

Critical Disability Theory

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1. Introduction

Critical disability theory (CDT) is an emerging theoretical framework for the study and analysis of disability issues. A jurisprudence of disability based on critical disability theory identifies with the legal realist tradition and builds on the Critical Legal Studies movement.

In this paper, I outline my conception of critical disability theory as a theoretical basis for a jurisprudence of disability. The various components of CDT are often approached

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within an interdisciplinary ‘Disability Studies’ framework, but, by grounding CDT within the critical theory tradition, I adopt and incorporate particular philosophical approaches which derive from that tradition which are not necessarily encompassed within the idea of ‘Disability Studies’.

2. Critical Theory

Critical theory as we know it today evolved from the work of scholars who formed the Frankfurt School, a term which refers to a group of Western Marxist social researchers and philosophers originally working in Frankfurt, Germany. These early critical theorists built on both Marx’s critique of the political economy of liberal capitalism and Freud’s exposition of the role of the unconscious in the formation of the human psyche to explain the persistent domination of late capitalism and to propose a means to achieve human emancipation.

The origin of the term ‘critical theory’ dates from 1937 when Max Horkheimer presented his ‘critical theory of society’ in the essay *Traditional and Critical Theory*.¹ Horkheimer contrasted what he called ‘traditional theory’ with ‘critical theory,’ which he proposed as a theoretical approach to providing ‘an account of the social forces of domination that takes its theoretical activity to be practically connected to the object of the study’.² In traditional theory the researcher is a disinterested observer who is simply describes the world as it is. For Horkheimer the essential limitation of the traditional

¹ M Horkheimer 'Traditional and Critical Theory' in M Horkheimer (ed) *Critical Theory: Selected Essays* (Herder and Herder, Toronto 1972).

² F Rush 'Conceptual foundations of early Critical Theory' in F Rush (ed) *The Cambridge Companion to Critical Theory* (Cambridge University Press, Cambridge 2004) at 8.

approach was its separation of the thing being examined from the researcher. In addition, traditional theory aimed only to understand and explain the world; its methodology was grounded in positivism and so it necessarily separated inquiry from normative judgement. Horkheimer's critical theory understood both the researcher and the thing being examined as being engaged in an interactive relationship. For Horkheimer, philosophy and empirical social science should influence and inform each other's work. Critical theories are to be both explanatory and normative at the same time.

Since it was first proposed by Max Horkheimer in 1937, critical theory has come to include a wide range of descriptive and normative bases for social inquiry which have the practical aim of maximizing human freedom and ending the domination of some groups by others defined by class, power, race or other social construct. Unlike traditional theory, critical theory makes no claim to be normatively objective – its purpose is to explain oppression and to transform society with the objective of human emancipation. Despite the extensive variation in the critical theory tradition, any adequate critical theory must be

explanatory, practical, and normative, all at the same time. That is, it must explain what is wrong with current social reality, identify the actors to change it, and provide both clear norms for criticism and achievable practical goals for social transformation.³

CDT, as a member of the critical theory family, is a theoretical approach to the concept of disability which is simultaneously explanatory, practical and normative.

3. Critical Legal Studies

Critical theory was not systematically applied to law until the 1970s with the emergence of the Critical Legal Studies (CLS) movement in the United States which merged

³ J Bohman 'Critical Theory' *The Stanford Encyclopaedia of Philosophy*
<<http://plato.stanford.edu/archives/spr2005/entries/critical-theory/>> (12 January 2007), at 1.

a revitalised legal realism with critical theory.⁴ Legal realism refers to theories of law which are concerned with the actual workings of the legal system. According to the traditional understanding of legal decision making, judges rely on legal materials, such as statutes and case law, and arrive at their judgements through the application of law, as expressed in these sources, through established processes of legal reasoning. Legal realists reject this simplistic conception of how legal decisions are made. Realists look behind the substantive and procedural rules of law to argue that law is inherently indeterminate and legal decisions are understandable only by taking into consideration, along with traditional sources of law, factors outside those sources, including the personalities of the participants in a judicial proceeding and ideological trends and political pressures of the day.

Since law is part of a complex social organization and cannot be understood as a thing unto itself, other disciplines such as economics, psychology and political science can make important contributions to understanding the nature of law, its role in society, and the outcome of particular disputes.

