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THE VANISHING BODY OF DISABILITY LAW: POWER AND THE MAKING OF THE IMPAIRED SUBJECT*

Jonas-Sébastien Beaudry**

The influence of disability studies on legal scholarship is most visible in the social model, which claims that people are not disabled because of their bodily impairments, but by society in its refusal to accommodate their impairments.

However, a modest but growing discourse within disability studies argues that the notion of impairment, in addition to disability, is socially constructed. This article aims to bring this problematized conception of impairment, informed by Michel Foucault's conception of power, into contact with legal scholarship. Judith Mosoff's sensibility about the role of impairments in the legal treatment of disabled people illustrates this critical

* This title was inspired by Bill Hughes & Kevin Paterson, "The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment" (1997) 12:3 *Disability & Society* 325, and by a sub-heading ("Foucault's vanishing body") in Chris Shilling, *The Body and Social Theory*, 2nd ed (London: Sage Publications, 2003) at 69.

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outlook, which has the potential to guide scholarship and legal reforms. For instance, in the context of family law, those reforms could affect the evaluation of a person's fitness to parent or her right to childcare support.

The first part of this article makes a prima facie case for a critical ontology of impairment and the second part provides theoretical foundations for such a practice. I use Supreme Court of Canada case law to illustrate how impairments are typically naturalized and to begin challenging impairment-based identities and detaching disability from impairment.

“By definition, of course, we believe the person with a stigma is not quite human. . . . We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences. . . . We use specific stigma terms such as cripple, bastard, moron in our daily discourse as a source of metaphor and imagery, typically without giving thought to the original meaning. We tend to impute a wide range of imperfections on the basis of the original one . . .”¹

1. RECLAIMING THE IMPAIRED BODY IN DISABILITY LAW

WHAT CAN A CRITICAL ONTOLOGY OF IMPAIRMENT DO FOR LEGAL SCHOLARSHIP?

“Our bodily experience”, Alfred North Whitehead wrote, “[is] so habitual and so completely a matter of course that we rarely mention it. No one ever says, Here am I, and I have brought my body with me.”² The failure to consider the body as a site of power and agency is widespread in Western thought, from modernity’s Cartesianism to post-structuralism’s “dissolution of *matter* as a contemporary

¹ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New Jersey: Prentice-Hall, 1963) at 5.

² Alfred Whitehead, *Modes of Thought* (New York: The Free Press, 1968) at 114.

category.”³ Phenomenology⁴ and “body studies”⁵ are important exceptions but remain peripheral to mainstream disability studies and legal scholarship.⁶ Judith Mosoff,

³ Judith Butler, *Bodies that Matter: On the Discursive Limits of Sex* (New York: Routledge, 1993) at 27 [emphasis in original].

⁴ Phenomenology is a philosophical discipline (associated with Edmond Husserl, Heidegger, and Jean-Paul Sartre, amongst others) that could be approximately defined by its objects of enquiry (consciousness or objects as experienced) or as a practice of suspending our focus on (the existence of) the thing-in-itself (the thing “behind” our perception) and shifting our attention to objects-as-experienced, or to our perceptual capacities. It notably included (e.g., in Merleau-Ponty’s work) a focus on the role that our body plays in experiencing the world and in constituting our consciousness (David Woodruff Smith, “Phenomenology”, *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N Zalta (ed), online: Stanford <plato.stanford.edu>).

⁵ Body studies can be defined as an interdisciplinary field that investigates how human bodies are culturally inscribed and represented; it pays particular attention to the social construction of bodies and naturalization of such constructs, though it can also deal with our representations of the “natural” body: Margo Demello, *Body Studies: An Introduction* (New York: Routledge, 2014) at xvi. Although it has earlier roots, and has come to include a variety of disciplines (anthropology, sociology, philosophy, sports studies, cultural studies, phenomenology, and dance), the field of “body studies” is relatively recent and is probably best associated with a “corporeal turn” in sociological scholarship (seminally illustrated by the work of Bryan Turner) in the eighties onward. For a survey of those developments by a leading scholar in the field, see Chris Shilling, “The Rise of Body Studies and the Embodiment of Society: A Review of the Field” (2016) 2:1 *Horizons in Humanities & Social Sciences: An International Refereed Journal* 1.

⁶ I list, *infra* note 11, a body of scholarship within disability studies that has integrated this concern for the body as a site of governance or an object of cultural construction. While feminist legal scholars have

however, provides an example of legal scholarship that interrogates this widespread naturalization and erasure of the body. In a discussion of the data collected about disability-related complaints within a human rights framework, she noted how severely cognitively impaired individuals were not deemed as full subjects under human rights law. In fact, institutionalized and psychiatrically-diagnosed bodies fell under a different (e.g., paternalistic) jurisdiction.⁷

As Mosoff notes, courts sometimes justify their refusal to intervene because diseases and impairments lie beyond their jurisdictions. It is one thing to reject disability claims because courts do not want to usurp the political role of the state or the professional role of medical experts. It is another to preclude “impaired persons” from concerns of fairness, equality, dignity, and freedom, all of which are within the jurisdictions of legal actors. When legal actors believe that “impaired persons”

long paid attention to the control of women’s bodies (e.g., its sexuality, its procreative capacities), the problematization of impairment as a social construct is rarely theorized (exceptions include Judith Mosoff’s work, as well as Hall, *infra* note 15; Kristin Savell, “Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law” (2004) 49:4 McGill LJ 1093; and Sheila Wildeman, “Agonizing Identity in Mental Health Law and Policy” in two parts: (2015) 38:2 Dal LJ 619 and (2016) 39:1 Dal LJ 147. The only work I know that systematically theorizes the construction of bodies in legal thought is Alan Hydes, *Bodies of Law* (New Jersey: Princeton, 1997)).

⁷ Judith Mosoff, “Is the Human Rights Paradigm ‘Able’ to Include Disability: Who’s In? Who Wins? What? Why?” (2000) 26:1 Queen’s LJ 225 at 263. As this example suggests, I use “body” in a broad way meant to encompass mental features as well.

lie outside of their jurisdictions, they assume that their “impairments” are value-neutral, power-independent, biological facts. They implicitly endorse a naturalistic view of the body, generally, and of impairments, specifically. Such naturalistic views hold that:

Inequalities in material wealth, legal rights and political power are not socially constructed, contingent and reversible, but are given, or at the very least legitimized, by the determining power of the biological body.⁸

This article takes issue with the assumption that impairments are natural facts that fairly underlie disability claims and justifiably delineate social expectations related to “disabled people”. Instead, this article suggests that we conceive of impairments as social constructions expressing power over people by transforming them into “impaired subjects”, whose freedom can be curtailed due to their impairment, and whose impairment can only be contested on a medical basis. Whereas the disabled legal subject can contest her marginalization or oppression, the impaired legal subject has few options for choosing or contesting the legal frameworks applied to her. This position follows a modest but growing body of literature within disability studies that problematizes the “absent presence”⁹ of impairment.¹⁰

⁸ Shilling, *supra* note 1 at 37.

⁹ Shilling, *supra* note 1 at 8; Tom Shakespeare & Nicholas Watson, “The Social Model of Disability: An Outdated Ideology?” (2001) 2 *Research in Social Science & Disability* 9 at 14.

