transgender rights advocates, disability rights coverage of gender dysphoria does not pathologize transgender identity . . .”).

⁶² See *Disabilityqueer*, *supra* note 4, at 11 (emphasizing that the APA working group that recommended abandoning the gender identity disorder diagnosis in favor of gender dysphoria suggested “that it is ‘stigma’ that causes distress, not GID”).

⁶³ *The Future*, *supra* note 4, at 50.

⁶⁴ *A New Path*, *supra* note 1, at 389.

A. “Disability” vs. “Impairment”

Disability discrimination law defines “disability” to mean “a physical or mental impairment that substantially limits one or more major life activities.”⁶⁵ Although the term “impairment” has historically received less attention than the definition’s other terms, it plays a core—and increasingly crucial—gatekeeping role.⁶⁶ Unfortunately, disability discrimination law treats “impairment” as a deficit inherent in the individual.

The problem is the longstanding dichotomy, enshrined in both social model theory and disability discrimination law, between “disability” and “impairment.” In the course of arguing that “disability” is socially created by negative attitudes and socially-constructed barriers, most social model theorists have implicitly accepted a medicalized view of “impairment.”⁶⁷ As Dr. Shelley Tremain explains:

An unstated premise of the model is that impairment is a necessary condition for disability. Proponents of the model do not argue that people who are excluded, or discriminated against on the basis of, for example, skin colour, are by virtue of *that* fact disabled, nor do they argue that racism is a form of disability. On the contrary, only people who *have*, or are *presumed to have*, an impairment are counted as disabled.⁶⁸

To illustrate this point, Tremain points to a formalized set of principles generated by the Union of the Physically Impaired Against Segregation, an early disability rights organization in the United Kingdom.⁶⁹ These principles define “disability” as “a form of disadvantage which is imposed on top of one’s impairment,

⁶⁵ 42 U.S.C. § 12102(1)(A) (2018).

⁶⁶ After the ADA Amendments Act of 2008, the term “impairment,” which was previously largely ignored, has gained new significance and has become a focus of litigation. *See generally* Jeannette Cox, *Reasonable Accommodations and the ADA Amendments’ Overlooked Potential*, 24 GEO. MASON L. REV. 147, 148 (2016); Michelle A. Travis, *Impairment As Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937 (2012).

⁶⁷ Travis, *supra* note 66, at 971; *see also* OLIVER, *supra* note 20, at 35 (“[T]he social model is built upon the distinction between a simple bodily description—i.e., ‘impairment’—and a complex social construct—i.e., ‘disability.’”). *But see* Bradley A. Areheart, *Disability Trouble*, 29 YALE L. & POL’Y REV. 347 (2011) (arguing that impairment is substantially socially constructed).

⁶⁸ Shelley Tremain, *On the Subject of Impairment*, in *DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY* 32, 42 (Mairian Corker & Tom Shakespeare eds., 2002).

⁶⁹ *Id.* at 33.

that is, the disadvantage or restriction of activity caused by a contemporary social organization that takes little or no account of people with physical impairments.”⁷⁰ The same document defines “impairment” as “the lack of a limb or part thereof or a defect of a limb, organ or mechanism of the body.”⁷¹ As these definitions suggest, even organizations comprised of social model adherents accept the view that impairment means natural deficit or lack. They accept the common understanding of the word “impairment,” reflected in most dictionaries, that involves “the status of having become worse, or weaker, or less valuable.”⁷²

In reality, of course, the social constructionist observations about “disability” frequently apply to “impairment” as well. Despite the apparent neutrality of diagnoses, the medical profession’s decisions to label certain human variations “impairments” are heavily influenced by social norms.⁷³ This is particularly obvious for homosexuality, which the DSM listed as a mental health disorder until 1973.⁷⁴ Although medical professionals formally controlled the de-listing of homosexuality as a mental health disorder, it was not scientific discovery but instead protest and persuasion that motivated the shift.⁷⁵ Another rejected mental health diagnosis easily held up for ridicule is drapetomania, a Nineteenth Century “disorder of slaves who

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 697 (1999) (quoting *Impairment*, OXFORD ENGLISH DICTIONARY (2d ed. 1989)); see also Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1259 (2007) (noting that, from a social model perspective, it may be “controversial to use the word ‘impairment’ and its connotation of inferiority. ‘Trait’ better fits the social model’s broadest implications”).

⁷³ See Travis, *supra* note 66, at 972 (“[D]isability theorists are now recognizing that impairments are more socially constructed than previously acknowledged.”); Areheart, *supra* note 67, at 364 (“Despite the modern tendency to see new diagnoses as the natural result of cumulative scientific progress . . . the creation of diagnoses is often a multi-factored process spurred along by political negotiation, financial incentives, and/or social judgments and norms.”).

⁷⁴ Although the APA removed homosexuality per se from the DSM in 1973, it took another fourteen years before the APA eliminated all homosexuality-related diagnoses. The DSM-II contained a diagnosis called “Sexual Orientation Disturbance” for persons who found their same-sex attractions distressing and wanted to change. Robert L. Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues*, 138 AM. J. PSYCHIATRY 210 (1981). In 1980, DSM-III dropped “Sexual Orientation Disturbance” and in its place substituted “Ego Dystonic Homosexuality.” *Id.* Ego Dystonic Homosexuality was removed from the next revision, DSM-III-R, in 1987. James Krajewski, *Homosexuality and the Mental Health Professions*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 26 (Robert P. Cabaj & Terry S. Stein eds., 1996).

⁷⁵ Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES SEXUAL BEHAV. 427, 434–35 (2010).

have a tendency to run away from their owner due to an inborn propensity for wanderlust.”⁷⁶ As these examples suggest, the “impairment” label does not neutrally reflect biological facts but instead reflects a complex web of factors that include moral value judgments, political pressure, and economic interests.⁷⁷

Transgender advocates hope to use the ADA to characterize gender dysphoria as a social-norms-driven diagnosis (like homosexuality or drapetomania) that assigns negative valance to a healthy human characteristic. Unfortunately, however, disability law does not acknowledge the social forces that contribute to the creation of “impairment.”⁷⁸ It instead continues to treat “impairment” as a deficit inherent in the individual.⁷⁹

B. “Impairment” Still Means Disorder

“Disorder” is the overarching requirement for “impairment” in disability discrimination law. Longstanding regulations define “mental impairment” as “[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”⁸⁰ Similarly, “physical impairment” is “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss”⁸¹ While the phrase “physiological disorder *or condition*” would appear to

⁷⁶ S. Schwartz, *The Role of Values in the Nature/Nurture Debate About Psychiatric Disorders*, 33 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 356, 357 (1998).

