



RESPONSE

Reweighing Medical Civil Rights

Rabia Belt & Doron Dorfman*

The Seductive, Yet Misleading, Allure of Disability Law

Civil rights law is at a crossroads. It's tough to find vindication for injustice claims in the courts. Scholars and advocates are looking elsewhere for legal paradigms that will help provide relief.¹ Disability law is one of the possibilities.

Disability law seems seductive. Despite the general parsimoniousness of U.S. welfare benefits, disabled people can receive tax breaks, financial payments, and health care. Disability accommodations and modifications oblige employers, government programs, and purveyors of public accommodations to provide remedies to the mismatch between people's disabilities and their services and programs. Disabled people may escape the weight of victim-blaming and fault attributed to others who ask for recognition and benefits from the government and from law. Social science research has found that in industrialized Western countries, people with disabilities are considered highly deserving of social protection (an identity category second only to that of older people).²

The disability community is a diverse group.³ It includes people with mobility, visual, hearing, mental, and intellectual impairments (just to name a few) whose various needs require multiple degrees of support and care. It also

* Rabia Belt is an Associate Professor of Law at Stanford Law School and Doron Dorfman is an Associate Professor of Law at Syracuse University College of Law. We would like to thank Sam Bagenstos, Ruth Colker, Liz Emens, Jennifer Bennett Shinall, and Michael Ashley Stein for their helpful comments and suggestions. Thank you to the editors of *Stanford Law Review Online* for their outstanding work on this Response.

1. See, e.g., Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 296 (2018).
2. Wim van Oorschot & Femke Roosma, *The Social Legitimacy of Targeted Welfare and Welfare Deservingness*, in *THE SOCIAL LEGITIMACY OF TARGETED WELFARE: ATTITUDES TO WELFARE DESERVINGNESS* 3, 13-15 (Wim van Oorschot, Femke Roosma, Bart Meuleman & Tim Reeskens eds., 2017).
3. PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 111 (2003); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 336 (1993); Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380, 385 (1989).

comprises people of different genders, classes, and races, and who experience different types of stigma and discriminatory patterns.⁴ As the original Americans with Disabilities Act of 1990 (ADA) recognized, what unites people in all of those categories is stigma and subordination. They all experienced a history of purposeful unequal treatment by a society skeptical of their abilities and potential.⁵

Craig Konnoth's Article,⁶ using "medical civil rights" as an angle onto disability, captures the ostensible benefits of disability legal claiming. His Article provides voluminous coverage of examples of individuals and communities framing their grievances and difficulties in medical terms within the law. He also charts out how this strategy may offer benefits that other non-medical framing does not. We partially agree with him on this, but we also believe that he does not fully account for the weight on the other side of the negative aspects of medical framing. The remainder of our Response notes some of these negative aspects.

Our Response unfolds as follows. We first discuss the benefits and recognition granted to medicalized individuals. We then contextualize these benefits by noting the drawbacks to medicalization. Finally, we conclude by proposing a new way forward for disability justice.

I. Medicalization and Disability

The advancement of the medical civil rights approach reflects the tension between the older model of disability advocacy and the newer disability rights activism. Disability advocacy has been primarily conducted on behalf of people with disabilities, often by non-disabled people.⁷ Much of the work of disability advocacy organizations has focused on rehabilitating the disabled individual with the goal of "eliminating or remediating individual

4. See, e.g., Marjorie L. Baldwin, *The Effects of Impairments on Employment and Wages: Estimates from the 1984 and 1990 SIPP*, 17 BEHAV. SCI. & L. 7, 7-8, 26 (1999); Kristin M. Graham, Brian T. McMahon, Jeong Han Kim, Paige Simpson & Megan C. McMahon, *Patterns of Workplace Discrimination Across Broad Categories of Disability*, 64 REHABILITATION PSYCHOL. 194, 198-200 (2019).

5. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329 (amended 2008). Disability law scholars refer to the disability community under the ADA as a "large, socially-constructed, amorphous group, which shifted the conversation away from groups that might have had more traction in popular discourse . . ." Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 620 (2015).

6. Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165 (2020).

