JOURNAL OF LAW AND SOCIETY
VOLUME 47, NUMBER 4, NOVEMBER 2020
ISSN: 0263-323X, pp. 558–87

Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?

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This article calls for a strengthening of Disability Law as an academic discipline and offers orientation for its future development. It argues that there is a need for enhanced cohesion among those already applying a critical disability perspective within disciplines such as Equality Law, Mental Health and Capacity Law, and Social Care and Protection Law and also for greater mainstreaming of this approach across the full breadth of sociolegal scholarship. The article is divided into three main sections. The first contextualizes Disability Law by reflecting on its relationship with other legal disciplines and broader pools of scholarship. The second focuses on issues of scope and structure. The third offers orientation for future Disability Law work by outlining four key cross-cutting challenges with the potential to bring together scholars with expertise in different areas of substantive law.

I. INTRODUCTION

This article makes a case for the strengthening of Disability Law as an academic discipline. It does so not in order to keep Disability Law discrete and separate from other legal disciplines, but as a means by which to dissolve barriers that too often divide scholars applying disability critique to different areas of substantive law, and to enhance the flow of such critique into areas of legal scholarship that it has been slow to permeate. It is a call to action that urges sociolegal scholars to interrogate the relationship between law and

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With heartfelt thanks to Michael Thomson for insightful guidance and support; Alastair Mullis for persuading me of the need for this piece; Beverley Clough, Luke Clements, Jen Hendry, Alex Green, and other colleagues at the Centre for Disability Studies and Centre for Law and Social Justice for thoughtful comments; David Newman and Rachael Thomas for invaluable practical assistance; and the anonymous reviewers and editors for guidance that has significantly improved this article.

disablement, challenge ableism, and contribute to the development of law and justice systems that are inclusive of people regardless of their ascribed 'impairment' or body/mind difference.

Disability Law is centrally concerned with, and defined by, questions about law's role in creating, perpetuating, resisting, and contesting disablement – important questions with profound implications for social justice. In accordance with a social model approach to disability (discussed more fully below),[1] disablement is understood here as the process by which social structures and systems operate to disadvantage, exclude, and marginalize disabled people – people with ascribed impairments (or body/mind differences) that deviate from generally accepted 'ability' norms of physical, sensory, cognitive, neurological, or emotional functionality. 'Disability' is understood as the resulting disadvantage or oppression. The term 'disabled people' will be used to refer to people with ascribed impairments who experience disablement, and terms such as 'impairment' or 'trait' (rather than 'disability') will be used to refer to the body/mind characteristics of those individuals. The phrase 'persons with disabilities' will be used only where context so requires.[2]

Law and the justice system, like other social systems and practices, operate in disabling ways to instantiate and underpin disadvantage experienced by people with ascribed impairments. Conversely, they also provide mechanisms through which disabling practices and structures can be challenged.[3] Disability Law is concerned with both these issues, entailing a critical approach to law's engagement with disability and disablement.

As a relatively young discipline, Disability Law is continuing to emerge and take shape. Dating back to the 1990s, it has rapidly become globalized[4] – a trend accelerated by developments in international law and policy such as the adoption of the United Nations (UN) Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993[5] and the adoption, in 2006, of the UN Convention on the Rights of Persons with Disabilities (CRPD).[6] From its inception, it has looked beyond traditional

1 Below, nn. 11–22 and accompanying text.
2 This terminology is favoured by proponents of 'people-first language', however, and appears in international instruments including the UN Convention on the Rights of Persons with Disabilities.
3 See further A. Lawson and M. Priestley, 'The Social Model of Disability: Questions for Law and Legal Scholarship?' in *Routledge Handbook of Disability Law and Human Rights*, eds P. Blanck and E. Flynn (2017) 3.
4 A. Kanter, 'The Globalization of Disability Rights Law' (2003) 30 *Syracuse J. of International Law and Commerce* 241.
5 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, GA Res 48/96, UN GAOR, 48th Sess, Supp No 49, Annex at 202-11, UN Doc A/Res/48/49 (1994). This followed the UN Decade of Disabled Persons 1983–1993 – GA Res 37/52, UN GAOR, 37th Sess, Supp No 51, at 185, UN Doc A/37/51 (1983).
6 UN Convention on the Rights of Persons with Disabilities (CRPD), A/RES/61/106, 61st item 76.67(b), 13 December 2006.

legal scholarship and drawn upon ideas and approaches (including the social model of disability) developed in disabled people's movements and literature in the multidisciplinary field of Disability Studies.[7]

Despite reaching across national, disciplinary, and sectoral boundaries in these ways, Disability Law remains fragmented and weakened by disciplinary boundaries within Law. These boundaries hamper the flow of disability critique into and across disciplines with a clear focus on issues of ascribed impairment – such as Health Law, Mental Health and Capacity Law, Social Security and Care Law, Equality Law and Human Rights Law – and beyond them into legal scholarship more broadly. The ultimate aim of this article is to provoke reflection and discussion that will enhance the permeability of these boundaries so that critical sociolegal scholarship on disability can be supported, developed, and expanded.

This article is divided into three main sections (other than the introduction and conclusion). Section II contextualizes Disability Law within the broader landscape of academic Law. Section III concerns the organization of Disability Law, offering ways of understanding its scope and structure. Section IV concerns the future orientation of Disability Law, suggesting key challenges around which conversation, collaboration, and cohesion across the discipline can be enhanced.

II. CONTEXTUALIZING DISABILITY LAW WITHIN SOCIOLEGAL AND DISABILITY STUDIES SCHOLARSHIP

2.1. Relationship with broader domains of study

Disability Law, I suggest, can be viewed as a discipline located within the broader domain of Disability Legal Studies, which is itself located at the confluence of the still broader domains of Disability Studies and Sociolegal Studies. There are many synergies between what is here termed 'Disability Law' and what both Mor and Kanter have termed 'Disability Legal Studies'.[8] Kanter describes Disability Legal Studies as a 'new field' of 'scholarship that seeks to apply a Disability Studies perspective to law'.[9] It thus presents a

7 See, for example, J. Cooper and S. Vernon, *Disability and the Law* (1996); M. Jones and L. Marks (eds), *Disability, Divers-ability and Legal Change* (1999); J. Cooper (ed.), *Law, Rights and Disability* (2000); L. Pickering Francis and A. Silvers (eds), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions* (2000).

8 S. Mor, 'Between Charity, Welfare and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy' (2006) 18 *Yale J. of Law and the Humanities* 63; A. Kanter, 'The Law: What's Disability Studies Got to Do with It, or an Introduction to Disability Legal Studies' (2011) 42 *Columbia Human Rights Law Rev*. 403.

9 Kanter, id., p. 444.

prism through which to view and critique ways in which diverse areas of law, practice, and scholarship produce, neglect, or challenge disability and disablement. So too does Disability Law. Indeed, for many purposes the terms 'Disability Law' and 'Disability Legal Studies' can be used interchangeably. Here, however, I use the former to denote an academic discipline, and the latter to denote the broader, more fluid pool of scholarship within which it sits.[10] This distinction matters because, while cohesion and structure are necessary for a discipline to develop and thrive, broader pools of scholarship are likely to be better nourished by more fluidity, flexibility, and openness.

Disability Studies has roots in disabled people's politics and activism. The social model of disability,[11] which understands disability as a form of socially produced oppression experienced by people with ascribed impairments, has been foundational to both Disability Studies and disability politics.[12] The political potency of this model lies in its capacity to unify and connect people who have different types of ascribed impairment, in order to generate a focus on socially produced disadvantage that can be challenged, resisted, and changed.[13] It has therefore been described as the 'big idea' of the disabled people's movement.[14] This notwithstanding, claiming the political identity of 'disability' is not always straightforward for particular groups and can meet with resistance from both external and internal sources.[15]

10 See C. Manathunga and A. Brew, 'Beyond Tribes and Territories: New Metaphors for New Times' in *Tribes and Territories in the Twenty-First Century: Rethinking the Significance of Disciplines in Higher Education*, eds P. Trowler et al. (2012) 44 for interesting reflection on the use of fluid, water-based metaphors (in place of the more traditional and bounded metaphors of fields and territories) in discussions of academic disciplines.

11 The term was introduced by Oliver. See M. Oliver, 'A New Model in the Social Work Role in Relation to Disability' in *The Handicapped Person: A New Perspective for Social Workers*, ed. J. Campling (1981) at <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Campling-handicppaed.pdf>; M. Oliver, *Social Work and Disabled People* (1983). However, he acknowledges that the idea was that of the Union of Physically Impaired Against Segregation/Disability Alliance, expressed in their *Fundamental Principles of Disability* (1976).

12 See, for example, C. Barnes, 'Disability, Disability Studies and the Academy' in *Disabling Barriers – Enabling Environments*, eds J. Swain et al. (2004) 28; L. Barton and M. Oliver (eds), *Disability Studies: Past, Present and Future* (1997).

13 For thought-provoking analysis of the political power of the social model, see A. Beckett and T. Campbell, 'The Social Model of Disability as an Oppositional Device' (2015) 30 *Disability & Society* 270.

