

The UK Disability Discrimination Act – disabling language, justifying inequitable social participation

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*Accepted for publication in a book to celebrate the 10th Anniversary of the Americans with Disabilities Act, edited by Anita Silvers and Leslie Francis, to be published by Routledge in 2000*

*Not for quotation*

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## Introduction

When I failed basic English on the first attempt, *they* said that was what was to be expected of the deaf. When I passed it on the second attempt *they* were silent. When I passed it at advanced level, *they* said it was a fluke. Funny how most of the other things they said never got through. Now when I read or write anything it's my way of continuing to defy them. And now they say I've got it wrong and that I don't understand my own history (Notes from a diary, 1974).

To be injured by speech is to suffer a loss of context, that is not to know where you are. Indeed, it may be that what is unanticipated about the injurious speech act is what constitutes its injury, the sense of putting its addressee out of control... to be addressed injuriously is not only to be open to an unknown future, but not to know the time and place of injury, and to suffer the disorientation of one's situation as the effect of such speech. Exposed at the moment of such a shattering is precisely the volatility of one's "place" within the community of speakers; one can be "put in one's place" by such speech, but such a place may be no place (Butler 1997: 4).

The claim of disabled people to social or civil rights has been high on the agenda of the UK disabled people's movement since the publication of the document *Fundamental Principles of Disability* by the Union of Physically Impaired Against Segregation (UPIAS, 1976), though individual disabled people, who drew inspiration from grass-roots organisations of disabled people were writing from a 'rights' perspective a decade before (Hunt 1966). Disability rights discourse has traditionally 'advocated policies based upon according disabled people full citizenship rights through anti-discrimination legislation' (Oliver 1996b: 123). The pursuit of this goal at the level of national policy has seen no less than 13 Private Members' Bills pass through British Parliament, most of which have fallen foul of outdated mechanisms of parliamentary procedure.

This period of intense political mobilisation in the UK also saw the generation of an increasing body of knowledge and practice which has come to be known as 'the social model of disability' (Barnes et.al. 1999: 2). There is not the space here to document these developments in detail.<sup>1</sup> For the purposes of this essay, it is important to note, however, that the social model of disability rests on a sharp, often rigorously applied conceptual distinction between *disability* and *impairment*. Disability is seen as a form of social oppression that is institutionalised in Western society, whereas impairment is nothing more than a description of physical, sensory or mental difference. Indeed the importance of this distinction is underscored by the resistance amongst many UK disability theorists to considering

impairment in its interpenetrative, interdependent relation to disability, and the insistence of some that impairment should be examined separately (Oliver 1996a).

Barnes et.al (1999) have suggested that the adoption of this conceptual model marks an important difference between US and UK approaches to understanding and theorising disability. The other main distinction is that UK approaches are heavily influenced by the discipline of sociology and social policy, whereas US approaches have sought to explore disability within a broad humanities context. Citing Linton (1998a, 1998b), Barnes et. al. suggest that the latter 'have been linked to the denial of civil rights to *a minority group* rather than a specific theoretical explanation of disability and the exclusion of disabled people from the mainstream of economic and social activity' (1999: 4, italics added). There are nevertheless important exceptions to this rule, most notably in the campaigns of Deaf<sup>2</sup> people in both the US and the UK for linguistic minority rights and status, and their pursuance of a political agenda that is in many ways disparate to that of the disability movement, particularly in its emphasis on the retention of residential schools and social coexistence rather than inclusion (Corker 1998). Drawing from the intersection of disability studies with feminist and queer studies, I have suggested that the distinction between impairment and disability itself rests on a dichotomy between the individual and the social, with the former being viewed primarily as an unexamined, commonly biological foundation for the latter (Corker 1999b). There are moreover, different ways in which both disability and the disabled individual can be understood from the perspective of a 'social model' approach, which also tend to be marked by discrete boundaries<sup>3</sup>.