7. MICHELLE R. NARIO-REDMOND, ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE 330 (2020). For a historical perspective of how American disability organizations transformed from being service-oriented to focusing on political advocacy (or to having a mixed model) in the 1970 and 1980s, see DAVID PETTINICCHIO, POLITICS OF EMPOWERMENT: DISABILITY RIGHTS AND THE CYCLE OF AMERICAN POLICY REFORM 84-91 (2019).

impairments or training people with disabilities to approximate nondisabled ways of being.”⁸ While providing important social support, material resources, and educational outreach, those disability advocacy organizations perpetuate dependency and charity views of disability closely aligned with ableism.⁹ On the other hand, disability rights activism, which blossomed in recent years into the disability justice framework,¹⁰ has been pushing toward a more transformative approach that addresses ableism on the group level.¹¹ Those organizations are also comprised of and headed by disabled individuals themselves.¹² The case for medicalized civil rights as presented in Konnoth’s Article fits with the older model of disability advocacy. It might get the individual plaintiff the relief they are after. The price of winning the case, however, might be quite high.¹³

Disability scholars recognize that the history of offering comparatively enhanced recognition and benefits to people designated as medically worthy is a long one. For instance, early American governments provided care for people with mental and physical conditions while punishing the able-bodied poor.¹⁴ Disabled veterans received pensions and specialized housing and were exempt from begging ordinances.¹⁵ More recently, as Konnoth points out, Social Security benefits, medical tax deductions, healthcare, and disability rights were conditioned on medical impairment status.¹⁶

On the one hand, as Konnoth notes, this means that people who are considered medically worthy are better off than those deemed medically unworthy. Medicalized rights and benefits are usually relational, however.

-
8. NARIO-REDMOND, *supra* note 7, at 330; *see also* PAUL K. LONGMORE, TELETHONS: SPECTACLE, DISABILITY, AND THE BUSINESS OF CHARITY 115-16 (Catherine Kudlick ed., 2016); PETTINICCHIO, *supra* note 7 at 84-91.
 9. Thomas P. Dirth & Michelle R. Nario-Redmond, *Disability Advocacy for a New Era: Leveraging Social Psychology and a Sociopolitical Approach to Change*, in UNDERSTANDING THE EXPERIENCE OF DISABILITY: PERSPECTIVES FROM SOCIAL AND REHABILITATION PSYCHOLOGY 349, 350-51 (Dana S. Dunn ed., 2019).
 10. SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 9-20 (2016).
 11. NARIO-REDMOND, *supra* note 7, at 331.
 12. *Id.*; Sharon Barnartt, Kay Schriener & Richard Scotch, *Advocacy and Political Action*, in HANDBOOK OF DISABILITY STUDIES 430, 444 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001).
 13. For more on the tension between the interests of the individual client and those of the community they belong to, in lawyering for social change more generally, see Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 683-84 (2004).
 14. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 3, 19 (1986).
 15. *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 25-26 (2009); Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435, 442 (2017).
 16. *See* Konnoth, *supra* note 6, at 1182-84.

That is, medically worthy individuals gain benefits, while people unable to use medical claiming are deemed lazy, dependent, and shiftless by contrast.¹⁷

Moreover, medical status acts as a gatekeeper to narrow the number of people who can utilize benefits and rights. The ADA, unlike the Civil Rights Act, mandates that claimants have a legally recognized disability before they can receive legal redress for discrimination, rather than merely requiring discrimination on the basis of disability.¹⁸

A related issue is that while Konnoth wants more people to use medical claiming, there is already concern that “too many” people claim medical rights. Thus, increased medical claiming causes gatekeeping, surveillance, and parsimoniousness. Examples include the judicial backlash against Section 504 of the Rehabilitation Act and its regulations in the late 1970-1980s,¹⁹ as well as the 1999 *Sutton* trilogy, where the Supreme Court held that courts must consider the ameliorative effects of mitigating measures when deciding whether a plaintiff has a disability.²⁰ Three years later, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, Justice O’Connor, who delivered the unanimous opinion, stated that the ADA’s definition of disability should “be interpreted strictly to create a demanding standard for qualifying as disabled . . .”²¹ Following these holdings, lower courts used this rule to hold that many impairments were not legal disabilities because in their mitigated

