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**New Governance and Rights-Claims**

Vlad Perju\*

***Introduction***

***I. Ideas as catalysts: Rights and the struggle for recognition of persons with disabilities***

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**Introduction:**

No school of thought has done more than new governance to advance our thinking about the nature, role and possibilities of political and legal institutions under the conditions of late modernity. Yet rarely does new governance theorize these institutions within the broader form of government --- constitutional democracy --- whose power they structure and channel. This uneasiness to combine new governance and “old government” is unjustified. If anything, the core insights of new governance should shine brighter when placed within a tradition of political thought that revolves around questions of justification, freedom and self-government. Whatever normative pressure that tradition may apply on the new governance canon will deepen the understanding of our commitment to live politically in a free community of equals.

Flexibility, transparency, experimentation, participation, access, accountability, catalysis - this is the conceptual landscape of new governance as it encounters the universe of traditional liberal thought: coercion, courts, justification, violence, freedom, self-respect, rights, (normative) individualism. That initial encounter is the terrain of this

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paper. Its claims can be listed as follows: not only institutions, but also ideas, can act as catalysts; one such powerful idea is that of enforceable rights; rights-claims combine strategic and communicative elements, and the latter remain obscured unless one approaches the social phenomena that rights can destabilize from the standpoint of the interested right-holder; courts have duties of responsiveness towards claimants (present and future), including a duty to anticipate and counteract distortions in the claimants' formulations of their own interests; a responsive conception of democracy need not necessarily be procedural.

My argument proceeds in three steps. Section 1 introduces disability rights as the example that grounds the subsequent theoretical analysis. This section dwells specifically on central features of legal reforms in the US and the EU under the influence of the social model of disability. Section 2 seeks to explain a puzzle identified in the first section, namely the remarkable staying power of rights-based social advocacy in the face of disillusionment with courts. The explanation offers a glimpse at the combination of strategic and non-strategic, or communicative, elements in rights-claims. Section 3 takes these lessons into the terrain of constitutional theory. It contrasts a conception of responsiveness as derived from the canon of new governance with an alternative but related conception that assumes more openly its normative affinity with constitutional democracy.

### **§1. Ideas as catalysts: Rights and the struggle for recognition of persons with disabilities**

One of new governance's main contributions to the understanding of modern regulatory regimes, and of modern law more generally, has been its emphasis on the role of institutions such as courts as catalysts.<sup>2</sup> However, that institutional focus must not be used to downplay the importance of ideas in politics and law. In this section I use the example of disability reform to show how the social model of disability and the related idea of rights have served as catalysts for the actions of social movements and institutional

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<sup>2</sup> Katie Young, Sturm & Scott.

reform.

The “charity” model is the starting point for any history of disability reform. According to this model, persons with disabilities were perceived as somehow deficient and therefore in need of “rehabilitation,” though not entitled to it. The charity model of social policy was rooted in a medical understanding of disability that understood disability as caused by functional incapacities rooted in an individual’s medical condition and/or impairment. This combination - charity model grafted onto a medicalized approach - created and reinforced specific understandings, including self-understandings, of social groups: society thus appeared divided between the passive beneficiaries of “rehabilitation” policies and the “able”, hopefully charitable citizens. Such a division bred an inevitable and unmistakable paternalism that informed the policies of national governments as agents of rehabilitative action.<sup>3</sup> The social model reversed this dynamic. It reoriented the understanding of disability away from the individual’s functional incapacity and towards society’s reaction to that incapacity. For instance, advocates of the social model argued that inability to walk is not a disability; what makes it a disability is the lack of wheelchair-accessible buildings. The social model turned persons with disabilities from passive “objects of rehabilitation and cure” into active citizens entitled to make demands on social institutions.

Tracing the trajectory of the social model, and generally of the struggle for equality of persons with disability, requires a comparative, mainly a transatlantic, approach.<sup>4</sup> That story is intricate and it helps to have a heuristic device to help one follow the social model across different jurisdictions. Social systems theory can serve as that device. According to (an adaptation) of social systems theory, one can think of legal systems

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3. See e.g., Council Resolution Establishing the Initial Community Action Program for the Vocational Rehabilitation of Handicapped Persons (June 1974) (“The general aim of Community efforts on behalf of the handicapped must be to help these people to become capable of leading a normal independent life fully integrated into society.”).

<sup>4</sup> It also requires an international approach - see the recent UN Convention - but that goes beyond my aims here. If interested, see Gerard Quinn and Michael Stein.

functioning like cells in that they translate into their unique “code” the “information” they receive from the outside environment. If the main insight of the social model, namely that disability is society’s reaction to an individual, is the information entering from the outside, then the story starts when the model traveled from the UK to the U.S. where, under the influence of a rights-centered legal and political discourse, it was translated into antidiscrimination code in Section 504 of the Rehabilitation Act of 1973.<sup>5</sup> As this code became engrained in American law, national and transnational social movements became the actors of learning and cross-jurisdictional acculturation. Even before the enactment of the Americans with Disabilities Act in 1990, developments in American disability policy proved very influential in Europe at the hands of the disability activists. There are many accounts of European advocates regularly traveled to the US, starting from the early 1970’s. At a time when the European domestic disability regimes were still deeply steeped in the charity-based model, the rights-based American legal reforms expanded the legal imaginary of disability advocates in Europe. Interestingly, it was American law, rather than the rhetoric or discourse of the American social movement, that proved most influential at the early stages of transatlantic influence. The explanation is that, in the US, the expansion of the Rehabilitation Act to cover discrimination on the basis of disability was not a response to societal pressure but rather the outcome of “anticipatory politics.”<sup>6</sup> Specifically, the reforms reflected the views of government insiders—in particular Congressional staffers—who came to see persons with disabilities as a minority group engaged in a struggle for recognition comparable to that of the civil rights and the women’s movements. While the American disability rights movement later borrowed from the rhetoric<sup>7</sup> of the other struggles for recognition<sup>7</sup>, in the

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5. In the early 1970s, after failed attempts to list disability as a prohibited ground for discrimination alongside race or national origin in Title VI of the 1964 Civil Rights Act, Congress included a provision in the Rehabilitation Act of 1973 (regarding federal aid for vocational training) mandating that “no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”

6. John Skrentny, *The Minority Rights Revolution*, at 270.

<sup>7</sup> Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, *Milbank Q.* at 386 (1989) (“The shape of the disability rights movement and perhaps its very existence has been the result of available models of these other movements, which have provided examples of political action and ideological frameworks, and which also served as sources of cooperation and competition.”).

early 1970's "the social movement was in the government."<sup>8</sup> By the time the Americans with Disabilities Act was enacted in 1990, an influential social movement had developed outside the government. Even so, the movement and the government provided to the European observers a united front – "unlike other major pieces of civil rights legislation enacted by Congress because there was no serious opposition to the ADA."<sup>9</sup>