QUESTIONING THE NATURALIZATION OF THE CONCEPT OF IMPAIRMENT IN DISABILITY LAW

In her article *Motherhood, Madness, and Law*, Mosoff introduces her readers to Shirley, a client discharged following a psychiatric hospitalization, and who eventually surrendered custody of her child after “social workers, public health nurses, and psychiatrists . . . strongly suggested that her mental health impede[d] her

¹⁰ Here is a representative selection of this sub-field, in chronological order: William Ray Arney & Bernard Bergen, “The Anomaly, the Chronic Patient and the Play of Medical Power” (1983) 5 *Sociology of Health & Illness* 1; Helen Liggett, “Stars are Not Born: An Interpretive Approach to the Politics of Disability” (1988) 3 *Disability, Handicap & Society* 263; Alden Chadwick, “Knowledge, Power and the Disability Discrimination Bill” (1996) 11 *Disability & Society* 25; Margrit Shildrick & Janet Price, “Breaking the Boundaries of the Broken Body” (1996) 2 *Body & Society* 93; Hughes & Paterson, *supra* note 1; Shelley Tremain, “On the Government of Disability” (2001) 27:4 *Social Theory & Practice* 617; Mairian Corker & Tom Shakespeare, eds, *Disability/Postmodernity: Embodying Disability Theory* (London: Bloomsbury, 2002); Shelley Tremain, ed, *Foucault and the Government of Disability* (Ann Arbor: University of Michigan Press, 2015); Margrit Shildrick, *Dangerous Discourses of Disability, Subjectivity and Sexuality* (London: Palgrave Macmillan, 2009); David T Mitchell, *The Biopolitics of Disability: Neoliberalism, Ablenationalism, and Peripheral Embodiment* (Ann Arbor: University of Michigan Press, 2015). There are earlier statements of the view that impairments are socially constructed within other theoretical frameworks, such as Robert Scott’s *The Making of Blind Men* (New York: Routledge, 1981), who describe blindness as a “social role” that sight-impaired people “must learn how to play”.

from being a good mother.”¹¹ This case was not isolated, and Mosoff criticized both the authority of psychiatrist experts to determine whether women were able to perform the role of mothers and the deference of courts toward medical expertise. Influenced by Michel Foucault, she writes:

[W]hat unites the people who are associated with psychiatry, psychology, and related disciplines is that they are all seen in law to have important expertise which assists in explaining how the human mind works, how a particular mind works, and how personality is formed. In exercising the accompanying power these professionals all perform functions of surveillance and control as designated state agents in modern society.¹²

Mosoff concludes that judges ought to scrutinize medical evidence more circumspectly when considering whether a woman’s medical condition actually threatens her child’s best interests. She reveals how medical categorizations of impairments can conceal an ableist ideology by shielding certain assumptions from rigorous scrutiny. By “ideology”, Mosoff refers to “unquestioned ideas and values that guide the way people in a culture think and act . . . and pervade what are considered

¹¹ Judith Mosoff, “Motherhood, Madness, and Law” (1995) 45 U Toronto LJ 107 at 107.

¹² *Ibid* at 110–1.

obvious ‘natural’ and true explanations”.¹³ Her reflections show a particular sensitivity to how the notion of *impairment* can become a discursive space where an ableist ideology can manifest itself and go undetected.

The social model of disability claims that people are not disabled because of their biological impairments, but by society in its refusal to accommodate their impairments. The social model has now found its way into the mainstream of legal and political discourses. Conceptualizing disability as a socially constructed problem has freed a space for activists to claim that they are disabled by society rather than by their bodies. This has had the significant benefit of positioning the burden of accommodation as one that the state must shoulder. The social model of disability helpfully framed such claims not as support for tragic losses, but as protection against oppression, and as a demand that society remove the social barriers arbitrarily blocking access to valued social roles and opportunities.¹⁴ Social modelists presented their view as opposing a traditional “medical model” of disability that equates disability with impairment. The Union of Physically Impaired Against Segregation published the classical formulation of the distinction between the concepts of impairment and disability at the root of the social model in 1976. It

¹³ *Ibid* at 108.

¹⁴ For early theorizations of the social model, see Vic Finkelstein, *Attitudes and Disabled People* (New York: International Exchange of Information in Rehabilitation, 1980); Michael Oliver, *The Politics of Disablement* (London: Palgrave Macmillan, 1990).

reflects a medical understanding of “impairment” and a social understanding of “disability”:

Impairment: Lacking part or all of a limb, or having a defective limb, organism or mechanism of the body; Disability: The disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities.¹⁵

In legal scholarship as well, disability—not impairment—became a ground to complain against discrimination and claim equal protection and benefit.¹⁶ Impairment is generally taken to be a necessary component of disability but is not a concept used to discuss how disabled people are oppressed or discriminated against. This is clear from the cases in which the Supreme Court of Canada endorsed at least two elements from the social model of disability: (i) a dichotomy between impairment and disability and (ii) the use of the latter concept to discuss social barriers and

¹⁵ UPIAS, *Fundamental Principles of Disability* (London: Union of Physically Impaired Against Segregation, 1976) at 3–4.

¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*Charter*]; see also various provincial and federal human rights laws, such as the *Ontario Human Rights Code*, RSO 1990, c H-19, that enumerate disability as one of the prohibited grounds of discrimination.

entitlements to their removal.¹⁷ Justice Sopinka, writing for a majority of the Court in 1997 in *Eaton v. Brant County Board of Education*, stated:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from

¹⁷ Note that the Supreme Court of Canada sometimes uses the notion of “handicap” to denote what social modelists would call “disability”, and sometimes uses the notion of “disability” to denote what social modelists would call “impairments”. Those semantic choices do not impede our discussion, as long as we keep track of concepts used to refer to medical, unalterable facts falling outside the reach of social redress and of the law, and concepts used to denote social problems that the law can address or are understood by scholars and legal actors as denoting, or potentially importing, prejudiced assumptions about differently embodied human beings.

participation, which results in discrimination against them.¹⁸

Justice Sopinka thus places impairments (such as blindness and motor impairment) outside of a discussion of ableist discrimination. Those are “true” individual characteristics, which are not the product of stereotyping but are rather natural, value-neutral facts *upon which* discrimination occurs. Social obstacles exclude *impaired people* from mainstream society. Social obstacles turn *impaired persons* into *disabled persons*. Social failures, Justice Sopinka writes, result in discrimination toward impaired persons; that is, they *cause* disability. Judges do not examine whether and how the prior identification of the individual as “impaired” potentially contributes to a person’s disability-*qua*-oppression.

Justice Binnie, in *Granovsky*, writing for a unanimous Court in 2000, reiterated the same dichotomy between impairment and disability, and held that equality rights are meant to correct social obstacles imposed on impaired people, that is, intentional or unintentional social barriers through which the state blocks access to equal benefits and protection under the law:

The Charter is not a magic wand that can eliminate physical or mental impairments . . . Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s.15 of the Charter can

¹⁸ [1997] 1 SCR 241 at 272, 142 DLR (4th) 385 [*Eaton* cited to SCR] [emphasis added].

do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment . . . or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks.¹⁹

Therefore, the conventional wisdom in disability studies and disability law is that *impairment* is a natural, value-neutral—as opposed to socially engineered—phenomenon, typically detectable and classifiable through medical expertise. *Disability*, on the other hand, is a socially constructed, value-laden phenomenon.

¹⁹ *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 186 DLR (4th) 1 [*Granovsky* cited to SCR].

Like any new paradigm, the social model of disability was exposed to a myriad of criticisms. For instance, many “impaired/disabled people” feel that their subjective experience of impairment, rather than oppression, characterizes their disabled identity, or that some “impaired/disabled people” do not see themselves as oppressed. Other scholars questioned whether the impairment/disability dichotomy, like the sex/gender one, was sustainable.²⁰ Some of these criticisms partly misfired because they attacked social modelists for failing to address issues they were not interested in. However, the matter becomes more controversial if social modelists are not only “uninterested” in dealing with disability-*qua*-“subjective experience of impairment” but also suggest that discussion of “disabled identity” should be refrained from unless it conforms to the framework of the social model. If so, social modelists would undermine other people’s use of this term to speak of issues, experiences, and identity distinct from social oppression.²¹

In response, new models of disability were developed. Current references to a “social model” may therefore not necessarily refer to the version popularized by Michael Oliver and others²² as these scholars do not

²⁰ For a survey of these criticisms, see Shakespeare & Watson, *supra* note 10.

²¹ See Jonas-Sébastien Beaudry, “Beyond (Models of) Disability?” (2016) 41 J Medicine & Philosophy 210.