14 F. Hasler, 'Developments in the Disabled People's Movement' in *Disabling Barriers – Enabling Environments*, eds J. Swain et al. (1993) 278.

15 For arguments that people with dementia should be able to access disability rights and political benefits associated with the social model of disability despite overwhelmingly medicalized approaches to their lives, see K. Swaffer et al., 'Dementia as a Disability' in The *Routledge Handbook of Disability Activism*, eds M. Bergh et al. (2020) 171. For controversies and debates about a disability identity in the mental health user/survivor movement, see H. Spandler et al. (eds), *Madness, Distress and the Politics of Disablement* (2015).

Voluminous Disability Studies literature has been generated by questions relating to the social model of disability. This includes literature that explores the implications of the original conception of the social model[16] – based on the Union of Physically Impaired Against Segregation's definition of disability[17] – and develops theories to explain the processes of disablement and oppression that the model describes.[18] It also includes work critiquing this model and the theories associated with it,[19] and work that identifies, develops, and critiques different but related types of disability model[20] – including, most recently, the human rights model of disability.[21] Confusingly, as Traustadóttir has pointed out, there is a tendency to use the term 'the social model of disability' rather broadly, to refer to a range of social-contextual approaches that, despite all recognizing that 'disability' is to some extent a socio-political construct, are each different and distinct.[22] For current purposes, however, the term 'social model' will be used to refer specifically to the understanding of disability advanced by the Union of Physically Impaired Against Segregation.

Scholars working within the broad ambit of Disability Studies employ diverse theoretical perspectives and have developed many allied fields or subfields (including Mad Studies,[23] Crip Theory,[24] Cultural Disability

16 Alongside more traditional academic publications, other work by (scholar) activists has played an influential role. See, for example, the Disability Archive of the Centre for Disability Studies, University of Leeds, at <https://disability-studies.leeds.ac.uk/library/>.

17 Op. cit., n. 11.

18 See, for example, P. Abberley, 'The Concept of Oppression and the Development of a Social Theory of Disability' (1987) 2 *Disability, Handicap & Society* 5; M. Oliver, *The Politics of Disablement* (1990); M. Oliver, *Understanding Disability: From Theory to Practice* (1996); C. Barnes and G. Mercer, *Disability* (2003); M. Oliver and C. Barnes, *New Politics of Disablement* (2012).

19 See, for example, T. Shakespeare, *Disability Rights and Wrongs Revisited* (2014).

20 For a critical overview of related models, see R. Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, eds O. Árnadóttir and G. Quinn (2009) 16. For helpful classification of different types of social and individual model of disability, see M. Priestley, 'Constructions and Creations: Idealism, Materialism and Disability Theory' (1998) 13 *Disability & Society* 75.

21 See, for example, T. Degener, 'Disability in a Human Rights Context' (2016) 5 *Laws* 35. For the argument that this is a model of disability policy rather than a model of disability, see A. Lawson and A. Beckett, 'The Social and Human Rights Models of Disability: Toward a Complementarity Thesis' (2020) *International J. of Human Rights*, at <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1783533>.

22 Op. cit., n. 20.

23 See, for example, J. Russo and A. Sweeney (eds), *Searching for a Rose Garden: Challenging Psychiatry, Fostering Mad Studies* (2016).

24 See, for example, R. McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (2006).

Studies,[25] Critical Disability Studies,[26] and Ableism Studies[27]). This complexity and richness means that any claim about the essence of Disability Studies risks being reductionist. Nevertheless, it is clear that at least one of the core characteristics of Disability Studies scholarship is its orientation to the study of 'disability' as a social problem or phenomenon, informed by and in collaboration with disabled people and their organizations and with a focus on activism and social change.[28] This marks a clear departure from studies, including those in traditional Social Science and Law, that are shaped by conceptions of disability as a phenomenon or pathology located within individual bodies or minds calling exclusively for responses in the form of correction, cure, or compensation (often under the supervision or control of medical professionals) and not for social change.

Adopting what Kanter refers to as a 'Disability Studies perspective'[29] to critical legal inquiry, as Mor observes, brings about 'a shift in writing on disability and the law from a focus on doctrinal analysis or policy advocacy to … research regarding the constitutive role of law in the production of disability'.[30] It feeds directly into the sociolegal project, enhancing critical reflection on and analysis of how law and the justice system produce, perpetuate, and provide means of resisting a major social problem: disablement.

The relationship between Disability Law and Disability Legal Studies, and their location at the confluence of Disability Studies and Sociolegal Studies, finds certain parallels with the relationship between Gender Law[31] and Feminist Legal Studies,[32] and their location at the confluence of Women's Studies and Sociolegal Studies. Disability Law and Disability Legal Studies are considerably younger than their gender counterparts. Accordingly, the latter offer valuable guidance and examples. Nevertheless, there are important differences that should not be overlooked.

One such difference is that the content of law that has a significant focus on ascribed impairment or disability, and that is therefore likely to feature prominently in Disability Law modules, textbooks, or research projects, is different from law that has a significant focus on gender or sex, and that is thus

25 See, for example, A. Waldschmidt et al. (eds), *Culture – Theory – Disability: Encounters between Disability Studies and Cultural Studies* (2017).
26 See, for example, D. Goodley et al., 'Provocations for Critical Disability Studies' (2019) 34 *Disability & Society* 972.
27 See, for example, F. Campbell, *Contours of Ablism: The Production of Disability and Abledness* (2009).
28 See, for example, N. Watson et al. (eds), *Routledge Handbook of Disability Studies* (2012); L. J. Davis, *Disability Studies Reader* (2013).
29 Kanter, op. cit., n. 8.
30 Mor, op. cit., n. 8, p. 64.
31 For an example of a relatively early student text, see K. Bartlett, *Gender and Law: Theory, Doctrine and Commentary* (1993).
32 There is a specific journal on this topic, the *Journal of Feminist Legal Studies*.

likely to feature prominently in Gender Law modules, textbooks, or research projects. The way in which Disability Law and Gender Law cut across and reach into traditional legal disciplines will therefore differ. This is a factor that may have implications for strategies by which to organize disciplinary content and permeate boundaries, associated with traditional disciplinary divides, that have created blockages between different strands of Disability or Gender Law scholarship.

Another important contextual difference between Disability Law and Disability Legal Studies on the one hand, and Gender Law and Feminist Legal Studies on the other, concerns numbers, identity, and political activism. For disability, there has not been, and is not likely ever to be, the equivalent of what Fineman describes as a 'huge influx of women into law schools' – because of which, she notes, it is 'not surprising' that feminism has had an impact on legal scholarship.[33] The view that only scholars who publicly identify as disabled can make useful contributions to Disability Studies scholarship has never gained traction – the emphasis instead being on establishing strong and respectful collaboration with disabled people's organizations.[34] However, it is no coincidence that many Disability Studies pioneers have themselves publicly identified as being disabled and have also been prominent disability activists. Such identities and backgrounds undoubtedly facilitate the establishment of the productive partnerships between disabled people's organizations and academia that have been so fundamental to Disability Studies and that will also be key to the development of Disability Law and Disability Legal Studies. Although a detailed analysis of the inclusiveness of Law Schools for disabled staff is beyond the scope of this article, it should be acknowledged that the number of disabled people who take up and retain posts in legal academia will obviously be affected by the accessibility and supportiveness of Law Schools – both for their disabled employees and, given that relevant qualifications are essential, also for their disabled students.[35]

33 M. Fineman, 'Feminist Legal Theory' (2005) 13 *Am. University J. of Gender, Social Policy and the Law* 13, at 15.

34 Op. cit., n. 12.

35 See, generally, S. Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17 *ILSA J. of International and Comparative Law* 281; E. Flynn, *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (2015) ch. 5.2. For a recent UK study highlighting university inclusion failures and recommendations for practical change, see W. Merchant et al., 'Changing Academia: Disabled Students and Staff in Universities' in *Getting Things Changed*, Norah Fry Centre and Disability Rights UK (2018) 28. For an example of an interesting US initiative, see Burton Blatt Institute, 'Call to Action: Creating a Disability Inclusive Law School Environment' 6 July 2020, at <https://bbi.syr.edu/2020/07/bbi-to-co-host-national-symposium-of-leading-law-schools-titled-call-to-action-creating-a-disability-inclusive-law-school-environment/>.

2.2. *Disability across the breadth of legal disciplines*

Law's engagement with impairment and disability has always been played out in multiple spheres of law and policy. Bickenbach and Cieza have acknowledged the 'extraordinary diversity of disability policy and law',[36] and Alldridge, who describes Disability Law as 'any interface of law and disability', has drawn attention to the breadth of legal issues situated at this interface.[37] The fact that so many areas of law have disability-related implications is unsurprising given that approximately one person in every five is estimated to be disabled.[38] Any area of law concerning human interactions will therefore inevitably need to address questions posed by impairment and disability.