The roles of official as well as non-official players make it a complex task to trace the social model's transatlantic influence. Turning the attention to Europe only compounds that complexity. Largely unsuccessful at the national level at a time when domestic policy was steeped in the charity models, European disability advocates used the American rights-based, antidiscrimination regulations to lobby EU institutions, especially the Commission but also the European Parliament, for similar legislation. Their rights-centered lobbying efforts were highly successful. There was no difficulty in convincing the Commission because its political interests in portraying European integration along a social, and not only an economic, axis perfectly aligned with the interests of the disability advocates. Moreover, rights-based social reforms also strengthened the Commission's effort to expand the powers of the Community vis-à-vis the member states. It also didn't hurt that reliable channels were available for advocacy for legislation based on the social model. Specifically, the main voice for the persons with disabilities was the European Disability Forum (EDF), an umbrella organization at the Community level that played a central role in the acculturation of the social model in Europe. Following a broader pattern of Commission involvement with the social movements, the EDF had been established with funds from the European Commission, which retained considerable influence over its political choreography.

The main obstacle for enacting American-inspired legal reforms was legal, not political. At the time, the limited powers of the Community did not include a legal basis to enact antidiscrimination legislation on grounds of disability. As soon as that obstacle

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8. Skrentny at 269; see also Richard K. Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* 41–43 (2001).

9. Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* 23 (2005). As the *New York Times* wrote one year before the ADA was adopted, "No politician can vote against this bill and survive."

was lifted, in Art 13 of the Treaty of Amsterdam, the Community proceeded without delay to enact secondary anti-discrimination legislation. Framework Directive 2000/78 prohibited employment discrimination on ground of disability, *inter alia*, and imposed on employers a duty to provide reasonable accommodation for disabled employees. The duty was transplanted *copy/paste style* from the ADA, which unsurprisingly provided the inspiration for the EU legislation. Indeed, so central has the ADA been in expanding the horizon of possibilities of disability advocates in Europe and beyond that observers have quipped that the Act has been more influential abroad than at home.<sup>10</sup>

In what follows I point out a few elements in this comparative history of disability reform that can help us think through the complex relationship between new governance and right-claims.<sup>11</sup>

Central to the new governance narrative is an emphasis on soft law as a cure for top-down, all-or-nothing legal rules backed by hard sanctions. Soft law measures are tools that allow stakeholders to negotiate and internalize norms of conduct or action so as these norms have long-term effects. Because the effects are not produced by fear of sanctions, but rather by flexible and self-referential frameworks, norms of soft law allow participants to gain a better understanding of their interests and capabilities and thus adjust their actions in the direction specified by the norm. The open method of coordination, benchmarks and peer review are part of the typical arsenal of soft law. In the area of disability policy, the Community deployed these methods starting in the 1970's and with increased frequency over the following decades. Some of those measures aimed, and succeeded, in creating a common institutional framework in which national officials in charge of disability policies could exchange information and learn from each other's experiences. But the fact is that overall the framework had very limited success in delivering the kind of change the stakeholders sought. Collecting information was

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<sup>11</sup> I gloss over some other relevant elements. Cite *Learning from Difference*, at pp. 300-302 (discussing the experimentalist interpretation of the requirement of "reasonableness" in the duty of employers to provide reasonable accommodation for employees with disabilities)

insufficient to bring about a policy shift to the social model. The use of soft law did little to challenge the medical model that informed the social policy of the Member States. Soft law measures were also insufficient in “socializing” states into opening up their disability policies to the Community’s outside scrutiny with bite. National governments proved willing to join in the Community’s information exchange networks as long as the costs of participation were low to nonexistent. But as soon as the Community tried to “harden” its soft measures, either by enabling its institutions to follow through with the national implementation of goals in areas such as employment or by seeking to enact secondary legislation in areas such as transportation of persons with disabilities, Member States quickly exercised their veto powers. As one commentator summed it up, the overall impact of disability-specific initiatives was “minimal.”<sup>12</sup>

Before Amsterdam, soft law measures were the only tool available to the Community lacking the legal basis for “hard” legal measures in this area. Yet disability advocates, through the EDF, argued that only changes in the Community competencies could allow for structural change along the lines of the social model through enforceable rules. Some scholars have recently used this example to make a sweeping case against soft law. For instance, Daniel Kelemen has relied on past lack of satisfaction with soft law, such as the OMC, to predict that “in core areas of EU competence, ... new modes of governance will remain of little significance. They will be overshadowed by the persistent tendency of the EU to rely on judicial enforcement of strict legal norms.”<sup>13</sup> This is a powerful argument but not entirely convincing. The study of disability reform teaches that the logic of hard vs. soft law is not a binary either/or logic. Soft law has remained in effect, and new soft law measures were enacted, after the coming into force of Art 13 Amsterdam and even the enactment of the Framework Directive. Indeed, the effectiveness of soft law measures increased once they were no longer self-standing but rather became parasitic upon hard law. It is no paradox that the case for soft law measures is stronger within a framework delineated by hard laws.

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12. See Waddington, *From Rome to Nice* at 13

<sup>13</sup> Kelemen, *Eurolegalism* at 31 (2011)



A second aspect of disability reform concerns the form of the hard legal norms. Both disability advocates and Community political actors argued for the enactment of individual rights. This idea of rights— enforceable rights—played a key role in the transformation of disability policy. That rights should have a prominent role was somewhat unsurprising in the context of American disability reforms, given the history of the modern struggles for recognition in the US. The interesting question is thus less why the American experience has been “an exporter of rights consciousness”<sup>14</sup> but rather why the export has been so successful in this context. As we have seen, from the late 1960s through the 1990s, the American antidiscrimination regime framed the horizon of the legal imagination of disability advocates from across Europe. Why?

The question about the influence of a rights-centered discourse answers itself once one sees that the importance of rights transcends their strategic use. The choice of rights as tools is normatively continuous with the tenets of the social model. The medicalized approach had failed “to take into account wider aspects of disability,”<sup>15</sup> such as the experiences of disabled persons. An emphasis on rights changed the social status and social understanding of persons with disabilities from powerless recipients of their peers’ charity to right-holders capable of making demands on the world.<sup>16</sup> When European disability advocates drew inspiration from the successes of their American counterparts, they unfailingly noted, more than anything else, the empowerment effect of using rights as swords or shields when confronting the prejudice embedded in social customs. In both (self-) perception and reality, rights promised to transform their holders from “objects of pity” into citizens ready to challenge the structure and dynamic of social spaces.

The empowerment connection between rights and the social model explains, at least in part, why the disability movement supported both the ADA and the EU framework as enforceable exclusively through private litigation, rather than through an equality

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14. Heyer, at 756.