²² See Oliver, *supra* note 15; Finkelstein, *supra* note 15. This has been recently reaffirmed, for instance, in Michael Oliver & Colin Barnes, *The New Politics of Disablement* (London: Palgrave Macmillan, 2012).

endorse the claim that disability is *solely* caused by social vectors. Instead, many endorse versions of a social model that might be more aptly called “mixed” or “multidimensional” models insofar as they retain the insight that disability is caused by social factors, but reject the view that disability is *exclusively* caused by such factors.²³

Theorists who endorse mixed or interactional models of disability typically allow for some social constructivism in the constitution of *disability* but adhere to (some version of) an ontologically realist position when it comes to *impairments*. Even Tom Shakespeare, who is very attuned to the complex processes through which a disabled identity is formed, endorses a “critical realist” perspective on impairment. He writes: “while different cultures have different views or beliefs or attitudes to disability, impairment has always existed and has its own experiential reality.”²⁴

The controversial compromise between medical, social, experiential and other models of disability is the view retained by the World Health Organization (which adopted a “bio-psycho-social” model²⁵) and possibly by the Supreme Court of Canada. On the one hand, as the extracts above suggest, the Court seems to recognize that

²³ See e.g. Jerome Bickenbach, *Ethics, Law, and Policy* (New York: Sage Publishing, 2012) at 14–15.

²⁴ Tom Shakespeare, *Disability Rights and Wrongs* (New York: Routledge, 2006) at 54.

²⁵ World Health Organization (WHO), *International Classification of Functioning, Disability and Health* (Geneva: WHO, 2001).

disabilities have varying causes, which would take it closer to a mixed model of disability. On the other, the Court says that it cannot do anything regarding the biological or medical causes and that discrimination law is only about particular social causes of disability, a position closer to that of traditional social modelists. Whichever position the Court may come to endorse on the issue of causality, my comment is the same: whether the Court sees impairment as a *sine qua non* condition, but not a cause, of disability-*qua*-oppression, or as one of the causes of disability-*qua*-mixed-phenomenon, it does not consider impairments to be socially constructed or created. Impairments are “true characteristics”²⁶ that are believed to lie outside the reach of ideology, stigma, oppression, or disciplinary apparatuses.

THINKING ABOUT THE SUBJECT AND POWER DIFFERENTLY

A natural reflex of a social justice scholar, upon hearing that “impairments” may themselves incorporate unquestioned prejudices, would be to expand an enquiry into stigmatizing attitudes toward impairments. This strategy, while measurably helpful in some ways, would confirm, rather than challenge, the assumption that there is an entity *at which* prejudicial attitudes are directed and that this entity itself is a “natural fact”. Such a scholar may also be keen to combat stigma by accepting the notion that impairments are constructs and looking for another natural fact (e.g., “differently embodied persons”) that may be discriminated against. She may hold that

²⁶ Eaton, *supra* note 19 at 272.

doctors and lawyers would turn those natural facts about people into inherently stigmatized impairments, just as ableist employers and discriminatory state policies would turn impairments into disabilities. The well-meaning quest for justice within the confines of liberal legal scholarship would take the form of a pursuit of the subject unencumbered by stigma in order to free her.

Alternative philosophical traditions, however, would resist the temptation to look for a subject whose status is not tainted by ideology, that is, a subject whose needs and preferences could be authentically understood in abstraction from the “vagaries of circumstance”²⁷: the subject lying behind the “differently embodied subject”, itself lying behind the “impaired subject”, itself lying behind the “disabled subject”. Social justice scholars are committed to attempting this perpetual regression because of their liberal understanding of the subject as preceding power. Liberal theory traditionally justifies the state’s authority to exercise power by seating it on the will of subjects who are postulated to exist beyond the reach of power that they themselves exercise and transfer to the state. An alternative theory of the subject, found in the work of Michel Foucault, denies that subjects precede power. This alternative view considers how power may be exercised through practices such as undergoing medical or judicial scrutiny and how subjects actively participate in the production of knowledge about themselves in a way that would legitimize their various treatments, from institutionalization to financial support.

²⁷ Michael Sandel, *Liberalism and the Limits of Justice*, 2nd ed (Cambridge University Press, 1982) at 19.

The suggestion that the agency of subjects is orchestrated by forces that ought to be scrutinized is potentially problematic for liberalism, as it undermines the liberal conception of freedom and the strategies undertaken to achieve it. In addition to their understanding of the subject, a connected reason why legal scholars working within a mainstream liberal framework fail to see the usefulness of a Foucauldian approach is because of their understanding of power. Here, I define power broadly as “compliance-securing mechanisms”²⁸ to capture both the kind of centralized power exercised by the state that liberals are traditionally preoccupied with and the kind of “micro-powers that are exercised at the level of daily life”²⁹ that Foucault and his followers investigate. Instead of reducing power to something done *to* an unencumbered subject, these theorists understand the subject as constituted by a reiterative process of practices, performances and discourses in which both the subject and others take part. Instead of understanding power as exercised *by* a dominant group *over* a subjugated one, this approach understands power as exercised *through* the subject’s identity and agency. As Foucault writes:

[P]ower reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their

²⁸ Stevens Lukes, *Power: A Radical View*, 2nd ed (New York: Palgrave MacMillan, 2005) at 88.

²⁹ Michel Foucault, "Body/Power" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (New York: Pantheon Books, 1980) at 59.

discourses, learning processes and everyday lives. The eighteenth century invented [a regime of power exercised] within the social body, rather than from above it.³⁰

Such non-directly coercive, but regulative mechanisms include the medico-legal determination that Shirley would be allowed to visit her child under supervision in order to determine whether she was a fit guardian. Mosoff describes her client being “heavily medicated and very sad”:

[Shirley’s] supervised access visits to her baby . . . were observed by those who would eventually be called to give evidence about her capacity as a mother. Her visits with the baby took place through the haze of medication which blurred her vision, made her mouth dry, and rendered her movements stiff. She was told to be spontaneous and demonstrative with the child.³¹

This disheartening description arouses a sense of injustice, because the expectations of being spontaneous and demonstrative seem questionable, especially given Shirley’s medicated state:

³⁰ Michel Foucault, "Prison Talk" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (New York: Pantheon Books, 1980) at 39.

³¹ Mosoff, *supra* note 12 at 107.

Eventually [Shirley] agreed that she needed to remove herself from her child in the best interests of the child. The case ended with a consent order giving permanent custody to the superintendent so that the child could be adopted. . . . Mothers with mental health histories may themselves be convinced that it is best to give up their child without a hearing.³²

Of interest is that the case was solved through Shirley's own agency. Through engaging with medical, welfare or legal frameworks, "differently embodied people"³³ (hereinafter DEP) come to see themselves

³² *Ibid* at 107, 128.

³³ I will sometimes use the term "differently embodied people" (or the acronym DEP) to keep a lexical distance from the terms "disabled persons" and "impaired persons". By "differently embodied people", I refer to people with unusual experiences or needs related to their particular embodiment, and I mean to encompass any physical and neurological differences without committing either to a particular source of authority to define those differences (as the medical model does when it relies on medical experts to identify "impaired individuals"), to particular experiences (such as someone's subjective appreciation of one's own situation), or to particular stigmas compounding one's situation (as the social model does by claiming that social factors cause "disability"). The term "differently embodied people" is not itself immune to criticism (notably, the term "different" prompts the question: different from what?). I am not necessarily claiming that this is a term that has any more truth about the broad umbrella of disability-related concepts or that it identifies a core shared by all of those concepts. I only suggest that it is helpful to discuss the specific notions I deal with in this paper to gain conceptual distance from "impairment" and "disability" when and if needed.

differently. Regulated “impairment talk” is one of the mechanisms through which DEP come to endorse “what others see as [their] failing, inevitably causing [them], if only for moments, to agree that [they do] indeed fall short of what [they] really ought to be.”³⁴

If the “disabled subject” or the “impaired subject” never escapes power relations but is rather constituted by them, a mode of resistance for scholars and advocates for people in Shirley’s situation might be to question the expectations imposed on mentally ill women performing the role of mothers.³⁵ A critical analysis of the mothering practices of women with mental health diagnoses—including an analysis of paternalistic supervision by medical and legal bodies—would render visible a pre-legal normative framework of “proper mothering” more or less taken for granted by legal actors enforcing it. Of interest to Foucauldian scholars would be the practices of inviting women to submit themselves to medical and judicial forms of scrutiny that require them to meet a set of unquestioned standards. Such processes, which are inscribed within invisible power relationships, inherently limit the conceptual horizon of recourses available to DEP.

