Critical Disability Studies and the State

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Abstract

Liat Ben-Moshe's *Decarcerating Disability: Deinstitutionalization and Prison Abolition*, and Linda Steele's *Disability, Criminal Justice and Law: Reconsidering Court Diversion* offer distinct critical perspectives on the law and by extension, the State. This essay offers some reflections on the implications for future research in Critical Disability Studies on the State and its relation to disability. Here it is argued that there is scope for a widened analysis of, firstly, what exactly the State is from the perspective of disability; secondly, the distinct role of the State in participating in the construction of disability as a form of social oppression; and finally, the tactical problem posed by the State, as both agent of violence against people with disability and a potential vehicle for structural change.

Just over 30 years ago Catharine A. MacKinnon put forward the proposition that "feminism has no theory of the state" (1989: 157). In this context MacKinnon posed a problem at the level of praxis, relating to the strategic relationship between feminism and the law:

> Feminism has not confronted, on its own terms, the relation between the state and society within a theory of social determination specific to sex. As a result, it lacks a jurisprudence, that is, a theory of the substance of law, its relation to society, and the relationship between the two. Such a theory would comprehend how law works as a form of state power in a social context in which power is gendered. It would answer the questions: What is state power? Where, socially, does it come from? How do women encounter it? What is the law for women? How does law work to

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legitimate the state, male power, itself? Can law do anything for women? Can it do
anything about women's status? Does how the law is used matter? (MacKinnon
1989: 159)

There is of course much we could say about MacKinnon's perspective in this classic text. We
could certainly ask *which* feminism Mackinnon seeks to represent, and whether all feminist
traditions lacked a theory of the State. For example, work in the Black feminist tradition,
such as Angela Davis' 1981 text *Women, Race and Class,* do indeed advance distinct
perspectives on the State, highlighting the non-neutrality of the state, including the place of
"racism in the judicial system" and "the government's posture of studied neglect toward
Black people and other people of color" (Davis, 1981: 201). Nevertheless, despite this
limitation, MacKinnon's challenge remains broadly valuable for thinking about social
movements and their relation to the State. The text points to the pressing need for
movements to theorise the political terrain as part of their praxis; and in the case of the
State, both analyse its complicity in violence and oppression, and simultaneously strategise
in relation to the opportunities and limits presented by the State as an agent of change.

Reading both Liat Ben-Moshe's *Decarcerating Disability*, and Linda Steele's *Disability,
Criminal Justice and Law*, I found myself remembering the questions asked within
MacKinnon's text. To an extent, my own view would be that critical disability studies has
been in need of more work that critically interrogates the relationship between the State
and people with disability: to understand how the State shapes the political terrain of
disability, and simultaneously determines in what way (if at all) the State has a role in
addressing injustice experienced by people with disability. Both Ben-Moshe and Steele's
impressive new texts help to address this need for more refined analysis.

Ben-Moshe's book takes carcerality as a focus, highlighting not only why the history
of disability institutionalisation and de-institutionalisation should be of interest to prison
abolition movements; but further arguing that radical demands made by people with
disability to end institutionalisation are *also* examples of decarceration movements. The
involvement of the State in the violence of incarceration – in a range of spheres – creates
tactical questions for disability movements. In this context, Ben-Moshe explores the

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limitations of the legal avenues for disability movements, arguing that "litigation and rights discourse draw on the state in fixing social ills of its own creation" (Ben-Moshe, 2020: 7.41). These concerns overtly shape Ben-Moshe's suggested political approach, which downplays piecemeal reform in favour of *abolition* as a political rationality and tactic (see Ben-Moshe, 2020: 3.1-24).

Steele explores court diversion as a modality of State violence used against people with disability. As Steele highlights, diversion is often understood as a legal pathway which 'protects' people with disability from forms of carceral violence in the criminal justice system. However, diversion opens people with disability to alternative forms of violence; in this sense, for Steele, diversion must be understood as a strategy of legal violence which redirects people with disability towards "coercive intervention through disability and mental health service" (Steele, 2020:1). Like Ben-Moshe's text, Steele's case study of court diversion reveals a number of different dimensions of State violence which are of importance to critical disability studies. Firstly, relevant to contexts such as Australia, Canada and the United States, Steele observes that the State is profoundly shaped by imperialism and settler colonialism, which frames both the violence that is experienced by people with disability and the tactics which are possible for disability movements (Steele, 2020: 16). Secondly, the State is intensely involved in forms of carcerality as a primary form of legal violence. In unison with Ben-Moshe, Steele's analysis of the carceral moves beyond the sphere of the formal criminal justice system, to include, for example, institutional forms of disability support. Thirdly, the State seeks to legitimise its own authority. Steele's case study of court diversion highlights that in discursively framing the capacity for the law to appear 'compassionate' in protecting people from its own violence in the criminal justice system, the State effectively legitimates its own force, and simultaneously denies its own role as an agent of violence (Steele 2020: 18; see also 109).