15. Oliver, *Politics*, 5.

16. See Scotch, *Models*, at 216 (“Rights empower people with disabilities. With rights, people with disabilities may legitimately contest what they perceive to be illegitimate treatment of them.”)

institution such as an agency.<sup>17</sup> The exclusivity of enforcement through litigation sets disability apart from other antidiscrimination regimes, such as race or gender discrimination, and indeed a peculiarity that might change under the obligations assumed by the EU and the US as signatories to the UN Convention of the Rights of Persons with Disabilities.<sup>18</sup> In the EU, supranational political institutions proved responsive to the demand for enforceable rights. The Commission organized training seminars for disability advocates across Europe on how to litigate the implementation of the Framework directive in their respective national legal systems. It is still too soon to gauge the implementation and social effect of this strategy of enforcement through litigation. Moreover, one must also recall that the Framework Directive covers exclusively the area of employment and occupation. Calls for a more comprehensive antidiscrimination directive have thus far been unheeded - one of the few instances of friction between the EDF and the Commission. Yet no proposal or evaluation of the current state of legal affairs have questioned the centrality of the enforceable rights as the form for hard law in the area of disability discrimination.

The steadfast commitment to enforceable rights is all the more noteworthy given a significant and quite unexpected difficulty in the implementation of the social model of disability. Neither primary nor secondary Community legislation defines the meaning of disability. The definition made the object of the first preliminary reference to the Court of Justice on the interpretation of the Framework directive. In the case of Sonia Chacon Navas, the Court was asked if the prohibitions against discrimination on the basis of disability in the Framework Directive extended to protect an employee who had been fired because of illness. Since the text of the directive itself provides no direction, the Court had to decide if discrimination on the basis of illness qualifies as disability discrimination. It was not difficult to anticipate that the question of the definition of disability would come up, and that, when it did, the Court of Justice would give itself the

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<sup>17</sup> Cite Bruno de Witte paper on equality institutions (ask for Bruno's permission).

<sup>18</sup> The ratification process in the US Senate is set for this fall.

task of wording an autonomous Community definition, for fear that definitional differences across national jurisdictions would undermine the effectiveness of the Directive. Moreover, the American experience should have flagged the dangers involved in defining disability. While the ADA does include a definition of disability (which has remained unchanged since the Rehabilitation Act and through the 2008 Amendments to the ADA<sup>19</sup>), American courts narrowed access to the benefits granted by Congress by limiting the application of the statute *ratione personae*. Similarly, the ECJ too opted for a narrow, medicalized approach that defines disability as the functional limitation deriving from a medical impairment rather than the societal response to the impairment. Specifically, the court defined disability as “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” Such an approach to the definition of disability disregarded the rich history of struggle for recognition of persons with disabilities. As one scholar points out, “For over a hundred years, disability has been defined in predominantly medical terms as a chronic functional incapacity whose consequence was functional limitations assumed to result from physical or mental impairment.”<sup>20</sup> Despite clear legislative indication to implement the social model, the Court of Justice nevertheless opted for a medicalized approach.

Before studying what led the court in that direction, it should be noted that decisions such as the Court’s narrow definition of disability are the basis for new governance’s judicial skepticism. In the European context, the narrow judicial definition set the clock back to before 1996 when the Commission formally endorsed the social model as the guiding principle for disability reform in the EU.<sup>21</sup> In the American legal system, however forward-looking the intent of Congress might have been in enacting the ADA, courts limited access to many of its intended beneficiaries. As one commentator of the

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<sup>19</sup> “With respect to an individual, the term “disability” means (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The 2008 ADAAA qualifies, in the sense of limiting, the remedy available under prong C. Cite Liz Emens paper.

<sup>20</sup> Richard Scotch, *Models of Disability and the Americans with Disabilities Act* at 214 (2000)

<sup>21</sup> See the 1996 Communication from the Commission.

American scene noted by reference to the ADA's reference to 40 million disabled Americans, it was very surprising how few of those Americans were among the plaintiffs who brought cases under the statute.

And yet, a curious fact has been the reaction of stakeholders, including most prominently the disability rights movement, to these judicial decisions that threatened to undo the legislative progress. These judicial actions did not change the strategy of the movement away from courts or/and back to regulation exclusively through soft law. To the contrary, advocates argued in the opposite direction - for ever more specific and clear rules – including rules defining disability that would limit the leeway of courts in imposing sanctions on employers found to have violated their duties.<sup>22</sup> Why? What explains the resilience of enforceable rights? Why did stakeholders continue to insist on rights, even in the face of obvious disappointment?

## **§2. Strategic and communicative components of rights-claims**

Before turning to these questions, it helps to ask something a more fundamental methodological question: why does it matter why the stakeholders continued to insist on enforceable rights? Asking about motivations assumes that motivations can illuminate legal phenomena. In this case, for instance, it assumes that the internal perspective of the stakeholders helps to understand the forces shaping disability regulation. But why attach the meaning of a phenomenon to the experience of the actors engaged in it? It is a venerable tradition in social thought, going from Marxism to social systems theory, that argues forcefully that the two must be decoupled. According to that approach, the meaning of a social phenomenon must be derived from objective social facts rather than from subjective states of mind. While states of mind might be important for understanding the actors, they are irrelevant for elucidating the phenomenon itself. Happy slaves are still slaves.

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<sup>22</sup> In the US, this advocacy led to the 2008 ADAAA that sought to restore the original intent of the ADA from subsequent judicial interpretations.

The canon of new governance shares a natural affinity to this objectivist, as opposed to a normativist, social theoretical approach. Exactly how it does it, and whether by so doing it can withstand jurisprudential scrutiny, are questions that I only introduce here and to which I will return, albeit indirectly, in the next section. For now it helps to keep in mind the distinction between objective and subjective approaches in social theory and offer the conjecture that the meaning of a specifically *social* phenomenon, including legal phenomena, will likely require a combination of external and internal accounts.<sup>23</sup> Roberto Unger helpfully states this methodological imperative in *Law in Modern Society*: “(t)he sense individuals attribute to one another’s acts is what gives their conduct its distinctly social or human meaning. To disregard this meaning is to neglect an integral part of the experience for which an account is to be given... If we disregard the meanings an act has for its author and for the other members of the society to which he belongs, we run the risk of losing sight of what is peculiarly social in the conduct we are trying to understand. If, however, we insist on sticking close to the reflective understanding of the agent or his fellows, we are deprived of a standard by which to distinguish insight from illusion or to rise above the self-images of different ages and societies, through comparison. Thus, subjective and objective meaning must somehow both be taken into account.”<sup>24</sup>

Searching for an explanation that combines subjective and objective meanings, I argue below that the resilience of enforceable rights in the disability context is a mechanism of empowerment and self-respect whose effectiveness the claimants themselves have eroded by misunderstanding the role and possibilities of courts. Using as an example the case of the definition of disability, I argue that the social movement has deployed a strategy that ended up distorting its legal claims and ultimately undermining its struggle for recognition. However, I also suggest that the courts themselves should have anticipated

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<sup>23</sup> For a helpful discussion, see Habermas on Luhmann’s Philosophy of the Subject in the Philosophical Discourse of Modernity.