### **The Disability Discrimination Act – justifying acts of individualism**

The complexity of disabled people's approaches to understanding disability and to articulating and effecting political action are important because they represent how disabled people would wish to be treated under law. New disability discourses<sup>4</sup>, though they are becoming increasingly influential at the level of local policy and practice and in the academy, nevertheless remain minority discourses that co-exist and are in competition with the dominant discourses of disability that drive UK government policy and its implementation (Corker 1998, Corker and French 1999). In spite of disabled people's intensive campaigns for disability rights; 'the failure of the UK social welfare and social security apparatus to deliver the goal of independent living for disabled people,' (Doyle 1999: 216); and concerted attempts since 1991 to move the *Civil Rights (Disabled Persons) Bill* modelled on the ADA 1990 (ibid: 217), Oliver's concept of disability 'rights' has not reached the statute. What has been 'achieved' is a legal instrument that has variously been described as 'confusing, contorted and unsatisfactory' (Gooding 1996 ); 'a dissembling law not an enabling statute' (Doyle 1997: 78); and 'one of the most ill-conceived pieces of

legislation ever to reach the statute books' (Corker 1998: 115). This is the *Disability Discrimination Act 1995 (DDA)*

In both the DDA and ADA, disability is defined as 'either a physical or a mental impairment' that has 'a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities' (DDA, s.1) or 'substantially limits one or more of the major life activities of such individual' (ADA, s.3). The DDA 'addresses the problem of discrimination against disabled persons in the employment field; in the provision of goods, facilities and services; in respect of the disposal and management of premises; and in a less direct and satisfactory fashion, the inaccessibility of education provision and transport' (Doyle 1999: 217-8). It is therefore more limited in its scope and provisions when compared to the ADA 1990.

Gooding (1996:5) notes that 'the conceptual framework of the DDA differs from both the British sex and race legislation and the American disability legislation,' and in a comparative analysis of UK anti-discrimination law relating to disability, race and gender, I have emphasized the lack of correspondence between the relative statutes (Corker 1998: 117). For example, the Sex Discrimination Acts of 1975 and 1986 (SDA) and the Race Relations Act 1976 (RRA) cross-reference each other so that it is technically possible to make a claim under both acts if one is a black woman. The DDA, in its emphasis on 'proof of disability' as it is defined under the Act, renders uncertain the status of a black disabled woman making a claim of simultaneous discrimination for, as Shakespeare (1996:109) notes 'disability' is a very powerful identity, and one that has the power to transcend other identities.' The definition of 'race' in the RRA is neither as specified nor as exclusionary as the definition of disability though, significantly for the purposes of this essay, it does not include the community of Deaf sign language users who self-define as a linguistic minority. Similarly, while there is reference to 'genuine occupational qualification' in both the SDS and the RRA, which makes provision for particular jobs to be advertised exclusively for women or people from ethnic minorities, the DDA (s 64), but only contains reference to occupations which are *not* covered by the Act.

At the time of writing (June 1999), there had been 5189 employment claims under the DDA, and it is estimated that 250 new claims are made every month (*The Disabled Century Debate*, BBC Television, 10.06.1999). It is more difficult however to judge the Act's success in addressing disability discrimination on the basis of case law, since a high number of claims are settled out of court or under a confidentiality agreement. However, there is little doubt that the DDA represents a muddled combination of prohibition, justifiable discrimination and reasonable adjustment that can themselves act as a barrier to claimants who may be 'isolated, possibly ill-informed and under-resourced' (Gooding 1996: 6). Further, because the

DDA legally justifies direct discrimination on the grounds of 'disability' in what Gooding (1996: 6) describes as 'dangerously vague' terms, and fails to incorporate a notion of the indirect discrimination experienced by disabled people, it seems an ineffective legal instrument for tackling the *institutionalised* oppression of disabled people. Unlike the ADA, the DDA is not at present supported within a constitutional Bill of Rights, though steps are currently being taken to introduce the European Convention on Human Rights into British law. This move has positive and negative dimensions, which, drawing on the US experience, I will explore further below.

But from the legal perspective, and because disability and discrimination are defined in different ways in different legal instruments pertaining to education, community care and criminal law, for example, this introduction may prove to be a legislative nightmare.

The disabled people's movement's description of disability as being located at the systemic level clearly marks a significant departure from an individual model epitomised by dominant legal, medical, educational and scientific discourses of disability which reify disability as an individual 'problem', 'pathology', 'deviance' or 'dysfunction.' However concerns about an individual model as a model of formal justice are not confined to criticisms of its use within the DDA and the ADA. Many of the detailed critiques of anti-discrimination law *per se* focus on this issue. For example, Downing (1999) has recently argued that 'First Amendment absolutists' who appear to urge the right to discriminatory language as free speech are imprisoned in the straitjacket formed by the priorities of legal discourse. These priorities ultimately require foundations to be laid that will rationalize and permit court decisions on individual cases at a particular moment in time. That is, they are framed primarily by the question, 'Was or was not this particular individual damaged in some way in this place and time by this particular expression of discriminatory language?' Discriminatory language is seen as an individual act based on socio-psychological dynamics and with purely individual effects (Goldberg 1995). This focus exiles the societal and historical dimensions of discriminatory language along with its capacity to injure, as we will see below.