Alldridge's observations about the extensiveness of the interface between law and disability are important. They provide a sense of the scale of ambition involved in any project to mainstream questions about law's role in producing, perpetuating, and resisting disablement across the breadth of legal scholarship. It should be stressed, however, that Alldridge uses the term 'Disability Law' in a different way to that in which it is used here. He uses it to describe any law at this interface, but it is used here to refer to a discipline based on a particular type of critical engagement with law at that interface. For current purposes, therefore, studying aspects of law involving disabled people but without interrogating law's role in creating, recognizing, or tackling disablement would not be part of the Disability Law project. As Flynn has observed, law students who 'study disability in the context of medical negligence, personal injuries, social welfare, health law or social care law' are likely to come away with a 'medicalised view of disability … rather than a more holistic, human rights-based approach or social model of disability'.[39]

The extent to which the type of critical engagement fundamental to Disability Law is currently evident in legal scholarship is, however, still very limited.[40] Publications applying this type of disability critique to areas of law covered in the curricula of core Law School courses do exist but are rarely mentioned in textbooks. An early example of such a publication is tenBroek's extremely powerful analysis of the implications of United States (US) tort law for disabled people and their freedom to participate in city life.[41]

36 J. E. Bickenbach and A. Cieza, 'The Prospects for Universal Disability Law and Social Policy' (2011) 1 *J. of Accessibility and Design for All* 23, at 24.
37 P. Alldridge, 'Locating Disability Law' (2006) 59 *Current Legal Problems* 289, at 291.
38 World Health Organization, *World Disability Report* (2011) 25–32.
39 Flynn, op. cit., n. 35, ch. 5.2.5.
40 See further A. V. Pearson, 'Through Merryman's Window: The Potential of English Undergraduate Liberal Legal Education to Create Proactive Critical Citizens and Advance Disability Rights' (2018) PhD thesis, University of Keele.
41 J. tenBroek, 'The Right to Live in the World: The Disabled in the Law of Torts' (1966) 54 *California Law Rev*. 841.

More recent examples include Minkowitz's critique of criminal responsibility and disability-specific exceptions and defences[42] and Lawson's reflections on Land Law.[43] There are also a growing number of disability critiques of legal developments and issues in areas such as Health Law,[44] Tort Law,[45] and Criminal Law.[46] Nevertheless, critical reflection on disability continues to occupy a relatively marginal place in textbooks on virtually all well-established legal disciplines. Issues such as the social model of disability – which grounds questions about law's role in producing, perpetuating, resisting, and contesting disablement – and the CRPD receive surprisingly little attention even in leading English textbooks on Human Rights Law,[47] Health Law,[48] and Criminal Law,[49] where disability critiques might be expected to be particularly evident given the nature of the subject matter. It is to be hoped that relevant recommendations for legal change made to the United Kingdom (UK) government by the UN Committee on the Rights of

42 T. Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead and Beyond' (2015) 23 *Griffith Law Rev*. 434.

43 A. Lawson, 'Land Law and the Creation of Disability' in *New Perspectives on Property Law: Human Rights and the Family Home*, ed. A. Hudson (2003) 117; A. Lawson, 'Mind the Gap: Normality, Difference and the Danger of Disablement through Law' in *Disability Rights in Europe: From Theory to Practice*, eds A. Lawson and C. Gooding (2005) 265.

44 See, for example, the articles in Volume 24, Issue 3 of the *Medical Law Review* (2016).

45 See, for example, J. Chriscoe and L. Lukasik, 'Re-Examining Reasonableness: Negligence Liability in Adult Defendants with Cognitive Disabilities' (2015) 6 *Alabama Civil Rights and Civil Liberties Law Rev*. 1; J. McNite, 'When Reasonable Care Is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation' (2015) 38 *William Mitchell Law Rev*. 1376; J. Goudkamp, 'Insanity as a Tort Defence' (2011) 31 *Oxford J. of Legal Studies* 727.

46 See, for example, L. Ellison et al., 'Challenging Criminal Justice? Psychosocial Disability and Rape Victimization' (2015) 15 *Criminology & Criminal Justice* 225; R. McCausland, '"I Feel like I Failed Him by Ringing the Police": Criminalising Disability in Australia' (2017) 19 *Punishment & Society* 290; L. Steele, 'Disabling Forensic Mental Health Detention: The Carcerality of the Disabled Body' (2017) 19 *Punishment & Society* 327; L. Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (2020); C. Edwards, 'Spacing Access to Justice: Geographical Perspectives on Disabled People's Interactions with the Criminal Justice System as Victims of Crime' (2013) 45 *Area* 307.

47 See, for example, P. Alston and R. Goodman, *International Human Rights: A Successor to International Human Rights in Context* (2013), in which the CRPD is mentioned only on one page; I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2016), in which it is mentioned only on three pages.

48 See, for example, M. Brazier and E. Cave, *Medicine, Patients and the Law* (2016); A. Grubb et al. (eds), *Principles of Medical Law* (2010), in neither of which is the CRPD mentioned. See, however, J. Herring, *Medical Law and Ethics* (2014), in which it is mentioned twice.

49 See, for example, D. Ormerod, *Smith and Hogan's Criminal Law* (2011); J. Herring, *Criminal Law Text Cases and Materials* (2016), in neither of which is the CRPD mentioned.

Persons with Disabilities (CRPD Committee),[50] established to monitor the implementation of the CRPD by states parties,[51] might give such issues a higher profile.

The marginalization of black and minority ethnic group perspectives in university curricula has recently been the subject of high-profile student campaigns[52] – a trend that will undoubtedly be accelerated by the increased momentum of the Black Lives Matter movement. Despite the fact that the marginalization of disability perspectives has not attracted such attention, the question of 'How ableist is my curriculum?' – like the question 'How white is my curriculum?' – is one that merits serious exploration.

Two issues that have the potential to hasten the hitherto slow pace of change towards increased mainstreaming of disability critique across core law curricula are worthy of note. The first is the importance attached by the legal profession to disability equality and inclusion and the training necessary to bring it about. Although the extent to which university Law degrees prepare and train students for the legal profession varies over time and place, there is generally sufficient connection to ensure that the priorities of the profession are reflected to some degree in the nature of Law School courses. Accordingly, were legal professional bodies to recognize the importance of this issue, including by making relevant and good-quality training compulsory, it is likely that interest would be accelerated among textbook writers and other legal scholars. A heightened university focus on questions about the role of law and legal professions in creating, perpetuating, resisting, and contesting disablement would go a long way towards equipping future generations of lawyers with the awareness and skills to build disability-inclusive professional cultures in which both disabled lawyers and disabled clients are valued. Studies suggest that, as a general rule, this is very far from being the case

50 See, for example, CRPD Committee, 'Concluding Observations on the Initial Report of the United Kingdom of Great Britain and Northern Ireland' UN Doc CRPD/C/GBR/CO/1, 29 August 2017, in relation to health law, recommending (at paras 13 and 55) that abortion law be amended to remove its current 'discrimination' on the basis of disability, and (at para. 27) that steps be taken to ensure disabled people's access to life-sustaining treatment and care; in relation to family law, recommending (at para. 49) that appropriate support be given to disabled parents to fulfil their parental role and to parents wishing to learn sign language in order to communicate with their children, and (at para. 21(d)) that the provision of appropriate and disability-sensitive childcare be made a statutory duty; and, in relation to criminal law, recommending (at para. 39) that disability hate crime be defined 'comprehensively' and prosecuted effectively, and (at paras 21(e), 23, and 39) that adequate steps be taken to protect disabled people (including disabled children, older people, women, and refugees) from harassment and exploitation.

51 CRPD, op. cit., n. 6, Art. 34.

52 National Union of Students, 'Why Is My Curriculum White?' campaign, at <https://www.nus.org.uk/en/news/why-is-my-curriculum-white/>.

either for disabled lawyers[53] or disabled clients[54] in England – a situation likely to be replicated elsewhere.[55] Article 13(2) of the CRPD specifically requires training in disability rights issues for people working in the justice system. It is to be hoped that this provision can add leverage and urgency to calls for raising the profile of disability rights and inclusion in legal education and training.

The second issue with the potential to hasten the pace of progress towards the mainstreaming of disability critique is the emergence of initiatives by scholars, with expertise in different areas of substantive law, to foster a more cohesive Disability Law discipline. Ideas to help to foster such initiatives are the subject matter of Sections III and IV below. Here, where the focus is on relationships between Disability Law and other legal disciplines, it is important to acknowledge again that the emergence and development of disciplines is a dynamic process, responsive to various factors, some of which are specific to the subject in question,[56] and that useful insights may be derived from the emergence and development of other disciplines. Reference is made to experiences that might be learned from Gender Law elsewhere.[57] Also helpful, particularly as regards the process of disciplinary development, is the recent emergence of Health Law. This discipline grew out of Medical Law, which originally focused on doctor–patient relationships, drawing on issues previously dealt with separately in a number of different traditional legal disciplines (such as Tort, Contract, Criminal, and Family Law).[58] The focus then broadened, beyond individual relationships and interactions, to engage with healthcare and its delivery at a more systemic level – reflected in the change of name from Medical Law to Health Care Law.[59] The use of the term 'Health Law'[60] reflects a further broadening of disciplinary focus, beyond issues of the delivery of healthcare in particular systems to a broader concern with health as a matter of social justice. This disciplinary journey towards a cohesive focus on health and social justice merits further study and reflection by scholars committed to the maturation and consolidation of the discipline of Disability Law.