17. Sociologist Eliot Freidson suggested that people with disabilities are judged, classified, and treated by experts, the community, and members of the group themselves using three metrics: “(a) whether they were responsible for their impairment, (b) the imputed seriousness of the condition, and (c) the attributed legitimacy of the condition.” GARY L. ALBRECHT, *THE DISABILITY BUSINESS: REHABILITATION IN AMERICA* 76-77 (1992). Those metrics dictate the type and nature of the intervention to provide resources and care to disabled people. *See id.* Albrecht further explains: “As with drinking behavior and drug use, moral connotations are assigned to the individual designated ‘disabled.’ The person disadvantaged is often judged to be morally culpable or paying for the previous abuses of person, family, work group, race, or nation.” *Id.* at 120.

18. *See* 42 U.S.C. § 12102 (2018) (defining disability).

19. LENNARD DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* 52 (2016). The judicial backlash focused on narrowing the definition of who is “a qualified individual with a handicap” in the context of higher education and employment. *See Grove City College v. Bell*, 465 U.S. 555, 558-59 (1984) (dealing with adherence of private colleges to federal antidiscrimination mandates, in particular Title IX to the Civil Rights Act, yet having a direct implication on the enforcement of Section 504, *see* DAVIS, *supra* at 57-58); *Southeastern Community College v. Davis*, 442 U.S. 397, 400, 414 (1979) (holding that a school could “require reasonable physical qualifications for admission to a clinical training program”); *see also American Public Transit Ass’n v. Lewis*, 655 F.2d 1272, 1273 (D.C. Cir. 1981) (similar in the context of costs containment with regard to making public transportation accessible).

20. *Sutton v. United Airlines*, 527 U.S. 471, 475 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 518-19 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999).

21. 534 U.S. 184, 197 (2002).

state, they did not cause a substantial limitation on any major life activities.²² With the invocation of the number “43 million Americans with disabilities” in the original ADA, Congress meant to provide the statistical floor rather than the ceiling to redress the historical problem of employment discrimination.²³ The Court, however, interpreted the ADA inconsistently with that intent, resulting in a statute covering no more than 13.5 million Americans.²⁴ The *Sutton* trilogy necessitated the enactment of the ADA Amendment Act of 2008 [ADAAA] to remedy the Court’s restrictive interpretation of what constitutes a disability.²⁵

Despite the ADAAA, a form of “popular backlash” to disability rights still occurs on the ground. People with disabilities who try to exercise their rights encounter public suspicion against abuse of those rights. Able-bodied bystanders perceive their rights-claiming activity as special treatment, and disabled people as imposters who are not disabled or not deserving enough in the eyes of observers.²⁶ This, in turn, leads to private policing by “self-appointed guardian[s]” of the law that may deter disabled individuals from exercising their rights in public or even result in violent retaliation against suspected “disability cons.”²⁷ Surveillance of disabled claimants has also been perpetrated by the government. In 2019, the Trump Administration started working on an initiative to follow social media accounts of Social Security benefits recipients and expose those who are “gaming the system.”²⁸

Because the “unworthy” poor and people of color are imagined as the people who do not use medical claiming [or disability claiming], if they

-
22. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 10 (2014); see also SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 37-38 (2009); Kay Schriener & Richard K. Scotch, *The ADA and the Meaning of Disability*, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 164, 172 (Linda Hamilton Krieger ed., 2003); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 139-41 (2000).
23. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 33 (2007).
24. *Id.* at 34.
25. 42 U.S.C. §§ 12101(a)(2), 12102(4)(E)(i) (2018); Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 211-213 (2012).
26. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051, 1061-62 (2019).
27. Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10.2 U.C. IRVINE L. REV. 557, 599-603 (2020) (citing original interview data with federal law enforcement personnel and quoting Howard Cohen, *They Fought over a Handicapped Parking Spot, Cops Say. Now a Man Is Fighting for His Life*, MIAMI HERALD (July 18, 2018, 11:33 AM), <https://perma.cc/MEJ8-LDLN>).
28. See e.g., Mark Miller, *U.S. Government Weighs Social-Media Snooping to Detect Social Security Fraud*, REUTERS (Mar. 29, 2019, 3:36 AM), <https://perma.cc/LD43-2ZRX>; Robert Pear, *On Disability and on Facebook? Uncle Sam Wants to Watch What You Post*, N.Y. TIMES (Mar. 10, 2019), <https://perma.cc/M82A-ZCC3>.

become more visible and more vocal about medical claiming, what is more likely is that medical-based benefits and rights will wither rather than increase.