It could equally be said, however, that both the DDA and the ADA, as historically and culturally circumscribed texts, appear at first to be conceived from within similar socio-cultural systems, which tend to be individualist rather than collectivist<sup>5</sup>. Kim (1994) suggests that in some individualist societies, notably those that are described in terms of *static* individualism, emphasis is placed on the individual's 'inalienable' rights and the institutions which uphold these. The welfare of disadvantaged, defenceless or powerless people is protected by law, as is the individual's right to autonomy and the freedom to pursue their own goals.

However, because individuals tend to be unrelated to each other in static mode, they may not always act in responsible, moral, sane or humanitarian ways.

The laws and regulations in such societies are therefore established and enforced so that people do not infringe the agreed group boundaries and no one enjoys special privileges, though individuals and groups can challenge these boundaries if they are regarded as a violation of their rights. I would suggest that this description is characteristic of the current situation in the UK. In other individualist societies, which are described in terms of *aggregate* individualism, individuals are expected to detach themselves from family, community and other ascribed relationships and are bound together by normative and ethical principles, rules and norms. Individuals base their interaction with others on these principles, which include an internalised concern for the welfare of others, a preparedness to take prosocial action, equality, competition, equity, non-interference and exchanges based on social contracts. Kim (1994) suggests that American culture is an example of aggregate individualism. In these circumstances, it may be important to examine Anita Silvers' (1999: 75) assertion that 'individuals with disabilities gain no greater recognition of their own equality if they seek a collective identity in disability itself [...] to make identifying with the roles characteristic of disability the primary mark of their identity is to disregard, even to demean and devalue, how people with disabilities develop strong individualised approaches to living and functioning with their impairments.' I will return to this in the final section. However, it may equally be said that a society is only individualist or collectivist to the extent that its members consent to or are coerced to support the individualist status quo and/or are able to engage in equitable social participation.

### **Interrogating 'competence' and disembodiment**

Iris Marion Young (1990: 91) argues that 'democracy is both an element and a condition of social justice' and therefore that 'justice requires participation in public discussion and processes of democratic decision-making.' She continues:

...for a norm to be just everyone who follows it must in principle have an effective voice in its consideration and be able *to agree to it without coercion*. For a social condition to be just, it must enable all to meet their needs and exercise their freedom; thus justice requires that all be able to express their needs" (1990: 34, emphasis mine)

I now want to expand Young's thesis by interrogating anti-discrimination law's dependency on both a Cartesian mind-body dichotomy in its definition of disability, and its prescription and standardisation of a particular authority on language. I will argue that, as an approach to formal justice, this actively works against democracy and social justice.

Further, it does so in a way that has particular implications for people with language and communication impairments. To explain this we must ask what it means to live in a post-modern, 'network society' (Castells 1996) founded on particularistic identities and information economies that increasingly 'script' our lives (Cameron 1998), when discriminatory language is institutionalised and self-expression is disciplined through the imposition of barriers to language acquisition (language education, and particular approaches to mainstreaming and institutionalisation, both educational and social) and use (language planning). When questioning is approached in this way, analysis becomes focused on the discursive construction of knowledge and a politics of resistance rather than being confined to subsidiary questions that ask, for example, what it means to be unable to hear in a society that discriminates through the privileging of oral performance, harbours a deep suspicion of relationships and communications that are not face-to-face, and places a very heavy emphasis on 'direct talk, which is taken as the "more honest" and "more human" type of communication' (Lernert 1997: 45-6). However, this is not to diminish the significance of these latter questions, because they touch on the roots of institutionalised, systemic disability. They remind us that discriminatory language is endemic in society *even when we have no access to it*, along with the corollary that our ignorance of it - or our silence in relation to it - does not mean that we lack complicity in its institutionalisation. Thus, we are also concerned with questions about responsibility and citizenship.