53 D. Foster and N. Hirst, *Legally Disabled? Career Experiences of Disabled People in the Legal Profession* (2020), at <http://legallydisabled.com/research-reports/>.
54 See, for example, P. Swift et al., *What Happens When People with Learning Disabilities Need Advice about the Law?* (2013).
55 Flynn, op. cit., n. 35, chs 3.5 and 3.6, ch. 5.
56 Trowler et al., op. cit., n. 10, particularly Part 4.
57 Op. cit., nn. 31–33, nn. 72–73 and accompanying text.
58 R. A. Hope, 'The Birth of Medical Law' (1991) 11 *Oxford J. of Legal Studies* 247. See also M. Brazier and J. Montgomery, 'Whence and Whither "Modern Medical Law"?' (2019) 70 *Northern Ireland Legal Q*. 5.
59 This is discussed, for example, in J. Montgomery, *Health Care Law* (2003) ch. 1.
60 L. F. Wiley, 'Health Law as Social Justice' (2014) 24 *Cornell J. of Law and Public Policy* 47.

2.3. *Disability Law: part of a different discipline?*

Any argument in favour of establishing or strengthening Disability Law as an academic discipline will confront questions about whether it should instead be treated as part of another larger or more firmly established discipline. Thus, some 15 years ago, Alldridge grappled with the question of whether Disability Law should be treated as a sub-discipline of Equality Law.[61] He concluded – rightly, I suggest – that despite important overlaps Disability Law extended to issues beyond the reach of equality and non-discrimination law and that it should therefore not be categorized as simply part of Equality Law. Over a decade later, and in light of human rights law's heightened engagement with disability after the CRPD, it is timely to reflect on whether Disability Law should now be regarded as a sub-discipline of Human Rights Law.

As already mentioned, the CRPD has proved highly influential in the development of Disability Law. Through it, human rights law concerning disabled people has developed apace over the past decade – at the national as well as the international level. This treaty, written with a degree of user involvement unprecedented in the UN human rights system,[62] is now prompting processes of disability-related legal reform, reflection, and critique all over the world. It has created a powerful evaluative framework against which domestic law and policy can be measured as well as a compass for forward-looking reform.

In many jurisdictions, including those of the UK, Human Rights Law is a far-reaching subject which has cross-cutting relevance to and implications for many other legal disciplines. Hepple, for instance, has drawn attention to the importance to Equality Law of its Human Rights Law grounding.[63] For purposes of curriculum and research community development, however, there are three strong reasons for arguing that Disability Law should not be regarded as simply part of, and coterminous with, Human Rights Law.

First, there is a measure of separation between international human rights treaties and the domestic law and policy through which they are given effect at the national level. This is particularly evident in countries such as the UK that take a dualist approach to international law whereby, although able to refer to unincorporated international treaties for interpretive guidance in limited circumstances, courts are unable to apply them directly or to rely on

61 Alldridge, op. cit., n. 37.

62 See further S. Tromel, 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' (2009) 1 *European Yearbook of Disability Law* 115; D. MacKay, 'The United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse J. of International Law and Commerce* 323.

63 B. Hepple, *Equality Law: The Legal Framework* (2014) 18–20.

them to overturn non-compliant domestic law.[64] Even in jurisdictions with more monist approaches, the manifestation of international human rights treaties (such as the CRPD) in domestic law is given shape and texture by the particular cultural, constitutional, and legal context of the country in question.[65] Accordingly, treating Disability Law merely as part of Human Rights Law would risk neglecting or overlooking important dimensions of the subject.

Second, as explained above,[66] disability has often been given a surprisingly low profile in mainstream human rights textbooks and modules. Gradually, and no doubt because of the CRPD, references to disability in English-language human rights law student texts are becoming more frequent.[67] Nevertheless, it is clearly not from this discipline that Disability Law has grown; it is instructive, for instance, that Alldridge's seminal 2006 article on 'locating disability law' was written without substantial reference to human rights.[68] Categorizing Disability Law as a mere sub-discipline of Human Rights Law would risk its continued invisibility to students and law makers alike. Further, it would wrongly suggest that Disability Law has little or no place in countries in which law on human rights is poorly developed or where human rights arguments are politically problematic.

Third, the political and theoretical traditions that animate Disability Law are closely associated with disability politics and Disability Studies. While these approaches were also influential during the drafting of the CRPD,[69] they differ from the political and theoretical traditions on which the Human Rights Law discipline is based.

For these reasons, I suggest that it is unhelpful to treat Disability Law as a subdiscipline of Human Rights Law. Nevertheless, it is a discipline in which human rights developments and perspectives play key roles. Indeed, as Quinn has argued, human rights as articulated in the CRPD demand a fundamental reassessment of the principles and values underpinning the bodies of law that have traditionally addressed disability issues – a process that has the potential

64 See generally L. Waddington and A. Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (2018).

65 See, for example, Waddington and Lawson, id; E. Kakoullis and K. Johnson (eds), *Recognising Human Rights in Different Cultural Contexts: The United Nations Convention on the Rights of Persons with Disabilities* (2020).

66 Op. cit., n. 47 and accompanying text.

67 See, for example, J. Rehman, *International Human Rights Law* (2010) ch. 17; C. Krause and M. Scheinin (eds), *International Protection of Human Rights: A Textbook* (2009) ch. 12; C. Gearty and C. Douzinas (eds), *The Cambridge Companion to Human Rights Law* (2012) ch. 2.

68 Op. cit., n. 37.

69 For detailed analysis, see Lawson and Beckett, op. cit., n. 21.

to reshape and dissolve boundaries between those bodies, creating a more 'unified field'.[70]

III. ORGANIZING DISABILITY LAW: SCOPE AND STRUCTURE

3.1. Scope

The scope of Disability Law cannot be delineated by reference to the subject matter or focus of particular laws or doctrines. Its scope is linked instead to the nature of the questions that are being asked and the approach to 'disability' that informs the associated investigation and analysis. The central questions posed by Disability Law, as suggested above, concern the roles played by law or the justice system in producing, perpetuating, resisting, and contesting disablement. Each of these questions, of course, can be broken down further for the purposes of particular studies and projects – for instance, according to what the role is, who is affected by the disablement in question, why it happens, and how the situation can be improved.

While Disability Law's underpinning questions can be stated relatively simply, answering them requires complex and time-consuming research. Different projects will need different theoretical and methodological framings and, of course, draw on different sources – including doctrinal sources and empirical data. For empirical projects, guidance on good disability research practice abounds in Disability Studies literature.[71] Disability Law scholarship, like other Disability Studies scholarship, should be underpinned by commitments to working respectfully and collaboratively with disabled people in ways that are inclusive, respect the principle of 'nothing about us without us', and are oriented towards achieving what disabled people concerned regard as positive change.

3.2. Structure

There is of course no single or best way in which to organize any discipline. Where disciplines are relatively new, however, difficulties associated with

70 G. Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities: Towards a Unified Field Theory of Disability' GV Pandit Memorial Ovation, delivered at the Indian Law Society, Pune, India, 10 October 2009.

71 See, for example, G. Zarb, 'On the Road to Damascus: First Steps towards Changing the Relations of Disability Research Production' (1992) 7 *Disability, Handicap & Society* 125; T. Shakespeare, 'Rules of Engagement: Doing Disability Research' (1996) 11 *Disability & Society* 115; E. Stone and M. Priestley, 'Parasites, Pawns and Partners: Disability Research and the Role of Non-Disabled Researchers' (1996) 47 *Brit. J. of Sociology* 699; C. Barnes and G. Mercer (eds), *Doing Disability Research* (1997); J. Walmsley and K. Johnson, *Inclusive Research with People with Learning Disabilities: Past, Present and Futures* (2003).

imposing order or structure can hamper initiatives such as module design – particularly where, as with Disability Law, the scope is potentially very wide in terms of types or areas of law covered. Gender Law is a discipline that has tackled similar challenges, making reflection on approaches to its organization relevant here.

Bartlett has identified two main approaches to the organization of Gender Law – her preference being for a combination of the two. The first is based on 'legal doctrines and analyses from conventional legal fields that seem to have special relevance to women'.[72] The second is based on theoretical perspectives or understandings of equality – for example, 'formal equality, substantive equality, nonsubordination theory, different voice theory, and post-modern feminism'.[73]

There is no reason why Disability Law could not be structured on the basis of either of Bartlett's two approaches. The second approach would highlight the importance of critiquing all types of law from a disability perspective and allow space for reflection on different theoretical perspectives. There is a risk, however, particularly in modules or student texts where space is more constrained than in conferences or research collections, that it might restrict opportunities for reflection on the detail of various law and policy spheres with particular relevance to disabled people and the different values and assumptions at play within and between them. The first of Bartlett's approaches would allow plenty of space for this type of reflection. A focus only on those areas of law that have particular relevance to disabled people, however, would limit opportunities for the mainstreaming of disability critique into other legal issues and debates. It is therefore suggested that one useful method of structuring or organizing Disability Law, which draws upon but is not limited by Bartlett's two approaches, comprises four elements that will be discussed in the remainder of this section.