While disability law looks seductive as written, its apparent generosity is belied by the reality in practice.²⁹ In recent years, for instance, the number of applications for Social Security disability benefits (both Supplemental Security Income [SSI] and Social Security Disability Insurance [SSDI])

29. Konnoth claims that “Social Security programs, comparatively at least, do not involve ‘the kind of close involvement with [recipients’] lives and individual circumstances that had been characteristic of’ welfare-based predecessors of Medicaid.” Konnoth, *supra* note 6, at 1221 (quoting Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 439 (1996)). We find this assertion to be peculiar and inaccurate. Not only does Konnoth rely on an article dated 1996, but he also relies on a statement by the Senate Finance Committee discussing the establishment of the SSI program articulating what the vision in rebranding the SSI program was *intended* to do. The full sentence Konnoth refers to reads: “SSI was intended to provide recipients with an income ‘without the kind of close involvement with their lives and individual circumstances that had been characteristic of the former State-run welfare programs.’” Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 439 (1996) (quoting STAFF OF S. COMM. ON FIN. 95TH CONG. THE SUPPLEMENTAL SECURITY INCOME PROGRAM 13 (Comm. Print 1977)). Like more contemporary accounts, the law on the books does not equal the law in action. As disability law scholar Jasmine Harris concludes: “Privacy concerns certainly exist [in Social Security adjudication]—specifically the abundance of medical information required to prove disability under the statute and the potentially disempowering narratives about functional limitations required to meet the statutory definitions of severity.” Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 524 (2015). Numerous real accounts about the experiences of disabled Social Security claimants point to how intrusive and scrutinizing the questions and techniques used by the SSA are to make claimants make mistakes and lose their benefits. See KATIE SAVIN, “BEING ON SSI IS A FULL-TIME JOB:” HOW SSI AND SSDI BENEFICIARIES WORK AROUND AND WITHIN LABOR INCENTIVE PROGRAMS 12 (2019), <https://perma.cc/5DJY-8CN9>; Doron Dorfman, *Disability Identity in Conflict: Performativity in the U.S. Social Security Benefits System*, 38 T. JEFFERSON L. REV. 47, 67-68 (2015); Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 218-20 (2017); see also Henry J. Whittle et. al., “*The Land of the Sick and the Land of the Healthy*”: *Disability, Bureaucracy, and Stigma Among People Living with Poverty and Chronic Illness in the United States*, 190 SOC. SCI. & MED. 181, 186-87 (2017) (explaining that “in addition to these stigmas of disability, [research] participants also described experiencing stigmas of poverty Even when participants were routinely receiving [Social Security] disability benefits, however, monthly income was generally barely enough to cover basic living expenses Sometimes . . . this poverty was the result of bureaucratic delays in gaining access to cash assistance or having paychecks temporarily cut off, which could result in destitution.”). As one judge put it: “The injustices of the disability payment system are both many and deep. Research suggests the majority of denials may be incorrect, and applicants struggling to manage their disabilities say such denials can amount to a ‘death sentence.’” *Boatner v. Berryhill*, No. 3:16-cv-243-CWR-RHW, 2018 WL 2191840, at *10 (S.D. Miss., May 11, 2018) (citations omitted).

significantly decreased after a decades-long upward trend.³⁰ One of the reasons suggested for this shift is that the program has made it so much harder to apply, qualify for benefits, or appeal rejections.³¹ Another reason for the decline is the decrease in SSDI awards by the Social Security Administration.³²

It needs to be emphasized that despite the fact that the ADA was put in place three decades ago, Americans with disabilities remain undereducated³³ and underemployed.³⁴ Poverty rates are higher among Americans with disabilities than among their nondisabled peers.³⁵ Federal funding for the Individuals with Disabilities Education Act since its inception has never fulfilled its mandate.³⁶

The term “accommodation” may also mislead. Rather than broad-scale social reform, accommodations in reality are more about changes such as providing small-bore items like ergonomic chairs.³⁷ Reasonable accommodations are civil rights that are required to level the unequal playing field; in the face of salient differences, they are not privileges or special benefits.³⁸ A disability accommodation is therefore not a lottery ticket, winnings from which can be used as one wishes. They are intended to be tailor-made to individual needs and, although they often can be suited to others, they are not one-size-fits-all.

