

# Welcoming Monsters: Disability as a Liminal Legal Concept

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“One morning, I got up to shave, as usual, and instead of a hair, there was a feather on my face.”

“Well, it’s normal for a crow to have feathers. However what’s less normal is to shave if you have feathers.”

“But I wasn’t a crow before, I was a normal being like you...”<sup>1</sup>

The philosophy of disability has burgeoned into a field of its own. Like the general field of disability studies, it hosts a multiplicity of schools, expertise and methodologies. It is unified, if at all, by a desire for the social integration of people perceived or understood to be “different”, mentally or physically. This article aims to orient the reader within the field of the philosophy of disability and present some important lessons that it can teach legal actors.

The task of achieving social integration for people with disabilities (PWD) and other minority groups has often been presented under the political idiom of equality. Philosophers have contributed to this endeavor, both within and outside of law schools, by problematizing the meaning and normative implications of equality. Philosophers of disability, in particular, have empowered disability activists with egalitarian arguments utilizing notions of oppression, dignity and substantive equality. However, the field of the philosophy of disability is not only divided by the question of “what is equality and how to best achieve it?” but also by the more fundamental question of “what is social integration and how to best achieve it?” While egalitarian answers to that question may hold greater purchase in our current legal culture, I will consider other promising answers that draw from beyond the confines of liberalism in this article,

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1. FREDERIC OTHON THEODORE ARISTIDES (FRED), *L'HISTOIRE DU CORBAC AUX BASKETS*, (1993).

and sketch the distinctive subversive potential of the philosophy of disability.

This article is divided into four parts. Part one surveys the field of the philosophy of disability, tracing it back to its activist origins and presenting some of the main tensions within it.

Part two unpacks three themes found in writings in the wake of the work of Michel Foucault and Jacques Derrida: the notion of the “monstrous,” normalization, and the principle of “limitless welcome”. Using primarily the work of Anita Silvers and of Margrit Shildrick, two influential philosophers of disability working respectively inside and outside of the liberal paradigm, I relate post-structuralist descriptive and normative claims to similarly subversive ideas existing within liberal political theory informing mainstream legal scholarship. I argue that liberal legal and political theory may well adopt certain (versions of) Foucauldian and Derridean lessons without abandoning their traditional commitments. As such, this essay illustrates the kind of translation work that can take place within the interdisciplinary field of disability studies so that its diversity does not become Babelian. This is especially desirable since those imported concepts yield significant emancipatory potential.

In Part three, I nonetheless recognize the inherently extra-legal nature of certain critical tools and ideals put forward by Foucault and Derrida, and I note why liberal structures and the people inhabiting them would resist its profoundly threatening impact. I also acknowledge that they cannot be operationalized like other concepts used in emancipatory struggles (such as “rights”). They may still inform the ethical dispositions that legal actors should endorse towards disability.

In Part four, I illustrate how mainstream legal discourses do not necessarily shy away from ideals simply because they are unattainable or because both their shape and the means to pursue them evolve along with our culture and the power dynamics within it.

While “disability” is typically utilized in the law as opening paths to welfare benefits on a medical basis or as a prohibited ground of discrimination (e.g. under human rights legislations), it also has the radical and subversive potential to be understood as a liminal legal concept that liberals can integrate into their emancipatory toolkit.

By “liminal legal concept”, I refer to a concept the boundaries of which are to be negotiated within a proto-legal discursive space where jurists imagine and define new configurations of law and policy. The term “liminality” has long been used by anthropologists to refer to an in-between state where individuals have not yet completed a ritual through which they will change.<sup>2</sup> I use the term “liminal” because it captures one

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2. VICTOR TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* (1969).

of the key characteristics of the normative and descriptive notions related to disability I examine in this article. This characteristic is that the concept of disability can be used as a critical tool at the periphery of the law, that is, before it is operationalized into enforceable norms and inevitably runs the risk of losing touch with its *raison d'être*. In the case of “disability”, this *raison d'être* is arguably to welcome and include, rather than to ostracize or assimilate.

Enquiries into legal concepts in a liminal state examine how extra-legal factors mould legal decrees. A great number of concepts could be analyzed during their transition toward concrete legal formulations, just like they could be analyzed through positivist or social lenses. However, social justice scholars will probably find that legal concepts defining subjects and their entitlements, or connected to historically oppressed or “vulnerable” identities, are particularly fecund sites of analysis in their liminal-legal stage.<sup>3</sup> This is because disability, like race and gender, is a concept that is deceptively taken for granted once it formally belongs to the legal realm.

### I. THE PHILOSOPHY OF DISABILITY: A SURVEY

As many recent books and anthologies indicate,<sup>4</sup> the phenomenon of

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3. Consider, for instance, the notion of “sexual harassment”, that was not a legal variety of sex discrimination before the 70s, and came into legal existence by “transiting through” a social process including activism and litigation. This approach can be used to criticize a certain legal category or apparatus. Consider Amy Adler’s criticism of how “censorship law respond[ed] and shap[ed] a cultural crisis [of child sexual abuse and child pornography]” by creating a legal framework that “threatens to enslave us all, by constructing a world in which we are enthralled - anguished, enticed, bombarded - but the spectacle of the sexual child”. Adler examines the disturbing hypothesis that prohibition invites transgression, *id es*, that the particular way in which the law has prohibited child pornography both masks and sustains repressed pedophilic desires. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 245 (2001). The definition of disability in law is controversial, and various legal actors (judges, legislators, activists) participate to its evolution. Like the two aforementioned examples (sexual harassment and child pornography), its use as legal category intends to produce a beneficial outcome. However, such legal discourses may, inadvertently and well-meaningly, become complicit in the creation of a “disabled subject” who must be cast in negative ways (notably, as being naturally unable, burdensome or unfortunate) in order to justify protective or supportive regimes.

4. The following titles are by no means an exhaustive bibliography, but an illustration of some of the remarkable works in the philosophy of disability to have appeared in the last decade: PHILOSOPHICAL REFLECTIONS ON DISABILITY (PHILOSOPHY AND MEDICINE) (D. Christopher Ralston & Justin Ho eds., 2010); COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY, (Eva Feder Kittay & Licia Carlson eds., 2010); DISABILITY AND DISADVANTAGE, (Kimberley Brownlee & Adam Cureton eds., 2009); CRITICAL DISABILITY THEORY (Dianne Pothier & Richard Devlin eds., 2006); LICIA CARLSON, THE FACES OF INTELLECTUAL DISABILITY: PHILOSOPHICAL REFLECTIONS (2009); FOUCAULT AND THE GOVERNMENT OF DISABILITY, (Shelley Tremain ed., 2006); INTELLECTUAL DISABILITY: ETHICS, DEHUMANIZATION AND A NEW MORAL COMMUNITY, (Heather Keith & Kenneth D. Keith eds., 2012); DISABILITY AND THE GOOD HUMAN LIFE (Jerome Bickenbach, Franziska Felder & Barbara Schmitz eds., 2014); TOBIN ANTHONY SIEBERS, DISABILITY THEORY (2008); ELIZABETH BARNES, THE MINORITY BODY (2016); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE, (2007); ARGUING ABOUT DISABILITY: PHILOSOPHICAL PERSPECTIVES (Kristjana Kristiansen, Simo Vehmas & Tom Shakespeare eds., 2008). Consider, also, the launch of a new series specialized in disability within university presses, such as the Disability Law and Policy Series at *Cambridge University Press*; Critical Perspectives on Disability at *Syracuse University Press*; or the Disability

disability has gained unprecedented attention within the philosophical community in the last decade. This is not to say that philosophers were not concerned with disability prior to the twenty-first century. Scholars like Adrienne Asch, Jerome Bickenbach, Eva F. Kittay, Anita Silvers, David Wasserman and Susan Wendell<sup>5</sup> made influential contributions to the philosophy of disability in the 90s. Disability, however, is not an ancient philosophical topic like law or war because, unlike those concepts, the notion of disability, as it is currently understood, did not exist until the rise of statistical science and the use of notions like normality and deviance in political agendas concerning public health in the 19th century.<sup>6</sup> Of course, phenomena that are commonly called “disabilities” have always existed (e.g. Down syndrome, blindness) but the concept of “disability” includes socially constructed elements that cannot be reduced to merely physiological traits. It is those socially constructed elements, instead of the strictly physiological aspects of “disability”, that have been of great recent philosophical interest.

The currently blossoming philosophy of disability, like the philosophy of race or gender, is rooted in injustice. Theories of disability in the 70s and the 80s were found in the activist and sociological work that constituted a delayed response to the segregation of PWD in asylums and workhouses which became widespread during the nineteenth century. Until that point, segregation had been the principal way of managing those individuals who were incapable of adjusting to the individualized and competitive modes of production of the social order established by the industrial revolution. The view that “disability” is a socially engineered situation in which one finds herself and not merely a medical condition or a biological abnormality is indebted to the pioneering work of sociologists like Saad Nagi<sup>7</sup> and Mike Oliver.<sup>8</sup>

Because disability studies is characterized by its interdisciplinary character, it would be artificial to deny the intellectual proximity of certain fields (e.g. anthropology or sociology of disability) to the philosophy of disability. Two foundational lines of inquiry about disability which cut across disciplines were (1) a social constructivist outlook, early versions

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Culture and Politics Series at *University of British Columbia Press*.

5. WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS (Michelle Fine & Adrienne Asch eds., 1988); JEROME BICKENBACH, PHYSICAL DISABILITY AND SOCIAL POLICY (1993); EVA KITTAY, LOVE'S LABOR (1999); ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY (1999); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1997).

6. LENNARD DAVIS, ENFORCING NORMALCY ch.2 (1995); IAN HACKING, THE TAMING OF CHANCE ch.20 (1990).

7. Saad Nagi, *Some Conceptual Issues in Disability and Rehabilitation*, IN SOCIOLOGY AND REHABILITATION 100 (Marvin B. Sussman ed., 1965).

8. MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990).

of which held that human beings are “unfinished” creatures, in the sense that we must supplement our “instinctual world” with a cultural one, and our biology with social determinants<sup>9</sup> and (2) a concern for the interrelated psychological and social mechanisms of power, stigma and oppression (respectively theorized, for instance, in the seminal work of Michel Foucault,<sup>10</sup> Erving Goffman,<sup>11</sup> and Mike Oliver<sup>12</sup>). Both clusters can inform the work of philosophers of justice and equality. The former sheds light on the complex claim that disability is at least partly socially constructed which, in turn, has repercussions on the allocation of responsibility to respond to situations of disability, as well as on the determination of what constitutes a proper “response” to disability. The latter equips disability activists with a rich language to articulate why PWD are victimized by prejudice rather than fate. Moral and legal claims can then be articulated as a demand for redress, similar to other oppressed minorities, rather than as a plea for charity. (This traditional plea, in contrast, would only provide PWD a right to medical treatment on the basis that they should not be held responsible for having drawn a short genetic straw or undergone a disease or an accident resulting in disability through no fault of their own).

Other theorists whose contributions to disability studies profoundly shaped the philosophy of disability include activists demanding social integration, such as Vic Finkelstein, who shares the paternity of the “social model of disability” with Mike Oliver.<sup>13</sup> Finkelstein was also the co-founder of the Union of the Physically Impaired Against Segregation (UPIAS), a UK disability group whose “fundamental principles”, published in 1976, describe the soul of the social model:

[I]t 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. [...] Poverty is one symptom of our oppression, but it is not the cause [...] We shall clearly get nowhere if our efforts are chiefly directed not at the cause of our oppression, but instead at one of the symptoms.<sup>14</sup>

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9. Bryan Turner, *Disability and the Sociology of the Body*, in HANDBOOK OF DISABILITY STUDIES, 256 (L. Albrecht, Katherine Seelman, & Michael Bury eds., 2003). Among the views considered by Turner, the most influential one is probably that of BERGER, P. & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1967).

10. MICHEL FOUCAULT, *LES ANORMAUX, COURS AU COLLEGE DE FRANCE, 1974-1975* (1999); MICHEL FOUCAULT, *HISTOIRE DE LA FOLIE A L'AGE CLASSIQUE* (1972); MICHEL FOUCAULT, *NAISSANCE DE LA CLINIQUE*, (1963).

11. ERVING GOFFMAN, *STIGMA* (1963).

12. MICHAEL OLIVER, *UNDERSTANDING DISABILITY, FROM THEORY TO PRACTICE* (1996).

13. VIC FINKELSTEIN, *ATTITUDES AND DISABLED PEOPLE* (1980).

14. UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION, *Fundamental Principles of Disability* (1976).

While the UK's brand of activism and disability theory was partly informed by Marxist and working class ideals, the American "Independent Living Movement" reflected the individualist brand of liberalism dominating North American culture by emphasizing how PWD could become independent citizens and consumers (of disability goods and services), through deinstitutionalization and a contentious rehabilitation into a capitalist social structure.<sup>15</sup>

In addition to sociologists and activists, persons with disabilities, with or without a philosophical background, such as Susan Wendell,<sup>16</sup> Robert Murphy,<sup>17</sup> Irving Zola,<sup>18</sup> and Jenny Morris<sup>19</sup> have produced autobiographical narratives that bring subjective experiences to the forefront of theoretical reflections about disability. Such approaches fed phenomenological and feminist analyses of disability, just like Oliver and Finkelstein helped political philosophers reconceptualize equality claims with regard to disability. Such subjective takes on disability were sometimes perceived as clashing with social ones, since the "social model" of disability wanted to emphasize external, environmental barriers to social integration rather than subjective experiences of impairments. In spite of these and other tensions between disability discourses, those subjective narratives undeniably enriched the philosophy of disability by illuminating how disability may inform one's identity, how it is a way to be in one's body, how it is to relate to differently embodied beings, and how it is to live in a world built for "normal" bodies. Moreover, narratives of disability as subjectively experienced and descriptions of disability as social oppression need not clash; they may, on the contrary, inform each other. As anthropologist Robert Murphy wrote in his *autopathography*:

This is . . . the history of the impact of a quite remarkable illness upon my status as a member of society, for it has visited upon me a disease of social relations no less real than the paralysis of the body.<sup>20</sup>

While it is hard to uncontroversially trace the evolution of such a motley field, a plausible description is that the philosophy of disability grew out of the concerns of activists. There is historical precedent for this intellectual chronology: other groups (e.g. women, LGBT, African

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15. For a survey of disability models, see COLIN BARNES & GEOFF MERCER, *EXPLORING DISABILITY*, (2010); Barbara Altman, *Disability Definitions, Models, Classification Schemes, and Applications*, in *HANDBOOK OF DISABILITY STUDIES* 97 (L. Albrecht, Katherine Seelman, & Michael Bury eds., 2003); J. BICKENBACH *PHYSICAL DISABILITY AND SOCIAL POLICY* (1993) and J. BICKENBACH, *ETHICS, LAW, AND POLICY* (2012).