Shirley’s story demonstrates a form of knowledge production and shows us how “knowledge-based power” (by contrast to repressive power) operates. We ‘learn’ that

³⁴ Goffman, *supra* note 2 at 7.

³⁵ Jane C Murphy, “Legal Images of Motherhood: Conflicting Definitions from Welfare Reform Family and Criminal Law” (1998) 83 Cornell L Rev 688.

Shirley is unfit to be a mother, indeed through her own statement. It was her ‘confession’, but also the unquestioned process, tied up with power relations, that constituted her into an impaired subject with limited legal options. We may call this kind of knowledge “confessional knowledge”.³⁶ This notion emphasizes that “disabled people” are invited or pressured to identify themselves within legal (and other social) frameworks that not only serve their explicit purposes but also mold the social roles, self-understanding, relations with others, and agency of DEP.

In the case of Shirley, the supervised visits with her child, displaying her parental capacities, constituted the setting of her “confession”. Another illustration of the production of confessional knowledge in legal settings is when judges interrogate potential witnesses with cognitive impairments to test whether they can act as witnesses. Cognitive impairments are traditionally taken to be an objective basis to justify some people’s exclusion from the witness stand, while the notion of a “normal witness” goes largely unquestioned.³⁷ Since testimonies arguably construct reality, what follows is an erasure of harms endured by cognitively different individuals and a

³⁶ I refer to the Foucauldian idea that subjects produce knowledge about themselves—and transform themselves in the process—in a confessional manner. Michel Foucault, *History of Sexuality, Vol.1*, translated by Robert Hurley (New York: Pantheon Books, 1978) at 58–62.

³⁷ Jonas-Sébastien Beaudry, “The Intellectually Disabled Witness and the Requirement to Promise to Tell the Truth” (2017) 40:1 Dal LJ 1.

reinforcement of their social exclusion.³⁸ Confession can also take the form of filling extensive Disability Living Allowance forms about one's "toilet needs". Subjects accept undergoing such a production of knowledge about themselves because it can give them access to certain benefits, such as being allowed to parent one's child, testify in a case against one's aggressor, or access social support.³⁹

The act of "confessing" transforms the confessor; in legal contexts, it changes her status, sometimes for the worse. Whereas Mosoff exposed paternalistic practices through which women are asked to show that they can reach the status of mothers fit to parent, Shildrick and Price focus on the "self-generated and self-policed behaviours" that welfare claimants engage in to satisfy "disciplinary economies" that require "goods and desires" to conform to what is considered normal:

No area of bodily functioning escapes the requirement of total visibility. . . . The welfare claimant is controlled not by a

³⁸ For instance, by asking a proposed witness with cognitive impairment whether she's been "told about God", whether she'll go to jail if she tells "big lies", or whether she's heard the expression "I promise to be good, mommy", a judge would not only be examining testimonial reliability, but also naturalizing a specific conception of a "normal witness". (Those questions, though deemed to be inappropriate by the Supreme Court, were asked at trial to a proposed witness with a mental disability, as reported in *R v DAI*, 2012 SCC 5 at para 84, [2012] 1 SCR 149.)

³⁹ Margrit Shildrick & Janet Price, "Breaking the Boundaries of the Broken Body" (1996) 2 *Body & Society* 93.

display of external coercion but by continuous surveillance. . . . [Through] the Disability Living Allowance claim form, she produces herself as a disabled subject.⁴⁰

This degree of invasiveness and control over individuals' private lives seems to belong to a dystopian novel, and yet it is commonly tolerated because knowledge-based power goes unnoticed: its manifestations are assumed to be objectively necessary ways of dealing with the essentialised abnormality of certain individuals. While seeming to attend to the individuality of a disabled person's needs, the welfare forms considered by Shildrick and Price universalize the unique individual claimant and turn her into a manageable "impaired subject". Power is therefore partly exercised through the self-enforcement of norms by the subject herself. Legal texts and policies not only coerce the subject but guide her self-understanding and self-regulation.

Even in coercive settings, the law's invitation to perform rituals that will allow individuals to qualify as victims, claimants, witnesses, etc. do not fit a traditional understanding of coercion. The requirement to meet those

⁴⁰ *Ibid* at 103–4. Mosoff, *supra* note 12 at 109–10, similarly reports that “[b]ecause mothers with mental health histories are often portrayed as dangerous or potentially dangerous to their vulnerable children . . . women can expect the smallest and most intimate details of their lives to be considered legitimate subject matter of the public domain . . . [b]ecause of a medical/scientific assertion about a person that creates and names her difference, such women have little claim to any vestige of privacy.”

status-granting criteria are presented as natural necessities. Knowledge-based power is exercised at this early stage of qualifying to participate in the legal sphere as a full legal subject. Even if it becomes possible for DEP to challenge repressive power on specifically recognized grounds within the legal sphere, it will often be after having submitted their unusual bodies (and connected needs and capacities) to the invasive scrutiny of medical and legal actors who act as gatekeepers to crucial resources and opportunities.

The most compelling reason for liberal scholars to endorse a critical posture toward their own endeavours is that a repressive view of power captures only the rarest and most visible uses of power. In an article criticizing the unnecessarily normalizing impetus of medical interventions, Anita Silvers report that many adults born with a limb malformation regret “having had their natural digits amputated, being fitted with ineffective artificial arms, and forbidden to use the much more functional method of manipulating objects with their feet”.⁴¹ It is hard to imagine a more invasive use of power than one driving parents to consent to their children’s amputation so that they would look a little more “normal”. Yet, this kind of power is typically invisible. Impairments were used in the instance described by Silvers as a ground for exercising power for the benefit of those children. Liberal narratives of power operate on such beneficial, welfare-

⁴¹ Anita Silvers, “On the Possibility and Desirability of Constructing a Neutral Conception of Disability” (2003) 24 *Theor Med Bioeth* 471 at 475.

maximizing grounds⁴² (e.g., it is for the best interests of children to be removed from their mother's custody or, given a certain set of congenital conditions, never to have been born). Even well-meaning medical practices and legal discourses related to disability can perpetuate the subjugation of the "impaired subject". As Judith Butler puts it, "we may seek recourse to matter [in our case: impairment] in order to ground or verify a set of injuries or violations only to find that matter [impairment] itself is founded through a set of violations."⁴³

To explore what a critical ontology of impairment may look like within disability legal scholarship, the rest of this article examines the theoretical foundations of such a practice, potential political-legal manifestations of it, and objections to both the foundations and practice of a critical ontology of impairment.

2. TOWARD A CRITICAL ONTOLOGY OF IMPAIRMENT IN DISABILITY LAW

CONSTITUTING AND MAINTAINING AN IMPAIRED IDENTITY

Differently embodied people are often attributed statuses (medical ones like "diseased", "impaired", "disabled", or degrading ones found in popular culture like "freak") that confine and orientate the exercise of their freedom. For instance, some report that "women who have disabilities

⁴² Michel Foucault, *Naissance de la Biopolitique. Cours au Collège de France, 1978–1979* (France: Seuil/Gallimard, 2004).

⁴³ Butler, *supra* note 4 at 29.

are seen as being sexless, unattractive, unmarriageable and generally non-female”.⁴⁴ Through social activism, the status of a “person with disabilities” has been cast under a more positive light, but it remains commonly associated with the role of the sick.⁴⁵ As a result, many differently embodied people reject the status of a “disabled person”.⁴⁶ This is pragmatically doable if they do not need to endorse this status in order to be processed within welfare, anti-discrimination, workplace integration, or punitive legal frameworks.