Critical Legal Studies contests fundamental principles of the liberal conception of law. Where liberalism argues that law is separate from other forms of social control, CLS argues that law is an integral part of the available social controls. Where liberalism argues law consists of formal rules which define their own scope of application, CLS argues that legal rules are indeterminate and political and social factors outside of those rules have a significant influence on legal outcomes. Where liberalism views law as the codification of objectively normative rules to govern society, CLS argues that law reflects subjective value

⁴ AC Hutchinson "The Last Emperor?" in A Hunt (ed) *Reading Dworkin Critically* (Berg Publishers, Inc., Oxford 1992) at 49.

choices that may be contested by those whose interests are not served, or are poorly served, by the value choices institutionalized by legal rules.

Critical Legal Studies deconstructs law to show how it reflects class interests and relations of power and that judicial decisions are essentially political in that, within the institutional boundaries of legal reasoning, judges base their decisions on their subjective assessment of the available policy options which will be informed by their personal beliefs and political and economic pressures of the day. Law acts to achieve particular social objectives and the analysis of law must account for both the purpose and effect of a law in its social context.

Later, in the 1980s and 1990s, identity jurisprudences, such as feminist legal theory, critical race theory and queer theory, identified limitations in CLS theorizing which arose from the underlying structural biases of society which CLS itself had inadequately exposed. Critical Race Theory (CRT), for example, evolved from the failure of CLS to adequately account for the role of race in American society and legal institutions and its inability to respond to the interests of oppressed minorities.

Building on this critical base and joining the family of identity jurisprudences is critical disability theory.

4. Critical Disability Theory

Critical disability theory centres disability as it compares liberalism's norms and values with their actualization in the daily life of disabled people. In this paper, I will outline seven elements of CDT: the social model of disability, multidimensionality, valuing diversity, rights, voices of disability, language, and transformative politics.

a) *Models of disability*

A theory which centres disability and proceeds from the perspective of disabled people needs to have a conception of disability which is sufficiently inclusive to encompass the population with which it is concerned. What this conception should be and how any definition can avoid being over- or under-inclusive is a key concern of critical disability theory. In my view, a ‘universalist’ conception of disability, which proposes that everyone may be placed on a continuum from disabled to not disabled and argues that disability is universal since everyone is disabled at sometime in their lives, is an insufficient basis upon which to analyse the social condition of disabled people and develop social policy which is responsive to the interests of this very diverse population. This necessitates some, inevitably contested, conception of disability which reasonably identifies the population in question without lapsing into essentialism.

Broadly stated, liberalism has traditionally conceived of disability as personal misfortune preferably to be prevented and definitely to be cured, privileges ‘normalcy’ over the ‘abnormal’, presumes able-bodied norms are inevitable, and values economic productivity as an essential aspect of personhood.⁵ In the context of CDT jurisprudence, these principles are reflected in how the law and legal institutions respond to disabled people as individuals and as populations which are the subject of various social policy initiatives. The dominant paradigm for understanding disability throughout most of the 20th century has been the medical model which identifies the source of the disadvantage experienced by disabled people as their medical condition. This essentialist model sees disability as an

⁵ R Devlin and D Pothier 'Introduction: Toward a Critical Theory of Dis-citizenship' in R Devlin and D Pothier (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (University of British Columbia Press, Vancouver 2005) at 2.

inherent characteristic of a person arising from an objectively identified impairment of the mind or body.

In contrast, critical disability theory adopts a version of the social model based on the principles that (1) disability is a social construct, not the inevitable consequence of impairment, (2) disability is best characterised as a complex interrelationship between impairment, individual response to impairment, and the social environment, and (3) the social disadvantage experienced by disabled people is caused by the physical, institutional and attitudinal (together, the 'social') environment which fails to meet the needs of people who do not match the social expectation of 'normalcy'.

In the early days of the social model disabled activists often made the extreme claim that no impairment was disabling: Only the failure of society to accommodate difference limited an individual's life options. This conception of the social model met the needs of the times - a mighty shove is needed to overcome inertia and without this extreme proposition the medical model may never have been budged. But now the social model is widely accepted and, while recognizing the need to avoid reverting to an essentialist conception of disability, a complete account of disability must incorporate the personal experience of impairment and illness. The CDT version of the social model is the synthesis of the medical and social models which the World Health Organization calls the 'biopsychosocial model.'⁶ This approach balances the contributions of impairment, personal responses to impairment and the barriers imposed by the social environment to the concept of disability.