16. WENDELL, *supra* note 5.

17. ROBERT MURPHY, *THE BODY SILENT* (1990).

18. IRVING ZOLA, *MISSING PIECES: A CHRONICLE OF LIVING WITH A DISABILITY* (2003).

19. JENNY MORRIS, *PRIDE AGAINST PREJUDICE* (1991).

20. MURPHY, *supra* note 17, at 4. I thank my student, Mark Erbert, for drawing my attention to this passage.

Americans) also made simultaneous progress on both practical and theoretical fronts. As civil rights struggles became a topic of philosophical research, their theorization also became increasingly abstract, including attempts to not only understand notions like gender, race, sex and disability, but also to genealogize and deconstruct them.<sup>21</sup> The philosophy of disability has also increasingly benefited from the criticism of liberalism and autonomy found in the fields of feminist and queer studies. Those exchanges shed light on core concerns from each fields and allow for intersectional analysis.<sup>22</sup> Cultural studies also intersect with disability studies through the influential work of Garland-Thompson and Lennart Davis, both English professors, which illustrates how cultural studies has the potential to clarify foundational concepts analyzed within the philosophy of disability (in their case, especially that of normalcy).<sup>23</sup>

Views of disability that deconstruct, genealogize or criticize the “disabled identity” instead of making use of it within political struggles could be considered to fall within a broad “second wave” of disability theory. By contrast, the first wave is characterized by a reappropriation of a “disabled identity” within social struggles for recognition. “Second wave” disability theorists problematize the nature and political or legal uses of such an identity.

Some of these “second wave” views caused a backlash within the disability movement. “Old school” disability theorists worried that the newer disability theory wave was losing sight of its activist roots and goals and betraying, to use some of those scholars severe terms, the very people they were ultimately supposed to help and on the back of whom many academic reputations were built.<sup>24</sup>

In a nutshell, traditional social modellists were concerned that challenging the very notion of “disabled person” as an identity would undermine its political use that had so far proven helpful in times of economic scarcity. Others criticized those later (post-modern) philosophical strands for being too obscure for the non-initiated and hard

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21. See, e.g., *DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY* (Mairian Corker & Tom Shakespeare eds., 2002); DAVID T. MITCHELL WITH SHARON L. SNYDER, *THE BIOPOLITICS OF DISABILITY: NEOLIBERALISM, ABLENATIONALISM, AND PERIPHERAL EMBODIMENT* (2015).

22. ALISON KAHER, *FEMINIST, QUEER, CRIP* (2013); *FEMINIST DISABILITY STUDIES* (Kim Q. Hall ed., 2011); *SEX AND DISABILITY* (Robert McRuer & Anna Mollow ed., 2012). Robert McRuer reported being told by Rosemarie Garland-Thompson on their way to a meeting on AIDS cultural theory in 1988, “You know, this is disability studies”: ROBERT MCRUER, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY*, xiii (2006).

23. Among their various publications, it would seem fair to count the following two books as part of the core canon of disability studies courses: LENNARD DAVIS, *ENFORCING NORMALCY* (1995); ROSEMARY GARLAND-THOMPSON, *EXTRAORDINARY BODIES* (1996). See also MICHAEL BÉRUBE, *LIFE AS WE KNOW IT: A FATHER, A FAMILY, AND AN EXCEPTIONAL CHILD* (1996).

24. See, e.g., Colin Barnes, *Disability Studies and the Academy - Past, Present and Future*, 4 *ARS VIVENDI* 3,12 (2013); Mike Oliver, *The Social Model of Disability: Thirty Years On*, 28:7 *DISABILITY & SOC'Y* 1024, 1026 (2013).

to operationalize.<sup>25</sup>

It may be said, in reply, that some (second-wave) theorists are test-driving the normative language of tomorrow and criticizing today's discourses that regulate and construct disability while some others pragmatically focus on the political idiom currently endorsed by law and policy. One should also mention that many of the aforementioned authors are either themselves disabled (indeed, some chronicled their own experiences) or have family members who are. The emergence of the philosophy of disability is, in part, an academic reclamation by scholars closely involved with disability of a field of knowledge previously appropriated and occupied by the able-bodied, in line with the disability movement's motto, "Nothing About Us Without Us". The field of disability philosophy would not only ensure the streamlining of "disability" as a worthwhile, distinct, philosophical *object* of research, but also that PWD remain the authors of such research, as self-understanding *subjects*. Consider the Society for Disability and Philosophy, whose constitution ratified in 2012 stipulates the dual purpose of "furthering research and teaching on philosophical issues related to disability" and of "promoting inclusiveness and support for people with disabilities in philosophical education and in the profession of philosophy."<sup>26</sup>

The appropriation of this field of knowledge by its "object" did not only take it away from the hands of scientists, but also of able-bodied philosophers who previously occupied much of whatever space could be called "philosophy of disability". They included utilitarian philosophers, like Peter Singer, who compared animals and intellectually impaired persons in order to reveal our callousness toward animals, as well as Helga Kuhse, with whom Singer has argued in favor of abortion and infanticide of PWD under specific circumstances.<sup>27</sup> As Susan Wendell writes, when she herself became disabled and started reflecting philosophically on her newfound embodiment:

I consulted *The Philosopher's Index*, looking under "Disability," "Handicap," "Illness," and "Disease". This was a depressing experience. At least 90% of philosophical articles and topics are concerned with two questions: Under what conditions is it morally permissible/right to kill/let die a disabled person and how potentially disabled does a fetus have to be before it is permissible/right to

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25. E.g., David Pfeiffer, *The Conceptualization of Disability*, in *EXPLORING THEORIES AND EXPANDING METHODOLOGIES*, 29 (Sharon N. Barnett & Barbara M. Altman eds., 2001).

26. Society for Philosophy and Disability, *Proposed Constitution for Philosophy and Disability* (2012), available at <http://societyforphilosophyanddisability.org/constitution>.

27. HELGA KUHSE & PETER SINGER, *SHOULD THE BABY LIVE?* (1985); PETER SINGER, *PRACTICAL ETHICS* (1993).

prevent its being born?<sup>28</sup>

While those utilitarian philosophers challenged the moral status of certain disabled human beings, others challenged their political status by qualifying them as “parasites” who never “qualified for membership of the egalitarian club.”<sup>29</sup> These kinds of exclusionist claims, which fundamentally deprive certain PWD from an entitlement to be socially integrated or respected for being different from their smarter, stronger human counterparts, were implicitly present elsewhere in moral and political philosophy.<sup>30</sup> However, they were only explicitly defended by a handful of philosophers who conceptualized (Licia Carlson said “exploited”<sup>31</sup>) PWD as receptacles of morally relevant properties that would nourish academic reflections on personhood and justice. In this debate, like in others, some ethicists like James Rachels or Jeff McMahan endorse variants of a “moral individualist” view that tend to give priority to individual, non-relational traits in understanding someone’s value, status and entitlements.<sup>32</sup> This view departs from those who would seek moral guidance from social context, ideology, relations and culture. Certain philosophers of disability, like Licia Carlson and Eva Kittay, have also criticized these early able-bodied philosophers of disability for not knowing their subjects well enough. I note that this criticism in part begs the question, when it is not only empirical, but rather assumes that ethicists are wrong to take a moral individualist stand from the get-go, as such a stand would excuse them from knowing their PWD subjects in the particular relational way in which Kittay and others think they must be known. Conversely, Singer’s and McMahan’s dissatisfaction with Kittay’s fundamental moral intuitions also risks begging the question.<sup>33</sup>

Another important area of disability research that was developed by non-disabled, well-meaning scholars with medical/psychological expertise was the field of “normalization” which evolved into the theory of social role valorization. As one of its founders wrote,

[T]he normalization principle means making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society.<sup>34</sup>

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28. Susan Wendell, *Towards a Feminist Theory of Disability*, 4 HYPATIA 104 (1989).

29. VINIT HAKSA, EQUALITY, LIBERTY, AND PERFECTIONISM 72, 74 (1979).

30. Consider Kittay’s and Nussbaum’s criticisms of John Rawls’s Theory of Justice. EVA KITTAY, LOVE’S LABOR (1999); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE (2007).

31. LICIA CARLSON, THE FACES OF INTELLECTUAL DISABILITY 194 (2009).

32. Jeff McMahan, *Our Fellow Creatures* 9 J. ETHICS 353 (2005).

33. LICIA CARLSON, THE FACES OF INTELLECTUAL DISABILITY (2009); Eva F. Kittay, *The Personal is Philosophical is Political: A Philosopher and Mother of a Cognitively Disabled Person Sends Notes from the Battlefield*, 40 METAPHILOSOPHY 606 (2009).

34. Bengt Nirje, *The Normalization Principle and Its Human Management Implications*, 1 SRV - VRS: THE INTERNATIONAL SOCIAL ROLE VALORIZATION JOURNAL, 19 (1994).

The important contribution of this work to the social integration of people with intellectual disabilities into society should not be minimized. Normalization theorists are aware of stigma—they are not under the naturalistic and generally oppressive spell that disability is only a medical condition. They especially know how disabled people systematically have trouble accessing enviable social positions or being integrated into society, hence their normalizing agenda. A criticism of this approach has been that while its authors are effectively designing a (normalizing) strategy to deal with a prejudiced social context, they are fundamentally catering to stigma rather than fighting it by using potentially oppressive structures and benchmarks of “normalcy” in order to help the differently embodied<sup>35</sup> to access social roles and opportunities like everyone else. Mike Oliver thus criticized normalization theory both for failing to examine structural oppression and for being developed by able-bodied medical experts who “best” know how to respond to PWD’s problems.<sup>36</sup>

It is not clear that one can fairly accuse normalization theorists of “mistak[ing] the symptom for the problem.”<sup>37</sup> It may be said that they are deliberately choosing to make social progress on a different front. It is difficult to monitor whether this choice unwittingly reasserts oppressive benchmarks of normalcy or over-pessimistically assumes that the stigmatizing of difference is there to stay.<sup>38</sup>

Three conclusions emerge from this brief survey of the frontiers of the philosophy of disability. First, this field asserts the importance of disability as a distinct object of philosophical investigation poised to profoundly illuminate moral and social philosophy, instead of denoting an anomalous instantiation of human beings, nagging philosophical frameworks for their incapacity to fully account for them. In other words, philosophers of disability recognize that disability is a central rather than peripheral feature of human life.

Second, the field is nourished by its interdisciplinarity and the healthy disagreements taking place within it. Schools within this field are generally unified by a commitment to social integration of PWD and their families on the grounds of fairness and epistemological privilege, as well as by an acknowledgement of the field’s activist roots. Yet, the lenses

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35. Neurologically, but also physically, as the field expanded to disabilities generally, as well as other minority groups.

36. Michael Oliver, *Capitalism, Disability, and Ideology: A Materialist Critique of the Normalization Principle*, in *QUARTER-CENTURY OF NORMALIZATION AND SOCIAL ROLE VALORIZATION: EVOLUTION AND IMPACT*, 168 (Robert Flynn & Raymond Lemay eds., 1999).

37. *Id.* at 171.

38. See e.g., Wolf Wolfensberger, *Response to Professor Michael Oliver*, in *QUARTER-CENTURY OF NORMALIZATION AND SOCIAL ROLE VALORIZATION: EVOLUTION AND IMPACT*, 175 (Robert Flynn & Raymond Lemay ed., 1999); see also Wolf Wolfensberger, *Response to Professor Michael Oliver* in *QUARTER-CENTURY OF NORMALIZATION AND SOCIAL ROLE VALORIZATION: EVOLUTION AND IMPACT*, 175 (Robert Flynn & Raymond Lemay eds., 1999).

through which they describe disability and the paths they take to achieve substantive integration are very diverse, just as diverse as philosophical methodologies and understandings of normalcy and disability. This is not inherently problematic (disagreements within any philosophical field are to be expected) but it brings me to my third point.

I suggest that many theoretical disagreements within disability studies (like the few presented above) often assume too one-sided an answer to the complex, fundamental question of whether and to what extent “normalcy” can and ought to play a normative role in disability policy. For instance, normalizing theory is sometimes accused of pursuing normalcy at the cost of disregarding whether the differences of PWD ought to be recognized.<sup>39</sup> Conversely, social modelists are sometimes accused of “forc[ing] us to redesign the human environment, at any cost.”<sup>40</sup> Such accusations are not always fair, but when they are, they could often be deflected if those they target would narrow down their claim in explaining when and how normalizing strategies seem promising, and when and how they are worrisome. This would avoid too promptly assuming that normalizing strategies are necessarily the vehicle of an ableist ideology or that they are the only solutions and ideals our society should strive to realize.

I want to present one last tension in the philosophy of disability as it will provide us with a jumping board into the next part of this article. There is a common and imperfect distinction made between “analytic” and “continental” philosophical outlooks. As Carlos Prado notes, the analytic-continental divide begins with a diverging methodological focus on analysis and on synthesis, respectively:

Analytic philosophers typically try to solve fairly delineated philosophical problems by reducing them to their parts and to the relations in which these parts stand. Continental philosophers typically address large questions in a synthetic or integrative way, and consider particular issues to be ‘parts of the larger unities’ and as properly understood and dealt with only when fitted into those unities.<sup>41</sup>

Most of the philosophers I have listed above work within the analytic tradition: Silvers, Kittay, Nussbaum, and Wasserman. I can also add Adam Cureton, Leslie Francis, Henry Richardson, and Lawrence Becker, amongst others, to a list of influential philosophers who have reflected on disability in an “analytic” mode of thought. In fact, they are specifically

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39. Oliver, *supra* note 36, at 163.

40. Christopher Boorse, *Disability and Medical Theory*, in PHILOSOPHICAL REFLECTIONS ON DISABILITY 55 (Christopher Ralston & Justin Ho eds., 2010).

41. A HOUSE DIVIDED: COMPARING ANALYTIC AND CONTINENTAL PHILOSOPHY 10 (C. G. Prado ed., 2003).

working within the confines of liberal philosophy and often tinker with, or answer to, John Rawls's influential theory of justice<sup>42</sup> and its difficulty to accommodate people with severe disabilities, especially intellectual ones. Some of their theories explain why PWD can actually be fitted in a Rawlsian theory of justice while others suggest that alternative principles of justice should supplement or replace Rawlsian ones.