Another purported benefit from medical harm that may have unintended consequences is the “excuse to skip work and school” that Konnoth notes as

30. The number of SSDI beneficiaries has been declining since 2014. See CONG. RESEARCH SERV., R45419, TRENDS IN SOCIAL SECURITY DISABILITY INSURANCE ENROLLMENT 1 (Nov. 30, 2018). SSI applications have also been falling in recent years. See SOC. SEC. ADMIN., BRIEFING PAPER NO. 2019-01, TRENDS IN SOCIAL SECURITY DISABILITY INSURANCE 5 (Aug. 2019), <https://perma.cc/R5AB-CKHT>.

31. Nelson D. Schwartz, *Disability Applications Plunge as the Economy Strengthens*, N.Y. TIMES (June 18, 2018), <https://perma.cc/EG6B-UA99>.

32. CONG. RESEARCH SERV., *supra* note 30, at 2.

33. INSTITUTE ON DISABILITY, 2019 ANNUAL REPORT ON PEOPLE WITH DISABILITIES IN AMERICA 10 (2019), <https://perma.cc/4UCA-5BEY>.

34. “For all age groups, the employment-population ratio was much lower for persons with a disability than for those with no disability.” U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS — 2016, at 1 (2017), <https://perma.cc/RR6V-U2NX>.

35. The gap between people with and without disabilities who live in poverty was 14.7 percentage points in 2018. INSTITUTE ON DISABILITY, *supra* note 33, at 15.

36. *IDEA Full Funding: Why Should Congress Invest in Special Education?*, NAT’L CTR. FOR LEARNING DISABILITIES, <https://perma.cc/72CF-PE22> (archived June 8, 2020).

37. According to an ongoing study conducted by Job Accommodation Network (JAN) since 2004, “employers report that 58 percent of accommodations cost absolutely nothing to make, while the rest typically cost only \$500.” *Don’t Break the Bank in 2014 – Low Cost Accommodations Do Exist*, JOB ACCOMMODATION NETWORK (Jan. 2014), <https://perma.cc/75SV-TRL9>.

38. See Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 695-97 (2014).

evidence of normative views about sickness.³⁹ In 1951, renowned sociologist Talcott Parsons coined the phrase “sick role,”⁴⁰ which has developed as a key notion in social science literature. For Parsons, being sick is as much of a social condition as it is a medical one as it involves adopting a social role accompanied by specific social expectations.⁴¹ Medical diagnosis is a way for society to assert control over those who are diagnosed as sick or disabled.⁴² The “sick-disabled person” is exempt from normal social obligations, such as taking part in the labor market, and is expected to cooperate with the medical establishment, fit with the “institutionalized expectations” to get better, but never fully recover.⁴³ In the short term, the occasional day off, envisioned in Konnoth’s Article, turns into exclusion from society and relegation to the margins due to low societal expectations over the long term. “[T]he sick role involves a *relative* legitimacy . . . an implied ‘agreement’ to ‘pay the price’ in accepting certain disabilities and the obligation to get well. It may not be immediately obvious,” Parsons writes, “how subtly this serves to isolate the deviant.”⁴⁴

Medicalization may also have considerable costs. Most of the patient advocacy in the Article—by AIDS patients, cancer patients, blind folks, vets, psychiatric patients, and patient movements more generally—has been against medicalization or the overarching power of medical professionals, rather than an embrace of medicalization.⁴⁵ What all those movements have been fighting for is to get a seat at the table and to include activist and patient perspectives at different stages in the scientific/medical enterprise. They seek

39. Konnoth, *supra* note 6, at 1225.

40. TALCOTT PARSONS, *THE SOCIAL SYSTEM* 285 (1951).

41. *Id.* at 312, 475.