The 'authority on language' adopted by anti-discrimination law is that exemplified by Jurgen Habermas's *Theory of Communicative Action* (1991a, b)<sup>6</sup>. He posits a model of language that depends upon the ability of 'rational' interlocutors to reason and relies heavily on a paradigm of discursive argumentation, whilst de-emphasising the metaphorical, rhetorical, playful, embodied aspects of speech and the affective dimension of expression that are an important aspect of its communicative effect (Young 1987), and are culturally embedded. Crossley (1997) suggests that Habermas's reduction of communicative action to rationalization amounts to cognitivism. He argues that when we communicate we do not only make cognitive validity claims and our sole purpose is not always to have our claims understood and verified -at least this would be a very clumsy way of trying to describe some aspects of our interactions. However, the rationalist assumption that theorising, in its ideal state, holds up a mirror to the world still dominates our thinking. The treatment of impairment as a regulatory ideal in dominant discourses of disability and its location in biological discourses occludes it, and banishes it from its contingent and variable place in the social world. Thus Crossley also argues that, in Habermas's critical theory, the body disappears and, in the absence of an alternative view of embodiment, human agency and communication are disembodied and confined to the expression of the symbolic:

Communication for Habermas, is dependent upon the competence of concrete interlocutors. And linguistic competence, however much it is constituted and regulated by the conventions of the life-world, is nevertheless the acquired performative skill of a concrete agent. This is important from the point of view of an analysis of embodiment because concrete communicative agents are necessarily embodied and theories of speech, therefore, presuppose a theory of the body.' (Crossley 1997: 21)

Though Habermas indicates that a theory of communicative action must challenge the philosophy of consciousness that locates intentional egos as the ontological origins of social relations, and his theory of communicative action conceives individual identity not as an origin but as a product of linguistic and practical interaction, this emphasis on the competence of 'concrete interlocutors' suggests a standpoint view of the communicator and of communication.

Habermas argues that language is a necessarily social and public act, which means that it is shared and in order to be shared it must be visible. For Crossley, this means it must be embodied, because a disembodied form of language would be invisible and inaudible and could not therefore function as a common, or as a concrete reference point. Without embodiment, communication can be seen to occur by transmission, following a 'conduit metaphor' that depicts speech as a three-step process. The speaker puts thoughts into word containers. These word-thought objects are then transferred from the speaker's mind through a conduit (the air) to the mind of the listener. Finally, the listener extracts the thoughts from the words. Communication is seen to work because speaker and listener are assumed to share a system of coding, or at least complementary systems for encoding and decoding. Crossley's distinction could be interpreted in terms of the difference between the Deaf way, which is to render Deaf (Sign) language visible through 'unconventional' body practice - and to the status of an 'exotic' object of fascination within the system - and the worlds of the 'silent' deaf, who because of systemic distortion, supposedly lack the 'competence' to full expression<sup>7</sup>. Further, as Alderson (1993), writing about children, suggests, 'the most powerful way to justify coercion is to deny that children can reason, and to align reason with force; children's resistance is then seen as mindless "self-destruction", to be overridden by rational adults.' Children 'don't know what they don't know', so adults can choose what to tell them. Because one of the common stereotypes of disabled people is that they are 'dependant', even childlike in their 'need of care', such perspectives on children's competence are often extrapolated to apply to disabled people. Indeed, there are some instances where this is enshrined in UK law. For example, the 1991 Criminal Procedure (Insanity and Fitness to Plead) Act states that if a person is accused of even a minor offence and the judge deems that s/he does not understand the charge and is unfit to plead or 'under disability'<sup>8</sup>, the only action the judge can



take is to commit the defendant to a secure hospital (Chappell 1994). Case law demonstrates that some disabled people will be more vulnerable to this than others, notably those with cognitive and communication impairments<sup>9</sup>.

In Habermasian terms, then, the 'visible' might be privileged, but the embodiment of communication does not remove the possibility for distortion, because it is only embodied discourses are subject to distortion. Crossley (1997: 31, italics, my additions) continues:

The systematic distortion of communication is that the possibility of open argument is negated through the influence of social-systemic factors: class, status, political power ...these factors often enter into communication through the *mediation* of our embodiment e.g. accent, comportment, gesture, dress, bodily attitude. Or alternatively, the visible embodied signs (socially coded) of [*impairment, for example*] may trigger a range of prejudicial interactive patterns [*direct discrimination*]. The way a person looks and acts comments upon what it is that they say and thus may detract from and distort it ...bodily markers frame communicative encounters.