Many philosophers of disability, such as David Mitchell, Magrit Shildirck, and Shelley Tremain instead draw their inspiration from continental philosophers, such as Michel Foucault, Jacques Derrida and Judith Butler. Those authors and their followers invite us to think about abnormality and disability within broader social, political, cultural or ideological contexts, within which subjects of power are constituted and regulated, rather than as discrete phenomena abstracted from such contexts. As previously mentioned, such views have been criticized for being difficult to operationalize. Lawyers and policy-makers are also more likely to be familiar with liberal theory as those theoretical elements find their way in the normative language they routinely use. Indeed, when disability studies finds its way into law journals, it is often through a discussion of themes drawn from egalitarianism (and its discontents) and through the introduction of the social model (paradoxically outdated in some disciplines and novel in others) to legal audiences. The first (egalitarian) lesson is generally articulated around the distinction between substantive and formal equality or the dilemma between special and equal treatment,<sup>43</sup> while the second examines how built environments or contingent structures, physical or institutional (from classrooms to guardianship regimes), determine how goods are distributed and socially valued roles are attained.

These two lessons are doubtlessly important and, like the three powerful notions I will present in the following section, they can help lawyers and policymakers to challenge the sometimes ableist and mostly liberal assumptions underlying their normative universe. However, legal scholars reflecting on disability, justice, law and power from within a liberal paradigm would also greatly benefit from integrating the insights drawn from "continental" scholarship. More specifically, I suggest that liberal legal and political scholarship should attempt to integrate the following notions to their critical toolkit:

- (i) Foucault's figure of the "monster" (defined below),
- (ii) normalization (understood as a mode of regulation and discipline, as explained below, rather than as a means of social integration, as within

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42. JOHN RAWLS, *A THEORY OF JUSTICE* (1971, 1999).

43. See Martha Minow's influential version of this dilemma. MARTHA MINOW, *MAKING ALL THE DIFFERENCE, INCLUSION, EXCLUSION, AND AMERICAN LAW* (1991).

social role valorization theory), and  
 (iii) the Derridean principle of “limitless welcome.”

While those “continental” notions are common in certain bodies of literature within disability studies, they are often eclipsed from conferences or edited collections written within a liberal and/or analytic paradigm (and vice-versa)<sup>44</sup> in a way that prompted me to examine whether these scholarships are necessarily unable to converse and whether the aforementioned three notions are necessarily incompatible with a liberal framework. I acknowledge that these Foucauldian and Derridean notions cannot be operationalized within our legal system like other familiar concepts used in emancipatory struggles (such as “rights”); however, they may still inform the critical and ethical dispositions that legal actors should endorse towards disability.

I suggest that the three aforementioned themes have familial resemblance to ideas and doctrines found within liberal scholarship. I rely principally on the work of Anita Silvers as a specific example of a contemporary liberal disability scholar and on the work of Margrit Shildrick as a specific example of a contemporary post-structuralist disability scholar. Shildrick's recent monograph, *Dangerous Discourses of Disability, Subjectivity, and Sexuality*, has compellingly merged some continental modes of thought that were not obviously compatible (namely, her marriage of Foucault and Derrida) and developed a farsighted and empowering theory of disability. Legal scholars working within the analytical liberal tradition would benefit from her invigorating take on these post-structuralist concepts. The good intentions usually motivating scholars, judges and policy-makers dealing with disability rights often suffer from a lack of awareness of their own prejudices. The three concepts I examine serve to bring ideology and culture under theoretical scrutiny, something that the methodology of analytic philosophy, as well as mainstream liberal theory and legal practice, all have considerable difficulty doing, since they proceed from within political and legal discourses without paying the same degree of attention to how structures of power have predetermined the parameters of these discourses. In spite of the theoretical gulf between post-structuralist and liberal modes of thought, the concepts I introduce from both traditions reflect surprisingly similar intuitions with regard to the legal treatment of PWD.

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44. Compare, e.g., FOUCAULT AND THE GOVERNMENT OF DISABILITY (Shelley Tremain ed., 2005) with DISABILITY AND DISADVANTAGE (Adam Cureton and Kimberley Brownlee eds., 2009). Like any generalization, it is easy to find counter-examples, but just as easy to point out how different the outlooks of (neo)Rawlsians and (neo)Foucauldians or of liberals and post-structuralists will be even though they may examine a same phenomenon (e.g. the nature and use of equality rights, of a “disabled identity”, or of the notion of “impairments” within discussions of law and justice).

*A Note on Terminology*

The title of this article (“Welcoming Monsters”) has a few meanings. First, the socially engineered figure of “disabled person” can be related to Foucault’s figure of the “monster” to which one may apply the Derridean principle of limitless welcome. Second, monsters/Others are themselves “welcoming”, in the sense that social integration should not be seen as a one-way street (with the dominant group assimilating the outsider), as briefly discussed in section II.b, on normalization, below.

Thirdly, I am addressing an audience of jurists familiar with the political liberal agenda and suggesting that they should welcome scholars like Foucault, Derrida, Shildrick and others, who are “monstrous” in the sense that they remain at the periphery of mainstream legal scholarship. This also explains why this article makes use of a dichotomy between “liberals”, on the one side, and “Foucault & Derrida”, on the other. However, I am aware of the risk of caricaturing both sides of such a dichotomy. This risk is increased if I place Foucault and Derrida together under a shared label (e.g. “post-structuralist”). Let me borrow general definitions of structuralism and post-structuralism from Simon Blackburn to situate the reader:

The common feature of structuralist positions is the belief that phenomena of human life are not intelligible except through their interrelations. These relations constitute a structure, and behind local variations in the surface phenomena there are constant laws of abstract structure.<sup>45</sup>

Foucault rejected structuralism as he conceived it to imply that “structures provide the conditions of their own existence”. By contrast, “Foucault is at pains to insist that ‘conditions of possibility’ are never guaranteed; rather accident and chance play a decisive role.”<sup>46</sup> This takes him closer to a post-structuralist orientation. As Blackburn explains, the latter generally agrees with the structuralist view that “words mean what they do through their relations with each other rather than through their relationship to an extra-linguistic reality”, but

[P]oststructuralism adds an interest in their origins in relationships of power, or in the unconscious . . . it does not share the structuralist view that the unconscious, or the forms of society, will themselves obey structural laws, waiting to be discovered. Rather, it echoes Nietzsche’s hostility to the reduction of human phenomena to lawlike

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45. SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* (3d ed., 2016) (“structuralism” and “poststructuralism”).

46. ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 6-7 (1994).

generalizations, associating such views with the philosophical underpinnings of determinist systems such as Marxism, and instead celebrating the formless, or the subjective and spontaneous.<sup>47</sup>

Although Foucault resisted both the structuralist and the poststructuralist labels, he endorsed the label of “nominalist.”<sup>48</sup> Shelley Tremain, using nominalism within the context of disability studies, defines it as:

[T]he view that there are no phenomena or states of affairs whose identities are independent of the concepts we use to understand them and the language with which we represent them.<sup>49</sup>

However, just like it would be dangerous to make generalizations about a variety of very diverse post-structuralist thinkers, it would be daunting to use the term “nominalist” to qualify the position that I use to criticize liberalism since it has a long philosophical history.<sup>50</sup>

Given these terminological difficulties, I ask for patience on the reader’s part when I use contested labels like “liberalism” and “post-structuralism.” For the purpose of this article, by “liberal legal scholarship”, I refer to an umbrella of commitments to advancing individual equality and freedom through legal means. By a “post-structuralist” critique of the limits of liberalism, I only mean to refer to the specific authors and the specific ideas presented in the article, especially the three notions presented in the next section. I also chose the term “post-structuralist” to encapsulate the critical apparatus I present below because I largely follow Shildrick’s reading of Derrida and Foucault and Shildrick qualifies herself of “post-structuralist/post-modernist” and takes this to mean that she is “committed to contesting the taken-for-granted grounds and structures of western humanism,”<sup>51</sup> a view that both Foucault and Derrida would subscribe to.

## II. THREE THEMES FROM POST-STRUCTURALIST REFLECTIONS ON DISABILITY

### A. Foucault’s Notion of “Monstrous”<sup>52</sup>

Michel Foucault used the notion of the “monstrous” to denote an

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47. BLACKBURN, *supra* note 45 (“structuralism” and “poststructuralism”).

48. Barry Allen, *Foucault’s Nominalism*, in *FOUCAULT AND THE GOVERNMENT OF DISABILITY* 99 (Shelley Tremain ed., 2005).

49. Shelley Tremain, *On the Government of Disability* 27:4 *SOCIAL THEORY & PRAC.* 617 (2001).

50. IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 82-4 (1999).

51. Margrit Shildrick’s biographical profile (Department of Thematic Studies; Gender Studies; Linköping university), available at <https://www.tema.liu.se/tema-g/medarbetare-och-kontakt/shildrick-margrit>.

52. The first and eleventh paragraphs of this section are partially reproduced from my essay, Jonas-Sébastien Beaudry, *The Anxious Heart of Injustice: Negative Affective Responses to Disabilities* BIOÉTHIQUE ONLINE (2016).

obstacle to the law. A “monster” is a being to which legal norms cannot apply; it escapes the reach of legal authority and grasp of political power. A King, standing above the law, is an example of a “legal monster.”<sup>53</sup>

This Foucauldian terminology has therefore little to do with the concept of “monstrous” associated with “abnormal bodies” in popular culture. The latter connects monstrosity with a failure to live up to some human standard (whether moral, psychological or physical), with little-to-no attention to the incidental consequence that these shortcomings prevent some individuals from being routinely disciplined or regulated (a Foucauldian may say) or from being effective social participants (a Rawlsian may say). Foucault explains this concept in his lectures at the *Collège de France*, in 1974-5, published under the title “The Abnormals”:

The monster . . . contradicts the law. He is the breach/offence [*infractio*] . . . And yet, while being an offence, he does not trigger a legal response . . . The monster does not call for a response from the law itself, even if he violates the law by existing. The response will be [non-legal]: violence, a desire to suppress pure and simple, or else medical care, or pity.<sup>54</sup>

This understanding of the “monster” as an entity transgressing or defying the parameters of the legal order is the most contemporarily relevant one. However, it bears noting that Foucault’s analysis of “monstrosity” within different historical periods include other understandings of the notion closer to the popular notion of “monster” *qua* hybrid or *qua* violation of some natural order. From the Middle Ages to the 18th century, the “monster” was essentially a kind a hybrid. It was therefore not only “deformed, disabled, defective”, but a transgression of nature. It was a mixture of realms (human and animals), of individuals (siamese twins), of sexes (hermaphrodites), of life and death (“the fetus born with a morphology that means it will not be able to live but that nonetheless survives for some minutes or days”), and of forms (“the person who has neither arms nor legs, like a snake”).<sup>55</sup>

However, Foucault emphasizes the passage from an understanding of monstrosity as a violation of *nature* to a transgression of *law*. In the 17th and 18th century, if not before, monstrosity only existed “when the confusion comes up against, overturns, or disturbs civil, canon, or religious law”:

Monstrosity . . . is the kind of natural irregularity that calls law into

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53. MICHEL FOUCAULT, *LES ANORMAUX, COURS AU COLLEGE DE FRANCE, 1974-1975*, 87-8 (1999) [author’s translation].

54. *Id.*

55. *Id.* at 58. For this translation and the following ones, I use: MICHEL FOUCAULT, *ABNORMAL, LECTURES AT THE COLLEGE DE FRANCE, 1974-1975*, 63 (Graham Burchell transl., 2003).

question and disables it. Law must either question its own foundations, or its practice, or fall silent, or abdicate, or appeal to another reference system, or again invent a casuistry. Essentially, the monster is the casuistry that is necessarily introduced into law by the confusion of nature.<sup>56</sup>

Not all disabled persons are therefore monsters in this legally transgressive sense: “[t]he disabled person may not conform to nature, but the law in some way provides for him.”<sup>57</sup> Only morphologies that prevent laws to regulate and discipline individuals are monstrous in that sense.

Foucault considers, for instance, certain cases of hermaphrodites who can be seen both to constitute transgression to the natural order and to defy laws regulating sexual behaviours on the basis of a defined gender. Foucault explains how the law brutally eliminated such monsters (“[they] were executed, burnt at the stake and their ashes thrown to the winds”) by normalizing them when possible. For instance, hermaphrodites, as it were, could cast a human cloak upon their monstrosity, by abiding by the norms applying to their dominant gender, under pain of being tried and condemned to death for infringing norms regulating sexual behaviours. Foucault also notes that one hermaphrodite case simply led to an order (again, under pain of death) not to live with anyone of either sex.<sup>58</sup>

These different dramatic scenarios are unfortunately familiar to disability activists and scholars who might well note that the state nowadays often has three main ways of responding to people with disabilities: (1) radically excluding them (from certain social opportunities, benefits or protections), (2) assimilating them (through forms of integration and accommodation that help disabled people to cast a cloak of normalcy upon their insufficiently acknowledged differences) or (3) creating a parallel special legal regime that does not threaten dominant social norms. Requesting the hermaphrodite to refrain from sex should echo the contentious policies framing the sexuality of people with disabilities, including intellectual disabilities. The reader is invited to consult Andrew Sharpe’s *Foucault’s Monsters and the Challenge of the Law* for an extension of this Foucauldian frame of analysis to contemporary cases of “monsters.”<sup>59</sup>

A fascinating English case cited by various bioethicists and philosophers - including scholars inspired by Michel Foucault such as Margrit Shildrick and Andrew Sharpe is that of conjoined twins, Jodie and Mary: *Re A (conjoined twins)*<sup>60</sup> in which British Courts decided that it was

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56. *Id.* at 63-4.

57. *Id.*

58. FOUCAULT, *supra* note 53, at 62-3.

59. ANDREW SHARPE, *FOUCAULT’S MONSTERS AND THE CHALLENGE OF THE LAW* (2010).

60. *Re A (conjoined twins)*, 2 WLR 480 (2001).

permissible to save one of the conjoined twins at the cost of the weaker twin's life. Shildrick notes that courts failed to even consider the possibility that the twins, Jodie and Mary, were a single being, "Jodie-Mary". A reading of the trial judge's and appellate judges' opinions reveal that, in spite of their different legal views on how it was possible to justify the dying of one twin in order to prolong the surviving twin's life, judges assumed that they were dealing with two distinct persons. A multi-headed entity does not exist as a legal subject, only individuals "can be interpellated by the law", Shildrick writes.<sup>61</sup> This case illustrates how certain forms of differently embodied subjectivity are precluded to exist from a legal point of view and will only be legally managed once normalized in one way or another.