<sup>24</sup> Unger, *Law in Modern Society* at 15.

and counteracted the self-inflicted distortion effects of societal stakeholders.

Our initial question was: What explains the resilience of courts and enforceable rights in the discourse of the disability rights movement even after disillusionment with the judiciary's narrow interpretation of disability statutes? Answering this question will be easier after asking a prior question - why did courts, in both the US & EU, interpret social model disability legislation narrowly, along the lines of the medicalized approach that the social model was meant to replace?

The voluminous literature on the causes of the judicial backlash in the US offers a number of possible answers to this latter question, some of which have equivalents in the European context. I cannot dwell on this literature here – I have done it elsewhere<sup>25</sup> - so I will only briefly mention among (related) causes interpretative-textualist accounts, jurisprudential explanations placing disability discrimination within the larger context of the jurisprudence of equality; ideological factors pointing to the conservatism of the judiciary and interwoven market and social factors in the discourse of disability reform.<sup>26</sup> In my view, these factors are insufficient to explain the resilience of the medicalized approach in judicial decisions. They fail to give ideas their due, especially to the insights of the social model. In what follows, I explain the staying power of the medicalized approach through the interplay between, on the one hand, its conceptualization of illness, impairment, and disability within the social model and, on the other hand, the broader argumentative strategies that the disability rights movement deployed in its struggle for recognition of the equal status of persons with disabilities.

It is difficult to disentangle the substance of the model's main claims from the argumentative strategies used to advocate for disability reform both in Europe and in the

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<sup>25</sup> Vlad Perju, *Impairment, Discrimination and the Legal Construction of Disability*, 44 *Cornell Int'l L J.* (2011)

<sup>26</sup> I do not assume that there are no mono-causal answers to the judicial backlash, or that these causes, whatever they are, are identical in the two jurisdictions.

United States. While the story points to the central role of courts, that prominence was the result of a certain understanding on the part of the social movement and theorists of the social model about the role that courts can play. Their distrust for courts led these actors to over-(and mis-) strategize, ultimately distorting its claims by diluting their communicative dimensions.

Consider first the failure to theorize the concept of medical impairments. This concept is central to the legal definition of disability, whether the source of the definition is legislative or judiciary. The failure to provide an account of medical impairments left judges bereft of guidance on how to interpret disability according to the social model and made them seek refuge in the more familiar territory of the medicalized approach. Important for our purpose is that the decision to leave medical impairments under-theorized was not an accident, but rather the result of strategy: the movement believed that theorizing impairments would make it harder to sever the disability from illness or disease, thus making it difficult to move away from the medicalized and towards the social model of disability. Failure to theorize social impairments was thus the response of social model theorists to the perceived risk that an analogy between impairments and illness would legitimize the dominion of medical expertise and perpetuate socially disabling assumptions about normality.<sup>27</sup> To be sure, social model theorists acknowledged the need to theorize about medical impairments, just not within a comprehensive social theory of disability, and not in the confines of the social model. Many of its early advocates believed that including a theory of impairment in the social model could undermine the model's political effectiveness. As one of the model's prominent theorists put it, "[t]he denial of impairment has not, in reality, been a denial at all. Rather it has been a pragmatic attempt to identify and address issues that can be changed through

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<sup>27</sup> In using interchangeably the social model and the claims social movement for disability rights, I gloss over the complexities of the social movement itself. See Samuel Bagenstos, *Law and the Contradictions of the Disability Rights Movement*.

collective action rather than medical or other professional treatment.”<sup>28</sup> This pragmatic political awareness was more than an additional strategic layer to a self-standing normative argument; it pervaded the normative core of the social model and, with it, the core of the claims put forth by the movement. It helps in this context to recall that the project of transformation that social model theorists envisaged was comprehensive, not piecemeal.<sup>29</sup> The wholesale shift from an individual to a social approach is premised on disconnecting disability from illness: “The achievement of the disability movement has been to break the link between our bodies and our social situation, and to focus on the real cause of disability, i.e. discrimination and prejudice. To mention biology, to admit pain, to confront our impairments, has been to risk the oppressors seizing on evidence that disability is ‘really’ about physical limitation after all.”<sup>30</sup> The distrust of courts as reliable fora for deliberation distorted the arguments of the movement, shaped the claims of plaintiffs, and had the perverse effect of courts resorting to the medicalized approach as a consequence of their failure to understand the tenets of the social model.

The distrust that judges can reason their way through the relationship between medical impairments and medical conditions, illness and disability and more broadly about body/mind/nature/society led to an understanding of courts as arenas for political strategy where claimants’ success depends on engaging in the kind of instrumental rationality that characterizes strategic, as opposed to communicative, actions. A claim is distorted when its strategic components trump its communicative components.<sup>31</sup> Consider for instance the strategic components in *Navas*. As mentioned previously, that case involved the question whether disability includes illness so that discrimination on the basis of illness –

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28. Oliver, *Understanding*, at 41–42 (“We must not assume that models in general and the social model in particular can do everything: that it can explain disability in totality. It is not a social theory of disability and it cannot do the work of social theory. . . . An adequate social theory of disability must contain a theory of impairment . . . . So let’s develop a social model of impairment to stand alongside a social model of disability but let’s not pretend that either or both are social theory.”).

<sup>29</sup> For the philosophical underpinning of such an approach, see Jay, *Marxism and Totality* (1986).

<sup>30</sup> See *id.* at 39 (citing M. Shakespeare). From this perspective, impairment and illness should be kept separate. The latter requires medical treatment, impairments might not. The confusion results from the colonizing tendency of the medical approach.

<sup>31</sup> For the distinction between strategic and communicative, see Habermas.



or a medical condition – is or can be tantamount to discrimination based on the disability. The ECJ answered the question in the negative, holding that illness falls outside of disability discrimination. However, it is not immediately obvious why disability discrimination should not be expanded to protect any decision made by an employer on the basis of a health condition of an employee (a condition of the body or mind). Since no antidiscrimination provision includes illness among suspect grounds, it is a viable question whether in situations of power asymmetry that are subject to legal regulation, whether in the private spheres such as employment or in public spheres where the state is involved, decisions about the status of individuals should ever turn on a condition of their body and/or mind.