⁷⁷ Travis, *supra* note 66, at 978 (“The practical and political demands that necessarily attach to such a legal definition—particularly one that polices the boundaries of legal protection—likely makes it impossible for the legal construction of impairment to fully reflect the insights of modern disability theory, at least under the existing ADAAA. In significant part, this is because it is difficult to take the social constructionist critique of impairment seriously without moving inexorably to the position that the ADA should protect all physical and mental characteristics upon which an employer renders a market-irrational decision.”); Areheart, *supra* note 67, at 364 (“[I]n a very real sense, an impairment does not exist until we agree that it does—until it is created. For example, a child who 100 years ago might have been described as a ‘bad student’ might today be described as having dyscalculia (a learning disorder associated with comprehending mathematics) or dysgraphia (a deficiency in the ability to write). Similarly, a person who at one time might have been seen as a ‘glutton’ might now be understood as having bulimia nervosa. Such diagnoses thus exist as a confluence of both biological and cultural factors.”).

⁷⁸ Travis, *supra* note 66, at 971.

⁷⁹ *Id.* at 970 (observing the courts have “endorsed the lay understanding of impairment as ‘having become worse, or weaker, or less valuable’”).

⁸⁰ 29 C.F.R. § 1630.2(h) (2018).

⁸¹ *Id.*

create opportunities for disability law to protect “conditions” that are not disorders,⁸² the Equal Employment Opportunity Commission’s (EEOC) longstanding interpretive guidance reads the term “condition” out of the definition.⁸³ It concludes that “conditions . . . that are not the result of a physiological disorder are . . . not impairments.”⁸⁴

This impairment-as-disorder definition forecloses arguments that the ADA covers persons without a physical or mental disorder who experience socially-imposed disadvantage. For example, the EEOC rules pregnancy outside disability discrimination coverage because it does not result from a “physiological disorder.”⁸⁵ The well-documented employment bias against pregnant workers⁸⁶ and the reality that pregnancy can impose temporary lifting restrictions identical to those associated with ADA-covered temporary back injuries is insufficient to create disability discrimination coverage.⁸⁷ Similarly, despite the historical stigma and the ongoing disadvantages left-handed people experience as a result of tools and furniture designed for the majority, the EEOC explicitly lists “left-handedness” as a condition that falls outside the ADA because it is “normal.”⁸⁸ As these examples suggest, the EEOC has prioritized policing the line between impairment and nonimpairment. The EEOC’s position is that “[i]t is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments.”⁸⁹

In keeping with this distinction between “impairment” and “healthy human variation,” the ADA’s text expressly provides that “homosexuality and bisexuality are not impairments and as such are not disabilities.”⁹⁰ This provision was the result

⁸² *Id.* (emphasis added); see Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 485 (2012) (“In order for the word ‘condition’ to have meaning independent of the term ‘physiological disorder,’ it should encompass conditions that are not ‘physiological disorder[s].’”).

⁸³ Interpretive Guidance on Title I of the ADA, 29 C.F.R. app. § 1630.2(h) (2019).

⁸⁴ *Id.*

⁸⁵ *Id.*; see also Cox, *supra* note 82, at 485.

⁸⁶ See generally Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749, 752 (2018).

⁸⁷ Cox, *supra* note 82, at 485.

⁸⁸ 29 C.F.R. § 1630.2(h).

⁸⁹ *Id.*

⁹⁰ 42 U.S.C. § 12211(a) (2018).

of cooperation between anti-gay legislators eager to exclude homosexuality and gay rights advocates eager to depathologize it.⁹¹ Although the version of the ADA originally passed in the Senate listed homosexuality and bisexuality alongside gender identity disorders and “other sexual behavior disorders,”⁹² the intervention of gay rights advocates resulted in the conference committee adopting the House version that explicitly disassociated LGB people from the “impairment” and “sexual behavior disorder” labels.⁹³

The resulting different treatment of LGB and transgender people in the ADA’s text makes it difficult for transgender people to obtain ADA coverage without cooperating with the impairment-disorder framework. Unlike homosexuality and bisexuality, the ADA characterizes transgender-related diagnoses as “sexual behavior disorders” and “impairments.”⁹⁴ Accordingly, while plaintiffs may succeed in arguing that their gender dysphoria has a physical cause and thus escapes the ADA’s exclusions, the ADA’s text frustrates efforts to distance gender dysphoria from the concept of disorder.

C. *Characterizing Gender Dysphoria as Benign Human Variation Removes It from Disability Discrimination Law*

Furthermore, as the previous discussion of pregnancy and left-handedness suggests, no matter how courts interpret the ADA’s anti-trans provisions, the ADA’s core definition of “impairment” requires disorder. Accordingly, a plaintiff who attempts to characterize gender dysphoria as a trait (comparable to left-handedness or sexual orientation) instead of a disorder will argue themselves out of the ADA.⁹⁵

Cases pre-dating disability law’s anti-trans exclusions illustrate how characterizing gender dysphoria as a “benign characteristic” would exclude

⁹¹ See Colker, *supra* note 40, at 43.

⁹² H.R. REP. NO. 101-596, at 88 (1990) (Conf. Rep.).

⁹³ See Colker, *supra* note 40, at 43.

⁹⁴ 42 U.S.C. § 12211(a); see Jasbir K. Puar, *Disability*, 1 TRANSGENDER STUD. Q. 79 (2014) (“[T]he notable inclusion of the specific *exclusion* as a disability in the ADA of GID not resulting from physical impairments . . . was largely understood, unlike the specific exclusion of homosexuality, as a commitment to the entrenchment of pathologization of GID.”); see also *id.* at 77–81.

⁹⁵ See R. Nick Gorton, *Transgender as Mental Illness: Nosology, Social Justice, and the Tarnished Golden Mean*, in THE TRANSGENDER STUD. READER 2 at 644 (Susan Stryker & Aren Z. Aizura eds., 2013) (“One prevalent view, especially in the transgender community, is that transgenderism is not a disease at all, but a benign normal variant of the human experience akin to left-handedness.”).

transgender people from disability discrimination law.⁹⁶ For example, after noting that “[n]o claim is made that a transsexual has an abnormal or unhealthy body,” one court reasoned that

transsexualism is more likely to have an adverse effect because of attitudes of others toward the condition. This does not mean, however, the condition meets the rule definition of impairment. The condition must independently come within the definition of impairment before attitudes of others can be said to make the condition a [disability].⁹⁷

More recently, one of the few courts to contemplate whether gender dysphoria fits the ADA’s definition of impairment took a similar approach. When faced with a claim that gender dysphoria qualifies as an ADA impairment because it has a physical cause, the United States District Court for the Southern District Ohio opined that “the [c]ourt is not convinced that a mere difference in brain structure or physiology, by itself, is necessarily a ‘physical impairment’—it may have physical underpinnings in the brain, but not every physical difference between two groups implies that one of the groups is impaired in some way.”⁹⁸

As these cases illustrate, a constructivist view of impairment is incompatible with current disability discrimination law.⁹⁹ A transgender person would need to characterize the discrimination they experience as resulting from a disorder.