Legal scholars and political theorists could use the notion of the monstrous by paying attention to situations where people are excluded from political or legal subjecthood because they lack the capacities or needs that legal procedures, institutions or rules ordinarily utilize to achieve their goals.

For instance, alleged victims of crimes who have mental disabilities have long been prevented from acting as witnesses in diverse jurisdictions, because they do not have the cognitive capacity to explain the theoretical notions of "promise", "truth" and "wrongness" or the composite idea of "promising to tell the truth", or "it is wrong to lie". However, courts have recently considered that their capacity to tell the truth could well be unrelated to the sophisticated cognitive capacities required to explain the notion of "truth" or "wrongness" (something even professional philosophers find arduous).<sup>62</sup>

Similarly, the social contract theories of John Rawls<sup>63</sup> and David Gauthier,<sup>64</sup> for instance, have excluded people with severe disabilities because they are deemed unable to cooperate socially to a sufficient extent. If individuals do not possess (enough of) the needs, capacities and propensities for social participation on which modern theories of justice from Thomas Hobbes<sup>65</sup> to John Rawls' capitalize, they cannot be part of the social contract. This is because their differences prevent them from being cooperative in, accountable to, or participants of, society, conceived

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61. MARGRIT SHILDRICK, DANGEROUS DISCOURSES OF DISABILITY, SUBJECTIVITY, AND SEXUALITY 118 (2012).

62. R v D.A.I., SCC 5 (2012); see also Janine Benedet & Isabel Grant, *D.A.I.: More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth*, 25 CAN. J. OF WOMEN & L. 31 (2013) and Jonas-Sébastien Beaudry, *The Intellectually Disabled Witness and the Requirement to Promise to Tell the Truth*, DALHOUSIE LAW JOURNAL (forthcoming Summer 2017).

63. RAWLS, *supra* note 42.

64. DAVID GAUTHIER, MORALS BY AGREEMENT (1987).

65. THOMAS HOBBS, LEVIATHAN (1651).

as a joint venture. They are therefore cast as “monsters” in a Foucauldian sense. It is not that they should be castigated for not being “capable enough”, but rather that there is no room for them in this theory. Their very existence may, in fact, point to an empirical and theoretical lacuna in contractualist theories of justice. Incorporating various PWD as subjects of justice within such theories may stretch the theory beyond recognition insofar as it would challenge some of its basic assumptions. Some liberal thinkers have amended<sup>66</sup> or partly abandoned these theories for making use of an incomplete picture of human beings. For instance, Martha Nussbaum has suggested to complement contractual thought with capability theory, and Eva Kittay has suggested to complement it with considerations drawn from care ethics.<sup>67</sup>

Not all instances of the monstrous may sway legal scholars or political theorists to alter their views. For instance, many may readily agree to criticize legal treatments of mentally disabled witnesses and social contract theory, while nonetheless having reservations with regard to conceptualizing conjoined twins as a single being. This is probably because the two former examples suggest the kind of piecemeal criticisms lawyers are comfortable with. Recognizing the status of Jodie-Mary as a metaphysically single being goes further than tinkering with our legal notions to be more responsive to the well-being of Jodie-Mary. It would serve to destabilize liberal assumptions about individual subjectivity. Since the twins share parts of a same body, but not a same brain, thinking of them as a single being would challenge the mainstream assumption that psychological capacities are the hallmark of personhood. (The situation would be different if Jodie and Mary shared thoughts or portions of their psychological agency).

However, even only focusing on variations in mental capacities amounting to “monstrosity” in the Foucauldian sense could serve to improve the well-being of outliers within a liberal framework. People with intellectual impairments can be excluded from the moral, political and legal community when it is understood as a community of autonomous agents. The theoretical construction of “monsters” can be said to occur when scholarship and legal frameworks (1) define moral and legal personhood in terms of psychological states, may they amount to making this subject a “respondent,”<sup>68</sup> a “project pursuer,”<sup>69</sup> a “subject-of-a-life”<sup>70</sup>

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66. E.g. Henry Richardson, *Rawlsian Social Contract Theory and the Severely Disabled* 10 J. ETHICS 419 (2006); Cynthia Stark, *Respecting Human Dignity: Contract Versus Capabilities*, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 111 (Eva Feder Kittay and Licia Carlson eds., 2010); Sophia I. Wong, *Duties of Justice to Citizens with Cognitive Disabilities, Capabilities*, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 127 (Eva Feder Kittay and Licia Carlson eds., 2010).

67. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2007); EVA KITTAY, *LOVE'S LABOUR* (1998).

68. CHARLES TAYLOR, *PHILOSOPHICAL PAPERS: VOLUME 1* 97 (1985).

69. LOREN LOMASKY, *PERSONS, RIGHTS, AND THE MORAL COMMUNITY*, ch. 2 (1990).

or a “moral agent” and (2) define what counts as threats to this personhood (e.g., poor “psychological connectedness”<sup>71</sup> – allowing potentially attainable future goods to matter to someone – vanishing<sup>72</sup> or limited<sup>73</sup> agency, or multiple-personality disorders). I consider such examples below.

Critical attention to the construction of otherness has long been present in one form or another in mainstream legal and political thought, in a way that exemplifies that scholars defending and specifying the values of liberalism are already making use of the ideas contained within the Foucauldian notion of the monstrous. However, when liberals (be they anti-discrimination theorists or human rights activists) promote concrete institutional changes, they generally pay insufficient attention to the ideology that previously hid them from view as possible alternatives. Instead, they may rely on empirical findings to justify assimilation – for instance, demonstrating that mentally disabled people are cognitively able to tell the truth and therefore are able fulfill the truth-finding aim of criminal trials. This integrationist outlook has two negative consequences.

First, scholars and practitioners aiming to promote equality may take longer to detect the exclusion of problems that were carefully hidden or naturalized by legal frameworks. Second, their modes of detection or correction paradigmatically take the problematic form of normalization, as we will see in the next section. Attention to the Foucauldian notion of the “monstrous” is likely to lead to more imaginative integrative legal reforms by triggering a scrutiny of legal frameworks or procedures that are assumed not to be applicable to some disabled people. It would also enable us to detect “forceful rejection in the face of radical transgressivity”<sup>74</sup> that may otherwise go unnoticed. As Foucault stresses in the quote opening this section, the monster may well be *hors-la-loi* (outlaw), but that does not mean that it will enjoy a desirable fate. Not being a legal subject may result in forceful suppression translating, socially, into marginalization and, legally, into a suspension of rights, as in the example of people who are not mentally competent to undergo a criminal trial.<sup>75</sup> Finally, Foucauldian attention to the over-reliance by legal actors (legislators, policy-makers, judges) on psychiatric or medical evidence may also enable legal scholars to criticize the suspension of

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70. TOM REGAN, *THE CASE FOR ANIMAL RIGHTS*, (2004).

71. JEFF MCMAHAN, *THE ETHICS OF KILLING* (2003).

72. Bruce Jennings, *Agency and Moral Relationship in Dementia*, 40 *METAPHILOSOPHY* 425 (2009).

73. Leslie P. Francis & Anita Silvers, *Thinking About the Good: Reconfiguring Liberal Metaphysics (or Not) for People with Cognitive Disabilities*, 40 *METAPHILOSOPHY* 475 (2009).

74. SHILDRICK, *supra* note 61, at 111.

75. For instance, in *Starson v Swayze*, 2003 SCC 32, the appellant’s choice not to be medicated and thus normalized led to his longer incarceration and treatment *qua* monster.

rights, privileges and benefits of individuals with disabilities or illnesses.<sup>76</sup>

Paying attention to the theoretical figure of the “monster” orients us toward focusing on various ideological motivations for excluding “abnormal” beings and enables critical thinkers to reveal hidden legalistic modes of exclusion. Detecting the monstrous, however, requires an active effort and learned attunement, since we naturally conceal the processes of creating monsters to enhance our sense of control over society and over ourselves. The monstrous is a peripheral legal notion, in the sense that it challenges the limits of the law. Excluding tactics to deal with the monstrous, Shildrick suggests, are akin to coping mechanisms that alleviate anxiety: the anxiety caused by the monster’s challenge to the boundaries of our bodies, and of our legal order and subjecthood.<sup>77</sup> Constructing the monstrous is also an insidious form of power: legal actors unwittingly exercise this power by applying rules while leaving their oppressive underlying foundations intact and their legitimacy unquestioned.<sup>78</sup>

Alternatively, the concept of “monster” could be reappropriated as an empowering strategy not so much to *denounce* the exercise of power that constituted outsiders as to *vindicate* “monstrous” embodiments as legitimate, indeed, desirable, ways of being in, and relating with, the world. In other words, new “monsters” would be detected in order to subvert traditional conceptions of the subject excluding PWD. A Foucauldian would note that this would still be a form of normalization, albeit a more demanding one testing the limits of social structures’ elasticity and ability to accommodate otherness. However, even admitting that some form of normalization within social structures is inevitable (for everyone, disabled or not), liberals concerned with the well-being of PWD would already see some progress if social structures would mould PWD less violently than they otherwise could. This alternative strategy is illustrated through an openness to new forms of community living, education, political participation or artistic expression unencumbered with expectations of normalcy. Catherine Frazee expresses it elegantly when she responds to Shildrick’s discussion of the monstrous:

We are, we now assert, integral beings, authentic, viable, and worthy of life. In a process of reinventing and self definition, we assert our beauty and our strength and our particularity as part of the asymmetrical, dissident, chaotic, interdependent, lumpy, leaky, and dappled natural world. No longer the monstrous object contained within the circus tent or the death camp, disabled people now step

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76. See, e.g., Judith Mosoff, *Motherhood, Madness, and Law*, 45 U. TORONTO L.J. 107 1995.

77. SHILDRICK, *supra* note 61 at 84, 112.

78. Steven Lukes similarly argues for the importance of detecting hidden conflicts of interests in STEVEN LUKES, *POWER: A RADICAL VIEW* (1974).

centre stage into a subject position as artists, creators, and agents of culture.<sup>79</sup>

Unfortunately, this subversive exercise of power resisting assimilationist norms and demanding radical reconfigurations of the social order in order to make it responsive to a multiplicity of human needs and capacities will be met by “the force of normalization”, to which we now turn. Such a force, Shildrick explains,

should never be underestimated, and I do not want to suggest that successful resistance to the standards of sameness and difference is assured. The norms of modernity are deeply entrenched. The persecution of those who are classed as monstrous may operate within historically changing parameters, but it is as persistent as it is intolerable.<sup>80</sup>

### *B. Normalization*

So far, we have seen that monsters threaten the legal order and our self-understanding. They defy the state’s modalities of power and parameters of legal subjecthood. Ways to deal with them, Foucault explains, are necessarily *extra-legal*.

The claim that monsters are exclusively dealt with extra-legally may seem counter-intuitive: are the violent modes of repression or elimination of monsters (such as the historical treatment of hermaphrodites, mentioned above) not justified through legal means? Are people with the most “abnormal” morphologies not still subjected to the law? Henry-Jacques Sticker, in his *History of Disability*, notes that PWD are not the monsters medievally imagined to live “in a geographical unknown” and confirm our own normality by helping us to imagine and answer the anguishing question: “how would we be if we were not the way we are?” Disabled people are, on the contrary, living in households and villages; they are “immanent in our society and not on its borders” and make us more fearful “because *they are already there*.”<sup>81</sup>

The claim that monsters can only be dealt with in extra-legal ways only means that monsters, by definition, evade the legal realm. Their elimination or integration through legal means are not so much legal treatments of those individuals *qua* monsters as they are means or abstracting their monstrosity away. Disabled people can indeed be

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79. Catherine Frazee, *Commentary. Portrait of the Activist as a Young Monster*, in YORK INSTITUTE FOR HEALTH RESEARCH, MONOGRAPH 1: VULNERABILITY 14 (2004), available at <http://yihr.info.yorku.ca/files/2014/11/Monograph-1-Vulnerability.pdf>.

80. Margrit Shildrick, *Why Monsters Matter: Ethics, Anxiety and Difference*, in YORK INSTITUTE FOR HEALTH RESEARCH, MONOGRAPH 1: VULNERABILITY 9 (2004), available at <http://yihr.info.yorku.ca/files/2014/11/Monograph-1-Vulnerability.pdf>.

81. HENRY-JACQUES STICKER, *HISTORY OF DISABILITY* 69-70 (2000).

“normalized,” i.e. made “normal”, same, “one of us”. Their monstrosity thus becomes an accidental rather than essential feature of their being. Insofar as they can be normalized, they are no longer “monsters” since legal norms can apply to them, at least partially. This normalized portion of themselves is entitled to legal personhood, though their legal prerogatives and rights may only be partial. The capacities that they can exercise *like normal people* are those they can exercise *qua* legal subjects. Other aspects of their identity are whittled away. As Seyla Benhabib puts it, “the other, as different from the self, disappears. . . [Differences] become irrelevant.”<sup>82</sup>

Shildrick makes use of both Foucault’s and Sticker’s writings to explain how normalization occurs through legal ordering, including through disability rights discourses:

[L]egislation in support of people with disabilities has taken as its baseline some notion of justice, understood either as the formal equality of opportunity, or as a distributive model which compensates those unable – by reason of their impairment – to take advantage of the available options.<sup>83</sup>

Shildrick’s reflections on normalization should be of particular interest to liberals who will recognize in the previous quote the familiar way in which rights and compensatory measures are the main kinds of benefits bestowed upon PWD. The problem with normalization, as stated above, is that it erases the differences of disabled people<sup>84</sup> and this prevents social engineers from imagining a legal order that would more meaningfully integrate differently embodied ways of being. These issues are hardly new to liberals, who have long problematized the lures of formal legal equality. For instance, legal scholar Martha Minnow has problematized rigid legal categorizations of differences. While law- and policy-makers highlight differences in order to deal with them fairly, they may also incidentally exacerbate these differences and reassert the validity of the “normal” benchmarks by contrast to which differences are created. Minnow calls this the “dilemma of difference.”<sup>85</sup> Differences can be either erased through equalizing frameworks or highlighted through compensatory ones. The danger is to make differences intrinsic, abnormal or natural features of individuals rather than to capture how they are (at least partly) a social construction. It transforms certain disabling differences into the individual’s own problem and it casts different individuals as burdensome

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82. Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in *FEMINISM AS CRITIQUE: ESSAYS ON THE POLITICS OF GENDER IN LATE-CAPITALIST SOCIETY* 89 (Seyla Benhabib & Drucilla Cornell eds., 1986).