42. *Id.* at 438, 477.

43. *Id.* at 436-37, 464; *see also* William C. Cockerham, *Medical Sociology*, 11 INT’L REV. MOD. SOC. 233, 235 (1981); Alexander Segall, *The Sick Role Concept: Understanding Illness Behavior*, 17 J. HEALTH & SOC. BEHAV. 162, 164 (1976); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1347 (1993).

44. PARSONS, *supra* note 40, at 312 (emphasis in original).

45. *See, e.g.*, LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 101-103 (2020) (discussing the mental patients’ rights movement); Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 137 (2016) (stating how medicalizing fatness, which typically involves labeling it as a problem, is strongly opposed by most of the fat rights community); Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW & SOC’Y REV. 397, 421-422, 427 (2008) (discussing how the opposition to medicalization has been a common issue for both the disability community and the fat rights community); Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 1-14 (2018) (discussing the Intersex movement and other patients’ rights movements and their objection to medicalization).

to emphasize the benefits of participatory knowledge over the exclusive regime of medical experts.⁴⁶ Disability rights activists have coined the phrase “nothing about us without us” to emphasize the importance of democratizing decisionmaking processes related to this population.⁴⁷ Medicalizing civil rights thus means taking the expertise and decisionmaking capacity away from patients and disabled individuals and handing it over to other experts to make decisions for them.⁴⁸

With regard to the case of *Blatt v. Cabela’s Retail*, which Konnoth discusses extensively,⁴⁹ as we have written elsewhere,⁵⁰ this decision can be problematic when considering disability and intersectionality. After the June 2020 historic Supreme Court decision *Bostock v. Clayton County*, which granted protection to trans persons under Title VII to the Civil Rights Act,⁵¹ the application of *Blatt* may at least seem to be theoretical. It is possible, however, that trans advocates will still try to use *Blatt* in order to obtain reasonable workplace accommodations under the ADA that are not available under Title VII (like the provision of non-gendered restrooms or the enforcement of grooming standards). According to *Blatt*, in order to gain ADA protection, trans persons need to obtain a diagnosis of gender dysphoria disorder.⁵² Thus, they need access to a doctor who can provide that formal medical diagnosis. But what about uninsured trans people or those with no time, desire, or money to get diagnosed with gender dysphoria; are they not also entitled to protection? And even if the answer is “yes” in the normative sense, is it rational to have to separate medically diagnosed trans persons from non-medically diagnosed trans persons in terms of their legal treatment? In addition, in May 2019, gender dysphoria was actually removed from the chapter on mental disorder in the International Classification of Disease (ICD), which is published by the World Health Organization and used for diagnosis together with the DSM-

46. See, e.g., Sudai, *supra* note 45, at 38.

47. JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 16-17 (2000); KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS 24 (2015); Sagit Mor, *With Access and Justice for All*, 39 CARDOZO L. REV. 611, 647 (2017).

48. For a classic exploration of the control asserted over people with disabilities through a medicalized definition of disability, see ALBRECHT, *supra* note 17, at 120-21 (“Disability, like many other behaviors, has been medicalized so that the physicians control the interpretive process of who is disabled, whereas lawyers control the court procedures determining the rights of people with disabilities.”).

49. Konnoth, *supra* note 6, at 1169, 1191-93.

50. Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in OXFORD HANDBOOK OF L. & HUMAN. 145, 159 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020).

51. *Bostock v. Clayton Cty.*, Georgia, No. 17-1618, 2020 WL 3146686, at *3 (U.S. June 15, 2020).

52. *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017).

5.⁵³ This move, which was supported by trans rights organizations, demedicalizes trans identities, and would render moot most of Konnoth's analysis regarding trans rights if the DSM-5 follows the ICD.