⁹⁶ *See id.*

⁹⁷ *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 476 (Iowa 1983).

⁹⁸ *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754–55 (S.D. Ohio 2018) (“Nowhere in the Amended Complaint did Parker allege that her gender dysphoria was caused by a physical impairment or that gender dysphoria always results from a physical impairment.”); *see also* Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People through Disability Laws*, in *TRANSGENDER RIGHTS 74* (Paisley Currah et al. eds., 2006) (“[O]n one occasion, an official at an administrative agency conveyed to the authors of this chapter that while the agency agreed that transgender persons logically should be protected under the disability law the agency was charged with administering, the agency was reluctant to issue such an opinion for fear of offending members of the community.”).

⁹⁹ *See* Travis, *supra* note 66, at 979–80 (“[B]y divorcing impairment from notions of social exclusion and oppression, the legal definition necessarily becomes both over- and under-inclusive of the set of stigmatized physical and mental characteristics. [It] cover[s] an individual with a non-stigmatized condition that medical professionals recognize as an impairment if the individual encounters an idiosyncratic employer with a singularly irrational response to that condition. At the same time, individuals with highly stigmatized physical or mental characteristics not deemed medical impairments will fall outside the ADA’s protection, even if such characteristics exclude the individuals from a wide range of jobs.”).

Characterizing the trait targeted by the discriminator in neutral or positive terms removes the person from ADA coverage. In order to frame “gender dysphoria” as an impairment, it would be necessary to argue that gender dysphoria is categorically different from benign human variations like homosexuality, bisexuality, and left-handedness. Instead, plaintiffs would have to argue that gender dysphoria is a disorder, a label that transgender activists fought a long battle to remove from the DSM.¹⁰⁰

III. THE PHYSICAL CAUSE REQUIREMENT’S ASSIMILATIONIST BIAS

Disability discrimination law’s trans-specific provisions amplify the requirement that transgender plaintiffs participate in the impairment-disorder framework in order to access disability discrimination law. Because they exclude “gender identity disorders *not resulting from physical impairments*,” plaintiffs would need to demonstrate that their gender dysphoria has a physical cause.¹⁰¹

A. *An Individualized Inquiry into Whether Each Plaintiff’s Gender Dysphoria Has a Physical Etiology*

Although transgender advocates would prefer courts simply take judicial notice that gender dysphoria has a physical cause and thus qualifies as an ADA impairment, most of the courts to consider the issue have instead required individualized proof.¹⁰²

¹⁰⁰ Some transgender advocates emphasize that the DSM’s “post-transition specifier for people who are living full-time as the desired gender” “expands the diagnosis to [transgender persons] *without* distress” and thus ameliorates the extent to which transgender persons must characterize themselves as experiencing distress. *A Bare Desire*, *supra* note 4, at 519–20. However, the post-transition specifier does not remove the impairment framework because it is “modeled on the concept of full or partial remission.” AM. PSYCHIATRIC ASS’N, DSM-5 FACT SHEETS: GENDER DYSPHORIA (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf. One of the drafters explains that “[w]e introduced the notion of a post-transition specifier to the diagnostic manual [so that a person] who is not dysphoric *but used to be dysphoric*, can still have a diagnosis code.” Jack Drescher, *New Diagnostic Codes Lessen Stigma for Transgender People*, MEDSCAPE (Sept. 11, 2017), <https://www.medscape.com/viewarticle/885141> (emphasis added).

¹⁰¹ 42 U.S.C. § 12211(b) (2018) (emphasis added).

¹⁰² *See Parker*, 307 F. Supp. 3d at 754–55 (dismissing disability discrimination claims because “[n]owhere in the Amended Complaint did Parker allege that her gender dysphoria was caused by a physical impairment or that gender dysphoria always results from a physical impairment.”); *Doe v. Mass. Dep’t of Corr.*, No. 17-12255-RGS, 2018 WL 2994403, at *6 (D. Mass. June 14, 2018) (noting the ADA’s exclusion applies only to “‘gender identity disorders *not resulting from physical impairments*,’ and Doe has raised a dispute of fact that her GD may result from physical causes”) (quoting 42 U.S.C. § 12211(b)(1) (2018)); *see also Manning v. McGettigan*, E.E.O.C. App. No. 0120161068, at 4 n.3 (2017) (concluding that dismissal was inappropriate because “Complainant has not had the opportunity to adduce

For example, in 2018, the United States District Court for the Southern District of Ohio emphasized that “[t]he language of the statutes makes clear that Congress . . . contemplated that some gender identity disorders result from physical impairments and some do not; [Congress] chose to protect from disability discrimination only those that do.”¹⁰³ The judge dismissed the plaintiff’s complaint because the plaintiff had not alleged that a physical impairment caused her gender dysphoria.¹⁰⁴

The intrusiveness of this inquiry, as well as its potential expense to plaintiffs, is at odds with the ADA Amendments Act of 2008’s (ADAAA) objective to simplify the ADA’s gatekeeping process.¹⁰⁵ It is also at odds with the ADAAA’s goal to shift attention from scrutiny of the plaintiff’s diagnosis to the question of whether the plaintiff experienced discrimination.¹⁰⁶

The physical cause inquiry also sharply contrasts with the general rule in disability discrimination law that “[t]he cause of a condition has no effect on whether that condition is an impairment.”¹⁰⁷ Courts do not ask whether smoking caused a plaintiff’s lung cancer or whether illegal or reckless conduct caused a person’s leg injury. Disability discrimination law also normally encompasses “any condition which is mental or physical *but whose precise nature is not at present known*.”¹⁰⁸

evidence, and accordingly the record is silent, as to whether, in this case, Complainant’s gender dysphoria results from a physical impairment”); Statement of Interest of the United States of America at 3, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. July 17, 2017) (“[B]ecause Plaintiff has alleged that her GD resulted from a ‘physical impairment,’ . . . by definition she has alleged that she falls within the statutory protections of the ADA.”); Statement of Interest of the United States of America at 3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017) (issuing a nearly identical statement).

¹⁰³ *Parker*, 307 F. Supp. 3d at 754–55.

¹⁰⁴ *Id.*

¹⁰⁵ The ADAAA expressly provides that the “question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADA Amendments Act of 2008, Pub. L. No. 110–325 § 2, 112 Stat. 3554 (2008).

¹⁰⁶ The ADAAA provides that “it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations . . .” *Id.*

¹⁰⁷ See EEOC COMPLIANCE MANUAL § 902.2(e).