83. SHILDRICK *supra* note 61, at 114.

84. *Id.*, at 113.

85. MARTHA MINNOW, *MAKING ALL THE DIFFERENCE* (1990).

members of society, requiring special, costly treatments, or as being necessarily worse off for not being “normal.”<sup>86</sup> The notion of equality has been vastly theorized within analytical moral and political literatures and criticized for suffering from a vagueness or a mistaken focus that may prevent it from accomplishing the valuable agenda that liberals are expecting from it.<sup>87</sup>

Post-structuralist reflections on normalization helpfully complement this body of literature by more closely examining underlying structures of power and the potentially ableist vectors they further. These underlying structures are said to utilize political and legal notions, like equality or rights, just like they would any other social tools, in order to persist. Liberals generally assume that political ideals and legal tools (such as equality and rights) sometimes fail because, innocuously enough, they are too vague and policy-makers have not properly specified the values they convey (axiological mistakes) or have failed to find the proper way to materialize them (empirical mistakes). By contrast, critical analyses of power present these mistakes as strategic devices to control the boundaries of the social and legal order, as well as the identity of the legal subject. Analytical moral and political theorists have more difficulty articulating such suspicions, due to their methodological and conceptual foci.

Judges suffer from a similar lack of critical sense when arguments put before them evoke *ideological* harm. For instance, non-individuated, systemic and/or future harm is often either discounted or made secondary to individual, immediate harm. This may draw no major concern when the ideological harm is itself an expression of social prejudice. For instance, Canadian courts rejected the anti-same-sex marriage argument that it would damage the heteronormative institution of marriage. This sort of argument was a dead letter, as the liberal legal idiom prioritizes individual rights to equality and liberty over the social imposition of controversial values within a community.<sup>88</sup>

In other cases, however, the ideological harm would affect marginalized or oppressed populations. For instance, Canadian courts rejected the argument according to which legalizing physician-assisted suicide would provide an ableist ideology with one more tool to marginalize or oppress PWD. Numerous members of disability communities expressed the concern that the medical profession, legal actors and the population more generally, tend to underestimate the quality of life of PWD. For instance,

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86. Anita Silvers, *No Talent? Beyond the Worst Off? A Diverse Theory of Justice for Disability*, in *DISABILITY AND DISADVANTAGE* (Adam Cureton and Kimberley Brownlee ed., 2009).

87. Elizabeth S. Anderson, *What Is the Point of Equality?* 109 *ETHICS* 287 (1999); Amartya Sen, *Equality of What?*, in *EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES* (Stephen Darwall ed., 1995).

88. See, e.g., *Halpern v. Canada* 95 C.R.R. (2d) 1 (2002); *Hendricks v. Quebec* R.J.Q. 2506 (2002); *Barbeau v. British Columbia* BCCA 251 (2003).

PWD have often reported that medical professionals underestimate the value of their life, provide them with poorer care, more casually dismiss their needs, or attempt riskier treatment to deal with their health issues. Other representatives of disability communities worry that opening suicide as a socially acceptable option may feed heroic narratives according to which disabled people should sacrifice themselves for the greater good.<sup>89</sup>

Whether or not this kind of harm should justify the legal prohibition of assisted suicide is a different, controversial question. Many disabled people and philosophers of health and disability think that it does not. Dan Brock and Anita Silvers, for instance, both think that physician-assisted suicide can be legalized while the disability community and policy-makers continues to fight against ableism on distinct or related fronts.<sup>90</sup> However, scholars like Silvers are at least aware of the harm that others are worried about. What is striking in the recent case law that legalized assisted-dying in Canada is how, from the trial level to the Supreme Court, ableist ideological harm received no more than a polite, normatively ineffective, nod—an acknowledgement of existence.<sup>91</sup>

To summarize, an attention to normalizing processes — that is, to the fact that some kinds of harm, needs and capacities are dismissed out of hand because they are assumed to be irrelevant to the protection and equal treatment of “normal” legal subjects — would enable liberals to closely scrutinize these otherwise unreflectively endorsed processes and assumptions.

Scholars working within critical legal studies are already suspicious of apparently neutral language, as well as of legal objects presented as “natural” rather than socially and legally constructed. The same kind of academic gap between intellectual and methodological postures between post-structuralist and liberal scholarships I am gesturing at in this article also occurs within law schools between factions of “traditional” legal scholarship and “Crits.”<sup>92</sup> Fortunately, it can also be said that newer generations of law students are trained to be sensitive to ideological vectors, political power, systemic prejudices, and other policy-related matters that were previously considered as falling outside of the study of law proper. While there are still institutional bastions of critical thinking

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89. See, for example, Catherine Frazee’s amicus curiae brief in *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 (on file with author) and factums on appeal by interveners opposing the legalization of medical aid in dying in *Lee Carter, et al. v. Attorney General of Canada, et al.* (Supreme Court of Canada, docket 35591). See also Carol J. Gill, *No, We Don’t Think Our Doctors Are Out to Get Us: Responding to the Straw Man Distortions of Disability Rights Arguments Against Assisted Suicide*, 3 DISABILITY & HEALTH J. 31 (2010).

90. Dan W. Brock, *A Critique of Three Objections to Physician-Assisted Suicide*, 109 ETHICS 519 (1999); Anita Silvers, *Protecting the Innocents—People with Disabilities and Physician-Assisted Dying* 166 WESTERN J. OF MEDICINE 407 (1997).

91. *Carter v. Canada (Attorney General)*, 2012 BCSC 886 at para.194 and 811-815; *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331.

92. Robert W. Gordon, *Critical Legal Studies*, 10 LEG. STUD. F. 335, 338 (1986).

and analytic thinking (contrast the law faculties of Birkbeck and Oxford, in England, and the philosophy departments of the New School and NYU, in the United States), legal scholars, practitioners and students are increasingly exposed to critical theory, or at least endorse, even while maintaining a traditional liberal language, its anti-naturalizing stance. This is partly due to the increased visibility of feminist and social justice scholarship whose work on equality enables legal practitioners to better respond to oppression.

Judges and policymakers can of course legitimately refuse hypotheses concerning structures of power and ideology on the ground that they are not sufficiently rigorously argued. It is the task of legal scholars, practitioners and empirical researchers from various disciplines, to provide such an argument by examining the fine grain, history and concrete impact of exclusionary legal structures. Arguments concerned with the harms caused by an ableist ideology may be rejected on the ground that they are insufficiently supported, but not out of hand on the basis of qualitative inadmissibility. Such an outright rejection should itself be scrutinized as a potential expression of an ableist ideology. We learn from Foucault that subjects exercising power may otherwise be well-meaning legal actors and meticulous theorists.<sup>93</sup> Legal actors, like all other subjects, “do not consciously exercise power; they are merely power’s passive objects.”<sup>94</sup>

A focus on normalizing processes may also enrich the influential “social model” of disability, which is probably the key lesson that disability studies have succeeded to teach to legal actors.<sup>95</sup> The *medical* model of disability postulates that disability is an individual, physiological issue, to be defined and dealt with by the medical profession. It roughly views disability as a long-term disease affecting one’s functions. The *social* model of disability, by contrast, situates disability outside of individual bodies and postulates that it is a social phenomenon. People, its motto goes, are disabled by society (i.e. social exclusionary structures) rather than their bodies.<sup>96</sup>

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93. It may seem surprising that philosophers themselves would become pawns of ideological structures. However, like judges whose role is to apply the law rather than question its underlying structures, philosophers may focus their effort on the specific task of analyzing a concept in abstraction of its historical use by various social actors. On ableist prejudices found in philosophical literature, see LICIA CARLSON, *FACES OF INTELLECTUAL DISABILITY* (2009).

94. Kevin Jon Heller, *Power, Subjectification and Resistance in Foucault*, 25 *SUBSTANCE* 78 (1996).

95. Consider, for example, *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (S.C.C.) and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.). See also Ravi Malhotra, *Has the Charter Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century*, 58 *SUPREME COURT L. REV.* (2012).

96. These definitions aim at briefly defining the key ideas behind the primitive versions of these models; they do not do justice to their numerous refined versions, nor to the medical profession which has greatly “socialized” its understanding of disability. See Jonas-Sébastien Beaudry, *Beyond (Models of) Disability?* 41 *J. MED. PHILOS.* 210 (2016).

Although proponents of the social model are already aware of the benefits and harms associated with normalization, Shildrick suggests that both the medical and social models of disabilities limit themselves to a value-laden discourse of rights and fail to “recognise either the disciplinary effects, or the irreducible incompleteness and instability, of [the] discourse[s] [they produce to achieve social justice].”<sup>97</sup> Shildrick’s comments on disability models will particularly resonate with social justice scholars when she mentions that both the medical and the social models of disability make use of rights discourse in a way that fails to deal with the limitations of such “legally situated notions of justice and equality”:

Any serious account of rights will need to acknowledge the multiple complexities that inform the differences between positive and negative rights and their relation to diverse forms of justice; the issue of conflicting rights; the problem of differential access to law; and even the question of whether rights should be preferred to alternative values.<sup>98</sup>

Both the medical and the social models of disabilities, putting aside their respective merits, have flaws and limitations, one of which is their tendency to normalize PWD. The social model tells us that disabled people have been disabled by society: they are actually not “disabled people” in any essential way. Rather, they are “people disabled by X”. For instance, the disabling issue of a wheelchair user would not be, say a particular paralysis of her body, but the lack of a ramp to access a building in a wheelchair. It is this particular infrastructure that would “disable” a wheelchair user, not the fact that she moves in an “abnormal,” but functionally efficient, way. The social model, for better and for worse, sometimes convey the idea that disabled people can be brought in line, given proper adjustments. It still often uses normalcy as a benchmark to articulate its claims, thus reinforcing disabling “normal” structures and expectations of normalcy even as it asks for accommodations within such structures or exceptions to such expectations.

The medical model normalizes disabled people in a different way. It tells us that PWD have a problem that is internal to them. The problem is not social; it is individual, medical and physiological. Instead of fixing society, society must fix them. The premiss, however, is that PWD *can* or should be “fixed” medically. Disability is analogized to a disease to be cured. The “person with a disability” has the prospect of becoming a “person” full stop. Even if this person does not have this prospect, the medical model categorizes her as physiologically deficient, and more

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97. SHILDRICK, *supra* note 61, at 114-5.

98. *Id.* at 114.

generally as worse off. By casting the disabled person as a “defective” person or subject, even when she cannot be cured, the medical model goes a long way in normalizing her. It places her, as it were, within a well delineated exception to “what should be.” Disability perceived as a statistical aberration can then be cast as the unlucky misfortune of not being “what one should be”. It is assumed to be a negative state of affairs and medical treatments normalizing individuals are seen as the proper response. The anxiety of able-bodied people dealing with differences is alleviated because this difference no longer threatens their identities and the way they imagine themselves, that is, the physical, social, political, legal and phenomenal boundaries of their selves. Disabilities are conceptualized as non-essential features of unfortunate persons, who would otherwise be seen as “normal people”. In ethical terms, this modelling often translates to a duty of charity toward these “unlucky souls”, fuelled by self-aggrandizing commiseration (“but for the Grace of God, there goes I”). Disabled people have a long history of being the recipients of charity and compassion, in addition to being monstrous.<sup>99</sup>

It is much less costly to our social structures to conceptualize the disabilities of PWD as non-essential features of their being. Insofar as their otherness can be theorized away, their integration does not threaten our social, legal and economic order to the same extent since they can be moulded to fit the “normal” environment rather than the other way around. By contrast, recognizing disabled people’s differences would require society to be fully receptive to their “abnormal” embodiment rather than theorize it away. It would not redefine otherness into sameness before facing the ethical demand PWD make on society, as they request concern, respect, integration, love, and the myriad of moral attitudes that able-bodied people have come to expect from fellow members of their community. This change of perspective would furthermore challenge our autonomy-centered legal traditions, our economic capitalist structures, our network of private and public roles, and the morphology of what we take to be desirable bodies (as opposed to abject or disgusting). This call to acceptance, made in dozens of ways within the interdisciplinary field of disability studies, would be revitalized with an awareness of the social, psychological and economic factors standing in the way of hearing it.<sup>100</sup> Once heard, however, what ethical principles could sustain this awareness of otherness? In other words, what disposition or attitude should legal actors endorse vis-à-vis differences threatening our legal order and mainstream conceptions of the legal subject? And can such an ethical

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99. See sources cited *supra* notes 15 & 86.

100. For instance, Shildrick proposes a diagnosis of anxiety to explain society’s discomfort with different forms of embodiment, see *supra* note 61, at ch.4. I have discussed affective responses to disability elsewhere, see *supra* note 52.

outlook ever become part of our legal order? Those are the questions that will occupy the rest of this article.

### C. *The Principle of “Limitless Welcome”*

Confronted with structures of power that seek to expel, segregate or normalize, one avenue open to PWD is to propose and vindicate new social structures. This exercise may be called “resistance”, to use a term that Foucault has defined as a multiplicity of social vectors playing the “role of adversary, target, support, or handle in power relations.”<sup>101</sup> Whether “resistance” is a necessary by-product, antagonist, or component of power, or whether “one man’s resistance is just another man’s power”<sup>102</sup> is a debated question in Foucauldian scholarship, since the concept of resistance may be interpreted differently in light of Foucault’s earlier and later work.<sup>103</sup> Kevin J. Heller explains that Foucault does not mean to essentially distinguish power from resistance, or hegemonic power from anti-hegemonic power. Resistance is simply another exercise of power, that is, “the capacity to modify the actions of others.”<sup>104</sup> Heller suggests that Foucault calls this power “resistance” to stress it is exercised by less powerful groups.