The first element comprises the ideas and techniques for critiquing different areas of law and practice, which provide the intellectual underpinnings of Disability Law. These include the ideas and perspectives from which Disability Law's key questions (described above) spring: social model perspectives on disability and disablement, and critical perspectives on ideas such as ableism, normalcy, and equality.[74] As well as engaging with literature and debate on ideas such as these, this first element of Disability Law would not be complete without reference to human rights values, principles, and standards. It was argued above that Disability Law should not be regarded as a subdiscipline of Human Rights Law. This notwithstanding, the CRPD (together with its subsequent interpretation and associated literature and debate) occupies a central place in Disability Law because of its significance to disability politics and law reform around the globe. As well as helping to

72 K. T. Bartlett, 'Gender Law' (1994) 1 *Duke J. of Gender Law and Policy* 1, at 1.
73 Id.
74 Op. cit., nn. 11–30, nn. 124–132.

explain relevant legal and political developments, human rights values and standards provide Disability Law scholars with useful evaluative tools for normative critique.

The second element of Disability Law comprises bodies of law that have a substantial, but not necessarily exclusive, impairment or disability focus and that have been developed, at least in part, to respond to disability-related concerns. In the UK, such bodies of law tend to have a legislative base and to be associated with broad policy agendas. Key examples are laws relating to equality, social care and protection, and mental health and capacity. These bodies of law, which will be termed 'disability-targeted law', have traditionally taken shape quite separately from each other, and been researched, critiqued, and taught by experts with separate and discrete specialisms.

It is important to note that the primary aim or effect of disability-targeted law need not be to reduce disablement and enhance equality and inclusion. Examples of laws that do not have this aim or effect, about which the CRPD Committee has repeatedly expressed concern,[75] are laws that deprive people of their legal capacity on the basis of assessments of their mental capacity and laws that authorize the detention or treatment of people with 'psychosocial disabilities'[76] against their will. Such laws often operate to disable people with ascribed impairments in ways that have profound effects on their life chances.

Some disability-targeted law, however, will aim to contest disablement. Statutes prohibiting discrimination, for instance, will generally have aims explicitly linked to reducing and challenging disablement – although their effectiveness in achieving such aims is another matter and one on which deep concern has often been expressed.[77] The enactment of such legislation developed apace following the UN Decade of Disabled Persons[78] and the Americans with Disabilities Act 1990 – a statute that Quinn has likened to Helen of Troy because it was 'the act that launched a thousand copycat laws around the world'.[79] As Degener notes, 'The reform process in disability law has been going on all over the world. … The 1990s in particular was a banner decade for disability law; more than twenty nations enacted disability discrimination laws during this period.'[80] In the following decade, this process

75 See, in particular, CRPD Committee, 'General Comment No. 1: Article 12: Equal Recognition Before the Law' UN Doc CRPD/C/GC/1, 11 April 2014.

76 This terminology is used here because it is favoured by the leading international representative organization, the World Network of Users and Survivors of Psychiatry.

77 In the context of Great Britain, see, for example, House of Lords Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: The Impact on Disabled People* (2016). For interesting research on this topic, see Norah Fry Centre and Disability Rights UK, op. cit., n. 35.

78 UN Decade of Disabled Persons, op. cit., n. 5.

79 Quinn, op. cit., n. 70.

80 T. Degener, 'International Disability Law – A New Legal Subject on the Rise: The Interregional Experts Meeting in Hong Kong, 13–17 December, 1999' (2000)

was accelerated by developments at the regional level (such as the EU Employment Equality Directive 2000[81] which required all Member States to prohibit disability discrimination in employment) and, more importantly, at the UN level. The UN General Assembly's adoption of the CRPD in December 2006 was particularly important.

It should also be noted that disability-targeted law is not a recent phenomenon. Although the history of law's response to people with ascribed impairments is a surprisingly under-researched subject,[82] ancient examples of laws responding to this form of human difference can be identified. For instance, the Roman Laws of the Twelve Tables, written almost 2,500 years ago, contain the following disability-related rules on infanticide, guardianship, and access to justice respectively:

> A dreadfully deformed child shall be quickly killed.[83]
>
> If a man is raving mad, rightful authority over his person and chattels shall belong to his agnates…[84]
>
> If disease or age shall be an impediment, [the plaintiff] shall grant [the defendant] a team (for transport); he should not spread with cushions a covered carriage if he shall not so desire.[85]

Early English examples of disability-targeted law include legislation authorizing the detention and treatment of 'lunatics', 'idiots', or people of 'unsound mind'[86] and the removal of property rights and other decision-making powers and responsibilities from broadly the same group of people;[87] poor laws, providing for the 'impotent' poor;[88] and, more recently, other laws dealing

18 *Berkeley J. of International Law* 180, at 183–184. For further discussion of these developments, see T. Degener, 'Disability Discrimination Law: A Global Comparative Approach' in Lawson and Gooding, op. cit., n. 43, p. 87.

81 Council Directive 2000/78/EC.

82 For interesting exceptions, see, for example, C. J. Rushton (ed.), *Disability and Medieval Law: History, Literature, Society* (2013); S. Scalenghe, *Disability in the Ottoman Arab World, 1500–1800* (2014); A. Sharpe, *Foucault's Monsters and the Challenge of Law* (2010) ch. 4. See also references to disability policy and law included in the resources of the Social History of Learning Disability project, Open University, at <http://www.open.ac.uk/health-and-social-care/research/shld/timeline-learning-disability-history>.

83 Table IV, Law III, at <http://thelatinlibrary.com/law/12tables.html>. For analysis of the Laws of the Twelve Tables more generally, see, for example, P. du Plessis, *Borkowski's Textbook on Roman Law* (2010).

84 Table V, Law VI, id.

85 Table I, Law IV, id.

86 See, for example, the Madhouses Acts of 1774, 1828, and 1832, the Lunatic Asylums Act 1845, the County Asylums Act 1845, and the Lunacy Act 1890. For historical accounts and analysis, see, for example, A. Scull, *The Most Solitary of Afflictions: Madness and Society in Britain 1700–1900* (1993).

87 See, for example, the Statute De Prerogativa Regis 1324.

88 See, for example, the Vagabonds Acts of 1531 and 1572, the Poor Relief Acts of 1601 and 1782, and the Poor Law Reform Act 1834.

with the social protection and welfare,[89] education,[90] and employment[91] of disabled people. Such legislation laid the foundations for two bodies of law that continue to play key roles today: mental health and capacity law, and social care and protection law.

The third element of Disability Law, which will be termed 'disability-untargeted law', consists of areas of law that, although not introduced or developed primarily to address disability-related concerns, have significant potential implications for the lives of disabled people or can be subjected to disability critique, drawing on insights and ideas embedded in Disability Law's underpinning questions. These areas of law, and their interaction with disability, are key to the mainstreaming concern of this article. Disability Law, by embracing them and exposing them to disability critique, transcends or cuts across conventional disciplinary divides within Law.

In common law systems, while disability-targeted law is likely to be grounded in statute, disability-untargeted law is just as likely to be based in case law. Indeed, although statutory provisions will feature in analyses of disability-untargeted law, it seems likely that case law will more frequently be its focus – relevant cases being ones in which judges are faced with applying various common law doctrines or statutory schemes to facts in which impairment-related human difference is (or should be) a significant factor, or using reasoning that has disability-related implications.

Finally, the fourth element of Disability Law, termed here 'disability-practice law', comprises encounters between disabled people and the machinery of the justice system. Disability-targeted and disability-untargeted law are concerned with the substantive content of the law itself. Disability-practice law, by contrast, is concerned with the practical operation of the legal system and its interaction with people who have ascribed impairments. These interactions take a range of forms which, for current purposes, can be divided into two broad types. First, there are those that involve disabled people as law's users – that is, users of the services of lawyers or participants in the justice system (for example, as witnesses, claimants, defendants, victims, suspects, or prisoners). Second, there are those that involve disabled people as law's workers – that is, holders of paid justice system positions (such as police officers, solicitors, barristers, or judges) or unpaid justice system positions (such as jurors, magistrates, or lay tribunal members).

The discipline of Disability Law is thus not confined to disability-targeted law. It also includes work on law's interaction with disability in the forms of disability-untargeted and disability-practice law. Thus, even in a hypothetical legal system in which there were no disability-targeted law, there would still be a place for the discipline of Disability Law. Further, it should again be stressed

89 See, for example, the National Assistance Act 1948, the Chronically Sick and Disabled Persons Act 1970, and the Disabled Persons Act 1986.
90 See, for example, the Idiots Act 1886 and the Education Act 1918.
91 See, for example, the Disabled Persons Employment Act 1944.

that key to Disability Law are the questions that it asks – thus, disability-targeted law will have a place in the discipline only when it is studied and critiqued with those questions in mind.