¹⁰⁸ 34 C.F.R. § 104 app. A (2019) (emphasis added); see also 45 C.F.R. § 84 app. A (2019); H.R. REP. NO. 101–485(III), at 29 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 452 (“The cause of a disability is always irrelevant to the determination of disability.”).

B. *An Inquiry Limited to Two Stigmatized Groups*

Aside from gender dysphoria, the only exception to the rule that causation is irrelevant is another group of stigmatized plaintiffs: persons with severe obesity. Despite the American Medical Association's conclusion that obesity is a disease¹⁰⁹ and overwhelming evidence that "hormonal factors, metabolism, and genetics are all factors that predetermine one's weight and impede attempts to lose it,"¹¹⁰ many courts refuse to accept the EEOC's conclusion that severe obesity itself is an impairment that can establish ADA coverage.¹¹¹ They instead allow ADA coverage of obesity only when plaintiffs are able to demonstrate their obesity's physiological etiology. Expert testimony about "the cause of morbid obesity in general—not specific to the plaintiff" is insufficient.¹¹² Accordingly, because it is very difficult to prove which of a myriad of possible causal forces contributed to a particular

¹⁰⁹ See Andrew Pollack, *AMA Recognizes Obesity as a Disease*, N.Y. TIMES (June 18, 2013), <https://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html> (reporting that the American Medical Association resolved at its annual House of Delegates meeting to "recogniz[e] obesity as a disease [to] help change the way the medical community tackles this complex issue").

¹¹⁰ Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264, 285 n.73 (2012).

¹¹¹ See, e.g., *Richardson v. Chi. Transit Auth.*, No. 17-3508, 2019 WL 2442786, at *7 (7th Cir. June 12, 2019); *Morris v. BNSF Ry. Co.*, 817 F.3d 1104, 1108 (8th Cir. 2016); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006); *Frances v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); *Valtierra v. Medtronic Inc.*, 232 F. Supp. 3d 1117, 1125 (D. Ariz. 2017); *Sibilla v. Follett Corp.*, No. CV 10-1457(AKT), 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012); *Merker v. Miami-Dade Cty.*, 485 F. Supp. 2d 1349, 1351 (S.D. Fla. 2007); *Ivey v. District of Columbia*, 949 A.2d 607, 613 (D.D.C. 2008); *Delta Air Lines v. N.Y. State Div. of Human Rights*, 689 N.E.2d 898, 902 (N.Y. 1997). *But see McCollum v. Livingston*, No. 4:14-CV-3253, 2017 WL 608665, at *35 (S.D. Tex. Feb. 3, 2017); *Whittaker v. Am.'s Car Mart, Inc.*, No. 1:13CV108 SNLJ, 2014 WL 1648816 (E.D. Mo. Apr. 24, 2014); *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 693 (E.D. La. 2011); *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 231 (Mont. 2012). The 2009 EEOC Compliance Manual stated: "Being overweight, in and of itself, is not generally an impairment On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment." EEOC COMPLIANCE GUIDELINES § 902.2(c)(5)). However, as the Seventh Circuit has observed, "the EEOC removed this paragraph from its compliance manual in 2012." *Richardson*, 2019 WL 2442786, at *6.

¹¹² See *Wagner's Pharmacy, Inc. v. Pennington*, No. 2013-SC-000541-DG, 2015 WL 2266374, at *1, *6 (Ky. May 14, 2015).

individual's obesity,¹¹³ obese people frequently lose ADA cases even when employers admit that obesity was the reason for the adverse employment action.¹¹⁴

C. *The Blame Framework*

The implicit presumption that obese plaintiffs are blameworthy because they are unable to prove a physiological cause lurks just beneath the surface of these cases.¹¹⁵ For example, in *Powell v. Gentiva Health Servs., Inc.*, the court held that a plaintiff's obesity was not an impairment but instead an "undesirable physical characteristic"¹¹⁶ comparable to "an unconventional hairstyle choice" to wear one's hair in "a neon green mohawk."¹¹⁷ This comparison of obesity to a conscious decision to flaunt grooming norms reflects the view that unless medical evidence demonstrates otherwise, obese people can be blamed for their nonconformance and thus do not deserve discrimination protection.¹¹⁸

This blame framework also infuses the physical cause requirement for transgender plaintiffs. Although the legislative history is silent about the precise intent behind the words "not resulting from a physical impairment," Congress's goal to differentiate on the basis of moral blameworthiness seems clear.¹¹⁹ Senator

¹¹³ Crossley, *supra* note 72, at 687 (1999) (noting the difficulty of proving impairment in weight-related ADA cases because of "the high level of medical uncertainty regarding the causes of obesity"); Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 231–33 (2010) (explaining that most people cannot link their obesity to a physiological disorder).

¹¹⁴ Travis, *supra* note 66, at 963–64.

¹¹⁵ Sondra Solovay & Dylan Wade, *No Apology: Shared Struggles in Fat and Transgender Law*, in THE FAT STUDIES READER 167, 167–69 (observing that obesity caselaw demonstrates "a sense of moral failure that prevents accepting it as primarily a physiological disorder").

¹¹⁶ *Powell v. Gentiva Health Servs., Inc.*, No. CIV.A. 13-0007-WS-C, 2014 WL 554155, at *7 (S.D. Ala. Feb. 12, 2014).

¹¹⁷ *Id.* ("[S]uppose plaintiff wore her hair in a neon green mohawk. Such an unconventional hairstyle choice might be viewed as unprofessional, and might well impede her [professional success] . . . but it obviously is not a physical impairment. The same goes for weight.").

¹¹⁸ Camille A. Monahan et al., *Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 ABA J. LAB. & EMP. L. 537, 551 (2014) ("The requirement to show the cause of severe obesity . . . reflects societal assumptions that severely obese individuals are culpable in creating their own impairment."); Korn, *supra* note 113, at 211 ("One of the reasons obesity is not considered a disability is because we blame the obese person for being fat. We see fat people as responsible for their physical condition and, therefore, assume that their obesity is voluntary.").

¹¹⁹ Commentators have hypothesized this language allows ADA coverage for intersex people whose gender nonconformance has an easily understood biological etiology. See *Disabilityqueer*, *supra* note 4,

Warren Rudman argued that “a diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition. . . .”¹²⁰ He concluded his remarks by arguing that “people must bear some responsibility for the consequences of their own actions.”¹²¹

This blame framework is enshrined in the text of disability discrimination law itself. The ADA explicitly mislabels “transsexualism and gender identity disorders not resulting from physical impairments” as “sexual *behavior disorders*.”¹²² And to further categorize these diagnoses as involving blameworthy volitional behavior, the ADA groups them with diagnoses closely linked to criminal conduct: “pedophilia, exhibitionism, voyeurism . . . kleptomania, [and] pyromania.”¹²³ In this way, the ADA enshrines the early 1990s view of socially conservative legislators that transgender people are to blame for the discrimination they experience unless medical evidence demonstrates otherwise.