Social modelists of disability, found amongst scholars in law, sociology and political philosophy, as well as within activist groups, can be seen as formulating such a resistance. As Shildrick explains, “[t]o call on the law as disabled is scarcely a challenge to the normative standards of ablebodiedness that tacitly underlie the liberal humanist notion of a legal subject.”<sup>105</sup> In other words, if PWD accept social structures that already cast them as physiologically defective, this will limit the kind of social demands they can make. They will typically be limited to medical care or forms of compensation, rather than more substantive social integration and architectural and institutional changes to their environment. Similarly, if they do not challenge a theory of justice that presents them as unlucky or worse off deserving only of compensation rather than being integrated as talented social participants, they would only be entitled to resources enabling them to reach the outcome, the “finish line”, that able-bodied people ordinarily achieve rather than to resources placing them on a same starting line.<sup>106</sup> This is why the social model of disability, in spite of the

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101. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I, THE WILL TO KNOWLEDGE* 95 (1978).

102. MARK G. E. KELLY, *FOUCAULT’S THE HISTORY OF SEXUALITY, VOL. I, THE WILL TO KNOWLEDGE* 69 (2013).

103. Brent Pickett, *Foucault and the Politics of Resistance*, 28 *Polity* 445 (Summer, 1996).

104. Heller, *supra* note 94, at 116.

105. SHILDRICK, *Supra* note 61, at 103.

106. Silvers, *supra* note 86. ANITA SILVERS, DAVID WASSERMAN AND MARY B. MAHOWALD, *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* (1998).

great number of criticisms that it has received (as any new paradigm does), has often been described as empowering and freeing to many individuals who had previously accepted that disability was a problem, and was *their* problem.

The work of Anita Silvers, who thinks about disability from within the tradition of liberal justice, can also be seen as providing the disability community with a language of resistance.<sup>107</sup> Only by refusing the place that the legal order and traditional liberal theories of justice give them can PWD constitute their own legal subjecthood rather than “unavoidably consolidate the power of the system that constitutes and sustains such binaries [disabled/able-bodied; dependent/independent] in the first place.”<sup>108</sup>

Shildrick, however, believes that “there is more at stake than the performativity of resistance.”<sup>109</sup> The disability community (broadly understood as anyone implicated in empowering PWD) may well offer counter-discourses to resist assimilation, but these discourses would not exhaust the inexhaustible otherness that disability presents. Shildrick is haunted by the “remaining undecidability that is never entirely settled or resolved by the technologies of power that shape the notion of disability”.<sup>110</sup>

Many disability scholars would not deny that the concept of disability has numerous and fluid facets that cannot be reduced to a single meaning. Tom Shakespeare and Nicholas Watson believe it is for this reason a paradigmatically post-modern concept.<sup>111</sup> Shildrick turns to Jacques Derrida, who deals more specifically with the insufficiency of law to capture an ever-changing otherness:

For both writers [Derrida and Foucault], the law is never impartial but always caught up with the strategies of power and a discursive violence that seeks to grasp and domesticate the troublesome other. Yet where Foucault sees resistance inherent within the productive power of normativity and governmentality, for Derrida, the law must be [. . .] rethought in relation to an impossible justice. When Derrida speaks of justice, he refers not to the here-and-now application of law through the agency of the police and the courts, but to that which is always yet to come.<sup>112</sup>

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107. *Id.*

108. SHILDRICK, *supra* note 61, at 116.

109. *Id.*, at 113.

110. *Id.*

111. Tom Shakespeare *The Social Model of Disability*, in *THE DISABILITY STUDIES READER* 266 (L. J. Davis ed., 2010); see also C. Boorse, *Disability and Medical Theory*, in *PHILOSOPHICAL REFLECTIONS ON DISABILITY* 55 (D.C. Ralston, J. Ho ed., 2010).

112. SHILDRICK, *supra* note 61, at 107.

Shildrick favours the Derridean approach over the Foucauldian one for maintaining the “singularity and strangeness” of the “monstrous *arrivant*”, the stranger who disrupts legal normativities.<sup>113</sup> She endorses Derrida’s intimation of extending our hospitality to anomalous bodies who will inevitably and always transgress the law.

The idea that we ought to be receptive to the differences of others in order to fulfill our moral duties toward them is also present in liberal theory making sense of civil rights struggles. Philosophers and jurists working committed to the joint liberal ideals of liberty and equality have long recognized that *formal* equality (giving the same to all, irrespective of their individual differences) will fail to achieve the ideal of equality. In 1950, Justice Frankfurter in *Dennis v. United States* wrote that: “[i]t was a wise man who said that there is no greater inequality than the equal treatment of unequals.”<sup>114</sup> In 1989, Justice McIntyre, on the Supreme Court of Canada, quoted him and added that “the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.”<sup>115</sup>

The liberal desideratum to treat different people impartially in spite of their differences nonetheless reasserts the terms according to which they granted various entitlements as members of a community. By contrast, the notion of Derridean hospitality is not characterized only by a preparedness to receive the other as a guest in one’s own “home” (i.e. one’s society or institutions) but by a disposition to endure a kind of threat to one’s home and self, and even *not* to be prepared for such a threat when it creeps up on us. As Jacques de Ville explains, “[h]ospitality thus involves the subject being both host and hostage. There is consequently no ‘I’, in an individual or collective sense, having the ability or power to make room for the other.”<sup>116</sup> This involves a threat on one’s identity prior to this genuinely hospitable meeting with the “disabled other.”<sup>117</sup> This is how Derrida describes the destabilizing potential of the radically Other, which he calls “absolute arrivant”:

[T]he arrivant par excellence, is whatever, whoever, in arriving, does not cross a threshold separating two identifiable places, the proper and the foreign, . . . I am talking about the absolute arrivant, who is not even a guest. He surprises the host . . . enough to call into question, to the point of annihilating or rendering indeterminate, all the distinctive signs of a prior identity, beginning with the very

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113. *Id.* at 122.

114. *Dennis v. United States*, 339 U.S. 162, 184 (1950).

115. *Andrews v. Law Society of British Columbia*, 1 SCR 143, 165 (1989).

116. JACQUES DE VILLE, JACQUES DERRIDA: LAW AS ABSOLUTE HOSPITALITY 197 (1992).

117. *Id.*

border that delineated a legitimate home and assured lineage, names and language, nations, families and genealogies. The absolute arrivant does not yet have a name or an identity. It is not an invader or an occupier, nor is it a colonizer, even if it can also become one. . . . Nor is the arrivant a legislator or the discoverer of a promised land. As disarmed as a newly born child, it no more commands than is commanded . . . . It even exceeds the order of any determinable promise.<sup>118</sup>

This hospitable outlook requires legal and political actors (and citizens more generally) to endorse an attitude of openness toward the person whose embodiment and relations with others and the world, challenge both our individual identity and our shared values and public goals. This openness includes not only a concern for this outsider but also a disposition to be changed and challenged by her. For instance, the different capacities of a PWD within a particular social environment threaten the conception of a citizen as a worker able to take part of individualized, competitive modes of production, and therefore threatens capitalist ideology. It also emphasizes the traits of vulnerability and dependency that ineliminably characterize human life. Yet, as Alasdair McIntyre has noted:

[T]he history of Western moral philosophy suggests otherwise. From Plato to Moore and since there are usually, with some rare exceptions, only passing references to human vulnerability and affliction and to the connections between them and our dependence on others.<sup>119</sup>

Individual and collective, psychological and ideological, vectors prevent us from being genuinely receptive to otherness, by making one's society and self vulnerable to its threatening or anxiogenic character. Such receptivity is not an unusual experience between family members and friends, who often mutually influence their respective identities and interactively construct the dynamics of their relations. The suggestion to expand it writ large to all human beings if not all living things does seem to raise the threat of empathetic exhaustion and it also seems to strain the kind of moral commitments ordinary people are able or willing to undergo. Yet, the integrationist challenge is to render such threats manageable or acceptable rather than to dismiss the profound epistemological and moral insights that such a receptive, open, disposition has the potential to bring us.

There is a meaningful difference between a disposition to put one's own

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118. JACQUES DERRIDA, *APORIAS*, 33-34 (1993).

119. ALASDAIR MACINTYRE, *DEPENDENT, RATIONAL ANIMALS* 1 (2001).

identity at risk and a disposition to help “abnormal” people. There is a meaningful difference between challenging the parameters of one’s community’s mode of interactions and cooperation and a disposition to reconsider how to best integrate PWD within one’s community as it currently exists. The less vulnerable the dominant, “welcoming,” group is willing to make itself, the more likely it is that the inclusion it finally bestows upon the outlier expresses enduring ideological vectors under other names. This is why social justice scholars and critical legal theorists must continually explain why a myriad of novel efforts to reach our ideals of equality run the risk of reproducing harmful ideological commitments that will endure under new forms.

The task of the legal philosopher committed to the Derridean ideal of hospitality, Jacques De Ville writes, is to “expose that which makes [legal concepts] possible in the first place;” it is “a movement away from essence, consistency and truth towards the (dangerous) logic of the *perhaps*.”<sup>120</sup> Shildrick explains that such a risk is not only worth taking because of what it will teach us about ourselves and for the sake of the “adventure of reconfiguring disability to feel and act differently”. It is also “an ethical necessity – a responsibility to otherness – that leaves no-one behind.”<sup>121</sup> As such, the Derridean most robust version of hospitality, the “Law of absolute hospitality”, is not a mere prescription of other-regarding concern, but a disposition to welcome the unknown. I have made a reference to the sort of other-regarding concern taking place within a family above because it would be familiar to liberal scholars working with the notions of care and empathy, but the Derridean ideal of absolute hospitality, is distinct from a prescription of other-regarding concern that would be directed at someone the agent already knows (and conditional upon some form of knowledge). As Derridean interpreter Judith Still describes it, “The door is open - even, there is no door, but rather perfect openness. Anything, however alien, can come in and take what it likes, do as it likes.”<sup>122</sup>

This desideratum of relatively unquestioning inclusion cannot be formulated as radically within liberal scholarship without threatening certain of its central tenets. More specifically, many liberal philosophers and social justice scholars are driven by the intuition that “everyone should be welcome” – even though their perceived obligation to answer to the question “how is this obligation of hospitality justified by liberalism?” mitigates the normative impact of this drive.

For instance, in their article on social contract theory, *Justice through*

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120. DE VILLE, *supra* note 116, at 199.

121. SHILDRICK, *supra* note 61, at 177.

122. JUDITH STILL, DERRIDA AND HOSPITALITY 18 (2010).

*Trust*,<sup>123</sup> Anita Silvers and Leslie Francis deal with a major issue that social contract theories have been confronted with: the exclusion of PWD. Social contract theories are generally divided in two strands: “contractarian” and “contractualist.” Very roughly, contractarian theory pictures society like a contract between self-interested participants who are potentially capable of benefitting or threatening others. It is associated with thinkers like David Gauthier<sup>124</sup> and nested in a tradition going back to Thomas Hobbes.<sup>125</sup> Contractualist theory, on the other hand, pictures society as the product of a reasonable contract-like procedure.<sup>126</sup> It is associated with thinkers like John Rawls<sup>127</sup> and Thomas Scanlon<sup>128</sup> and nested in a tradition going back to Immanuel Kant.<sup>129</sup> Contractarians exclude some PWD because they are deemed unable to sufficiently benefit the other self-interested participants to the social contract. Contractualists exclude some disabled people because they cannot take part to contracting procedures (which may be associated with a lack of moral power such as moral agency, and not only a lack of capacity to act as a cooperative contractor).

Silvers’s and Francis’s argument posits that society depends on trust to flourish. They also find that this requirement is embedded in the social contract tradition (rather than propose it as a novel interpretation): without the possibility of building, maintaining and fostering trust, no social cooperation would be possible. This first move is hard to contradict. Their next move, plausible, but more controversial, is to argue that integrating disabled people as full members of our society will foster such trust. This second move is not only more controversial because it may be empirically challenged, but also because it provides PWD with what seems like an accidental or secondary moral status. While their arguments are compelling, some may find that their effort to preserve the language of the social contract and its requirement that people be conceptualized as active social participant fails to challenge the traditional liberal conception of the subject of justice. Instead, the boundaries of the social contract are

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123. Anita Silvers & Leslie Francis, *Justice through Trust: Disability and the “Outlier Problem” in Social Contract Theory*, 116 *ETHICS* 40 (2005).

124. GAUTHIER, *supra* note 64.

125. HOBBS, *supra* note 65.

126. This is not to say that contractarians are not “reasonable”: of course, they “reasonably” pursue the outcome that would maximize their self-interest. However, their prudential, self-regarding goal differs from the contractualist focus on achieving an outcome that would respect participants *qua* decision-makers. Another way to distinguish them would be to say that contractarians emphasize the use of reason as instrumental whereas contractualists consider reasonability as a trait warranting a particular moral response. For a detailed description of those schools, see Cressida Heyes, *Identity Politics*, *The Stanford Encyclopedia of Philosophy* (2016 Edition), E. N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2016/entries/identity-politics/>.

127. RAWLS, *supra* note 42.

128. THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

129. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797).

stretched to integrate “outliers” in a way that risks normalizing them instead of challenging the status quo.

This argument written within the liberal tradition strikes me as a good illustration of the sort of analytical philosophy of disability that formulates ideas close to Derridean ideals of hospitality, but yet falls short of fully considering their emancipatory potential.

Consider, for instance, their notion of “outliers” or “out-groups,” which refers to individuals or a group of marginalized people (disabled people, African Americans, women, etc.) who are placed by the contract model “beyond the reach of equal justice.”<sup>130</sup> They define “outliers” elsewhere as “kinds of people who traditionally have been ignored by both theories and practices of justice.”<sup>131</sup> Even though this notion overlaps with the Foucauldian notion of the monstrous, the notion of “outlier” does not problematize the processes that constructed the category of outlier (although Silvers and Francis do note that dominant groups will typically use their own traits to define the entitlements-giving features that outliers do not possess). This could be justified by an argumentative focus on the current state of affairs and an eye to future reconceptualization, rather than by a critical focus on the past with an eye to historical denunciation.<sup>132</sup> Yet, the former kind of focus fails to question the structure of power in place. Note the use of the passive tense in the definition of “outliers” above, as though PWD were haphazardly, arbitrarily ignored by “theories and practices of justice,” rather than constructed on the basis of their traits, themselves conceptualized as deviances from a norm. This incomplete definition of the problem may, in turn, lead to an incomplete solution. If PWD seek integration by using the language of the law and showing that they belong to their community as per the condition set by this language, they will only achieve an entitlement to normalization.

Silvers and Francis come as close as liberals do to proposing bringing the Derridean ideal of “limitless welcome” within liberal justice when they write that “[j]ustice reigns . . . in virtue of having been shaped in response to the need of “outliers” to achieve successful personal trust relationships.”<sup>133</sup> In another article, Silvers defines outliers as “people who depart significantly from the prevailing paradigm for philosophical

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130. Silvers & Francis, *supra* note 123, at 42.