IV. ORIENTING DISABILITY LAW: CROSS-CUTTING CHALLENGES FOR FUTURE WORK

4.1. Bringing the voices of disabled people and their organizations into Disability Law scholarship

Rooted as it is in Disability Studies, an ongoing responsibility and challenge for Disability Law scholars is ensuring that their work is effectively informed and shaped by the lived experience of disabled people and the concerns of disabled people's organizations. In relation to research design and methodology, a well-established body of relevant literature and practice now exists.[92] In relation to teaching, there is of course a need to ensure that modules are accessible to and inclusive of disabled students. Beyond this, however, there is a need for scholars designing Disability Law modules to develop interesting, innovative, and mutually beneficial ways in which to bring students into contact with the voices and concerns of disability activists and disabled people's organizations – both inside and outside classrooms.

Disability Law scholarship also entails supportive engagement with, as well as critical reflection on, initiatives by disabled people's (and other) organizations to introduce or reform law. In the late twentieth century, campaigns for disability equality legislation took centre stage in countries such as the UK and the US.[93] While these were successful in securing that legislation, and provided important opportunities for using the law to achieve change,[94] the extent to which such law ushered in a new model of social justice proved disappointing to many campaigners.[95] Although the potential of relevant equality legislation to achieve more far-reaching social change could undoubtedly be strengthened, equality legislation alone can secure only a relatively thin version of social justice. In recognition of this, Bagenstos (writing in the US context) has argued that 'the future of [US] disability

92 See, for instance, op. cit., n. 71.

93 See, for example, J. P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (1994); L. J. Davis, *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights* (2016); C. Barnes, *Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation* (1991); C. Gooding, *Disabling Laws, Enabling Acts* (1994). See also H. Hahn, 'Adjudication or Empowerment: Contrasting Experiences with a Social Model of Disability' in *Disability, Politics and the Struggle for Change*, ed. L. Barton (2001) 59.

94 L. Vanhala, 'Anti-Discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16 *J. of European Public Policy* 738.

95 C. Gooding, *Blackstone's Guide to the Disability Discrimination Act* (1994) 1.

law lies as much in social welfare law as in antidiscrimination law'.[96] He draws attention to the need for US disability rights advocates to acknowledge this and (re)engage in campaigns for appropriate social welfare law – a shift of emphasis made politically uncomfortable because campaigns for anti-discrimination law and civil rights gained political traction by claiming that such laws would reduce dependency and the cost of welfare.[97]

In the UK, the need to challenge austerity policies, and their devastating impact on disabled people, has rightly prompted a campaigning focus for the past decade on social protection and the preservation of existing benefits and support.[98] While this shift is an important and understandable response to the severity of austerity measures, there is a danger that its focus on fighting against cuts generates an emphasis on preserving the status quo rather than on a positive forward-facing vision of social justice.[99] Human rights offer a means and language through which to claim the full span of civil, political, economic, social, and cultural rights. The CRPD thus provides a potentially powerful campaigning tool. Both Kanter and Quinn have drawn attention to the fact that the potential of the CRPD to achieve change depends crucially on the extent to which it is used at a grass-roots level by disabled people's organizations and internalized by policy makers and other social actors.[100] The fact that the CRPD is itself the product of sustained campaigning and engagement by disability activists[101] would seem to increase the prospects of its use at a grass-roots level. In 2012, Oliver and Barnes observed that 'initial enthusiasm among disabled activists and their organizations for the Convention has started to wane' because 'there is little sign that it has had any significant impact on securing disabled people's individual or social rights'.[102] No specific source is cited in support of this view, however, and its persuasiveness is therefore questionable.

The relationship between law and disability-related political mobilization, and the potential contribution that legal scholars can make to informing and supporting such mobilization, is an important element in the development of

96 S. Bagenstos, 'The Future of Disability Law' (2004) 114 *Yale Law J*. 1, at 4.
97 S. Bagenstos, 'The Americans with Disabilities Act as Welfare Reform' (2003) 44 *William and Mary Law Rev*. 921. See also S. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (2009).
98 For recent accounts of the UK programme of austerity from 2010, its underpinning ideology of 'conscious cruelty', and grass-roots disability activism in response, see, for example, E. Clifford, *The War on Disabled People: Capitalism, Welfare and the Making of a Human Catastrophe* (2020).
99 See, for example, L. Sayce, *From Psychiatric Patient to Citizen Revisited* (2016) 65–67; Oliver and Barnes, op. cit., n. 18, pp. 183–184.
100 A. Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (2015) ch. 8; G. Quinn, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in Arnardóttir and Quinn, op. cit., n. 20, p. 215.
101 Op. cit., n. 62.
102 Oliver and Barnes, op. cit., n. 18, p. 150.

trust and partnership between Disability Law scholars and disabled people's organizations. Disability Law, like Disability Studies more generally, is underpinned by a commitment to social justice and social change – the focus of study being the injustice associated with disability and disablement. Given this, claims to academic objectivity effectively constitute a politically non-neutral endorsement of the status quo.[103]

4.2. Critiquing the shifting (and often conflicting) aims and values that underpin law's interaction with disabled people

Disability Law addresses law's role in creating, resisting, and challenging disablement. It is thus centrally concerned with law's role in facilitating and also obstructing social justice for disabled people, and with questions about the aims and values that are and should be promoted by law's interaction with people with ascribed impairments. As explained in Section III above, such interactions occur in a wide range of contexts with laws targeting, and otherwise responding to, disability being developed in pursuance of different policy agendas. While a multiplicity of specific aims and values are undoubtedly at play, critical reflection on broad trends, directions, and tensions has an important role in the development of conversation and cohesion between Disability Law scholars with expertise in different areas of substantive law.

One valuable critical reflection of this kind was offered by Quinn in 2009.[104] He identifies three historic fields of what is termed here disability-targeted law: 'mental health law', which he suggests is primarily concerned with people diagnosed with mental illness; 'legal capacity law', which he suggests is primarily concerned with people with intellectual impairments; and 'equal opportunities law', which he suggests is primarily concerned with people with physical or sensory impairments. For the mental health field, Quinn argues that autonomy is the dominant value, relevant law being animated by a commitment to maximizing autonomy through due process rights; for legal capacity, it is protection, with a focus on substituted decision making and safeguards; and for equal opportunities, it is (unsurprisingly) equality. Quinn argues that these different values or ideals play an important role in separating the fields and that, because the CRPD's drafting process brought together disabled people connected to all three fields, it 'restores the full panoply of values to each segment of the disability continuum',[105] thus carrying with it the promise of dissolving the boundaries that have traditionally separated different areas of disability-targeted law.

103 See, for example, C. Barnes, 'Disability and the Myth of the Independent Researcher' (1996) 11 *Disability & Society* 107.
104 Quinn, op. cit., n. 70.
105 Id.

The three broad values that Quinn ascribes to traditional strands of law on disability are thus autonomy, protection, and equality. Autonomy and equality both feature among the CRPD's underpinning general principles.[106] Protection, however, does not – although the CRPD does include rights to social protection; protection from violence, exploitation, and abuse; and protection in situations of risk, such as armed conflict, humanitarian emergencies, and natural disasters.[107] The absence of protection from the CRPD's general principles is unsurprising given the oppressive limitations on autonomy and opportunity that have often been imposed on disabled people in its name. The extent to which the CRPD is prompting a shift in the balance between laws driven by protection on the one hand, and those driven by autonomy and equality on the other, is an interesting one which merits consideration well beyond the scope of this article. Nevertheless, some initial reflection will be offered here.

Equality and protection sometimes pull in the same direction. Thus, the first dimension of 'inclusive equality' identified by the CRPD Committee in its General Comment No. 6 is 'a fair redistributive dimension to address socioeconomic disadvantages'.[108] This has obvious synergies with high-level approaches to social protection. Nevertheless, there are also tensions and conflicts between equality and protection within many laws affecting disabled people. Thus, in its General Comment No. 6, the CRPD Committee observes that many national laws and policies that perpetuate discrimination against disabled people 'are commonly not regarded as disability-based discrimination because they are justified as being for the protection or care of … persons with a disability, or in their best interest'.[109]

It provides, as examples of discrimination on the basis of disability, 'non-consensual and/or forced systematic sterilizations and medical or hormone-based interventions (for example lobotomy or the Ashley treatment), forced drugging and forced electroshocks, confinement, systematic murder labelled "euthanasia", [and] forced and coerced abortion'[110] – forms of disability-specific treatment that tend to be authorized by laws based on notions of protection of the disabled person receiving the treatment or of those around them. The CRPD thus signals the importance of shifting the balance away from protection and towards equality.