The physical cause requirement effectively compels transgender plaintiffs to cast themselves as victims of their biology in order to avoid being excluded as “voluntary deviants.” This choice is explicit in a 1991 decision concluding that

at 50 n.35; Zach Strassburger, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337, 375 (2012).

¹²⁰ See 135 CONG. REC. 19,896 (1989) (statement of Sen. Rudman).

¹²¹ *Id.* As these remarks suggest, the ADA’s physical cause requirement for gender dysphoria parallels the frequently critiqued immutability doctrine in equal protection law, which “requires harsh, intrusive, and stigmatizing judgments about who is ‘truly’ victimized, based on whether a victim might have been able to change, hide, or downplay a disfavored characteristic.” Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 35 (2015). The ‘difficult to change’ definition may not prohibit, for example, discrimination against a woman for dressing in ways associated with masculinity. It parallels the unfortunate approach of the Iowa Supreme Court which explained that focusing on the biological etiology of difference “may separate truly victimized individuals from those who have invited discrimination by changing themselves so as to be identified with the group.” *Varnum v. Brien*, 763 N.W.2d 862, 892–93 (Iowa 2009); *cf.* Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1517 (2009) (observing that the Varnum “immutability inquiry purports to exempt victims from blame, while in fact carving out a narrow category of ‘true’ victims and reserving blame for voluntary victims. Such a distinction is both unfortunate and unnecessary”).

¹²² 42 U.S.C. § 12211(b) (2018) (emphasis added).

¹²³ *Id.* As described *supra*, this categorization was not required by the then-existing version of the DSM, which had, three years before the ADA’s enactment, removed “Gender Identity Disorders” from the “Sexual Disorders” classification and thus dissociated it with the paraphilias such as pedophilia. See *supra* notes 46–47 and accompanying text.

transgender identity qualified for disability discrimination protection under then-existing Florida law (which at the time did not expressly exclude transgender people).¹²⁴ The judge held for the transgender plaintiff based on the conclusion that she “was as undeservedly afflicted as someone born with a physical deformity.”¹²⁵ The court emphasized that because the plaintiff’s “condition was wholly involuntary,”¹²⁶ “[t]here was nothing illegal, immoral, wrong, or bad about it.”¹²⁷

This “voluntary deviant” vs. “hapless victim” dichotomy leaves little room for transgender people who believe that self-determination plays an important role in their gender identity.¹²⁸ It is incompatible with the growing view that gender identity is an ever-changing concept that is both performative and relational.¹²⁹ More

¹²⁴ *Smith v. City of Jacksonville*, No. 88-5451, 1991 WL 833882, at *5 (Fla. Div. Admin. Hrgs. Oct. 2, 1991), *superseded by statute*, Florida Civil Rights Act of 1992, FLA. STAT. §§ 760.01–760.11 (2019) (holding transgender woman had a disability under the Florida Human Rights Act of 1977, which paralleled the ADA’s definition of disability).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ For example, transgender lawyer and activist Dean Spade “would like people to have the freedom to determine their own gender identity and expression.” Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 29 (2003). He objected to therapists who “wanted to hear that I hate my breasts, [and] that the desire for surgery comes from desperation.” *Id.* at 21 n.20. He suggests that, for some transgender people, the “desire for surgery is a joyful affirmation of gender self-determination.” *Id.* Gender theorist Judith Butler similarly suggests that transgender identity is “a practice of self-determination, an exercise of autonomy . . . one among many human possibilities of determining one’s gender for oneself.” Judith Butler, *Undiagnosing Gender*, in *TRANSGENDER RIGHTS* 274 (Paisley Currah et al. eds., 2006). She objects to medical approaches to transgender identity that “assume that the diagnosed person is affected by forces he or she does not understand.” *Id.* at 275.

¹²⁹ Maria Pahl, *Immutability of Identity, Title VII, and the ADA Amendment Act: How Being Regarded as Transgender Could Affect Employment Discrimination*, 3 DEPAUL J. WOMEN GENDER & L. 63, 67–68 (2014) (“[M]any transgender individuals . . . conceive of gender identity and expression as a complex and ever-changing concept. Because this perception of gender is fluid, it rejects taking on an essentialized identity. . . .”); Spade, *supra* note 128, at 20 (“I’ve always rejected the strategy that adopts some theory of innate sexuality and forecloses the possibility that anyone, gender troubled childhood or not, could transgress sexual and gender norms at any time.”); cf. Zach Strassburger, *Disability Law and the Disability Rights Movement for Transpeople*, 24 YALE J.L. & FEMINISM 337, 361–62 (2012) (observing that “it is difficult to describe gender expression as innate”); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 528 (1994) (“Immutability offers no theoretical foundation for legal protection of those gay men and lesbians who experience their sexual orientation as contingent, mutable, chosen.”); *see also id.* at 506 (“[P]ro-gay legal arguments from biological causation should be abandoned. Instead, pro-gay essentialists and constructivists should design legal strategies that emphasize the political dynamics that inevitably attend sexual orientation identity—no matter how it is caused.”).

fundamentally, it reinforces the idea that gender dysphoria is inherently negative and to be avoided if possible.¹³⁰

Additionally, the requirement that plaintiffs demonstrate that their gender dysphoria has a physical cause obscures the reality that whether the law should permit employers, government officials, and places of public accommodation to discriminate against transgender people is fundamentally a political question, not a scientific one.¹³¹ Framing it as a scientific question implicitly accepts a moral framework that regards transgender people as deserving of discrimination protection only if they can point to a physical disorder that caused their gender dysphoria. The unstated judgment is that people ought to assimilate to traditional gender norms if they can.¹³²

IV. THE ADA'S "REGARDED AS" PROVISION FALLS SHORT OF THE SOCIAL MODEL

Disability discrimination law's innovative coverage of persons merely *perceived* to have an impairment would appear to empower transgender plaintiffs to challenge discrimination without participating in the pathologization of their identity.¹³³ Transgender advocates champion the ability of "regarded as" claims to shift attention away from narrow questions about whether the plaintiff is impaired to the more pertinent question of whether discrimination occurred.¹³⁴ In reality, however, courts' insistence that "regarded as" claims require the discriminator to view the plaintiff as having a condition that qualifies as an "impairment" under disability law severely limits the potential for "regarded as" claims to address gender identity discrimination.

¹³⁰ Clarke, *supra* note 121, at 57 ("[Compare this to] the harshness, intrusiveness, and stigmatizing nature of a rule requiring a plaintiff to provide expert medical testimony showing she is not to blame for her weight. . .").

¹³¹ *Cf.* Halley, *supra* note 129, at 568 ("Proponents of the pro-gay argument from immutability have covertly withdrawn a political question from the political sphere by falsely implying that science has answered it.")