The acquisition and parameters of the status of an “impaired person” are harder to challenge.⁴⁷ Social modelists have negotiated a space for a disabled identity to be worn as a political badge promoting anger rather than sadness, hope rather than despair, strength rather than docility. The same cannot be said of an impaired identity, which social modelists have been accused of

⁴⁴ Sharon Barnartt, “Using Role Theory to Describe Disability” (2001) 2 Res in Social Science and Disability 53 at 61, referring to Michelle Fine & Adrienne Asch, “Disability Beyond Stigma: Social Interaction, Discrimination, and Activism” (1988) 44:1 Journal of Social Issues 3.

⁴⁵ Saad Z Nagi, “Some Conceptual Issues in Disability and Rehabilitation” in MB Sussman, ed, *Sociology and Rehabilitation* (Washington: American Sociological Association, 1970) at 104.

⁴⁶ Nick Watson, “Well, I Know this is Going to Sound Very Strange to You, but I Don’t See Myself as a Disabled Person: Identity and Disability” (2002) 17:5 Disability & Society 509 at 522.

⁴⁷ This is for reasons similar to those given by Saad Nagi for distinguishing the role of a “sick or ill person in a hospital or clinic” as that of a *patient* and the role of a “disabled person in a rehabilitation setting” as that of a *client*. Nagi, *supra* note 45 at 106.

having surrendered to medical experts, leaving it to them to define “impairments” and prescribe expectations attached to it.⁴⁸ A medical, value-neutral understanding of impairment is theoretically possible,⁴⁹ but some find it “politically naïve”⁵⁰ while others suggest that it flies in the face of the history of the use of statistical sciences by the state to manage public health,⁵¹ as well as of the emergence of the figure of the “chronic patient”.⁵² One could also object to a value-neutral conception of impairment because empirical data indicates that impairments are, in practice, negatively valued by both able-bodied and disabled people.⁵³

⁴⁸ See Hughes & Paterson, *supra* note 1; Tremain, *supra* note 11. Although these criticisms may have a *de facto* purchase, I note that social modelists like Michael Oliver endorse a “structural account” of impairment that challenges the “personal tragedy theory [that] impairments are chance events happening to unfortunate individuals”. Oliver holds that “impairments are not randomly distributed throughout the world but are culturally produced.” Oliver, *supra* note 15 at 12, 14.

⁴⁹ Consider Guy Kahane & Julian Savulescu, “The Welfarist Account of Disability” in Kimberley Brownlee & Adam Cureton, eds, *Disability and Disadvantage* (New York: Oxford University Press, 2009).

⁵⁰ Tremain, *supra* note 11 at 621.

⁵¹ Lennard Davis, “Constructing Normalcy” in Lennard Davis, ed, *The Disability Studies Reader*, 2nd ed (New York: Routledge, 2006) 3.

⁵² William Arney & Bernard Bergen, “The Anomaly, the Chronic Patient and the Play of Medical Power” (1983) 5:1 *Sociology of Health & Illness* 1.

⁵³ Watson, *supra* note 46.

Such a negatively charged understanding of impairment may come to be incorporated into one's identity through different practices and discourses: unpleasant routines, failure to socialize, lack of spontaneity connected to an obligation to plan ahead, and formally asking for support.⁵⁴ Through the performance of such practices, the differently embodied person becomes an "impaired subject", sometimes described in ways reminiscent of the biomedical model that constructs disability as medical condition and a personal tragedy.⁵⁵ Eve, a self-described "sad lonely character" with multiple sclerosis reports:

Well, you are so much trouble to people. . . .
I just feel that before everything happened
things were good and boyfriends were on
the scene and marriage was on the scene and
everything changed with MS.⁵⁶

The goal of genealogizing impairment would be to understand how culture, ideology or power transformed Eve into an impaired person and orchestrated her self-understanding. Surely, Eve cannot theorize her medical condition away. To carry out a critical ontology of impairment requires us to qualify what is meant by "social construction" to avoid the criticism that "the constructivist refutes the reality of bodies, the relevance of science, the alleged facts of birth, aging, illness, and

⁵⁴ *Ibid* at 522.

⁵⁵ *Ibid* at 522–23.

⁵⁶ *Ibid* at 523.

death.”⁵⁷ One need not suggest that reality is only a function of language to argue that impairments are socially constructed. One may concede that a natural substrate of some kind underlies “impairment” and still hold that any effort to define and describe it cannot avoid *contributing to*, rather than strictly describing, this phenomenon. We may think of social construction as a kind of co-creative or interpretative exercise rather than a creation *ex nihilo*.⁵⁸

Mainstream disability studies and legal scholarship have effectively “concede[d] the body to medicine”⁵⁹ and limited the scope of their constructivist critique. To challenge how impaired identities are formulated and used within legal frameworks, we need to begin articulating impairment and disability differently.

EMANCIPATORY STRATEGIES

A critical ontology of impairment can serve to support at least two emancipatory strategies: (1) the strategy of challenging power by denying, resisting, and redefining the impaired status imposed on DEP and (2) the strategy of articulating disability claims independently from the concept of impairment.

⁵⁷ Butler, *supra* note 4 at 10, 28.

⁵⁸ *Ibid* at 10.

⁵⁹ Hughes & Paterson, *supra* note 1 at 326.

(i) Challenging Cultural Appreciations of One's Bodily Differences

As Shakespeare and Watson argue, impairments are “experientially salient” to many disabled people.⁶⁰ Hughes suggests that people with visible disabilities may be more prone to “experience their bodies as an influential presence [in the context of everyday social encounters]”. Whereas the body is “normally taken for granted by most people in most situations”, visible disabilities draw attention to the power of the body.⁶¹ Some, like Jenny Morris, would therefore prioritize the development of a “disability culture [that] give[s] [people with different embodiments] the confidence to take pride in our difference, to assert that we have an experience which is valid and important”.⁶² Otherwise, social modelists may be recruiting demoralized soldiers who can hardly attach an activist badge on their bruised identity, which has already incorporated the expectations associated with an “impaired person”. If endorsing the social model’s political badge of “disabled” requires one to give in to the medical understanding of impairments, many DEP may choose to avoid this identity.

Those difficulties have led “second wave” disability theorists to be skeptical of identity politics

⁶⁰ Shakespeare & Watson, *supra* note 10 at 15.

⁶¹ Bill Hughes, “Disability and the Body”, in Colin Barnes et al, eds, *Disability Studies Today* (Cambridge: Polity 2002) at 71.

⁶² Jenny Morris, *Pride Against Prejudice* (British Columbia: New Society Publishers, 1993) at 114.

within the disability movement. While some would detach emancipatory discourses from any kind of self-identification as an impaired person (see next section), others prefer to redeem the notion of impairment, precisely because embodiment—and the experience of one’s embodiment in a world of differently embodied people—is salient to the life and identity of many disabled people. The disability movement may follow Morris’s advice to develop a more positive “impaired status”. Morris gives the example of deaf people who “because they have a separate language . . . often have a clearer sense of a separate culture and history than do other groups of disabled people.”⁶³ Such cultural reframing of embodied experiences of difference in a more positive or empowering way, sustaining a recognition of identity rather than the material redistribution primarily sought by social modelists, may do more for people like Shirley and Eve than the social model could.⁶⁴

A large body of reflections authored by disabled people could contribute to this cultural shift. The key virtue of this strategy is that it helps disabled people regain control of the construction of an impaired identity. Scholars like Carol Thomas and Bryan Turner express concerns over such narratives becoming too idiosyncratic and being “largely devoid of historical and sociological

⁶³ *Ibid* at 113.