The strategic interests of the social movement, concerned with its own self-identity, added complexity to the issue. At one level, the Court’s negative answer to the question if disability includes illness can be seen as consistent with the interests of the social movement. However unwelcome the narrow, medicalized definition itself might be, the ECJ’s refusal to accept illness as a suspect criterion, or as part of the suspect class of disability, fits the strategy of the social movement because it does not threaten to distort the movement’s self-identity. The relation between self-understanding, on the one hand, and the status of belonging to a certain social category, on the other hand, is particularly significant in the case of persons with disabilities because of the wide array of medical impairments that triggers social discrimination.<sup>32</sup> Yet social reform depends on effective political advocacy whose strength depends at least partly on the shared consciousness of participants in the social movement. Unlike with other disadvantaged groups that struggled for recognition, where such commonality—on grounds of race, gender, sexual orientation, etc.—could be more or less taken for granted, the formation of a shared consciousness of persons with disabilities required that the protected class be carefully

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32. See Scotch, *Social Movement*, at 163 (“‘disability’ as a unifying concept that includes people with a wide range of physical and mental impairments is by no means an obvious category. Blind people, people with orthopedic impairments, and people with epilepsy may not inherently see themselves or be seen by others as occupying common ground. Even greater divisions may exist between individuals with physical impairments and those with mental disabilities. Thus another prerequisite for collective action may be the social construction and promulgation of an inclusive definition of disability.”).

delineated. From this perspective, linking impairments and illness run the risk of expanding the ambit of the protected class, dilute the shared political identity of the class members, and delay, perhaps sine die, political emancipation. From the perspective of the social movements, allowing persons who are ill to receive disability protection would undermine the conditions for the development of a collective consciousness that could support effective political action. This idea of a special class, a group, was central to the architecture of the social model.<sup>33</sup> From within that model, the transition from the medical to the social approach brought with it a shift from an individual approach to a group perspective. At the very core of the social model, at least in its early formulations, was the need for a “process of empowerment of disabled people as a group” by contrast to the individualized assessment of the medicalized approach.<sup>34</sup> Implied in this shift is the acceptance of a binary approach to disability (including a categorical conception of dependence/independence), and conversely, a rejection of the view that it is best to conceptualize disability along a continuum. It is thus apparent how this political strategy shaped the core claims of the social model, particularly the lack of theorizing about medical impairments. In this light, the ECJ’s refusal to extend the Directive’s protection to cover Navas’s illness was correct. The social model provides counter-arguments to the position of the referring court to the effect that “a worker should . . . be protected as soon as the sickness is established.”<sup>35</sup>

But the resilience of the medicalized approach is the effect of convergence between the social movement’s fears that only a strong social discrimination approach could create the shared political consciousness necessary for reform, on the one hand, and something else. That additional factor becomes visible when approaching the question of the definition of disability from the standpoint of those called to answer it. Courts have

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33. As always in these situations, there is a risk of essentializing the traits that delimit the protected class. See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 191 (2006) (“the liberty paradigm [protects] the authentic self better than the equality paradigm. While it need not do so, the equality paradigm is prone to essentializing the identities it protects.”).

34. Oliver, *Understanding*, at 37.

35. See Opinion of AG., Navas, 27.

understandable concerns with administrability of potentially sweeping disability statutes. According to this institutional self-understanding, they are actors entrusted with the interpretation and application of statutes in a clear, rational, and administrable fashion. Administrability, for instance, plays an important role in the concerns of the judiciary.<sup>36</sup> If adjudication is understood as line-drawing and line-policing, then the task becomes to filter out abusive claims.<sup>37</sup> This task requires drawing and enforcing the boundaries of the group to whom the law grants special entitlements. How those boundaries are drawn will impact on the formation of the group's political consciousness. That impact, however, is not likely to be a concern of the judiciary. The stakes in the definition of disability are a function of its far-reaching implications for both courts and the social movement, albeit for different reasons.<sup>38</sup>

I have thus far traced the staying power of rights to the double helix of strategic and communicative elements of right-claims. I have also argued, specifically by reference to the disability example, that the judiciary's institutional self-understanding explained its reaction to the strategic decision of the social movement to gloss over the need to theorize medical impairments from a social model perspective. The explanations for the resilience of the medicalized approach can be found at least in part at the convergence of the strategizing of disability movement, on the one hand, and the self-understanding of courts, on the other hand. However, there is something unsatisfactory about ending the analysis at this point. There is a poverty of institutional analysis when it remains entirely confined to the description of strategic behavior. There is more to say on the topic of struggles for recognition, rights and courts – and one feels the need to move into

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36. The dissenters in a landmark ADA case in the US noted the majority's concern with "the tidal waves of lawsuits"<sup>36</sup> that presumably would have followed from authorizing plaintiffs to bring claims despite the alleviating effects of measures that mitigate their impairment. See *Sutton*, 527 U.S. at 508 (Stevens J., dissenting).

<sup>37</sup> See the ECJ in *Navas*: "[t]here is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness,

<sup>38</sup>. Because of these high stakes, the definition of disability has become the battleground of different approaches. See, Bagenstos, at 45 ("Passing judgment on the Supreme Court's definition-of-disability decisions . . . entails passing judgment on the strategies and ideals of disability movement activists themselves.").

normative territory in order to say it. For instance, however understandable their institutional concerns might be, courts deciding disability claims nevertheless disappointed the expectations of both claimants and legislator. What exact duty did their actions fail to meet? The role of courts is not exhausted by strategic institutional considerations – there are other standards that courts of law must live up to. The next section takes the analysis in that direction by drawing on the new governance canon in articulating a richer normative critique.

### **§3. Two conceptions of responsiveness: An excursus into constitutional theory**

This section identifies the conception of responsiveness – the “meta-value of social responsiveness”<sup>39</sup> – at the center of new governance’s conceptual framework for richer critique. Responsiveness-centered analysis makes that framework well-suited for such critical inquiries. At the same time, I aim to show that its exclusive focus on the dynamic of institutional arrangements makes that conception of responsiveness inherently unstable. Finally, I sketch out an alternative, more stable and normatively robust conception of responsiveness that draws on the normative outlook of the form of government – constitutional democracy – in which institutional arrangements exist.

According to what Walker and de Burca call “the absorption, or merger, orientation” – and which they contrast to the “separation orientation” - new governance brings to law a “highly pragmatic and flexible approach to and modality of regulation, a method of ensuring maximum responsiveness and adaptability.”<sup>40</sup> New governance thus offers ways for “democratizing” law, at least in the sense of making regulation sufficiently adaptive to the interests and demands of its subjects. As Sturm & Scott argue, “courts prompt new governance institutions to provide for full and fair participation by those affected by, and responsible for, new governance processes.”<sup>41</sup> The themes of participation, flexibility,

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<sup>39</sup> Walker and de Burca, p. 17.