¹³² Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 506 (1998) (arguing that the immutability factor transforms the "descriptive claim that a group *can* assimilate . . . into the prescriptive claim that it *should* assimilate without much intervening investigation") (emphasis added).

¹³³ *See* 42 U.S.C. § 12102(1)(C) (2018).

¹³⁴ *See id.* at § 12208.

A. *The Medicalized Approach to “Regarded As” Coverage*

The problem is that “regarded as” coverage requires the perceived trait to fit disability discrimination law’s definition of impairment. Courts reject “regarded as” coverage when the discrimination is based on a physical, mental, or behavioral characteristic that the discriminator does not perceive to be an impairment.¹³⁵ This narrow emphasis on impairment-motivated discrimination leaves unaddressed the large amount of discrimination fueled by beliefs that certain characteristics are simply undesirable.

For example, in *Cooper v. CLP Corp.*, the plaintiff had strabismus, a disorder that caused his eyes to appear crossed or misaligned. While working at a McDonald’s restaurant, his supervisor called him “cockeyed-ass” and “lazy-eyed.”¹³⁶ In keeping with the numerous courts that have characterized strabismus as an impairment, the court acknowledged that “[i]t is undisputed that strabismus is a medical condition.”¹³⁷ The court nonetheless concluded, as a matter of law, that Cooper had not established disability law coverage because while the supervisor’s “cruel and reprehensible” comments “are clearly commentary on the plaintiff’s physical appearance,” they “only demonstrate an awareness of Cooper’s physical condition.”¹³⁸ The court concluded that “regarded as” coverage did not apply because the plaintiff could not establish that the discriminator regarded him as having a physical *impairment*.¹³⁹

A 1983 case from the Iowa Supreme Court, which predates the ADA’s transgender exclusions, illustrates how disability discrimination law’s narrow

¹³⁵ See, e.g., *Richardson v. Chi. Transit Auth.*, No. 17-3508, 2019 WL 2442786, at *7 (7th Cir. June 12, 2019); *Morris v. BNSF Ry. Co.*, 817 F.3d 1104, 1109 (8th Cir. 2016); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 442–43 (6th Cir. 2006); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997); *Horton v. Hillshire Brands Co.*, No. 3:16-cv-00578-AKK, 2017 WL 11144887, at *5 (N.D. Ala. Dec. 8, 2017) (“Under the ADA, not every condition or characteristic—even those that create significant risk of future health problems—is considered an impairment. . . . Plaintiff’s high blood pressure . . . was a manifestation of poor health that caused no impairment in and of itself but indicated an increased risk for problems in the future. This, combined with the undisputed testimony of Hillshire’s employees that they did not consider him to be disabled, defeats Plaintiff’s attempt to establish the ‘regarded as’ prong of his prima facie case.”).

¹³⁶ *Cooper v. CLP Corp.*, No. 2:13-CV-02152-JEO, 2015 WL 9311964, at *2 (N.D. Ala. Dec. 23, 2015).

¹³⁷ *Id.* at *4.

¹³⁸ *Id.* at *6.

¹³⁹ *Id.*

approach to perceived impairments may apply to transgender plaintiffs.¹⁴⁰ The court rejected a transgender plaintiff's "regarded as" claim on the rationale that "[a]n adverse societal attitude does not mean that the transsexual is necessarily perceived as having a physical or mental impairment."¹⁴¹ The court reasoned that "[a]lthough a transsexual may have difficulty in obtaining and retaining employment, the . . . difficulty is the result of discrimination based on societal beliefs that the transsexual is undesirable, rather than from beliefs that the transsexual is impaired physically or mentally as that term is used in [disability discrimination law]."¹⁴² Effectively, the court embraced a socially constructed view of the discrimination associated with being transgender—precisely the destigmatizing approach that transgender advocates desire—but concluded that it excluded transgender people from disability discrimination law.

This framework is very advantageous for accused discriminators. They can take the high ground of depathologization of transgender identity and use it to escape liability under disability discrimination law. A recent Sam's Club brief illustrates this approach. The brief argued that the plaintiff's assertion that her distress arose "from how Sam's associates treated her—not her own condition"—disqualified the plaintiff from "regarded as" coverage.¹⁴³ The brief also emphasized that while Sam's Club associates knew the plaintiff was transgender, they did not know she was "suffering from gender dysphoria or any of its distinguishing symptoms."¹⁴⁴ It noted that "[n]othing suggests that anyone at Sam's even knows what gender dysphoria is."¹⁴⁵ In this way, Sam's Club exploited the reality that discriminators are far more likely to discriminate on the basis of gender nonconformance, which is not an impairment, than on the basis of the relatively new and little-known medical diagnosis of gender dysphoria.

¹⁴⁰ See *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983).

¹⁴¹ *Id.* at 476–77.

¹⁴² *Id.*

¹⁴³ Brief in Support of Defendant's Partial Motion to Dismiss, *Bost v. Sam's East, Inc.*, No. 1:17-cv-1148, 2018 WL 3854466 (M.D.N.C. Apr. 10, 2018) (citing Amended Complaint at ¶¶ 2–10, *Bost v. Sam's East, Inc.*, No. 1:17-cv-1148, 2017 WL 6610357).

¹⁴⁴ *Id.*; see also *id.* ("[I]n order to seek protection under the ADA . . . Plaintiff's allegations must do more than state she is transgender—her allegations must make it plausible that Defendants regarded her as having the medical condition of gender dysphoria.").

¹⁴⁵ *Id.*

Future defendants may similarly dodge “regarded as” liability by emphasizing the APA’s efforts to destigmatize transgender identity. The APA is very explicit that “[it] is important to note that gender nonconformity is not in itself a mental disorder.”¹⁴⁶ It emphasizes that “given the increased openness of atypical gender expressions by individuals across the entire range of the transgender spectrum, it is important that the clinical diagnosis be limited to those individuals whose distress and impairment meet the specified criteria.”¹⁴⁷ These statements, which are designed to help destigmatize transgender people, frustrate “regarded as” claims because they place many people who experience discrimination outside the scope of disability discrimination law. Accordingly, few transgender plaintiffs—perhaps only those who have told the discriminator they have gender dysphoria—will easily succeed with a “regarded as” claim.