It is here perhaps that we have the primary reason for the use of Habermasian perspectives on communication in legal discourse, because the capacity of embodiment for distortion means that the relationship between individuals, between the individual and society, and therefore, the location of disability, is problematised through the act of multi-channelled, embodied communication. In the context of anti-discrimination law, this may mean for example, that the provision of a TTY<sup>10</sup> or a Sign language interpreter, though it may be regarded as 'reasonable accommodation', may not *in practice* remove discrimination because of the capacity of these communication auxiliaries to emphasise distortion through what I have described as extra-embodiment (Corker 2000). That is to say, these provisions externalise the act of communication, removing it from the embodied situation of the individual's life-world and instead placing it in the space between communicators in a conduit that is not neutral.<sup>11</sup>

Though embodied communication takes place at an 'interval' or 'between and involves a rhythm or rather a synchronisation of rhythms, an embodied conception of life-world just also include some understanding of the lived spatial and temporal organisation of social life (Crossley 1996). To communicate is, at one level, to create and occupy (qua body-subject) a shared space and rhythm. Thus, communication auxiliaries are more at the level of mediating our embodiment than embodying our communication. And, as Schutz's (1967) work on phenomenology shows, changes in time-space co-ordination have significant effects upon the possibility for communication. As embodied communicators, we must negotiate

these time-space factors within the more general temporal and spatial factors of our life world; but this is not within our control when communication is extra-embodied. The embodiment of communication may allow it to maximise its potential to be multi-layered in a way that is essential to mutual understanding, but its mediation creates a high probability of systemic distortion because different layers can convey different and opposed messages that can be reduced or lost altogether in the act of mediation.

Following Williams' (1998) analysis of Leder's (1990) ideas about *The Absent Body*, mediation also seems to dichotomise the hermeneutical and pragmatic dimensions of telic demand exerted by the interaction between disability and impairment in communication. However, because both these dimensions are ultimately important, it must follow that the body in physical limbo and the body in communicative limbo, or the body apart and the body collective, for example, will produce different trajectories in relation to these dimensions which in turn create changes in 'matter' which are 'experienced' and 'lived' differently, and cannot be understood solely as the material creations and solutions of regulatory frameworks of 'normality'. Moreover, because all disabled people engage in some form of linguistic and social interaction, and much of this communicative action is regarded as 'distorted' by a society engaged in normative practice, this can be extrapolated to the social category 'disability'.

Despite the possibilities of a communicative ethics then, Habermas retains a commitment to the view that the reasoning subject abstracts from her or his own concrete contexts of need, desire and commitment, and regards others also from this general standpoint. Seyla Benhabib (1986: 348-51) suggests that, in that form, he retains a distinction between a public realm of rights and principles and a private realm of contextualised need. And as Young (1990) further notes, his claim that participants in a dialogue implicitly aim at consensus echoes a strong strain of Kantian universalism that undermines any move to a radically pluralist participatory politics of need interpretation, and appears to hark back to the earlier discussion of individualism. Habermas' s conception of dialogic reason finds valid only the expression of generalisable interests, a term whose meaning is *equivocal*.

This creates further binaries between universal and particular, public and private, as needs and interests which may not be shareable, because they derive from a person's particular history and affiliations, are made liminal.

### **Embodied communication, 'hate speech' and universalist rights discourse**

Earlier, I pointed out that the DDA contains no recognition of the concept of indirect discrimination, nor does its conceptualisation of direct discrimination encompass an understanding of the role of communicative action in the transmission of discriminatory attitudes and stereotypes of disabled people.