Also, medicalization has specific potential costs that other types of claims do not. In addition to the stigma discussed in the Article, disability advocates and scholars have written and agitated about obstacles like deportation, barriers to immigration entry,⁵⁴ loss of child custody,⁵⁵ institutionalization,⁵⁶ committal, forced medication, and sterilization.⁵⁷ There are also long-term negative effects. While in the short term, medicalized people may receive benefits and rights, over the long term, they have to deal with societal alienation, as the cost of being recognized as a medicalized person is that you are not part of the mainstream.

II. Looking Ahead

Where we can all agree is on the call to go beyond traditional antidiscrimination law⁵⁸—to increase benefits, expand rights, and ensure healthcare. Newer conceptions of disability embrace these goals. Early articulations of the social model of disability, which was first developed in

53. Sophie Lewis, *World Health Organization Removes "Gender Identity Disorder" from List of Mental Illnesses*, CBS NEWS (May 29, 2019, 9:37 PM), <https://perma.cc/FY6T-YTCG>.

54. See DOUGLAS C. BAYNTON, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS* 1-6 (2016); Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and, of All Things, Hobby Lobby*, 52 ARIZ. ST. L.J. 245, 249 (2020).

55. See Ella Callow, Kelly Buckland & Shannon Jones, *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 11 (2011); Doron Dorfman, *The Inaccessible Road to Motherhood—The Tragic Consequence of Not Having Reproductive Policies for Israelis with Disabilities*, 30 COLUM. J. GENDER & L. 49, 61-62 (2015); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 139 (2016); Robyn M. Powell, Susan L. Parish, Monika Mitra, Michael Evan Waterstone & Stephen Fournier, *Terminating the Parental Rights of Mothers with Disabilities: An Empirical Legal Analysis*, 85 MO. L. REV. (forthcoming 2021) (manuscript at 4-5), <https://perma.cc/QUM4-J62E>.

56. See BEN-MOSHE, *supra* note 45, at 47-48; KIM NIELSEN, *A DISABILITY HISTORY OF THE UNITED STATES* 88-89, 125-27 (2012); Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 427 (2018).

57. *Buck v. Bell*, 274 U.S. 200, 205 (1927) (upholding the Virginia statute that authorized the sterilization of Carrie Buck, an eighteen-year-old who was diagnosed as "feeble minded" and gave birth to a daughter while living in an institution, a law put in place to stop the "defective" from reproducing).

58. See, e.g. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 34 (2004).

England in the 1970s,⁵⁹ drew a sharp distinction between the social environment, the stereotypes, and the discrimination that cause disability and impairments.⁶⁰ While the original social model's strength was in its simplicity, which allowed for it to become popular and to mobilize a community,⁶¹ its downside was in undermining the myriad personal experiences of disabled people, and hampering a nuanced understanding of the complexity of disability.⁶² Some also critiqued the classic social model on the grounds that it is not applicable to the development of policies.⁶³ A contemporary concept of disability that draws from the "classic" social model views the term as complex and "fluid" rather than a dichotomous process of presence or absence.⁶⁴ It is multidimensional, dynamic, bio-psycho-social, and interactive