⁶⁴ For a discussion of the benefits of both distributive and recognitive measures, see Nancy Fraser & Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (London: Verso, 2003).

content”.⁶⁵ However, they are not intended to replace political movements, but only help those movements stay connected to the actual concerns of their constituencies. Moreover, underestimating the value of personal narratives within social struggles risks failing to see the political in the personal and vice-versa.⁶⁶

However, social modelists like Colin Barnes and Michael Oliver have expressed concerns that a focus on impairment (or difference, or different embodiment) “will only de-politicise the social model” without yielding any alternative models that may be operational within “campaigns to improve or defend the lifestyles of disabled people”.⁶⁷ Criticisms in this vein resemble arguments in favour of identity politics. Responses may therefore take the form of traditional attacks on identarian politics, such as the fact that group identities put forward in emancipatory struggles may not be adequately representative or may be assimilationist.⁶⁸

⁶⁵ Bryan Turner, *The Body and Society*, 3rd ed (New York: Sage Publishing, 2008) at 52. See also Carol Thomas, “Disability Theory: Key Ideas, Issues and Thinkers” in Colin Barnes et al, eds, *Disability Studies Today* (Cambridge: Polity, 2002) 38 at 44.

⁶⁶ Thomas, *supra* note 65 at 50.

⁶⁷ Mike Oliver, “The Social Model of Disability: Thirty Years On” (2013) 28:7 *Disability & Society* 1024 at 1025; Colin Barnes, “Disability Studies and the Academy—Past, Present and Future” (2013) 4 *Ars Vivendi* 3.

⁶⁸ Cressida Heyes “Identity Politics”, *The Stanford Encyclopedia of Philosophy*, (2016), online: <plato.stanford.edu>; Kimberley Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color” (1991) 43:6 *Stan L Rev* 1241.

(ii) Detaching Disability-Related Claims from Impairments

A political alternative is to detach impairments from disability claims altogether. This approach would radically sever any connection with the medical model of disability (which holds that disability and impairment are co-extensive). It would also depart from the mainstream “Russian nesting doll” model of disability generally endorsed by the social model and a variety of authorities that keep *impairments* at the heart of the concept of disability by making it a necessary condition for *disability* to exist, even though it severs the causal relation between impairment and the ideological and power-related dimensions of said disability. Rather than “secur[ing] the political freedom of a particular [impaired] constituency”, the disability movement would need to organize its political platform around “belief systems, programmatic manifestos, or party affiliation”.⁶⁹ What would it mean to articulate disability claims without relying on the notion of impairments? This question asks whether the disability movement—historically defined around a group identity—can coherently abandon identitarian politics for a more profitable alternative. It asks what other values and manifestos could be endorsed by social actors preoccupied with the fate of DEP.

Articulating disability claims beyond a shared identity may be less sacrilegious than it seems to social modelists. The heterogeneity of the group of “disabled people” is such that there is no unifying membership

⁶⁹ Heyes, *supra* note 68.

criterion to the “disability community” *other than* impairment. Thus, empirical research like that of Watson suggests that much disability activism “rests on an unreflexive acceptance of the distinction of disabled/non-disabled”.⁷⁰

The *Mercier* case at the Supreme Court of Canada⁷¹ provides us with a platform to begin discussing what a post-identity approach of disability might look like in legal terms. Three individuals complained to the Quebec Human Rights Commission for having been discriminated against on the basis of their disability.⁷² Ms. Mercier and Mr. Jean-Marc Hamon had spinal cord anomalies and were not hired by municipal bodies to work. Another municipality refused to hire Mr. Palmerino Troilo, the third appellant in *Mercier*, because he had Crohn's disease. This case raised the question of whether the complainants were “disabled” in a legal sense, considering that they were all asymptomatic.

The American Supreme Court had held that the status of being impaired, in and of itself, did not suffice to bring someone under the purview of the *American with*

⁷⁰ Watson, *supra* note 46 at 525.

⁷¹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665 [*Mercier*].

⁷² The Court says “handicap”, but conceptually refers to what mainstream disability studies would identify as “disability”, see *supra* note 18 on terminology.

Disabilities Act (ADA).⁷³ Impairments are, under the *ADA*, necessary but insufficient conditions to constitute disability; they have to cause substantial limits on major life activities.⁷⁴ The trial judge who dealt with Ms. Mercier's and Mr. Troilo's cases followed the American Supreme Court's logic. The three complainants had impairments in that they had a physiological dysfunction. However, being asymptomatic, their impairments did not amount to a functional limitation. Therefore, Judge Brossard concluded that Ms. Mercier and Mr. Troilo's "physical anomalies" did not amount to them having "handicaps for the purposes of s. 10 of [Quebec's *Charter of Human Rights and Freedoms*] because they do not suffer from a disadvantage or disability that results in a functional limitation."⁷⁵

The significance of an "impaired" or "disabled" identity is highlighted in cases where failing to properly identify oneself effectively deprives claimants of legal standing or legal positions. As an illustration of the irony, an employer tells a person with a "physical anomaly": "I won't hire you because you're disabled." The prospective

⁷³ *Sutton v United Airlines, Inc*, 1999 199 S Ct 2133; *Murphy v United Parcel Services*, 1999 119 S Ct 2133; rejected by the *Americans with Disabilities Act of 1990*, including changes made by the *ADA Amendments Act of 2008*, Pub L No 110-325, tit 42 § 12101 note (a)(4) and (b)(2).

⁷⁴ *Americans With Disabilities Act of 1990*, Pub L No 101-336, § 12102, 108th Congress, 2nd sess (26 July 1990), including changes made by the *ADA Amendments Act of 2008*, Pub L No 110-325.

⁷⁵ *Mercier*, *supra* note 71 at para 14 referring to *Charter of Human Rights and Freedoms*, RSQ, c C-12.

employee answers: “No, I’m not. I’m perfectly able to do the work”. The employer concludes: “Good! It means that you won’t be able to sue me.” It is to prevent such unfair outcomes that Justice Rivet, presiding over the Hamon case at the trial level, found that actionable discrimination could be based on limitations, even “limitations attributed in error”. In doing so, she grounded a disability claim on stigma or prejudiced assumptions alone.⁷⁶

The Court of Appeal reversed the decision and held that the applicants had been victims of discriminatory exclusion because being impaired was enough to classify someone as handicapped.⁷⁷ The Court of Appeal equated disability with impairment (i.e., it endorsed the medical model), which provided relief for Troilo and Mercier, who had actual physiological anomalies, but would have failed to help people stigmatized on the basis of falsely attributed characteristics.

The Supreme Court of Canada, recognizing that the “nature of discrimination is often subjective” and “may be based as much on perception and myths and stereotypes as on the existence of actual functional

⁷⁶ *Ibid* at paras 15–17.

⁷⁷ *Ibid* at paras 18–24: “[The C.A. Judge] referred to case law and literature, but declined to adopt a strict [or exhaustive] definition of the concept of handicap. . . . [He only stated that] a handicap may take the form of a loss, malformation or abnormality of an organ, a structure or an anatomical, physiological, psychological or mental function.”

limitations,”⁷⁸ followed Justice Rivet, rather than the Court of Appeal, in detaching disability from impairment.

The Supreme Court did not, however, endorse a general stigma-based conception of disability that would altogether detach disability from the idea of the body. Prejudices are still “body-related” even if they are grounded in imaginings. Otherwise, it would be hard to distinguish disability from any other ground of discrimination.⁷⁹ In fact, other grounds like age or sex are also closely related to human embodiment, so we need to further narrow the kind of stigma associated with disability by connecting it to “abnormal” bodies. Having a female or an aged anatomy attract stigma, but if a young man would *look like* an older woman, then the stigma associated with his attributes would be related to disability, as understood here, because prejudices would not be directed at his female or aged bodily features, but at the fact that those bodily features differ from a young man’s “normal” body.

Although Justice L’Heureux-Dubé claims to be incorporating the social model into Canadian law,⁸⁰ it

⁷⁸ *Mercier*, *supra* note 71 at para 39; see also para 81.

⁷⁹ Consider e.g. Tom Koch, “Is Tom Shakespeare Disabled?” (2008) 34 *J Med Ethics* 18, who would implicitly define disability merely as a loss of social opportunities or power, or as exclusion from certain roles or relations.