Habermas' project is certainly concerned with attempting to guarantee a communicative system in which political power and authority is dispersed, and no-one's speech disables or silences another's in a way that prevents them from using the performative. But as was noted above, arriving at such a guarantee relies heavily on speech acts being grounded in consensually established, *univocal* meaning -'the productivity of the process of understanding remains unproblematic only as long as all participants stick to the reference point of possibly achieving a mutual understanding in which the *same* utterances are assigned the same meaning' (Habermas 1987: 198). There are two problems with this 'ideal unity or a civic public' (Young 1990). First, as Judith Butler (1997) suggests, there is a permanent diversity within the semantic field that constitutes an irreversible situation for political theorising. Second, the drive for univocal meaning must involve a struggle for power of univocality, since diversity in the semantic field means that several meanings of disability co-exist. Such a struggle, in Habermasian terms would involve the production of 'more speech' in order to resist universalist expressions of univocality that are seen to be oppressive, and the re-legitimation and re-negotiation of new disability discourse as it enters into the primary areas of social reproduction (Corker 1999a). This returns us to questions of 'competence', 'voice' and 'access' in relation to censorship and silencing. In the UK, as we have seen, this struggle takes place against the backdrop of legal discourse that justifies direct discrimination, and emphasises reactive justice. Indeed, I have suggested elsewhere (Corker 1998) that inter alia, UK law in relation to disability, in its confusion of liberty rights and welfare rights and in its propensity for dictating disabled people's prospects for self-determination in a way that reinforces the existing distribution of advantage and disadvantage, is more concerned with protecting the rights of the non-disabled majority.

Is there then a case for some form of universal approach to the question of civil or human rights, as is proposed? Much would depend on the model adopted and if and how it is enforced. But in searching for such a model, it may be important to address Wendy Brown's (1998: 319) question: 'What does it mean to write historically and culturally circumscribed experience into an ahistorical discourse, the universalist discourse of law? Is it possible to do this without rendering 'experience' as ontology, 'perspective' as Truth, and without unifying this ontology and this Truth' in the Subject of Disability, and without encoding them in law as the basis of disabled people's rights?' Brown continues:

...as a regulatory fiction of a particular identity is deployed to displace the hegemonic fiction of universal personhood, the discourse of rights converges insiduously with the discourse of disciplinarity to produce a spectacularly potent mode of juridical- regulatory domination ...efforts at bringing subjugated discourses into the law merely constitute examples of what Foucault identified as the risk of recodification and

recolonization of 'disinterred knowledges' by those 'unitary discourses, which first disqualified and then ignored them when they made their appearance.'

In other words, she suggests that the law *produces* the subjects it claims to protect or emancipate. Recent critiques of First Amendment absolutism in the US (Downing 1999) and 'hate speech' (Allen and Jensen 1995, Butler 1997) have highlighted the process of this production and have pointed to the drawbacks of universalist approaches. First Amendment absolutists argue that there is no reason for the US Constitution to grant specific protection in relation to expressions of 'hate speech' because such speech conflicts with the commitments to universal equality that are the fundamental tenets of the Constitution. However, Jensen and Arriola (1995) argue that the First Amendment offers illusory protections. The ideology that in the USA anyone can constitutionally say anything, bypasses the social factors inhibiting the free and full expression of grievances and problems. '... [T]he vast majority of survivors of sexual violence are ignored, blamed, pathologised, threatened, disbelieved, and otherwise revictimised when they protest the violation and try to hold their offenders accountable (1995: 195-6). Thus women, ethnic minorities or disabled people with important stories to tell may not tell them, because of a fear of what Jensen and Arriola describe as 'oppressive silencing' (199-203). Moreover, the double-bind is that those who are oppressed can comfortably be presumed by the public to have nothing of substance straitjacketing them because there is a talismanic First Amendment in existence (Downing 1999). In reality, then, the First Amendment does not protect their freedom to communicate or their right to freedom from hate-based communication or any other form of oppression that does straitjacket them in making 'more speech'.

Thus, following Butler (1997) and others, I would argue that, like reactive anti-discrimination legislation, universalist rights discourses, whilst perceived as being proactive, can be equally ineffective in dealing with institutionalised forms of linguistic oppression that have assumed the status of ritual. This is because, when combined with the mind-body dichotomy implicit in definitions of disability, Habermas's perspective on communicative action contrives a divorce between speech and action. Within this dichotomy, only discriminatory actions such as attacking individuals or direct discrimination against them are said to be appropriate for prohibitive legislation. As long as people restrain themselves to speech acts, no legal action can be taken against them. However, as Merleau-Ponty (1962: 178) notes, 'speech, in the speaker, does not translate ready-made thought, but accomplishes it.' Indeed, Downing (1999: 182) argues that the division between speakers and actors represents a 'phantasmagorical social theory.' He emphasises that discriminatory language seeks to create a climate within which hostilities are more and more likely to be perpetrated because they seem 'excusable, even

meritorious, even inevitable.' Judith Butler (1997) elaborates on this perspective in a way that encompasses concepts of social agency and social injury.