131. Francis & Silvers, *supra* note 73, at 238. See also Silvers & Francis, *supra* note 123, at footnote 14: “Historically, members of groups such as racial minorities, women, and the disabled have been ‘outliers,’ but in principle anyone might be exiled to the margin of society and thereby become an ‘outlier.’”

132. It may also be explained by a focus on an ideal theory (social contract theory) rather than on its use by social actors engaged in power relationships. At the risk of generalizing, this would reflect the “analytical” tendency to take ideal theories seriously (making it worthwhile to offer a more accurate, compelling or coherent - critics of Silvers and Francis would say revisionist - account of said theory) whereas critical and “continental” scholars read those such theories as as discursive tools designed and used to justify and exercise power.

133. Silvers & Francis, *supra* note 123, at 45.

considerability” and she goes beyond (1) the normalizing step of showing that disabled people meet the existing requirement for considerability or (2) the attempts to “resist” this paradigm by suggesting a different test of considerability.<sup>134</sup> Here is how she describes in greater details the foundations of this “expansive, responsive, and receptive theory of justice”:

[W]hen moral and political theorizing embraces outliers, other areas of philosophy are enriched, for moral and political theories not only reflect how we do treat each other, but also guide how we ought to value and treat each other. . . . Absent persuasive and powerful principles of justice to bring outliers of every sort into interaction with the rest of society, philosophers, like other citizens, are likely to remain ignorant about and dismissive of them, an arrangement that depletes philosophy as much as every other human practice.<sup>135</sup>

The utility of bridging the work of scholars from different philosophical traditions become apparent when one juxtaposes Anita Silvers’s train of thoughts, above, with Margrit Shildrick’s own suggestion, below:

[I]t is in the very ambiguity of the monstrous that we may begin to discern different ways forward. The monster is a figure of fear and fascination because it is never wholly other. For all that it remains excessive of any category; it matters because it tells us things about ourselves. Though it may evoke anxiety and loathing, it always claims us, always touches us and implicates us in its own becoming.<sup>136</sup>

On the one hand, Shildrick’s insights prompt liberals to consider whether and how they could handle the liminality of the concept of the “monstrous” and, *mutatis mutandis*, of “disability.” On the other, Silvers teaches two lessons to an adherent of the principle of “limitless welcome”.

First, she gives it an important instrumental purpose. She explains that openness to anomalous abilities will make political thinkers (and by extension also judges, law-makers, and the general population) more knowledgeable about the possibilities of human embodiments, and therefore about others and ourselves. The claim that expanding our knowledge about human embodiment, relations and vulnerability is inherently valuable seems congenial to liberals, who are committed to welcoming minority opinions and outlooks.<sup>137</sup> Her framework also holds the promise of integrating outliers rather than maintaining them

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134. Silvers, *supra* note 86.

135. *Id.* at 164.

136. SHILDRICK, *supra* note 61, at 9.

137. JOHN STUART MILL, ON LIBERTY (1859).

permanently *hors-la-loi*. Like most liberals, she has faith that modernist projects can succeed if amended and need not to be jettisoned or treated as a space within which principles of hospitality could never be implemented.

Second, she explicitly tells us that this disposition of hospitality or welcome must be entrenched in specific principles of justice rather than be left as an ideal to be, or not, endorsed by moral agents. This programmatic incorporation of a principle of “limitless welcome” within liberal theories of justice is embryonic, but still more promisingly specific than the Derridean ideal. This specificity does not prevent Silvers’s principle of receptivity from responding to a wide variety of alterity. Similarly, the instrumental dimension of her principle does not necessarily impinge upon the non-instrumental value of being responsive to alterity. Rather, it locates this value within a theory of justice where it serves further instrumental ends.

However, a liberal version of the principle of “limitless welcome” would have limitations. It is appealing to liberals precisely because it maintains a requirement of *reciprocity*, which is quite central to both schools within the social contract tradition, may it be understood in a tit-for-tat (contractarian) manner or in a (contractualist) display of mutual respect. However, the principle of limitless welcome is not conditional upon reciprocity. How could one develop, from a liberal point of view, Silvers’s idea that “no one should be an outlier”? One would have difficulty, at least, to connect it to the goal of fostering trust alone. Certainly, picturing the political subject as potentially vulnerable and dependent – in need of a society fostering trust – is more promising a description than the narrow traditional understanding of legal subject as autonomous and self-sufficient. The former conception is closer to our experiences and it better captures some of our ethical duties toward one another as we would ordinarily intuit them. However, what about the stranger, the abnormal, the monster, whose presence in our community fosters distrust or the kind of anxiety that hinders cooperation? Additionally, is a contractualist understanding of trust all that there is to justice? Is it worth focusing on it so much as to obscure other equally important reasons to welcome people in our community?

Perhaps Judith Still provides us with a notion of reciprocity that would lie between a liberal and a Derridean ethics. Still analyses different categories of social interactions, gradually progressing from the most self-interested kind of reciprocity (“simple commerce”) to a disposition of hospitality requiring no reciprocity whatsoever (“absolute hospitality”). On the way from “simple commerce” to “absolute hospitality”, she mentions increasingly complex or indirect forms of social exchanges - the most indirect and diffuse category of reciprocity (“indirect social exchange”) would look very much like Silvers and Francis’s model of fostering trust to facilitate reciprocal interactions. The category of

“invitation without reciprocity” is the one I want to draw attention to:

You are perceived as ‘without’ means (home, money, contacts) and I invite you to dinner without the expectation that you will eventually do the equivalent either for me or someone else or that I will ever be in your situation where someone could do the same for me.<sup>138</sup>

She explains that even such situations could imply some kinds of reciprocity, through an “imaginative recognition of similarity”. In her words : “I *could* be in your position even if it is not likely; if I ever were in your situation then I would want to be treated thus. Hence the possibility of common ‘humanity’ as similarity alongside difference.”<sup>139</sup> The idea of a shared fate - potentially extendable to animals as well - would nourish an imaginative kind of reciprocity. One may well note that Silvers and Francis’ theory is similar: indeed, what if building trust required to foster this kind of imaginatively shared fate? This understanding of reciprocity would, however, constitute a Derridean (or Levinasian) reading of the liberal ethos, placing hospitality at its heart, which may well be desirable if Derrida is correct to claim that “hospitality . . . is ethnicity itself, the whole and the principle of ethics”.<sup>140</sup> However, taken to its ultimate conclusion, this outlook would ask liberals to renounce to liberalism, for hospitality would displace freedom in their pyramid of values. One avenue of research in the field would be to explore whether and how freedom could be interpreted in a way that requires hospitality to trump not over freedom, but over non-hospitable understandings of freedom. In other words, hospitality would not be seen as antithetical to freedom insofar as, even when it seems to threaten it, it would in fact enable it. The hypothesis to test would be that one cannot truly be free without being hospitable or welcoming to others.

Be that as it may, just like a liberal framework would confront post-structuralist notions with the potentially unproductive vagueness of their open-endedness, such foundational questions would confront liberals’ normalizing and reductionist tendency to justify social integration and exclusion on the basis of a few goods (e.g., trust, cooperation, negative liberty) that may well be the unwitting vehicle of (individualist, capitalist, ableist) ideologies and the result of arbitrarily narrow understandings of subjectivity, equality and freedom.

### III. EXTRA-LEGAL CONSIDERATIONS

The ethical obligation to challenge the frontiers of our legal order

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138. STILL, *supra* note 122, at 17.

139. *Id.*

140. JACQUES DERRIDA, ADIEU TO EMMANUEL LEVINAS 50 (Pascale-Anne Brault & Michael Naas, transl., 1999).

cannot wholly be transformed into a legal duty. The concepts explored in the previous Part of this article are, by design, placed outside of the law. The virtue of this theoretical move is to always preserve an emancipatory space where those mechanisms and ideals can be discussed, (re)defined, and used as guidance to revise our current legal and political order. As Peter Goodrich notes of Derrida:

He never got to talk about law, he never seemed to want to, he held off. What he did do, however, was take lawyers to task, directly and more likely indirectly, by reintroducing what law has historically separated itself from: amity, community, femininity, felicity.<sup>141</sup>

Structuralist and post-structuralist criticisms of our legal order can empower PWD by providing them with a narrative about the construction of their otherness and their exile from the legal order, as well as by enabling them to demand that their subjective experiences, needs, capacities and ways of interacting be recognized like that of their fellow citizens. However, they remain problematic *qua* legal tools. The idea of the monstrous is a critical notion marking the limits of the law rather than being a substantial part of the law. Similarly, the principle of “limitless welcome” constitutes an ethical demand and it directs us to an ideal of justice that can never be codified. It necessarily stands outside of the legal order; the justice it aims at is ideal. It stipulates that the “monstrous *arrivant*” always and necessarily transgresses the law and should defy normalization.<sup>142</sup>

For Derrida, the law of absolute hospitality lies outside of the legal realm of hospitality rights just as surely as the ideal of justice lies outside of the realm of law.<sup>143</sup> However, Jacques Derrida urges that this “is not bad news” for progressive politics. The fact that law is deconstructible and that justice, always “outside of beyond law” is always “à-venir” (to come; i.e. never realized) constitutes a licence for “the transformation, the recasting or refounding of law and politics”<sup>144</sup> that social justice scholars should welcome.

Foucault’s genealogical concepts and analyses are not only extra-legal, they may not even be able to provide us with a basis for emancipatory politics, legal or not. While some scholars seem to at least imply that Foucault’s critical genealogy will equip individuals with a liberating knowledge of the processes through which they have been subjugated, others note that to impute Foucault’s subjects with a capacity to freely

141. Peter Goodrich, *Introduction: Un Cygne Noir*, 27:2 CARDOZO L. REV. 529, 541-2 (2005).

142. SHILDRICK, *supra* note 61, at 122-24.

143. ANNE DUFOURMANTELLE & JACQUES DERRIDA, OF HOSPITALITY: ANNE DUFOURMANTELLE INVITES JACQUES DERRIDA TO RESPOND 25-27 (Rachel Bowlby, transl., 2000).

144. Jacques Derrida, *Force of Law: the Mystical Foundation of Authority* 11 CARDOZO L. REV. 920, 943, 945, 969, 971 (Mary Quaintance transl., 1989-1990).

resist power misunderstands Foucault's theory of subjectivity. This is because of Foucault's fatalism, thus explained by Bill Hughes:

In Foucault's work, the body is a target (of power), an effect, a text upon which to write . . . The body is constituted as passive, without agency, the plaything of discourse and text, and a surface ripe for inscription . . . Foucault robs the body of agency . . . the body does not act in and on the world; rather, the body is docile . . . a product of the play of power . . . [even appearances of freedom are] a reflex of domination.<sup>145</sup>

Another issue with the Derridean ideal of hospitality as a tool of emancipatory liberal politics is that it is paradoxically demanding and obfuscating. Considering the magnitude of the task asked of us (accepting outliers without reducing their otherness to manageable categories by attempting to identify her), practically minded ethicists may lament the lack of unequivocal guidance to operationalize it. A general disposition to have a meaningful encounter with others is in fact the point of departure of many moral theories, may it be based on moral attitudes like love, concern, respect, or care, or on a recognition of other agents' priceless worth. While intuitively plausible at a high level of abstraction, the principle of limitless welcome seems to govern only the moment of welcoming alterity in our midst.

Similar criticisms are not unknown to legal scholarship. Critical legal scholars' radical attacks of liberalism are sometimes criticized for resting on muddled ontologies<sup>146</sup> while practitioners may be concerned by the lack of concrete guidance resulting from deconstructing and denouncing arbitrary legal structures and relations of power.

An obvious response to such criticisms is that not all moral insights translate into unambiguously specifiable policies, nor should they, and that we should focus on what the ideal of absolute hospitality can do for us rather than criticizing it for failing to deliver specific political prescriptions it never meant to offer. The principle of limitless welcome can have a positive role to play within amendments to liberal theories of justice and legislative and judicial endeavours to foster equality even if its nature prevents it from being articulated as a fixed norm within the legal order.

Cressida Heyes also reports that “[p]roponents of identity politics have suggested that poststructuralism is politically impotent, capable only of deconstruction and never of action”. Traditional liberals, on the other hand, are criticized for being blind to ideology and social context, in a way

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145. Bill Hughes, *What Can a Foucauldian Analysis Contribute to Disability Theory?* in *FOUCAULT AND THE GOVERNMENT OF DISABILITY* 85-87 (Shelley Tremain ed., 2015).

146. ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

that leads them to extend a protection to the Other that reaffirms the oppressive hierarchy that constituted it as an Other in the first place.<sup>147</sup>

Beyond name-calling, those accusations gesture at a real, unavoidable issue: If we take seriously the tools that our political system gives us to help the marginalized and the powerless, we simultaneously implicitly endorse and reinforce the ideology underlying the efficaciousness of said tools. One must try to strike an unsteady balance by remaining alert to the oppressive dimensions of an ideology that is also the vehicle of the desirable values that one wishes to promote. Liberal and post-structuralist insights seem to confer some steadiness to the funambulist legal scholar walking this wavery line, even though they stand at the opposites ends of the pole balancing them. Certainly, the aforementioned post-structuralist reflections on the exclusionary characteristics of the legal order show that both schools share surprisingly compatible intuitions on the need to respond morally to PWD. This proper moral response would not only welcome by assimilating, but also by accepting to change one's self and community, and being disposed to endure the risks associated with such changes.

That said, the comparisons I am drawing between these scholarships engaged in substantially different enterprises (or my suggestion that liberals could add post-structuralist insights to their emancipatory toolkit) could be criticized for doing too much or too little. My survey would either accomplish too little if I am only juxtaposing a few thoughts that liberals and their critics seem to share, or it would be too ambitious if it suggests that Derridean or Foucauldian concepts can be integrated to liberalism without being essentially denatured in the process. Liberal scholarship (focused on refining egalitarian projects and ensuring individual freedom) and post-structuralist or critical legal scholarship (focused on criticizing such projects) operate within two different modes of thought and pursue different projects. Liberals make use of a political language that critiques of liberalism systematically problematize.