<sup>40</sup> Id.

<sup>41</sup> Catalysts, 567. See also Katie Young’s article, ICON.

transparency and accountability are central to the canon and can be interpreted as subsumed to the imperative of responsiveness. The same is true about the new governance's emphasis on constant institutional experimentation. Experimentation is necessary because institutions have an inherent tendency towards ossification, thus entrenching the interests of select social groups. Institutional experimentation is a form of radicalizing democracy by enhancing the responsiveness of the institutional arrangements to the demands and interests of the members of a free community of equals. According to Unger's idea of destabilization rights, each these members should have the tools to challenge and unsettle institutional arrangements that right-holders experience as no longer responsive to their legitimate needs. Destabilization rights are tools for individuals to reshape the social space.

The connection with democracy is vitally important. Democracy alone among all forms of government promises its subjects ownership over the social spaces they inhabit. As Thomas Pogge has put it, there is a "moral imperative that political institutions should maximize and equalize citizens' ability to shape the social context in which they live."<sup>42</sup> Indeed, the members of a free community of equals can neither establish nor retain a connectedness with the political world if their claims fail to engage the institutions to which they are addressed. The normative availability of institutions – their responsiveness capacity – is what keeps social spaces, and thus the conditions of collective self-government, open to all members of a free community of equals. As Hannah Arendt wrote, "whenever people come together, the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted."<sup>43</sup> Law shapes these in-between spaces. Unlike in totalitarian regimes, where institutions remain glacial – or worse, they retaliate – when faced with the demands of their subjects, a democratic state keeps the spaces between people and public institutions, and between people themselves, open to access, contestation, and re-imagination. In a constitutional democracy, the constitution establishes the structures and sets the conditions that allow

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<sup>42</sup> Thomas Pogge, *Politics as Usual* at 200 (2010)

<sup>43</sup> Hannah Arendt, *Introduction into Politics in The Promise of Politics* 106 (2005).

people to access, challenge, and (re)make the spaces between themselves and their public institutions.

Anti-discrimination rights are destabilization rights. When courts decide disability cases by narrowing the meaning of disability, they confine the statute *rationae persone* by limiting the class of beneficiaries. There is a cumulative social effect to these decisions, which limit the reach and frequency of citizens' challenges to the shared social space. They reduce the situations when stakeholders can challenge, destabilize and re-shape the social spaces. This paradigmatic instance of unresponsiveness is only compounded by the opaque justifications that courts – and I'm referring here specifically to the ECJ, though the same applies to the US courts- use to justify their decisions. More than in its usual manner<sup>44</sup>, the ECJ's *Navas* reasoning was opaque because the focus on definitional questions about the meaning of "disability" pulled judges in the direction of conceptual analysis – what some might know as "transcendental non-sense."<sup>45</sup> The medicalized approach could thrive in the fetid darkness of impenetrability. By contrast, one can imagine an alternative – the decisions of courts in Canada or Australia help in that task – where disability is interpreted broadly and judges spend the superior quantum of their interpretative energy on the issue whether the action or inaction at issue amounts to discrimination. Note how the unresponsiveness in *Navas* is addressed to the demands of present (and future) claimants. But one can certainly enlarge the framework to include legislators.<sup>46</sup> These narrow judicial interpretations have also been unresponsive to the

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<sup>44</sup> See generally Vlad Perju, Reason and Authority in the European Court of Justice, 49 Virginia J. Int'l L. 307 (2009).

<sup>45</sup> Felix Cohen, Transcendental nonsense and the Functional Approach, Columbia Law Review (1935). I should hasten to add that I do not believe there is anything inherently nonsensical about conceptual analysis.

<sup>46</sup> In fact, one can enlarge the framework even more. For instance, Jack Balkin has gestured in the direction of responsiveness in the formation of legitimacy judgments in his discussion of the role of social feedback on legitimacy via mechanisms such as political parties or social movements. Balkin surmises that there must be "some kind of feedback mechanism that makes the dimension of constitutional change responsive to popular opinion about the Constitution. If such a feedback mechanism is missing, there is no guarantee that the constitution that was respect-worthy at one time will not lose that legitimacy." See Jack Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 Tulsa L. Rev. 485, 503 (2004). See also Robert Post, *Forward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 Harv. L. Rev. 4 (2003) (defining constitutional culture as the beliefs and values of nonjudicial actors and emphasizing the dialectical relationship between constitutional culture and constitutional law).

legislators whose policies to promote the social model of disability these decisions undermined. Rather than act as catalysts, bringing together the different institutional actors and stakeholders, courts have acted in ways that alienated these myriad participants in the regulatory process.

The conception of responsiveness presented in the new governance literature is essentially procedural. Its essential outlook is well captured by Frank Michelman's discussion of Robert Post's *Constitutional Domains*. While Post's work does not belong to the new governance literature, it nevertheless shares some of the same conceptual territory. According to Michelman, the "responsive" theory of democracy assumes that "each individual who (cares to) exercises real if mediated self-rule through his or her respective contributions to collective processes. The agency of each is diluted but preserved in a stream of political results that 'respond' like vector sums to each and every input vector."<sup>47</sup> Such concerns underlie new governance's emphasis on access, participation, transparency and accountability. Whether or not resting on epistemic foundations – the new governance emphasis on disagreement and indeterminacy leaves that possibility open –, responsiveness is understood as the reaction of public institutions – including courts, when all else fails – to the demands and needs of the members of the polity. Experimentation is necessary because democratic arrangements must adapt to societal interests.

In this understanding of "responsive democracy," there can be no objective – in the sense of transcendental - criterion by which to assess the substantive performance of a society's institutional arrangements. Responsiveness here is simply a matter of institutional reaction to stimuli, and thus depends on the aggregate of societal preferences.<sup>48</sup> And yet, this is not where things rest. The new governance canon is shot through with fruitful and telling equivocations on this issue. The canon mentions "robust

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<sup>47</sup> Michelman, Must Constitutional Democracy Be "Responsive"?, *Ethics* vol. 107, 706 at 708 (1997).

<sup>48</sup> Michelman analogizes it with Dworkin's conception of statistical democracy. See Dworkin, *The Moral Reading of the Constitution* (the Introduction).

proceduralization”<sup>49</sup>, which refers to courts’ capacity to “structure an integral relationship between procedure and substance.”<sup>50</sup> Similarly, the duty of courts to give reasons for their decisions is portrayed as part of “principled decision-making: transparency and accuracy.” At the same time, however, “reason-giving is not solely a procedural requirement; it is a substantive requirement pertaining to the kind of justification which can legitimately be put forward.”<sup>51</sup> These are equivocations about the relationship between procedure and substance in the new governance theory. They lead us to articulate conceptions of responsiveness that are not completely procedural. But how should one conceptualize substantive aspects of “responsive” democracy?