-
59. The social model of disability originated in mid-1970s England with the Union of Physically Impaired Against Segregation (UPIAS), a radical organization comprised of physically disabled male veterans. In their 1976 statement they wrote: "In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society." UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION & THE DISABILITY ALLIANCE, UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION & THE DISABILITY ALLIANCE DISCUSS FUNDAMENTAL PRINCIPLES OF DISABILITY 20 (1976), <https://perma.cc/EFA6-7K8M>. The early articulations of the social model in academic writing was led by pioneer scholar Michael Oliver in the mid-1980s. Mike Oliver, *Social Policy and Disability: Some Theoretical Issues*, in 1 DISABILITY, HANDICAP & SOC'Y 5, 6 (1986). For the differences in the ways English and American scholarship conceptualize disability, see Helen Meekosha, *Drifting Down the Gulf Stream: Navigating the Cultures of Disability Studies*, 19 DISABILITY & SOC'Y 721, 725-32 (2004).
60. Michael Oliver was the one who famously made the distinction between impairment and disability, similar to the distinction between sex and gender. Sex represents the biological components that differentiate males from females; gender is a much broader term that encompasses the social construction of gender roles. In the field of disability studies, impairment is the biological component that differentiates the disabled from the non-disabled, while disability refers to the way impairments are viewed and experienced by others, that is, the degradation caused to people with impairments by society. MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 37-38 (1996); see also SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 5 (1996).
61. BAGENSTOS, *supra* note 22, at 18-20; Tom Shakespeare, *The Social Model of Disability*, in THE DISABILITY STUDIES READER 266, 268-69 (Lennard J. Davis ed., 3d ed. 2010).
62. Mike Oliver, *If I Had a Hammer: The Social Model in Action*, in DISABLING BARRIERS—ENABLING ENVIRONMENTS 7, 8 (John Swain, Sally French, Colin Barnes & Carol Thomas eds., 2d ed. 2004); Shakespeare, *supra* note 61, at 269-72; Tom Shakespeare, *Still a Health Issue*, 5 DISABILITY & HEALTH J. 129, 129-30 (2012).
63. Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1285-1308 (2007). For a response to that criticism, see Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. U.L. REV. 575, 594-95 (2009).
64. Sharon N. Barnartt, *Disability as a Fluid State: Introduction*, in DISABILITY AS A FLUID STATE 1, 2 (Sharon Barnartt ed., 2010). Another way disability is fluid is temporal, as it is a category that most people will fall in and out from over the course of their lives. See generally MARK PRIESTLEY, DISABILITY: A LIFE COURSE APPROACH 1-5 (2003).

in nature.⁶⁵ Disability is therefore formulated through a complex interaction between the impairment and the social environment.⁶⁶

The United Nations' Convention on the Rights of Persons with Disabilities reflects this new conceptualization of disability. It "[r]ecogniz[es] that disability is an evolving concept" that "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."⁶⁷ This vision has also been implemented into the "International Classification of Functioning, Disability and Health (ICF)" published by the World Health Organization in 2002.⁶⁸ Disability under the ICF is defined as a combination of Body Structures and Functions as well as restriction of activities and participations.⁶⁹ The focus is on the function and ability limitations rather than on the medical impairment. A normative implication derived from the bio-psycho-social model is to remind courts to shift the focus from class-based identification (determining whether a person is disabled or not) to the function of the job or the service that is denied from the plaintiff because of their disability.⁷⁰ The functionality issue can be remedied by reasonable accommodations or modifications. Such a way of thinking fits within the ADA's directive to construct disability "in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of" the legal definition.⁷¹

By trying to push forward the medical aspects of disability, rather than the updated and nuanced social model, more harm than good may be inflicted on the group as a whole. While we agree that the current landscape of

65. See Irving K. Zola, *Disability Statistics, What We Count and What It Tells Us: A Personal and Political Analysis*, 4 J. DISABILITY POL'Y STUD. 9, 18 (1993) (explaining why the fixation to quantify the number of people with disabilities is problematic: "My general contention is that the dilemmas we face in disability statistics are expressed empirically in our attempt to make [disability] *fixed* and *dichotomous* . . . which is better conceptualized as *fluid* and *continuous*.").

66. See ALBRECHT, *supra* note 17 at 60 ("Impairments and disabilities are socially produced; that is, they are a product of the interplay between individuals and the physical, biological, and sociocultural environments that characterize their society."); Carmelo Masala & Donatella Rita Petretto, *From Disablement to Enablement: Conceptual Models of Disability in the 20th Century*, 30 DISABILITY & REHABILITATION 1233, 1234 (2008); Saad Z. Nagi, *Disability Concepts Revisited: Implications for Prevention*, in DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 309, 325 (Andrew M. Pope & Alvin R. Tarlov eds., 1991).

67. G.A. Res. 61/106, annex I, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

68. WORLD HEALTH ORGANIZATION, TOWARDS A COMMON LANGUAGE FOR FUNCTIONING, DISABILITY AND HEALTH ICF 1, 9 (2002).

69. *Id.* at 9.

70. For similar move with regard to the definition of "sex" in the context of the gendered bathroom debates, see Maayan Sudai, *Toward a Functional Analysis of "Sex" in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 201, 242-43 (2019).

71. 42 U.S.C. § 12102(4)(A) (2018).

antidiscrimination law looks dire, there are ways to move forward without resorting to older models of justice.