Liberalism and post-structuralism are obviously strange bedfellows. However, I have endeavoured to show that a Foucauldian sensibility to genealogies of power and a Derridean sensibility to radical otherness is able to inform the extra- or proto-legal considerations confronting legal actors committed to liberal ideals. Moreover, liberal scholars and practitioners are open to amending their legal frameworks and theories when they detect unfair uses of power within them or realize that current norms unwittingly reinforce unfair structures. Critics of the liberal enterprise may respond that even such amendments have fundamental limitations since they ultimately rest on a tradition that encompasses

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147. Cressida Heyes, *Identity Politics*, The Stanford Encyclopedia of Philosophy (2016 Edition), E. N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2016/entries/identity-politics/>.

ideological elements that necessarily exclude alternative worldviews. Liberals are constrained by the boundaries of the tradition they work at revising, whereas critical thinkers are devoted to emphasizing how those revisions reproduce oppressive structures or constitute new forms of disciplinary or regulatory power. Nonetheless, let me, in the penultimate Part, show that legal actors already engage with a self-critical mode of thinking that is not dissimilar to the post-structuralist insights mentioned before. Those self-critical ideas, by their very nature, may never be fully entrenched in the structure that they aim at criticizing. Mainstream efforts to integrate the “abnormal” are also bound up with, and limited by, the idiom of equality and liberty, the twin values at the heart of mainstream liberalism. They nonetheless contribute to the judicial interpretation of legal concepts and to the outlook of scholars whose work “dredg[es] up the suppressed alternatives [to existing legal conceptions, frameworks and rules] and detail[s] the devices employed in their suppression.”<sup>148</sup> I will illustrate this claim with the treatment of the concept of equality.

#### IV. THE EVOLVING FACES OF EQUALITY

Sheila McIntyre writes: “When equality claims are really substantive, they should challenge privileged understandings of the world and privileged players’ understanding of themselves.”<sup>149</sup> Legal scholars are well aware that equality involves not only asking whether, within a given framework (including legal, regulatory or political structures), goods are being “equally” distributed, but also whether the framework itself meets the requirements of “substantive equality.” In other words, it is not enough for social actors to ask what goods society should redistribute, and how this distribution should proceed. The social structures (and the relations of power and domination underlying them) within which this redistribution takes place must itself be scrutinized, or else, they may provide a refuge for harmful ideologies and deep inequalities to hide and insidiously govern social arrangements, unchecked.<sup>150</sup>

This reflection may open the door to a worry that the struggle to achieve equality may be an infinite, unachievable, task. The pursuit of equality would follow this order: as a first step, we would look for formal inequalities in the distribution of goods (i.e. whether everyone receives the same). Then, we would look for substantive inequalities (i.e. whether

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148. Gordon, *supra* note 92, at 338.

149. Sheila McIntyre, *Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination*, in MAKING EQUALITY RIGHTS REAL 108 (Faraday, Denike & Stevenson eds., 2009).

150. This position is compellingly articulated in IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) and is not foreign to equality law: the Supreme Court of Canada has expressed similar ideas in its treatment of systemic discrimination in *Canadian National Railway Company Co. v. Canada* (*Canadian Human Rights Commission*) [1987] 1 SCR 1114, at 1134-43.

everyone equally benefits, or is being equally considered, by the existing distributive scheme, considering that individuals may benefit from a same good in different ways). While the first step would only reflect a formal sense of equality, the second one would reflect a more substantive sense of equality. The second step would question whether we were truly paying equal consideration to all when we were considering giving the same to everyone. Our quest for substantive equality may then require not only that we pay attention to the diversity of human needs without discriminating against anyone on the basis of prejudice, but also that we inspect whether the very distributive institutions in place are not structured in such a way that they systematically favour some social groups or individuals over others. This third step would be associated with a systemic analysis of inequality. It is fair to say that social justice scholars deplore that, in practice, courts and policy-makers have not fully developed the conceptual tools (such as “positive rights” and “systemic discrimination”) that would enable them to fully achieve this third step.<sup>151</sup>

The worry that our quest for substantive equality requires infinite, and therefore perhaps futile, work, is based on the hypothesis that inequalities will then hide in any corrective structures or corrective theories that will be put in place. And once these corrective meta-structures are scrutinized, inequalities (based on harmful ideologies and relations of power) will further retreat when any additional scrutinizing process is used, or any corrective meta-meta-structures it gives birth to. If liberal endeavors to achieve equality are susceptible to be appropriated as tools of power by dominant groups or as ways to discipline physically or mentally different bodies, can the liberal ideal of substantive equality ever be accomplished?

The moderately good news is that the sense in which this quest may never be accomplished may not matter so much as to make liberal endeavors meaningless. Dominant groups may and probably will subvert (if not create) legal apparatuses meant to pursue equality. A Foucauldian taking his distance from a Marxist understanding of power as ideological would make a similar point by saying that such new apparatuses will be used in controlling individual bodies and populations. Liberal legal scholarship cannot devise a way to shield their legislative and judicial efforts to advance a commitment to the ideal of substantive equality from ideology or biopower once and for all. The concern that moral agents or collectivities may be the unwitting puppets of ideologies should not paralyze liberals. Before giving in to Foucauldian fatalism by noting that legal actors cannot stand up *to* power because power pervades their every “actions and attitudes, their discourses, leaning processes and everyday

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151. MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER (F. Faraday, M. Denike & M. K. Stephenson eds., 2009); POVERTY: RIGHTS, SOCIAL CITIZENSHIP, AND LEGAL ACTIVISM (M. Young, S. B. Boyd, G. Brodsky & S. Day eds., 2007).

lives,”<sup>152</sup> one may remember Derrida’s encouraging note that justice is always “yet to come”. Assuming that the subversive discourses and actions of disability scholars and activists are meaningful acts in pursuit of freedom, a critical outlook can prompt liberals to probe their equality-enhancing policies for ideological biases and questionable forms of control over differently embodied individuals or deterministic assumptions about them, instead of abandoning equality policies and rights altogether. Ableist prejudices are susceptible to endure in the systemic confines of our democracies, but we would already partially cut off their retreat by capturing their direct and indirect manifestations, as well as by scrutinizing relational structures fostering more insidious, less detectable, forms of inequalities.

Social justice scholars may not spend much time lamenting about the senses in which this “achievement” is never perfected, but they are certainly aware that their strategies for overcoming discrimination and achieving recognition of neurological and cultural diversity must evolve contextually to remain relevant. In the first case concerning the constitutional rights to equality before the Supreme Court of Canada, Justice McIntyre acknowledged that “in human affairs . . . all that can be expected” is to “approach the [admittedly unattainable] ideal of full equality before and under the law”. This involves:

Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.<sup>153</sup>

Legal actors cannot afford to shy away from ideals only because they are unattainable or because both their shape and the means to pursue them evolve along with our culture and the power dynamics within it. Evolving conceptions of disability have the potential to challenge the boundaries of our community, just like conceptions of equality, freedom of expression and other liberties were utilized in emancipatory struggles. Nothing, in principle, prevents courts, activists and legislators from harnessing the subversive potential of disability conceptions by uncovering the processes that construct them and by expanding legal definitions, frameworks and doctrines that make use of them.

The multiplication and strategic uses of different models of disability under the *Americans with Disability Act*,<sup>154</sup> the *Canadian Charter of*

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152. Hughes, *supra* note 145, at 86 (citing Michel Foucault’s *The Eye of Power*).

153. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 65.

154. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. OF EMP. & LAB. L. 213 (2000).

*Rights and Freedom*,<sup>155</sup> and the 2006 United Nations' *Convention on the Rights of Persons with Disabilities* all illustrate this possibility. For instance, the latter instrument integrates the conceptions of "disability" both as a universal human feature and as a stigmatized minority identity marker. Those rights point to potentially conflicting paradigms, but whether or not this tension can or will be worked out, it provides a point of pressure for understandings of substantive equality to evolve.<sup>156</sup>

"Disability", similarly to "equality", is both a difficult concept to pin down and an important one to pursue the ends of liberal justice. The term "disability" is often used to denote abnormality, but it could equally be used to criticize society's expectations of normalcy. A simplified post-structuralist ethical prescription derived from the second part of this article is that no model of disability can definitively exempt society from a collective duty to remain alert to the continuing mutation of the category of social and biological phenomena currently denoted by conceptions of "disability." This aspiration to remain receptive to new manifestations of alterity and new ways of constructing outliers is far from a bleeding heart truism. Anyone familiar with the harms commonly endured by disabled people facing legal and social arrangements that ignore their particular needs and capabilities should apprehend its moral weight. The quote from Frédéric Othon Théodore Aristidès in the epigraph of this Article is taken from his parable, *L'histoire du corbac aux baskets* (The Story of the Crow that Wore Sneakers). In this graphic novel, Fred depicts the story of Mr. Corbackobasket ("Mr. Crowsneakers"), a crow that consults a psychiatrist and relates how troublesome his life is in a world of human beings. As the treatment draws to a close, he loses his feathers and becomes human again, only to find that everyone around him, including his psychiatrist, have now become crows, and keep ostracizing him for being different. One of the lessons this parable teaches is that (ab)normalcy and (dis)ability undergo social mutations so that any particular legal accommodation trying to protect today's outlier or monster would miss the point that tomorrow's outlier or monster will have a different face.

## V. CONCLUSION

Disability has often been, and still is, used to discuss and deal with the Other that defines the Self, the scraps of paper on the floor after the paper-doll chain has been cut out. In that sense, disability can be approached philosophically not as an effort to understand a peculiar category of

155. Mary Ann McColl, *People with Disabilities and the Charter*, 5 CAN. J. DISABILITY STUD. (2016).

156. On the divergence between those two particular models, see Jerome E. Bickenbach, *Minority Rights or Universal Participation: The Politics of Disablement*, in DISABILITY, DIVERSABILITY AND LEGAL CHANGE (M. Jones & L. A. Marks eds., 1999).

beings, but as an effort to understand the being who cannot be what human beings are “supposed” to be: the person who cannot fit normal modes of production, reproduction, political and social participation, or a variety of other roles that are assumed, when normally performed, to give meaning to a human life. The child who cannot grow up. The grown-up who cannot have a child. The absolutely disabled person is the person who has nothing but personhood in common with us, and by personhood, I only mean here a sense - generally anchored in a shared humanity - that this individual belongs to our community. The fact that the “disabled person” belongs to our community and simultaneously cannot be controlled, rewarded, punished, or moulded into social roles like most people makes her a disquieting other in our midsts, demanding us to live with our intolerable failure to integrate her, to change the shape of our community to better welcome her, or to exclude her from, or isolate her within, this community. Thus radically put, disability defies the well-meaning integrationist agenda of liberals seeking to normalize PWD, for disability would be defined, in its core, by abnormalcy or that which resists sameness. Normalizing strategies would not accommodate radical otherness: they would eliminate it.

By contrast, a mainstream liberal outlook on disability does not understand this concept as denoting the inherent limits or failures of liberalism as traditionally understood. It sees disability as a more manageable issue that liberalism is supposed to fix or dissolve. However, not all instances of “disability” can or should be solved. First, the term “disability” may denote a process that construct otherness rather than a medical phenomenon. Second, not all disabilities have a negative value and ought to be cured, through new technologies or otherwise.<sup>157</sup> Certain senses of disability may come to pass, as ideals of universal design become more widespread, and as disability comes to denote a fact of human societies rather than an essentialized category of people. Other, new, senses of “disability”, however, may appear as the norm of “that which we ought to strive to become” shifts and evolves along the figures of the “disabled”, the differently embodied (and other marginalized figures, such as the “freak”, the “monster”, the “stranger”, the “scapegoat”, etc.) shaped by their inability to inhabit our socially constructed world and society’s unwillingness to construct a more hospitable world.

The philosophy of disability can help legal scholarship to deal with the evolving landscape of disability phenomena. In spite of being nourished by very different schools, disability theorists generally favor the social

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157. ELIZABETH BARNES, *THE MINORITY BODY: A THEORY OF DISABILITY*, ch. 2 (2016).

integration of PWD.<sup>158</sup> This shared ideal suggests that even disability theorists working from within diverging methodologies and modes of thought may learn from one another. While mainstream liberal theories of justice are concerned with responding to differences respectfully and fairly, philosophers of disability can help articulate the nature of differences and what constitutes a fair response to them. Certain criticisms of our liberal ideology must inevitably exist outside of a liberal framework, just like the inherent limitations of our legal order may not be solved with legal tools. This does not mean that policymakers, activists, legal actors and social justice scholars dealing with disability should not endorse self-critical and hospitable dispositions. Nor does it mean that moral recommendations incompatible with liberalism should not be taken seriously, even though our current institutions have trouble accommodating them.

The philosophy of disability does not only have the potential to support civil rights struggles by supplementing theories of identity politics, discrimination and equality, now already integrated, though constantly negotiated, within our law. (To use the crow-turned-man parable: it can do more than assimilate PWD in a way that fails to deal with how problematic assimilationist strategies are in the first place.) It also has the potential to further destabilize barely explored and challenged assumptions about the human embodiment of the legal subject, as currently conceived in mainstream legal and political thought. It is at work, concretely speaking, when policy-makers and legal scholars re-imagine the legal subject's capacities and entitlements and the kind of social interactions the state should foster. "If disabled people were truly heard," Susan Wendell wrote, "an explosion of knowledge of the human body and psyche would take place."<sup>159</sup>

This article examined various strands within disability theory, many of which capitalize on this subversive potential. While "first wave" disability theorists define disability as oppression, "second wave" disability theorists characterize disability as a cluster of phenomena that "evade classification by refusing to stay in place . . . always liminal, transgressive and transformative."<sup>160</sup> Understood as a liminal legal concept (in the vicinity of Foucault's "monster" or Derrida's "absolute *arrivant*"), disability is paradoxically a threat and an ally to mainstream liberal scholarship and

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158. This include philosophers of disability who are critical of terms like "social integration" or "social inclusion" because they take it to mean assimilation. I mean "integration" in a sense broad enough to encompass any more empowering visions they may have of means for PWD to claim their own subjectivity. One may also share Foucault's understanding of power and reject this ideal for being too optimistic and hold instead that discourses about "social integration" are doomed to complicity reinforce the structure that constructed "disabled people" and casted them out of the legal order in the first place.

159. Wendell, *supra* note 28 at 120.

160. SHILDRICK, *supra* note 61 at 9.

the legal practices it informs. On the one hand, its lessons profoundly disturb the bases upon which liberals hope to achieve equality and freedom. On the other, it invites liberals to perpetually refine their agenda of social integration without which equality and freedom would be illusory for many of us.