⁸⁰ She writes that handicaps are “personal characteristics or ailments” that attract a “negative bias” (*Mercier*, *supra* note 71 at para 83) and this “negative bias” generates “obstacles to full participation in society” (*ibid*), or “the loss or limitation of opportunities to take part in the life of the community on an equal level with others” (*ibid* at

seems that the Court offered a distinct “discrimination model” of disability in *Mercier*.⁸¹ Justice L’Heureux-Dubé does not require a cumulation of factors typical of multidimensional models of disability. One need not be disabled by one’s body *and* by society. Her definition is more open-ended: “a “handicap” (i.e., disability) may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of these factors.”⁸² She refuses to provide a narrow definition of disability, because “what is a handicap today may or may not be one tomorrow”.⁸³ Her “discrimination model” of disability could be interpreted as merely requiring physical or mental features that attract stigma. If her open-ended definition of disability is read as detaching the concept of disability from the notion of physiological anomaly, other traits attracting this stigma—like unconventional looks, unattractive appearances, or obesity—would fall under this definition. On the other hand, she says that having a cold or having blue eyes would not count as disabilities because they do not attract negative biases.⁸⁴

para 80). She also explicitly incorporates into her judgment Jerome Bickenbach’s terminology of a “social phenomenon of handicapping” (*ibid* at para 83), as well as his focus on the socio-political dimensions of disability (*ibid* at para 77).

⁸¹ Especially considering that establishing handicap as ground of discrimination does not require proof of physical limitations or the presence of an actual physiological anomaly.

⁸² *Mercier*, *supra* note 71 at para 79 [emphasis added].

⁸³ *Ibid* at para 76.

⁸⁴ *Ibid* at para 82.

This discrimination model of disability comes as close as an actual judicial model can to David Wasserman's plea for a de-medicalized interpretation of disability discrimination under the *ADA*.⁸⁵ Wasserman argues that protection against disability discrimination should extend to any "disfavored physical and mental variations."⁸⁶ If the goal of human rights legislation is to protect "some of the least advantaged and most stigmatized members of society", it would be counter-productive to ignore how "disabling habits of thoughts and social practices"⁸⁷ function. Wasserman's stigma-based approach to disability (or *Mercier's* discrimination model of disability) would turn our attention to how and why stigma functions and invite analyses of a history of negative affective responses toward "abnormal bodies".⁸⁸ This more open-ended approach better captures arbitrary prejudices against different forms of embodiment not clearly associated with historically oppressed groups or defined within the narrow confines of "medical anomaly". Extending the protection of human rights law would protect and respect a wide range of people who do not fall within the traditional conception of "disabled people" but still struggle with "body prejudice".

⁸⁵ David Wasserman, "Stigma Without Impairment" in Leslie Francis & Anita Silvers, eds, *Americans with Disabilities* (New York: Routledge, 2000) 146.

⁸⁶ *Ibid* at 148.

⁸⁷ *Ibid* at 159.

⁸⁸ See Shildrick, *supra* note 11.

One the other hand, this approach would deprive courts of clear, easily supported criteria to establish disability discrimination. Canadian Courts have long tried to overcome the difficulty of proving discriminatory attitudes by relying on “facts” such as impairments and different treatments⁸⁹ to establish discrimination by effects rather than by intent.

Some legal literature suggests avenues to articulate equality claims on the basis of fundamental interests⁹⁰ and vulnerability,⁹¹ and the same could be done around stigma⁹² and disability/impairment. These concepts can be taken to be conditions which might apply to everyone rather than as descriptors of an “insular and discrete” identity. For instance, according to Goffman, the notion of stigma refers to any discrediting feature and only acquires a stigmatizing dimension within specific contexts.⁹³ With regard to disability specifically, Irving Zola has popularized the view that disability is a universal

⁸⁹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1; See also *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 in which the Court distanced itself from too thick an attitudinal analysis of discrimination.

⁹⁰ Robin Elliot & Michael Elliot, “The Addition of an Interest-Based Route into Section 15 of the Charter” (2014) 64 Sup Ct L Rev (2d) 461.

⁹¹ Martha Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20:1 Yale JL & Feminism 1.

⁹² Wasserman’s chapter, *supra* note 85, is a contribution to this enterprise.

⁹³ Goffman, *supra* note 2 at 2–5.

condition, so that social and legal measures should deal with disability and impairment accordingly:

[A]n exclusively special needs approach to disability is inevitably a short-run approach. What we need are more universal policies that recognize that the entire population is “at risk” for the concomitants of chronic illness and disability.⁹⁴

The parameters of a principled approach to weigh the merits of disability claims on grounds other than impairments remain embryonic and this is perhaps the challenge that disability law scholarship must confront head on. Zola’s universalist model, often echoed in disability studies, lays the theoretical grounds to legitimize “universal design” claims in a way that would not require claimants to constitute themselves into impaired subjects of power.

Shelley Tremain and Wendy Brown recommend that “protest[s] against marginalization or subordination” take the political form of demanding “what we want” rather than of stating “who we are”, since making claims on the basis of “impairments” will necessarily “appeal to the very identity upon which [the] subjection [of DEP]

⁹⁴ Irving Zola, “Toward the Necessary Universalizing of a Disability Policy” (1989) 67:2 *The Milbank Quarterly* 401 at 401. See also JE Bickenbach, “Minority Rights or Universal Participation: The Politics of Disablement” in M Jones & LA Basser Marks, eds, *Disability, Divers-Ability and Legal Change* (Boston: Martinus Nijhoff, 1999) 101.

relies.”⁹⁵ We can therefore assert that *we want* an inclusive society, and avoid explaining why we deserve it on the basis of an impaired identity. As Brown explains, this political language would recover “the moment prior to [one’s identity’s] own foreclosure against its want”.⁹⁶ Theorists of justice would contribute to this endeavour by formulating justifications for a society inclusive of DEP that would not capitalize on tragic or medical descriptions of impairments. For instance, one may develop the view that a fair society ought to design its institutions from the point of view of a diversity of human bodies, or that a fair society would enforce a principle of accessibility that would preclude requiring different people (outsiders, others, DEP) to normalize, or even identify, themselves before having access to some goods.⁹⁷

In practice, it is probable that both strategies considered above will take the form of new identity-based claims. This is because of the robust political tradition of expecting people who make disability claims to submissively create and maintain a pedigree of “impaired subject” prior to making requests to various social actors (the welfare state, judges, not to mention personal relationships). It is concretely difficult for disabled people

⁹⁵ Wendy Brown, *States of Injury* (Princeton: Princeton University Press, 1995) at 73; Tremain, *supra* note 11 at 635.

⁹⁶ Brown, *supra* note 95 at 76.

⁹⁷ Margrit Shildrick, “Transgressing the Law with Foucault and Derrida: Some Reflections on Anomalous Embodiment” (2005) 47:3 *Critical Quarterly* 30; Jonas-Sébastien Beaudry, “Welcoming Monsters: Disability as a Liminal Legal Concept” (2017) 29:2 *Yale JL & Human* 101.

to avoid abiding by current frameworks expecting an impaired identity from them.

Nonetheless, formulating these new, more inclusive⁹⁸ identity-based claims would already constitute progress, if they provide grounds for claims that would not require *discrediting* oneself,⁹⁹ that is, the public endorsement of a stigmatized identity, tied with undesirable normative consequences.¹⁰⁰ A critical ontology of impairments could therefore be appropriated by proponents of identity politics as a tool to expand their understanding of an impaired identity, even without moving beyond identity-based claims altogether.¹⁰¹ I tend to agree with Sheila Wildeman that “an anti-identitarian

⁹⁸ As Dianne Pothier suggests in “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 CJWL 37.

⁹⁹ Goffman, *supra* note 2 at 4.

¹⁰⁰ As illustrated in the work of Mosoff, *supra* note 23, and that of Susan Stefan “‘Discredited’ and ‘Discreditable’: The Search for Political Identity by People with Psychiatric Diagnoses” (2003) 44 Wm & Mary L Rev 1341.