Responsiveness is best understood as referring to a posture of normative availability of public institutions towards their citizens and non-citizens who come within their jurisdiction. These institutions, including courts, have a duty to respond to the claims of a pluralist citizenry in ways that recognize and reinforce the social standing of each citizen claimant - present and future claimants - as free and equal. Institutions must give answers that the claimant and his/her representatives will find intelligible, that show appropriate respect to the claimant, and demonstrate thoughtful consideration of the meaning of the claim and the impact of the institution’s response on the claimant and the political community as a whole. Responsiveness signals the recognition, respect, and consideration that institutions give to citizens, and that citizens give to one another. Judgments of legitimacy are, in part, judgments about the capacity for normative responsiveness of the political institutions.<sup>52</sup>

“Respond” is a euphemism. At issue here are exercises of political power that coerce subjects into compliance with norms which they can – and often do – reasonably challenge on substantive grounds of fairness, as they understand it. Indeed, pluralism puts

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<sup>49</sup> Scott & Sturm at 570.

<sup>50</sup> Id.

<sup>51</sup> Id. at 23

<sup>52</sup> For an earlier, though different, account of “responsiveness,” see Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1978).



particular pressure on responsiveness, especially, the kind of self-perpetuating pluralism that, as Rawls defined it, is “the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.”<sup>53</sup> These social circumstances challenge the terms of the interaction between public institutions and their subjects. The fact of pluralism widens the pool of perspectives on social and political life from which claims are drawn while at the same time deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable yet incompatible, comprehensive doctrines of the good? While differently worded, constant references to complexity, novelty, disagreement and uncertainty show that new governance literature shares these pivotal concerns.

It is a duty incumbent upon all public institutions to respond to the claims addressed to them in ways that recognize and reinforce the social standing of each citizen claimant as free and equal. The duty is met by reacting to claimants, and by doing it in particular ways. While political theories offer a gamut of different interpretations of the specific content of the duty, at the very minimum, institutions must give claimants answers that they and their representatives will find intelligible, that do not misinterpret the claim, that show appropriate respect to the claimant as a free and equal citizen, and demonstrate thoughtful consideration of the meaning of the claim and the impact of the institution’s response on the claimant and the political community as a whole. It is easy to see why these requirements are particularly important in the case of responses by courts as public institutions. When citizens bring a claim to legal decision-makers, they are in effect appealing to law to arbitrate their relations with institutions that allegedly have been unresponsive to their demands. An important social function of judicial remedies is to reopen the public space and *eo ipso* restore the fair terms of social cooperation and the conditions for self-government. Given the state’s claim to monopoly over the legitimate

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<sup>53</sup> Rawls, *Political Liberalism* at xviii. See also Frank Michelman, *Law’s Republic*, 97 *Yale L. J.* 1493, 1507 (defining pluralism as “the deep mistrust of people’s capacities to communicate persuasively to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world.”)

use of violence, no other public institution can deliver the immediate satisfaction of a citizen's particular need, should the institutions of the legal system also prove unresponsive.

This is not the place to attempt the taxonomy of unresponsiveness. Whatever its specific form (inaction, wrong action, refusal to recognize or misrecognition<sup>54</sup>), the “glaciality”<sup>55</sup> or lack of an appropriate response of public institutions threatens to erode the legitimacy potential of a political order. Constitutional legitimacy is partly a function of the constitutional system's high levels of responsiveness to citizens' claims. Because institutional responsiveness to a citizen's claim to recognition and/or action is a statement about that citizen's social standing, judgments of legitimacy are, in part, judgments about normative responsiveness.

To understand the connection between responsiveness and legitimacy, in the particular context of adjudication, it helps to turn to the concept of a legal claim. For reasons of consistency, I pursue the analysis with respect to the constitutional form of legal claims. Constitutional claims represent citizens' own interpretations of constitutional provisions (recall that in many European constitutions, and at the EU level, the prohibition on disability discrimination has constitutional status – or a functional equivalent) that aspire to official status upon endorsement from courts, as the institutions invested with the authority to interpret authoritatively the meaning of the constitutional text.<sup>56</sup> Drawing on Charles Taylor's work on the social imaginary, we can identify the origin of constitutional claims in the claimant's “constitutional imaginary.” Taylor refers to the social imaginary as “a largely unstructured and inarticulate understanding of our

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<sup>54</sup> For a discussion of different forms of recognition, see Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflict* (MIT, 1995); Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *The Inclusion of the Other* 203-236 (MIT press, 1998); Paul Ricoeur, *The Course of Recognition* (Harvard, 2005). References to recognition in the text are not signals of my taking sides in the debate recognition vs. redistribution. See generally Nancy Frazer and Axel Honneth, *Redistribution or Recognition: A political-philosophical exchange* (Verso, 2003).

<sup>55</sup> I borrow this term from Charles Black, *A New Birth of Freedom* 159 (1997) (referring to “judicial glaciality”).

<sup>56</sup> The distinction between top-down and bottom-up constitutional interpretation maps, with some approximation, onto Sanford Levinson's distinction between Catholic and Protestant readings of the constitution. See Sanford Levinson, *Constitutional Faith* (1988).

whole situation... (,) an implicit map of the social space.”<sup>57</sup> He distinguishes social imaginary from social theory, and writes that “for most of human history and for most of social life, we function through the grasp we have of the common repertory, without benefit of theoretical overview. Humans operated with a social imaginary well before they ever got in the business of theorizing about themselves.”<sup>58</sup> By analogy, a constitutional imaginary can be understood as an implicit map of the constitutional space as it appears from an individual citizen’s perspective. It is an implicit map because citizens do not routinely think of interpretations of freedom, equality, and dignity as specifically constitutional interpretations. They appear constitutional once they are reconstructed within the discourse that constitutional democracy reserves for political approaches to freedom and equality.

Citizens’ constitutional/legal imaginaries do not fully overlap with constitutional law/legal system. Even if/when these imaginaries are not the immediate reflection of their citizens’ un-universalizable comprehensive conceptions of the good, they nevertheless are not subject to the limitations and constraints under which constitutional doctrine is generated. For instance, citizens do not share certain concerns with courts, such as the administrability of constitutional norms, nor are their imaginaries subject to constraints such as stare decisis. However, even if they do not perfectly overlap, in a constitutional democracy, the spheres of citizens’ constitutional imaginaries and constitutional law should be synchronized. The capacity to access courts is in this sense an essential guarantee against citizens’ political and social alienation; that is, a guarantee that the conditions of collective self-government are not beyond the reach of the members of that

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<sup>57</sup> Charles Taylor, *Modern Social Imaginaries* 25 (Duke, 2007).