Echoing Carey's (1989) distinction between transmission and ritual modes of communication, she says that language is injurious to the extent that it is given the form of a ritual - repeated in time, and hence maintains a sphere of operation that is not restricted to the moment of the utterance itself. Further, the repetition of disabling performative acts produces over time 'a set of corporeal styles that, in reified form, appear as the natural configuration of bodies' (Butler 1990: 140), into different impairments existing in a binary relation with one another.'

Writing about race, Calvert (1997) suggests that the use of a ritual model would direct attention to indirect discrimination as the reinforcement of racism in society through the repetition of hate speech as a form of cultural ritual. This assumes importance in the light of the recommendations resulting from the findings of the Stephen Lawrence Enquiry in the UK (MacPherson 1999). These recommendations urge a much greater recognition of the role of racist speech in the incitement of institutionalised racial hatred and insist that steps be taken both to prohibit racist speech, even in the private domain, and to educate young people about its dangers through the school curriculum.<sup>12</sup> If a Bill of Rights is introduced into UK law, these recommendations must also apply to the institutionalised patterns of hate speech encountered by other disadvantaged groups, including disabled people. However, the Report also recommends that those who experience 'hate speech' and other forms of racial hatred must have the right to decide exactly what constitutes racist behaviour and to explain why. Again we have the 'more speech' dictum and all the difficulties that presents.

### **Concluding remarks**

In this essay, I have interrogated anti-discrimination law's uncritical adoption of a Habermasian dialogical model of 'equitable' social participation, arguing that it is one of the primary instruments through which the law produces the subjects it claims to protect and emancipate. In its disembodiment of communication, the conceptual separation of speech and action, and an emphasis on universalised, univocal expression, it is particularly deleterious of those whose lives are already characterised by systemic communication distortion. This happens through its appropriation by legal discourse in the specification of 'accommodations' that depend on the mediation of these lives, without addressing the displacement effected by culturally embedded, institutionalised and ritualised patterns of discriminatory language. Additionally, I have suggested that there are problems with a legal framework that separates reactive, corrective justice from proactive, distributive social policy, a separation that renders both ineffective. It is for

government and the legal profession to reconstruct the law, but it seems essential that such a reconstruction is effected through a dialogue with disabled people, through a public conversation with difference, through sameness -a conversation that is neither objectivist nor subjectivist. This stresses a different dialogic model based on the work of M.M. Bakhtin (1981). Like Habermas, Bakhtin is acutely aware of a strong potential in the post-metaphysical age for an expansion of participatory democracy and dialogue. However, his radical tolerance is not a form of tolerance that simply allows us to put up with the existence of pluralistic life-worlds. Rather it aims at mutual recognition and co-understanding in a manner that opens up each life world to a diversity of reciprocal influences and perspectives -a principle that must be central to the interrelationship of difference in the post-modern era of uncertainty, because it emphasises that 'truth', itself, is constituted dialogically:

The person who understands must not reject the possibility of changing or even abandoning his (sic) already prepared viewpoints and positions. In the act of understanding, a struggle occurs that results in mutual change and enrichment (Bakhtin 1986: 142).

This is very different to Lyotard's (1984) construal of post modern society as a collection of discrete and incommensurate forms of life. It means that, within law, people should have not only the right to be heard, but also *the right to be understood*.

In this context, I remain concerned that, in some sectors of the movement, disabled people's political resistance to systemic oppression and their insistence on visibility, ontological 'purity' and the production of 'more speech', has tended to reproduce Lyotard's vision, with very similar fragmentary outcomes. Based on my own work on the relationships between Deaf community and the disability movement (Corker 1998), I tend to agree with Silvers' (1999: 98) assertion, following Helen Meekosha and Jan Pettman (1991), that:

...the politics of collectivity is also categorically deleterious for people with disabilities. Not just specific political identities, but also the logic of transforming political identity into categorical group identity, result in performance norms that always will be oppressive and dismissive of (some) people with disabilities. This appears to be the case even when disability itself is made into a categorical group identity .