Public policy must respond to both the biomedical and social aspects of disability. Prevention, treatment and rehabilitation are all appropriate responses to the biomedical, or

⁶ WHO 'Towards a Common Language for Functioning, Disability and Health: ICF The International Classification of Functioning, Disability and Health: Beginner's Guide' (2002) World Health Organization, <<http://www.who.int/classifications/icf/site/beginners/bg.pdf>> (accessed 7 August 2007), at 9.

impairment, aspects of disability. For those people who continue to experience social marginalization despite interventions responding to their biomedical circumstances, the appropriate policy response is to change the social environment. There is, however, an inherent dialectical tension between the medical model which seeks to abolish disabling impairments and a social model which accepts and truly values disabled people as equal, integrated members of society. Critical disability theory probes this tension by questioning, among other things, concepts of personal independence and interdependence, the social construction of 'nondisability' as well as disability, the concept of normalcy, fundamental values of individual dignity and respect in democratic societies, and issues at the intersection of disability with class, gender, race, sexual orientation, ethnicity and other socially constructed categories.⁷

b) Multidimensionality

I have attached critical disability theory to the family of identity jurisprudences the members of which are related by their focus on some identifying characteristic which serves as an organising principle for the study of how law and legal institutions impact individuals and groups sharing that identity. Identity jurisprudence grows out of identity politics which, as the name implies, are politics structured around a social identity. One of the dangers of identity based politics is that the need to define the identity of the group tends to exclude potential members, demand members conform to group ideology, and make diversity within the group disappear.⁸

⁷ After Devlin and Pothier, n 5 above.

⁸ See, for example, E Holzleithner 'Mainstreaming Equality: Dis/Entangling Grounds of Discrimination' (2004-2005) 14 *Transnat'l L. & Contemp. Probs.* 927 and N Ehrenreich 'Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems' (2002-2003) 71 *UMKC L. Rev.* 251.

I introduce multidimensionality theory as an integral element of my critical disability theory both as a means to avoid the pitfalls of exclusion and conformity, which identity politics tends to perpetrate, and to reflect the reality that disabled people are a diverse and variable population within any particular social structure (country, ethnic group, class, etc.) who are also members of all other social classifications.

Kimberlé Crenshaw is credited with introducing the term ‘intersectionality’ to jurisprudence.⁹ In her work developing a 'Black feminist criticism' she identified a 'tendency to treat race and gender as mutually exclusive categories of experience and analysis.'¹⁰ She described how the analytical approach of anti-discrimination law applied a 'single-axis' framework to analyze claims of discrimination raised by Black women which 'perpetuated' this tendency and which was reflected in feminist theory and antiracist politics.

In its early form intersectionality referred to the intersection of one axis of oppression with another. Crenshaw’s particular focus was on the intersection of gender and race, as the US civil rights movement and the US women’s movement both ignored the distinct experiences of black women. The result was that the U.S. civil rights movement focused on the privileged members of the black community, that is black men in comparison to black women, and the women’s movement focused on privileged women, white (and middle and upper class) women in comparison to black (and working class) women.

Nancy Ehrenreich has coined the term ‘hybrid intersectionality’¹¹ to describe the intersection of an axis of privilege with an axis of subordination. The singly burdened will

⁹ DL Hutchinson 'New Complexity Theories: From Theoretical Innovation to Doctrinal Reform' (2002-2003) 71 UMKC L. Rev. 431 at 433. The concept of intersectionality had existed in the humanities and social sciences for many years before it was introduced by Crenshaw in 1989, *ibid* at 440.

¹⁰ K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1989 University of Chicago Legal Forum 139 at 139.

¹¹ Ehrenreich, n 8 above at 257.

often simultaneously be in a privileged position relative to others who experience additional axes of subordination. For example, a gay man is privileged in contrast to a lesbian by gender while both are disadvantaged by sexual orientation. The gay man is said to be singly burdened whilst the lesbian is burdened on 2 axes. This concept is particularly relevant for critical disability theory because a large proportion of disabled people developed their impairment after they became adults. Their formative years were not influenced by disability. Suddenly the privileged white, young adult, heterosexual man might experience the subordination of disability but he may well experience a relative privilege over a person disabled from birth or who has another axis of subordination.

With the recognition that each person interacts with others on a number of potential axes of subordination and domination, intersectionality has evolved into ‘multidimensionality’. Multidimensionality describes the presence of the multiple interconnected memberships which individuals have as they go about their daily lives. Recognizing that everyone is multidimensional allows for structural analysis of society while recognising that every group is made up of multidimensional members.

c) *Valuing diversity*

A fundamental value of political and legal liberalism is the principle of political and legal equality. Race, gender, sexual orientation, ethnicity are all differences to which liberalism has had to respond. With race and ethnicity, and to lesser extents gender and sexual orientation, the response has been to deem what used to be relevant differences to be no longer relevant. In this way, political and legal equality could be extended to these claimants without disturbing the basic structures of society. The consequence of this approach is, however, that diversity must be suppressed: The claimant must appear like the

comparator or else the claimant is found to be different and thus legitimately subject to different treatment.