*B. The Physical Cause Requirement Further Complicates
“Regarded As” Claims*

The physical cause requirement creates an additional hurdle for “regarded as” claims. Assuming that transgender plaintiffs can show that discriminators believed they have gender dysphoria, they also would need to show that the discriminator believed that their gender dysphoria was caused by a physical impairment. Cases brought by obese plaintiffs illustrate this difficulty. For example, in *Sturgill v. Norfolk South Railway Co.*, the court concluded that the plaintiff’s obesity qualified as a disability under the ADA’s “actual” disability prong because it had a documented physical cause: primary male hypogonadism.¹⁴⁸ However, the court concluded that the plaintiff had not established “regarded as” coverage because the employer did not *know* that the plaintiff’s obesity had a physical cause.¹⁴⁹ Similarly, in *Spiegel v. Schulman*, the plaintiff based his “regarded as” claim on his former employer’s statement that his obesity “demonstrated that he had no self-esteem and was a weak person” and “could not be a proper role model for others.”¹⁵⁰ The court rejected the “regarded as” claim because these comments suggested the employer

¹⁴⁶ AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf.

¹⁴⁷ DSM-V, *supra* note 12, at 458.

¹⁴⁸ *Sturgill v. Norfolk S. Ry. Co.*, No. 2:18CV566, 2019 WL 1063374, at *3–4 (E.D. Va. Mar. 6, 2019).

¹⁴⁹ *Id.* at *6.

¹⁵⁰ *Spiegel v. Schulmann*, No. 03-CV-5088, 2006 WL 3483922, at *13–14 (E.D.N.Y. Nov. 30, 2006), *aff’d in part, vacated in part*, 604 F.3d 72 (2d Cir. 2010).

thought the plaintiff's obesity "was due to overindulgence" instead of a physiological disorder.¹⁵¹

These cases illustrate the profound lack of fit between transgender advocates' hopes for disability discrimination law's "regarded as" prong and the reality of "regarded as" case law. Instead of focusing on discriminatory attitudes—which have the same negative effect regardless of whether a person's obesity has a physical cause—courts narrowly focus on whether the employer viewed the plaintiff's obesity as having a physiological cause. The great irony, of course, is that awareness that a stigmatized trait has a physical etiology typically *decreases*, rather than increases, animus.¹⁵²

¹⁵¹ *Spiegel*, 2006 WL 3483922, at *13–14; *see also id.* at *13 (“[P]laintiffs must allege and prove more than just that Spiegel was discharged because of his weight. Plaintiffs must allege, and adduce evidence to show, that defendants believed, even mistakenly, that Spiegel had a ‘physical impairment’— that is, that his weight problem stemmed from a physiological disorder. . . .”); *id.* at *14 (“Since there is nothing in the complaint, or in any of the evidence produced by plaintiffs, to suggest that [the employer] believed that Spiegel’s weight condition was the symptom of a physiological disorder, plaintiffs have neither alleged nor established [ADA coverage].”); *cf.* *Richardson v. Chi. Transit Auth.*, No. 17-3508, 2019 WL 2442786, at *7 (7th Cir. June 12, 2019) (concluding that, to succeed in a “regarded as” claim, a plaintiff “must present sufficient evidence to permit a reasonable jury to infer that [the alleged discriminator] perceived his extreme obesity was caused by an underlying physiological disorder or condition”); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (“Francis alleges only that Meriden regarded him as disabled because it disciplined him for failing to meet a weight standard applied to all of its employees. He does not claim that Meriden disciplined him because it perceived him as suffering from a physiological weight-related disorder. Accordingly, because Francis has not alleged that he has a physical impairment within the meaning of the ADA or the RHA, or that his employer believed that his weight condition constituted the kind of physical impairment covered by the acts, we affirm the dismissal of his complaint.”); *Andrews v. Ohio*, 104 F.3d 803, 806 (6th Cir. 1997) (“[P]hysical characteristics that are ‘not the result of a physiological disorder’ are not considered ‘impairments’ for the purposes of determining either actual or perceived disability.”); *Powell v. Gentiva Health Servs., Inc.*, No. CIV.A. 13-0007-WS-C, 2014 WL 554155, at *7 (S.D. Ala. Feb. 12, 2014) (rejecting the plaintiff’s “regarded as” claim because the evidence demonstrated that discriminator “viewed [the plaintiff] as overweight, not that [the discriminator] perceived [the plaintiff’s] weight to constitute a physical impairment”); *Marsh v. Sunoco, Inc.*, No. 06-CV-2856, 2006 WL 3589053, at *4 (E.D. Pa. Dec. 6, 2006); *Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F. Supp. 1082, 1088–89 (S.D. Iowa 1997) (“It is not enough that [employer] perceived [claimant] was obese He must establish . . . that [employer] regarded him as having . . . a physical impairment within the meaning of the ADA. . . .”).

¹⁵² *See* Rebecca M. Puhl et al., *Impact of Perceived Consensus on Stereotypes About Obese People: A New Approach for Reducing Bias*, 24 HEALTH PSYCHOL. 517, 523 (2005) (suggesting that “education about [genetic and biological] causes of obesity may be helpful to reduce negative attitudes”).

C. *Disability Discrimination Law's Exclusions Further Complicate "Regarded As" Claims*

Federal disability discrimination law's express exclusion of homosexuality, bisexuality, transsexualism, and gender identity disorders not resulting from a physical impairment further exacerbates the difficulty of "regarded as" claims for transgender plaintiffs.¹⁵³ Discriminators may evade "regarded as" liability by showing that they regarded a plaintiff as falling into one of these exclusions to disability discrimination law's coverage.¹⁵⁴

A 1987 Rehabilitation Act case illustrates this possibility.¹⁵⁵ The plaintiff was transgender, which qualified as an impairment under the then-existing version of the Rehabilitation Act.¹⁵⁶ The discriminator observed that the plaintiff, who was assigned male at birth, had breast implants, wore feminine clothing and had a feminine hairstyle.¹⁵⁷ However, the district court accepted the discriminator's claim that he did not think the plaintiff was transgender but instead believed the plaintiff was gay.¹⁵⁸ The United States Court of Appeals for the District of Columbia, in an opinion by then-Judge Ruth Bader Ginsberg, critiqued some aspects of the district court's decision and argued that "the liability of a government department under the Act should not turn . . . on whether [the interviewing] officer knows that homosexuality and [transgender identity] are not one and the same."¹⁵⁹ Ginsburg's

¹⁵³ Cf. Brief in Support of Defendant's Partial Motion to Dismiss, *supra* note 143 ("Given the unique circumstances of the ADA's explicit exclusion of 'transsexualism' and 'gender identity disorders not resulting from physical impairments' as disabilities, Plaintiff's lack of any allegation that Defendants believed she suffered from a medical impairment is fatal to her disability discrimination claims under the ADA.").

¹⁵⁴ Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973*, in GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ¶¶ 16-1, 16-149 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) ("If transgender people are wrongly perceived as transsexuals or transvestites, as a result of the ADA and Rehabilitation Act exclusions are they are prohibited from seeking relief under those laws for 'regarded as' disability discrimination.").

¹⁵⁵ *Blackwell v. U.S. Dep't of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987).