In part, it seems that this is because of the kind of collective we have constructed for ourselves and the fact that this collective exists in a world where we are coerced to consent to individualist ways of being and behaving. I don't think this means that we should abandon the collective, because it can be a tremendous

source of strength to isolated individuals. Rather, it may be useful for the movement to look to the literature on collectivism and feminist notions of interdependency for examples of how we could address this problem. However, I think some of the movement's difficulties also happen because 'the normative defects of interest-group politics are, first, that the privatised form of representation and decision-making it encourages *does not require these expressions of interests to appeal to justice*, and second, that inequality of resources, organisation, and power allows some interests to dominate while others have little or no voice.' (Young 1990: 92, emphasis added). This allows the most privileged and the most articulate members of a minority group to claim to 'represent' their community (Meekosha & Pettman 1991; Corker 1998). Letting go of assumptions about the cohesion of the grouping disabled people may open out a much richer range of explanatory possibilities, and this is not just a matter of adding inflections such as 'Deaf', 'lesbian', 'black' or 'woman' to the existing collectivity, but of entirely dismantling it. This means looking seriously at the diverse, discrete and interconnected moments of its construction through discourses and associated social practices as the basis for a truly proactive social policy.

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<sup>1</sup> The reader is referred to a number of wide-ranging British texts for this purpose (Morris 1991; Swain et.al. 1993; Campbell and Oliver 1996; Barnes and Mercer 1997; Oliver 1996; Shakespeare 1998; Barnes et al 1999)

<sup>2</sup> The term 'Deaf' refers to people with hearing impairments who use Sign language

<sup>3</sup> Priestley (1998), for example, presents a useful if ultimately simplified typology that depends upon such boundaries

<sup>4</sup> It should be clear from this description that the term 'disability' is used in both the social model of disability and in dominant discourses. However, in the latter, the term refers to what social model thinkers describe as impairment. In order to avoid confusion I will refer to social conceptualisations of disability as 'new disability discourses' and to other conceptualisations as 'dominant discourses on disability'

<sup>5</sup> Individualist societies are those which emphasise 'I' consciousness, autonomy, emotional independence, individual initiative, the right to privacy, the need for specific friendship and universalism. Their stress on the I versus you distinction and on having an explicit and firm boundary between self and others, takes an independent view of the self. Collective societies, in contrast stress 'we' consciousness, collective identity, emotional dependence, group solidarity, sharing, duties and obligations, a need for stable and predetermined friendship, group decision and particularism. They generally take an interdependent view of the self and are defined by specific and firm group boundaries which emphasis a we (the in-group) versus they (the out-group) distinction. (see for example, Kim et. Al. 1994; Rose and Kiger 1995; Corker 1996).

<sup>6</sup> In *Justice and Politics of Difference* (1990), Young cites the title of Habermas's work as 'The Theory of Communicative Competence', whereas in the most recent British translation of this work, it is called 'The Theory of Communicative Action'. It seems that there is a very subtle distinction between the terms 'competence' and 'action' which are particularly relevant for this essay, and though I refer to both, my analysis is focused on the concept of 'communicative action'.

<sup>7</sup> This distinction may also be of significance to the 'politics of visibility' so often associated with identity politics and the practice of 'passing' (see Seidman et al. 1999, in reference to sexuality).

<sup>8</sup> The criteria for defining 'under disability' are: (i) the defendant must be able to understand the trial proceedings in order to make a proper defence; (ii) s/he must be able to understand the evidence; (iii) s/he must be able to instruct legal advisors; (iv) s/he is able to understand the charges and plead appropriately (Prins 1985:19)

<sup>9</sup> See, for example, C. Williams (1995). Brennan and Brown (1997)

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<sup>10</sup> A TTY or minicom is a telecommunications device which enables a deaf person to communicate through text with another party. Because the use of this device relies on written language, its effectiveness as a communication tool may depend, in Habermasian terms, on the 'competence' of the deaf person to communicate in this way, and on the ability of the receiver to decode the deaf person's English if they are not 'competent'.

<sup>11</sup> See Brennan and Brown (1997) and Metzger (1999) for further comments in relation to Sign language interpreting

<sup>12</sup> MacPherson marks a recognition that the 'reactive' nature of legislation as framed by the 1976 Race Relations Act and its explication of direct discrimination (the projection of hostile attitudes or stereotypes), along with its definition of indirect discrimination (institutionalised discrimination), do not go far enough.