For disabled people, however, this approach to responding to demands for political and legal equality frequently will not be a successful response strategy. Disability epitomises Martha Minow's 'dilemma of difference'¹² which arises when it is necessary to decide whether to deal with difference by acknowledging and responding to it or by ignoring it. Depending on context, equality objectives may be promoted by acknowledging and respecting difference in ways which effectively ignore it or in ways which respond to it. With disability, in most cases, difference should not just be dismissed as irrelevant, because ignoring the difference usually has the effect of rejecting and marginalizing the person. Instead, a response which takes account of the disability so that adjustments can be made to eliminate the obstacle to welcoming the individual and enabling the person to participate as an equal is required.

For critical disability theory being identified, and identifying, as a disabled person is central to understanding one's self, one's social position with its attendant opportunities and limitations, and one's knowledge of the world. CDT recognises and welcomes the inevitability of difference and conceives of equality within a framework of diversity. Any systematic response to disability which purports to make disability invisible is inherently incapable of effectively protecting the rights of disabled people to be full participants in their communities.

¹² M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, Ithaca 1990).

d) Rights

Despite much scepticism about the relevance of legal rights to disadvantaged groups in society, critical disability theory embraces legal rights as an indispensable tool to advance the equality claims of disabled people and to promote their full integration into all aspects of their society while at the same time valuing and welcoming the diversity that disabled people bring to their communities.

Critical disability theory's central concerns with disabled people's (individual) rights to autonomy and (social) rights to full participation in society are reflected in the tension between the social welfare- and rights-based approaches to disability policy. CDT does not reject liberal rights: It exposes the ways in which liberal rights theory has failed to respond adequately to the needs and interests of disabled people individually and collectively by failing to incorporate the diversity of the disabled community within the scope of its conception of equality.

e) Voice

Traditionally, the voices of disabled people who contest mainstream conceptions of disability and the potential and role of disabled people have been suppressed and marginalized.¹³ If one starts with a belief that disability is lack and inability, unchosen and despised, then the voices of disabled people can always be interpreted as symptoms of a person's healthy or unhealthy relation to that disability. When the disabled voice says what the able-bodied perspective wants to hear, it is heard; when it says something the able-bodied perspective does not want to hear, it can simply be dismissed as the inappropriate response of a person who has developed an unhealthy response to the impairment.¹⁴

¹³ A Weis 'Jumping to Conclusions in "Jumping the Queue"' (1998-1999) 51 *Stan. L. Rev.* 183.

¹⁴ T Titchkosky *Disability, Self, and Society* (University of Toronto Press, Toronto 2003) at 162.

CDT, building on the reflexive approach to social inquiry characteristic of critical theory, privileges the stories of disabled people; it gives them voice. This is not a minor matter. Able bodied people think about disability from their abled perspective. For them being severely disabled is imagined as unmanageable suffering, a life subject to constant dependency and without value. It is only by listening to and valuing the perspectives of those who are living disabled lives that the able bodied can begin to understand that even severe disability does not have to prevent a joyful and desired life.

f) Language

Another theme of critical disability theory deals with how language influences the concept of disability and the status of disabled people. This theme includes both the words used to describe or label disabled people and the words and images used to portray disability. Language is popularly assumed to be a transparent, neutral means of communication. Critical theory, however, understands language to be inherently political. Language carries with it ideological implications which are more or less transparent. The word disability is used to identify a sub-set of a population but the fuzzy boundaries which occur with all social categories are nowhere more contested than with disability.

Human group labelling is a continually evolving process. Generally, any label describing a thing society considers a negative attribute comes to have a negative social connotation. To avoid the negative connotation an interest group selects a new label which soon enters mainstream usage. This usage then picks up a negative connotation and so a new label is selected and the process continues. Generally, with each change of label, there will be a reduction or elimination of some negative stereotype associated with the label.

By the early 1980s, the English speaking disabled community reclaimed the word ‘disability’ and began to mould it to fit their interests. Phrases such as ‘disabled people,’ ‘people with disabilities’ and ‘the disabled community’ were adopted by the community in preference to other options. The consensus on using the word ‘disability’ has held over the past two decades.