There are also tensions between protection and autonomy in the context of disability-targeted law. Autonomy-based concerns about the development of systems that respect the individual will and preference of disabled

106 CRPD, op. cit., n. 6. For autonomy, see Article 3(a). For equality, see Article 3(e), as well as 3(b) on non-discrimination, and 3(g) on equality between men and women.
107 Id., Arts 28, 16, and 11.
108 CRPD Committee, 'General Comment No. 6 on Equality and Non-Discrimination' CRPD/C/GC/6, 26 April 2018, para. 11.
109 Id., para. 3.
110 Id., para. 7.

people have underpinned independent living movements.[111] In the years following the Second World War, the UK welfare state placed obligations on local authorities to provide support to disabled people on a firm statutory footing.[112] While this enhanced levels of support, it attracted criticism for failure to grant choice and control over services to the disabled people receiving them. Barnes has described such services as 'constructed upon the erroneous belief that disabled people are not competent to make basic decisions about their own individual service needs … [and] cannot assume the responsibilities of citizenship'.[113] Similarly, writing of analogous issues in the US, commentators have noted that:

> It is the agency of welfare, not the recipient, who decides what life goals are to be followed, what ambitions may be entertained, what services are appropriate, what wants are to be recognized, what needs may be budgeted, and what funds allocated to each. In short, the recipient is told what he wants as well as how much he is wanting.[114]

Greater emphasis on choice and control is now reflected, in the UK and elsewhere, by a shift towards the use of personalized budgets and assistance.[115] However, as Clements has argued, there is a risk that such shifts towards 'personalization' may be achieved as part of a neoliberal 'responsibilization' agenda, under which individuals are made responsible for their care needs, without access to the financial and advocacy support necessary for meaningful choice and control.[116]

Thus, an autonomy rationale operates in synergy with an equality rationale to contest laws that impose outcomes on disabled people in the guise of protection, but without regard to the wishes of the person being 'protected'. Through its emphasis on ensuring that disabled people can access rights 'on an equal basis with others' and receive recognition and support with decision making, the CRPD calls for a re-alignment between equality and autonomy on the one hand, and protection on the other – protection that, if not sufficiently textured and trimmed by equality and autonomy, clearly risks the generation of law that is oppressively paternalistic and inconsistent with the CRPD.

111 See CRPD Committee, 'General Comment No. 5 on Article 19: Living Independently and Being Included in the Community' CRPD/C/GC5, 27 September 2017, para. 4.

112 See, in particular, the National Assistance Act 1948, the Chronically Sick and Disabled Persons Act 1970, and the National Health Service and Community Care Act 1990.

113 Barnes, op. cit., n. 93, p. 124.

114 O. Markham et al., 'The Disabled and the Law of Welfare' (1966) 54 *California Law Rev*. 809, at 831.

115 See, for example, N. Crowther, *The Right to Live Independently and to Be Included in the Community in European States: Synthesis Report* (2019) ch. 4.

116 See also L. Clements, 'Individual Budgets and Irrational Exuberance' (2008) 11 *Community Care Law Rev*. 413; L. Clements, *Community Care and the Law* (2017) I.35.

4.3. Universalizing law while retaining a focus on the particularity of the needs and circumstances of disabled people

A key challenge for Disability Law is moving away from 'special needs' approaches to disability and impairment[117] – whereby impairment attracts separate treatment and provision – towards more 'universalist' or 'mainstreamed'[118] approaches. This is a challenge associated particularly with what has been termed disability-targeted law in this article – law that has a substantial, but not necessarily exclusive, disability focus and that has been developed, at least in part, to respond to disability-related concerns. Disability-targeted law, as understood here, may thus take the form either of universalist approaches, in which disability-related issues are addressed as part of more holistic interventions, or of law that addresses disability as a distinct issue, separate from policies affecting the rest of the population.

A shift towards laws and policies adopting more universalist approaches to impairment and human difference is supported by recent developments in Human Rights Law. Thus, the CRPD and UN guidance based upon it have highlighted the need to move towards law and policy that is disability inclusive and 'disability neutral'.[119] For example, the CRPD requires states parties to move away from laws designed to apply only to people with particular medical diagnoses;[120] to shift from policies that segregate disabled children towards the provision of 'inclusive education';[121] and to ensure that transport, public housing, healthcare, banking, legal, and other services and facilities provided to the public are accessible and structured around principles of 'universal design'.[122] The UN Special Rapporteur on the Rights of Persons

117 I. K. Zola, 'Toward the Necessary Universalizing of a Disability Policy' (1989) 67 (Supplement 2) *The Milbank Q*. 401.

118 This terminology has been used extensively in the context of gender equality. See, for example, H. Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harvard Human Rights J*. 1; C. Moser, 'Has Gender Mainstreaming Failed? A Comment on International Development Agency Experiences in the South' (2005) 7 *International Feminist J. of Politics* 576; T. Rees, 'Reflections on the Uneven Development of Gender Mainstreaming in Europe' (2005) 7 *International Feminist J. of Politics* 555; I. Ritterhofer and C. Gatrell, 'Gender Mainstreaming and Employment in the European Union: A Review and Analysis of Theoretical and Policy Literature' (2012) 14 *International J. of Management Reviews* 201.

119 For discussion of the concept of 'disability neutrality', see, for example, E. Flynn and A. Arstein-Kerslake, 'State Intervention in the Lives of People with Disabilities: The Case for a Disability-Neutral Framework' (2017) 13 *International J. of Law in Context* 39.

120 See, for example, CRPD Committee, 'General Comment No. 1', op. cit., n. 75, para. 15.

121 CRPD, op. cit., n. 6, Art. 24(1).

122 Id., Arts 9, 21, and 4(1)(f). See also M. Heikkilä et al., 'Disability and Vulnerability: A Human Rights Reading of the Responsive State' (2020) 24 *The International J. of Human Rights* 1.

with Disabilities has explained that the CRPD demands universalist social protection systems which ensure that disabled people are not excluded from generic schemes while at the same time guaranteeing that provision is made for additional disability-related costs.[123]

Universalist approaches have also long been advocated by Disability Studies theorists. Zola's classic article on this issue, for example, remains as relevant and powerful today as it was 30 years ago.[124] According to this, a 'special needs approach to disability' would 'create and perpetuate a segregated, separate but unequal society – a society inappropriate to a larger and older "changing needs" population'.[125] It is associated with systems designed only for population groups with levels of functional ability consistent with (generally unstated) societal norms. Critical reflection on the origins, nature, and exclusionary power of ablist assumptions offered by scholars such as Campbell,[126] Davis,[127] Tremain,[128] Shildrick,[129] and Garland-Thomson[130] help to explain the prevalence of systems and structures (including law and policy) designed for prevalent ability norms but not for people who have mind-body traits and functional limitations deviating from those norms.

Instead of a 'special needs' approach to disability policy, Zola cogently argues (with particular reference to housing, transport, and work) that a universalist approach is needed – an approach that takes into account and caters for a population that includes people with a wide range of levels of functional ability, and of physical, psychosocial, and cognitive difference.[131] Not only would this facilitate inclusion for people who already

123 C. Devandas-Aguilar, *Report of the Special Rapporteur on the Rights of Persons with Disabilities* (2015) GA 70th session, A/70/297. See also Bickenbach and Cieza, op. cit., n. 36, p. 23.
124 Zola, op. cit., n. 117.
125 Id., p. 401.
126 See, for example, Campbell, op. cit., n. 27; G. Wolbring, 'Expanding Ableism: Taking Down the Ghettoization of Impact of Disability Studies Scholars' (2012) 2 *Societies* 75.
127 See, for example, L. J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (1995).
128 See, for example, S. Tremain, 'On the Subject of Impairment' in *Disability/Postmodernity: Embodying Disability Theory*, eds M. Corker and T. Shakespeare (2002) 32; S. Tremain, 'Foucault, Governmentality, and Critical Disability Theory' in *Foucault and the Government of Disability*, ed. S. Tremain (2005) 1.
129 See, for example, M. Shildrick, *Dangerous Discourses of Disability, Subjectivity and Sexuality* (2012).
130 See, for example, R. Garland-Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (1997). See also R. Devlin and D. Pothier, 'Introduction: Toward a Critical Theory of Dis-Citizenship' in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, eds R. Devlin and D. Pothier (2006) 1.
131 Zola, op. cit., n. 117. See also R. Scotch and K. Schriner, 'Disability as Human Variation: Implications for Policy Analysis' (1997) 549 *The Annals of the Am.*

have impairments, but it would 'recognise that the entire population is "at risk" for the concomitants of chronic illness and disability'.[132]

Universalist approaches such as that of Zola demand that disability-related considerations influence and shape areas of law and policy applicable to the entire population. In the words of Bickenbach et al., 'Disability policy is … not policy for some minority group; it is policy for all'.[133] Universalist approaches to law and policy do not require silence on disability or impairment, however. Indeed, in order to effectively ensure that a particular law or policy is not ablist, levels of functional ability falling short of conventional ability norms will often require explicit acknowledgement and provision.[134] The crafting of inclusive universalist law and policy requires sensitivity to ways in which disablement might occur – a sensitivity that cannot realistically be achieved without the involvement of representative organizations of disabled people.[135]

Any move towards laws that are universalist and inclusive of people not conforming to dominant ability norms will raise complex questions with which Disability Law will need to engage. In the built environment context, Imrie has expressed concerns about the lack of theorization of 'universal design' and limited engagement with challenges associated with ensuring that its principles are applied in ways that are respectful of cultural and individual difference and do not themselves privilege the voice of professionals or reify simplified notions of the 'universal subject'.[136] Such concerns reach beyond the built environment context and can helpfully inform and drive work in Disability Law.