¹⁰¹ A ground to reject this suggestion, as well as the first emancipatory strategy of conceptualizing impairment in a more positive way, is that people who wish to understand or present themselves as “impaired” would necessarily import elements subjugating the “impaired subject” in their identity. (Shelley Tremain gave a similar answer to a member of the audience objecting that some individuals may want to endorse an impaired or diseased identity, after her talk “Groundwork for a Feminist Philosophy of Disability”, presented at the Canadian Philosophical Association’s 61st Annual Congress.) I would respond to this objection in the same way as I respond to social modelists who worry about the political inefficiency of a critical ontology in the conclusion: both approaches are not necessarily mutually exclusive.

ethic of resistance to epistemic violence” does not necessarily require “a wholesale shift from the politics of mental health to a post-identity politics”.¹⁰² It may not only lay the grounds for new political identities, but also for novel political uses of identity that would be a new, more adjustable and responsive, kind of identity politics.

Better understanding impairments would not exempt disability theorists from also examining how experiences of impairment and disability relate. An exclusive focus on embodiment risks “marginalizing the sensual, discourse, and the emotions”.¹⁰³ I am not suggesting that impairment is any kind of new Archimedean standpoint that would provide stability to the concept of disability, but rather that (naturalized) abnormal embodiments are currently used unreflectively as such a standpoint.

I do not have the space to deal extensively with a final objection that a critical ontology of impairment ought to rebut: the claim that Foucauldian and other post-structuralist conceptions of impairments as a site of power and resistance leave no space for agency and freedom. Some believe, for instance, that Butler’s performative understanding of agency¹⁰⁴ or Foucault’s conception of

¹⁰² Wildeman (Part II), *supra* note 7 at 192.

¹⁰³ Mairian Corker, “Differences, Conflations and Foundations: The Limits to ‘Accurate’ Theoretical Representation of Disabled People’s Experience?” (1999) 14:5 *Disability & Society* 627 at 634.

¹⁰⁴ Watson, *supra* note 46 at 510.

the body¹⁰⁵ either pre-determine the subject or render her passive. These criticisms have been addressed by post-structuralist scholars.¹⁰⁶ In short, simply because structuralist and post-structuralist perspectives on agency investigate the strings manipulating the puppet does not mean that they deny the possibility of freedom; these perspectives may, instead, be read as qualifying the nature of freedom that we do possess. Moreover, this last challenge to a critical ontology is unlikely to faze legal scholars. Even if they were convinced that certain conceptions of power, agency or impairment are myths, these myths acquire political capital. In legal matters, success may well depend upon appealing to established myths rather than on ontological (dis)proofs.

CONCLUSION

This article has suggested ways of integrating into legal scholarship insights from a modest body of literature within disability studies that problematizes the concept of impairment. The central objection to developing emancipatory practices through a critical ontology of impairment is that its use as an identity marker is necessary to social, political, and legal struggles to foster the social inclusion of DEP. This objection assumes that traditional identitarian politics cannot continue in parallel to developing alternative disability discourses. This

¹⁰⁵ Bill Hughes, “What Can a Foucauldian Analysis Contribute to Disability Theory?” in Shelley Tremain, ed, *Foucault and the Government of Disability* (Ann Arbor: University of Michigan Press, 2015) 78 at 85.

¹⁰⁶ Butler, *supra* note 4 at 197–98; Tremain, *supra* note 11 at 634.

assumption is questionable: it might just as well be said that theoretically divergent disability discourses may feed off each other's political successes. (Consider how both anti-discrimination ideals and universal design ideals sit together throughout the United Nations *Convention on the Rights of Persons with Disabilities*.)

The reward of questioning the social construction of impairments within medical, social and legal discourses, on the other hand, is real and promising. Scholars and practitioners would be equipped with a more sophisticated array of concepts to assess how DEP are socially excluded, not only through measures exercised against them but through a myriad of practices and discourses that construct them interpretatively as "impaired". In the legal field, this "impaired legal subject" is positioned in ways that define and limit the recourses available to her. This awareness is empowering insofar as it provides us with further sites of resistance to challenge treatments of DEP that would insidiously reassert an identity that harms, rather than benefits, them and that subjugates, rather than frees, them.

Tobin Siebers goes so far as to argue that an impaired identity has not been problematized as a social construct nearly as much as other minority identities. This would explain why its use as a tool of domination "remains in full force". Race or gender, for instance, are typically suspicious justifications when invoked in circumstances implying inferiority, but the same cannot be said of common (e.g. tragic or compensatory) ways of depicting and dealing with "the disabled":

[T]he prejudice against disability¹⁰⁷ . . . [provides] seemingly credible reasons for the belief in human inferiority and the oppressive systems built upon it. This usage will continue. . . until we reach a historical moment when we know as much about the social construction of disability as we now know about the social construction of race, class, gender, and sexuality. Disability represents at this moment in time the final frontier of justifiable human inferiority.¹⁰⁸

Working out the implications of the thesis that our bodies are sites of power and agency within legal and political fields that assume bodies are natural objects and are premised upon disembodied conceptions of power and agency may require radical changes. Such changes should not alarm social justice scholars and disability activists because they think these would deprive them of helpful categories to carry out their worthwhile struggles. On the contrary, if they are truly concerned with the emancipation of “persons with disabilities”, they cannot afford to ignore the fact that legal frameworks which seem to cater to the special needs of “people with

¹⁰⁷ In this context, Siebers uses the term “disability” to mean “impairment” or bodily difference.

¹⁰⁸ Tobin Siebers, *Disability Aesthetics* (Ann Arbor: University of Michigan Press, 2010) at 27–28. In his work on the “aesthetics of human disqualification”, Siebers argues that medical (and other, e.g., artistic) representations of impairments carry a symbolic weight that must be read within a history of disability aesthetics, used to disqualify certain people from the ranks of full human beings.

disabilities” are not value-neutral.¹⁰⁹ Whether one uses the idiom of repressive power, ideology and stigma to detect ableist assumptions underlying legal norms, or the Foucauldian notion of regulatory power to understand how profoundly they control differently embodied human beings,¹¹⁰ the point is to dislodge the concept of impairment from its medical pedestal. Bringing the

¹⁰⁹ Shildrick, *supra* note 97 at 43.

¹¹⁰ Foucauldian scholars may find my use of the notions of ideology and prejudice within an argument informed by Foucauldian insights somewhat out of place. This is because, by contrast to critical views of human sciences as a vehicle of ideology, Foucault looks at scientific and other discourses as creating mechanisms that collect and constitute knowledge through which social control is exercised. A focus on prejudice and ideology implicitly supposes the existence of a position untainted by prejudices and ideology and sends us on an impossible quest to find such a position that is less illuminating than understanding how we reached the “truths” that we now have. See e.g. Michel Foucault, *Surveiller et Punir* (France: Gallimard, 1975) at 187 and Michel Foucault, “Truth and Power” in *The Foucault Reader*, (New York: Pantheon Books, 1984) at 60. See also how Foucault considered that his view of knowledge production could inform an understanding of ideology: Michel Foucault, *The Archeology of Knowledge and the Discourse on Language* (New York: Pantheon Books, 1972) at 185. My answer is that objecting to a simultaneous use of legal tools and of a critical outlook on those tools is far from inherently illogical (Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989) at 73). It also does not seem that Foucault himself would have been opposed to this politically opportunistic gleaning of his work. When asked “how can your writings contribute to [social] struggles?”, Foucault conceded that all of his books were “small toolkits” that anyone was welcome to use to “short-circuit, disqualify, or break systems of power”: Michel Foucault, *Dits et Écrits 1954–1988, Vol. II (1970–1975)* (France: Gallimard, 1994) at 720 [translated by author].

construction of its materiality under critical scrutiny will “permit the term to occupy and to serve very different political aims”, which will more than make up for the temporary epistemological uncertainty it may occasion.¹¹¹

¹¹¹ Butler, *supra* note 4 at 30.