The words and images used to portray disabled people, the second language theme of CDT, have a direct effect on social attitudes towards disabled people. Historically and today, in print and visual media, in high and low culture, disabled people have been and are portrayed as deficient, pitiable, wicked or malign, dangerous or valueless. Despite the introduction of many euphemisms, the media and the culture industry still consistently reflect the negative attitude towards disabling impairments which the medical model reflects. CDT examines how these negative attitudes are revealed through a discourse of personal tragedy with disability rendering individuals powerless, vulnerable and dependent.

g) Transformative politics

One of the ways in which Max Horkheimer distinguished his critical theory from traditional theory was his insistence that theory must be both explanatory and normative. Changing the economic, political and social structure of society with the objective of emancipating humanity was always the purpose of the Frankfurt School’s critical theory.

Critical disability theory retains this linkage between theory and practice from its critical theory roots and is ‘a self-consciously politicized theory. Its goal is not theory for the joy of theorization, or even improved understanding and explanation; it is theorization in the

pursuit of empowerment and substantive, not just formal, equality'.¹⁵ CDT is about power and 'who and what gets valued'.¹⁶

The policy response to the medical model of disability focuses on preventing and curing disability or providing support for those who do not respond to medical model interventions. In most Western democracies there has been a progressive democratisation of disability related social welfare programs, but they are still characterised by paternalism and inflexibility. And often democratisation disguises government cost cutting measures which disproportionately impact disabled people and other socially excluded communities. CDT provides the theoretical basis for different policy responses to disability – those being policies of inclusion, equality and autonomy.

While it is obvious that CDT does not suggest that prevention and cure are not important elements of a complete national disability policy, medical interventions and the discourse of prevention and cure both have been highly problematic for the equality and social rights of disabled people. The capabilities of medical science in the areas of genetic screening, reproductive technology, treatment of premature babies and sustaining life through the use of life support technology, to name a few, are examples of science progressing faster than our moral compass can be reset. CDT, by exposing hidden motivators, identifying how social attitudes are conditioned by the portrayal of disability in the print and visual media, showing that the choices made for the directions and goals of empirical research are the result of contingent social processes and demonstrating the contingent nature of the social construction of disability, provides a theoretical basis for the development of more effective

¹⁵ Devlin and Pothier, n 5 above at 8.

¹⁶ Ibid at 9.

policy responses to disability and stronger, democratic political control of social institutions which deal, in one way or another, with issues related to disability.

5. A Jurisprudence of Disability

For CDT the relationship between law and disability is a complex combination of two social constructs – ‘law’ and ‘disability’. A critical jurisprudence of disability (1) identifies the overt and covert sources of oppression within the law and legal institutions and, by means of that exposure, seeks to relieve disabled people from that oppression and (2) identifies the potential positive role of law and seeks to create law, use existing law and enlist legal institutions in the struggle for the emancipation of disabled people which is the rationale for CDT itself.

6. Conclusion

Max Horkheimer introduced the term ‘critical theory’ in his essay *Traditional and Critical Theory*. Since then critical theory has undergone significant broadening in scope and taken on a pluralist complexion. What unites the diverse family of critical theory is that, in all its variations, critical theory looks below the surface of the status quo and seeks ‘the potentiality for, or desirability of, things being other than they are’.¹⁷ A critical jurisprudence of disability identifies the sources of oppression within the law and also the potential positive role of law in the struggle for the emancipation of disabled people which is the rationale for CDT itself.

Critical disability theory centres disability as it identifies the potential for the social conditions of disabled people to be other than what they are. CDT is based on a social model

¹⁷ A How *Critical Theory* (Palgrave Macmillian, Basingstoke 2003) at 149.

of disability which recognises disability not as the inevitable consequence of impairment but as a complex socially constructed interrelationship between impairment, individual response to impairment, and the social environment and that the social disadvantage experienced by disabled people is caused by a social environment which fails to meet the needs of people who do not match a society's expectation of 'normalcy'.

An adequate conception of equality which supports the political demands of disabled people for full inclusion in their communities must take account of the reality of difference and recognise that sometimes difference must be taken into account, and sometimes it must be ignored, to advance equality. CDT welcomes and values diversity and adjusts the concept of equality to accommodate diversity.

Traditionally there has been very little room for the voices of disabled people who contested mainstream conceptions of disability and the proper social position of disabled people. CDT privileges the voices of disabled people and relies on their voices to challenge the negative attitudes toward disability commonly expressed by able bodied people and so often reiterated in print and visual media. These attitudes are both reflected in, and reinforced by, the language used to describe disabled people and to describe their disabilities

Critical disability theory is intentionally political in that its objective is to support the transformation of society so that disabled people in all their diversity are equal participants and fully integrated into their communities. CDT provides a conceptual framework to understand the relationship between impairment, disability and society and to inject disability interests into all policy arenas.