Fineman has challenged legal approaches that rely on identity-based categories as privileging some groups of people at the expense of others and as failing to recognize or design for universal human vulnerability.[137] Her thesis thus opens up debates about the desirability of perpetuating laws prohibiting disability and other forms of discrimination. Do such laws play a vital part in bringing about the CRPD Committee's conception of 'inclusive

Academy of Political and Social Science 148; D. Lepofsky and R. Graham, 'Universal Design in Legislation: Eliminating Barriers for People with Disabilities' (2009) 30 *Statute Law Rev*. 97.

132 Zola, op. cit., n. 117, p. 401.

133 J. E. Bickenbach et al., 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (1999) 48 *J. of Social Science and Medicine* 1173, at 1182.

134 This point is also made in Shakespeare, op. cit., n. 19, p. 63.

135 CRPD, op. cit., n. 6, Art. 4(3).

136 See, for example, R. Imrie, 'Universalism, Universal Design and Equitable Access to the Built Environment' (2012) 34 *Disability and Rehabilitation* 873.

137 See, for example, M. Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92 *Boston University Law Rev*. 1713; M. Fineman, 'Equality and Difference: The Restrained State' (2015) 66 *Alabama Law Rev*. 609; M. Fineman, 'Equality: Still Illusive after All These Years' in *Gender Equality: Dimensions of Women's Equal Citizenship*, eds L. McClain and J. Grossman (2010) 251.

equality'[138]? Can the disadvantage and exclusion faced by disabled people be tackled without laws prohibiting disability discrimination? Can equality law be framed in ways that do not undermine initiatives to respond to the universal vulnerability of all of law's subjects?[139]

The questions posed by universalism, particularity, voice, and representation will require further exploration in Disability Law in coming years. They also pose challenges for disability politics, empowerment, and identity – challenges that are not confined to the disability context.[140]

4.4. Analysing the impact and enhancing the effectiveness of relevant law and policy

The last of the cross-cutting challenges for future Disability Law highlighted here is analysis of the disability-related impact of relevant law and enhancing the effectiveness of law in countering and resisting disablement. This demands scholarship that evaluates the impact of relevant law and practice, such as by assessing ablist effects and identifying blockages and possible facilitators. While legal scholarship has an important role to play in such work, multi-disciplinary expertise and collaboration will often be required.[141]

The importance of a focus on impact and effectiveness is highlighted by recent evidence of disappointing implementation gaps in English equality and social care law. In relation to social care, for instance, despite innovative approaches, Clements notes that the impact of the Care Act 2014 has been disappointing and identifies austerity and lack of resources as major factors. In his words:

> Funding remains the outstanding problem – and … England remains one of the few major advanced countries that has not reformed the way it funds long-term care in response to the needs of an ageing population.[142]

Similarly, the disability provisions of the Equality Act 2010 (EqA), despite winning international acclaim for their extensive and innovative nature,[143]

138 Op. cit., n. 108 and accompanying text.
139 See further S. Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?' in Lawson and Gooding, op. cit., n. 43, p. 199, p. 208.
140 M. Verloo, 'Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality' (2005) 12 *Social Politics: International Studies in Gender, State and Society* 344. See also op. cit., n. 118.
141 See generally M. Rioux et al. (eds), *Disability, Rights Monitoring and Social Change: Building Power out of Evidence* (2015).
142 Clements, op. cit. (2017), n. 116, I.40.
143 The Equality Act was, for instance, identified as an example of international good practice at the first annual conference of the Zero Project, held in Vienna on 22–23 January 2012; see M. Fembek et al., *Zero Project Report*

have been identified by parliamentary committees in 2016[144] and 2017[145] as falling short of their promise and potential to achieve change. The most significant factors underpinning this failure, according to the committees, concern enforcement – with the Act's emphasis on litigation brought by individual claimants, and the additional barriers to bringing such litigation caused by post-2010 austerity measures, being particularly problematic.

Alongside scholarship investigating the impact and effectiveness of particular types of law, there is a need for work exploring the combined impact on the lives of disabled people of multiple applicable laws and policies, including the complexity of navigating them all in order to secure rights and entitlements. There is also a need for further research on how disabled people experience the justice system, including initiatives towards greater reliance on e-justice.[146]

Interactions (and non-interactions) between law and its disabled users outside the courtroom also provide important subjects of study. A multitude of factors work together to create a situation in which disabled people in the UK, as elsewhere, surprisingly seldom appear to resort to court to assert entitlements or claim redress.[147] One significant factor is lack of awareness of entitlement to make a claim, or even of having been the victim of discrimination, crime, or some other wrong.[148] While legal consciousness approaches have been used to explore the role of law in the everyday lives of

2012 (2012), at <https://zeroproject.org/wp-content/uploads/2013/12/Zero-Project-Report-2012.pdf>.

144 House of Lords Select Committee on the Equality Act 2010 and Disability, op. cit., n. 77.

145 House of Commons Women and Equalities Committee, *Disability and the Built Environment* (2017).

146 On the move toward e-justice, see, for example, Global Initiative for Inclusive Information and Communication Technologies, *Driving Progress on Article 13 of the United Nations Convention on the Rights of Persons with Disabilities: Leveraging Technology for Better Access to Justice* (2018), at <http://g3ict.org/press/press_releases/press_release/p/id_113>; D. Larson, 'Access to Justice for Persons with Disabilities: An Emerging Strategy' (2014) 3 *Laws* 220, at 226.

147 See, for example, L. Clements and J. Read, 'The Dog that Didn't Bark: The Issue of Access to Rights under the ECHR by Disabled People' in Lawson and Gooding, op. cit., n. 43, p. 21; Swift et al., op. cit., n. 54; M. Jones and L. A. Basser-Marks, 'The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992' in *Justice for People with Disabilities: Legal and Institutional Issues*, eds M. Hauritz et al. (1998) 60; Foundation for Law and Justice, *Access to Justice and Legal Need* (2003).

148 See, for example, J. Lerpiniere and K. Stalker, 'Taking Service Providers to Court: People with Learning Disabilities and Part III of the Disability Discrimination Act 1995' (2009) 38 *Brit. J. of Learning Disabilities* 245; J. Lord et al. (eds), *Human Rights: Yes! Action and Advocacy on the Rights of Persons with Disabilities* (2009) para. 12.1.

disabled people,[149] disability has to date occupied a surprisingly small place in legal consciousness literature.

V. CONCLUSION

Disability, as a social justice issue, is a topic that continues to have a surprisingly low profile in legal academia.[150] This is itself a cause for serious concern. As Linton has argued, by 'disregarding disability as subject matter, disabled people as subjects, and disabled people's subjectivity', academia has been 'complicit' in the marginalization of disabled people in society more generally;[151] and, as Bérubé notes in the foreword to Linton's book:

> [T]he understanding of disability can – *and should be* – central to what we do in universities. More specifically, … it should be central to what we do in the humanities. And perhaps, just perhaps, if disability is understood as central to the humanities, it will eventually be understood as central to *humanity* …[152]

Few claims on our attention, I think, could be more pressing.

Critical legal scholarship on law's engagement with disability matters. It has the potential to contribute to developing our law and legal systems in ways that work more inclusively and more effectively for disabled lawyers and for the 15 per cent of the population who, it is estimated, are disabled[153] – a proportion that is likely to increase as average age rises. If this scholarship is to grow and to be mainstreamed across the breadth of legal topics, however, there needs to be a more cohesive Disability Law discipline. Achieving this will require the development of undergraduate and postgraduate modules and fora (such as conferences, conference streams,[154] books, and journals) that bring Disability Law scholars with expertise in different areas of substantive law into conversation with each other. Without such initiatives, the pace of progress towards the mainstreaming of disability critique across the spectrum of legal scholarship, including into student texts, is likely to continue to be painfully slow.

The scope of Disability Law is defined by its underpinning questions about the role of law in creating, perpetuating, resisting, or contesting disablement, with the result that it cuts across traditional legal disciplines and has relevance to law on many different types of topic. Imposing structure on such a

149 See, for example, D. M. Engel and F. W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (2003).

150 This point is also made (relatively recently) by Malhotra and Isitt; R. Malhotra and B. Isitt (eds), *Disabling Barriers: Social Movements, Disability History, and the Law* (2017) 4–5.

151 S. Linton, *Claiming Disability Knowledge and Identity* (1998) 185.

152 Id., p. xii, emphasis in original.

153 World Health Organization, op. cit., n. 38.

154 See, for example, the Disability Legal Studies stream of the Law and Society Association's annual conference.

wide-ranging discipline can be daunting, but possible approaches to this are outlined in Section III above. A focus on Disability Law's underpinning questions, together with the cross-cutting Disability Law challenges outlined in Section IV, provides a framework to anchor initiatives for disciplinary collaboration and development.

In order for Disability Law to flourish, there is an urgent need both for greater cohesiveness among those already bringing a critical disability perspective to different areas of law, and for greater mainstreaming of this approach so that it reaches into legal topics where it has not yet penetrated. The advent of the CRPD has increased interest in Disability Law scholarship. Recognition by legal professional bodies of the importance of disability training would provide another boost. Ultimately, however, whether Disability Law becomes more cohesive and mainstreamed will depend on the engagement, commitment, and leadership of sociolegal scholars, textbook writers, their Law Schools, and professional associations.