¹⁵⁶ *Blackwell v. U.S. Dept. of Treasury*, 656 F. Supp. 713, 715 (D.D.C. 1986), *aff'd in part, vacated in part*, 830 F.2d 1183 (D.C. Cir. 1987).

¹⁵⁷ *Blackwell*, 656 F. Supp. at 714–15.

¹⁵⁸ *Id.* at 715.

¹⁵⁹ *Blackwell*, 830 F.2d at 1184. The opinion uses the word "transvestite" and uses the plaintiff's birth name assigned birth pronouns. However, "transgender" is likely the more appropriate term in today's nomenclature. *See id.*

opinion, however, nonetheless upheld the district court's dismissal of the plaintiff's claim because the discriminator did not believe the plaintiff was transgender.¹⁶⁰ Ginsburg reasoned that the plaintiff had failed to establish an ADA claim because the perceived trait—homosexuality—does not qualify for disability discrimination protection.¹⁶¹

Avoiding claims that a discriminator acted on the belief that a plaintiff has one of the outdated transgender-related diagnoses the ADA excludes will likely be even more difficult.¹⁶² While transgender advocates regard gender dysphoria as a unique medical diagnosis entirely distinct from “transsexualism” and “gender identity disorders not resulting from a physical impairment,” persons who harass and otherwise discriminate against transgender persons are less likely to have studied and internalized these distinctions.¹⁶³

Accordingly, while seemingly useful upon cursory examination, the ADA's “regarded as” prong is in fact a poor vehicle to address gender identity discrimination. It reaches only a very narrow category of persons who discriminate against transgender people: those who discriminate based on a perception that the plaintiff has an impairment within the meaning of disability discrimination law. Accordingly, only plaintiffs who tell their discriminator they have a gender dysphoria diagnosis resulting from a physical impairment will likely succeed with a “regarded as” claim.

¹⁶⁰ *Id.* at 1183.

¹⁶¹ *Id.* (“We agree with the district court that there is no precedent for holding that one’s sexual orientation or preference falls within the compass of the Rehabilitation Act Accordingly, we affirm the district court’s judgment.”); see *Blackwell*, 656 F. Supp. at 715 (the interviewing officer “rejected plaintiff because he believed he was a homosexual (a condition not protected under the Rehabilitation Act), and not because he was a transvestite (a protected condition) . . .”).

¹⁶² See 42 U.S.C. § 12111.

¹⁶³ Even the DSM-V, which creates gender dysphoria as an official diagnosis, at times appears to treat gender dysphoria as simply the successor to the discarded terms gender identity disorder and transsexuality instead of a narrower category. See DSM-V, *supra* note 12, at 457 (“The equivalent of gender dysphoria has also been reported in individuals living in cultures with institutionalized gender categories other than male or female. It is unclear whether with these individuals the diagnostic criteria for gender dysphoria would be met.”). Sophisticated transgender academics sometimes do as well. See Alexandre Baril, *Transness as Debility: Rethinking Intersections between Trans and Disabled Embodiments*, 111 FEMINIST REV. 62 (2015) (citation omitted) (“Since the 1980s, transsexuality has been considered a mental health disorder (previously ‘Gender Identity Disorder,’ now ‘Gender Dysphoria’ in the DSM-V.”).

The large number of transgender people who do not have a gender dysphoria diagnosis will have great difficulty bringing “regarded as” claims. This group includes transgender people who face significant financial and geographic barriers to diagnosis.¹⁶⁴ It includes transgender people who do not meet the diagnostic criterion of experiencing clinically significant distress or impairment.¹⁶⁵ It also includes transgender people who choose not to obtain a diagnosis because they do not desire surgical or hormonal treatments.¹⁶⁶

Much like the “actual disability” prong, disability discrimination law’s “regarded as” prong disappoints. Instead of focusing on discriminatory attitudes—which have the same negative effect regardless of whether a person’s stigmatized trait results from a physical impairment—courts have narrowly focused on whether the employer believes that it does.

CONCLUSION

If disability discrimination law really took the social model of disability seriously, the history of medicalizing and stigmatizing transgender people would itself be enough to justify disability discrimination coverage. The reality, however, is that disability discrimination law does not embrace a socially constructed view of “impairment.” It continues to link impairment to a disorder inherent in the individual rather than to a social and political problem. Because of this reality, advocates should view disability discrimination law as only a short-term strategy for addressing gender identity discrimination.

¹⁶⁴ See NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016) (“[L]arge economic disparities [exist] between transgender people in the survey and the U.S. population. Nearly one-third (29%) of respondents were living in poverty, compared to 14% in the U.S. population. A major contributor to the high rate of poverty is likely respondents’ 15% unemployment rate—three times higher than the unemployment rate in the U.S. population at the time of the survey (5%).”); see also NICHOLAS TEICH, TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE 52 (2012) (noting that transgender surgery of any type “always takes an immense financial commitment. Health insurance covers transgender surgeries in very few cases. Since most people pay out of pocket, the costs can be astronomical. Because of this, many transpeople never have surgery. Some people have fewer surgeries than they would like because of the high prices.”).

¹⁶⁵ See DSM-V, *supra* note 12, at 452.

¹⁶⁶ See Austin H. Johnson, *Normative Accountability: How the Medical Model Influences Transgender Identities and Experiences*, 9 SOC. COMPASS 803, 807 (2015) (“[N]ot all transgender people identify with the medical model or require medical interventions.”); Clarke, *supra* note 28, at 908 (“[S]ome nonbinary people may not seek medical treatment because they do not wish to ‘pass’ as men or women.”).

The long-term goal should be a statute akin to the Equality Act, passed by the House of Representatives this year.¹⁶⁷ If the Equality Act becomes law, it would provide many of the protections of disability discrimination law to transgender people without requiring them to participate in an impairment-disorder framework. It would prohibit discrimination on the basis of gender identity (and sexual orientation) in employment, education, housing, federally funded programs, and places of public accommodation. The Equality Act would accomplish this goal by amending many existing civil rights statutes, including the Civil Rights Act of 1964 and the Fair Housing Act.¹⁶⁸

To eliminate the stigmatizing trans-specific provisions within disability discrimination law, Congress should expand the body of statutes the Equality Act amends to include the ADA and the Rehabilitation Act. In place of the stigmatizing trans-specific provisions, new language should be inserted in these statutes to make clear that minority gender identities are not impairments but instead benign human variations like left-handedness and homosexuality. This adjustment to disability discrimination statutes, when enacted simultaneously with the Equality Act's substantive provisions, will provide discrimination protection for transgender people while avoiding disability law's impairment-disorder framework.

¹⁶⁷ Equality Act, H.R. 5, 116th Cong. (2019) (as passed by House, May 17, 2019).

¹⁶⁸ *Id.*