<sup>58</sup> *Id.* at 26.

free community of equals.<sup>59</sup> As Joel Feinberg wrote, “what is called ‘human dignity’ may be simply the recognizable capacity to assert claims.”<sup>60</sup>

The duty of responsiveness is a mechanism of synchronization between the subjects’ constitutional imaginaries and the legal system.<sup>61</sup> Synchronization is, of course, a two-way street. As far as courts are concerned, they are under a duty to respond to the individual’s claim. *Ex ante*, the odds of a claim’s success are irrelevant to the attention the claim deserves from the institution to which it is addressed. Put differently, the institution has the same obligations of responsiveness to the claimant irrespective of the claim’s likelihood of success as gauged from past experience or from any other factor exogenous to the claim itself. At the other end, citizens’ constitutional imaginaries are not static either. Since responsiveness takes the form of reason-giving, a duty of civility is incumbent upon citizens, which requires them to engage in a process of reflective equilibrium where the claimant goes back and forth between the justification offered by the public institution in its response and the claimant’s original claim.<sup>62</sup>

Return now to institutional responsiveness. A central lesson of the new governance literature is a constant reminder that access is a precondition of responsiveness. This is true in the case of all public institutions, especially in the law-making process, but also when citizens approach courts, such as in the context of their claims for protection from disability discrimination. When courts can only answer claims that reach them, and whose meaning they understand. The fair value of responsiveness thus depends on the institutional mechanisms that secure the effective access of citizens

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<sup>59</sup> This synchronization is one aspect of what Jed Rubenfeld referred to as the “anti-totalitarian” principle in constitutional law. See Jed Rubenfeld, *Freedom and Time* (Yale, 2001). The survival of certain elements of the constitutional imaginary might depend on his peers’ endorsement through institutional action. “What does not live in reality dies in the imagination” - Robert Unger, *What Should Legal Analysis Become* 21 (1996).

<sup>60</sup> See Joel Feinberg, *Rights, Justice and the Bounds of Liberty*, cited in Paul Ricoeur, *The Course of Recognition* 201 (2005).

<sup>61</sup> I don’t mean to imply that only courts can interpret constitutions. Legislators also can. Cite BU symposium.

<sup>62</sup> I borrow the idea of the duty of civility from Rawls’s *Political Liberalism*. The process of reflective equilibrium on the part of the claimants is rooted in the duty of responsiveness. I present this argument in a less schematic fashion in Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, *ICON* vol. 8 (3), 2010.

to the institutions before which they can press their demands about the specific terms of collective life. Yet, the space in which claims travel from their point of origin in the constitutional imaginary to courts, and back, is marked by successive translation processes that may distort the meaning of the claim. Distortion effects can occur when citizens formulate their claims (including self-inflicted distortion effects of the type we encountered from the disability rights movement), and when institutions translate and process them.

Some distortion effects are inevitable. The effects caused by the necessity to translate claims into law's formal categories are one example. The formal structure of legal categories explains the loss of original nuance and complexity; translation into legal "code" is seldom without residue. As Weber explained this process, "the expectations of parties will often be disappointed by the results of a strictly professional legal logic":

"Such disappointments are inevitable...where the facts of life are juridically 'constructed' in order to make them fit the abstract propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be 'conceived' by the jurist in conformity with those 'principles' which are revealed to him by juristic science.... To a large extent such conflicts are the inevitable consequence of the incompatibility that exists between the intrinsic necessities of logically consistent formal legal thinking and the fact that the legally relevant agreements and activities of private parties are aimed at economic results and oriented towards economically determined expectations... a 'lawyers' law' has never been and will never be brought into conformity with lay expectations unless it totally renounce that formal character which is immanent in it."<sup>63</sup>

Not all distortion effects are inevitable. For instance, there is nothing inevitable in decisions reflecting the biases of the decision-makers.<sup>64</sup> Finally, there are effects that might or might not be distortive, depending on how and when they are deployed. The doctrine of stare decisis is generally responsive to both present and future claimants, yet it could also be used in ways that produce distortion effects.

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<sup>63</sup> Max Weber, *Economy and Society* 885 (vol. 2).

<sup>64</sup> The reader should fill in the blanks with her favorite examples.

Because of these different types of distortion effects, it is important not to tie the legitimacy of a constitutional system – its “respect-worthiness”<sup>65</sup> – to an assessment of the mere existence of such distortion mechanisms (even when they were partly self-inflicted, as in the case of disability rights). Rather, legitimacy is a function of how effectively a constitutional system has developed mechanisms for de-programming distortions from its doctrines and discourse or for minimizing their impact, when the cause of distortion cannot be eradicated. Determinations about legitimacy are judgments of degree that can fine-tune to the existence and efficiency of such responsiveness mechanisms. While the dynamic of responsiveness is influenced by legal culture and historical development, some features of modern constitutional systems can be normatively reconstructed as part of a strategy for self-correction against distortion effects.

We see now why, in the case of disability rights, the duty of responsiveness that courts owed to the claimants required them to correct for the self-inflicted distortion effects resulting in their plaintiffs’ several and the social movement’s collective failure to offer a social model theory of medical impairments for use in the judicial interpretation of the definition of disability. The duty of judicial responsiveness in a constitutional democracy requires judges to anticipate and counter situations when the “input vectors” have been subject to distortion effects.

***Conclusion: The not-so-strange alchemy of new governance and “old government”***<sup>66</sup>

I have argued above that the substantive aspects of a theory of responsiveness can be found in the normative theory of the form of government – constitutional democracy - whose exercise of power these institutions structure and channel. The conception of responsiveness becomes more stable and robust when placed within a larger normative

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<sup>65</sup> Frank Michelman, *IDA's Way: Constructing the Respectworthy Governmental System*, 72 *Fordham L. Rev.* 345

<sup>66</sup> The reader will be reminded of Albie Sachs’s *The Strange Alchemy of Life and Law* (2009).

conception of constitutional democracy. The resulting combination of new governance and “old government” is a reminder that, however important courts’ role as arbiters of interaction and information-sharing might be, law remains – essentially though by no means exclusively - a coercive practice. Approaching responsiveness in this new light also helps to clarify three ambiguities that unnecessarily erode the normative power of new governance. The first is the conception of flexibility (mistakenly equating responsiveness with flexibility, thus failing fully to theorize to whom the duty of responsiveness is owed); the second is the conception of transparency (mistakenly equating responsiveness with transparency, thus failing to capture the justificatory depth of the duty to give reasons) and finally the conception of catalysis (mistakenly equating responsiveness with catalysis, thus downplaying the essentially violent and coercive dimension of state – including judicial – power).

This analysis is a helps to see in a new light some of the central insights of new governance. However innovative and original contemporary regulatory phenomena might be, these phenomena still involve perennial questions about violence, power, dignity and self-government that have always been the concern of political theory.

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