Ben-Moshe and Steele's texts are to an extent complementary in their analyses of law's violence and its relationship to people with disability, offering case studies which, when placed together, provide the reader a wide and comprehensive picture. There is a strong united theme in both books: both texts highlight the non-neutrality of the State with respect to people with disability. As a result, both Ben-Moshe and Steele are suspicious of

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the capacity of the law to achieve positive change, and both texts highlight the way in which even well intentioned "legal actors might be complicit in disability injustice" (Steele 2020, 14). Ben-Moshe, for example, draws critical attention to the way some feminist demands for policing and criminalisation in response to violence have led to "the build up of the prison nation" (Ben-Moshe 2020, 3.5; see also Richie 2012, 3). Thus, the abolition approach advocated by Ben-Moshe calls for a "lens rooted in black radical tradition that critiques the state as violent and not the arena to seek remediation to injustice" (Ben-Moshe 2020, 3.6). Steele similarly expresses repeated concerns about the capacity of domestic and international law to provide justice to people with disability; for example, with reference to the often lauded United Nations Convention on the Rights of Persons with Disabilities (CRPD), Steele suggests the need for a "careful and strategic" approach, warning that "an unreflective, instrumental and technical use of the CRPD risks further legitimating and embedding carceral control and debilitation of criminalised disabled people" (Steele 2020: 214).

Both Ben-Moshe and Steele's important new books have raised some further questions for me about the relationship between the State and people with disability. These are both questions of analysis and of praxis. Firstly, from the standpoint of disability, what is the State? Ben-Moshe and Steele lean strongly on a Foucauldian analysis of power, carcerality and the law. But perhaps there are limits to how far such an analysis might be able to interrogate State power. Foucault famously distanced himself from a theory of power that revolved around the politics of the State (Foucault 1980: 121) and sometimes treated it as a somewhat 'episodic' phenomena with the terrain of power: "the state is only an episode in government, and it is not government that is an instrument of the state" (Foucault 2007: 248; see also Tremain 2006: 3-4 and 10-11). In this respect, Foucault's analysis of the State is somewhat – for me at least – under-developed. And this analysis misses that the State, from the standpoint of disability, has a potentially radically different meaning. What does critical disability studies have to say about the meaning of the State, the law and government? For example, how was the evolution of the Hobbesian state, and the monopoly of violence that is associated with it (see Hobbes 1994), interconnected with the right of the State to use systematic violence against people with disability to securitise,

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normalise and 'immunise', including through institutional torture and ill-treatment (see Wadiwel 2017; Puar 2017)? Further, how was the evolution of the State also connected with contemporary conceptions of the 'rule the law', and rights to security and protection which are central to contemporary human rights claims made by disability movements? To what extent can we separate contemporary claims for equality and security from the understandings of State power which have evolved around its monopoly over violence?

Secondly, and related to the above, how is the genealogy of the State intertwined with the emergence of 'impairment' and 'disability' as categories? There are different trajectories to explore here. For example, relevant to colonial history of contemporary state power, Nirmala Erevelles argues that racial slavery depended upon the production of 'black disabled bodies' as commodities for exchange (Erevelles 2014: 86). This 'value production' underpinned the development of global capitalism. Mitchell and Snyder track the internationalisation of eugenics, and the ways in which these logics infiltrated the governance of the State (Mitchell and Snyder 2003). Deborah Stone, in *The Disabled State*, explores the way the administration of welfare systems gave rise to categories of disability, which in turn produced a social and political conception of impairment and disability (Stone 1984). These different accounts offer histories on how the racial and bureaucratic state interacted with disability as a form of social oppression, and intersected with other forms of structural violence, such as race and sexuality.

Finally, there is the question of tactics. As above, both Ben-Moshe and Steele express caution about the law and its capacity to be utilised by disability movements as an agent of change. However, there remains, at least in my view, some tricky issues to navigate at the level of strategy. One problem relates to how disability movements might respond to the problem of violence where the State is both cause and cure. In many contexts, in relation to both institutional and interpersonal violence, the State has completely abandoned any responsibility for protecting most people with disability and is often directly complicit with the exercise of force. This means that forms of violence – often State violence – are routinised and 'naturalised' in the lives of many people with disability. What should the response of disability movements to this problem be? How is it possible to democratise a right to freedom from violence, while at the same time avoid the problems raised by Ben-

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Moshe and Steele of playing into a politics which simply authorises and extends the Hobbesian State? Can we do without the Hobbesian state? What is its alternative?

In a different register, I wonder broadly about the role of the State in protecting people with disability from the encroachment of capitalism into almost every aspect of social relations. Traditional social policy approaches have used the State, and its ability to levy taxes and engage in fiscal expenditure, as a way to ameliorate at least part of the violence of the capitalist economic system through forms of 'decommodification' (Esping-Andersen 2012: 63-95). In many parts of the world, social policy interventions, such as income transfers and publicly funded social support, while certainly not beyond criticism, present as important opportunities to address the structural dimensions of ableism. To an extent, and unless radical disability movements are actively calling for full socialisation of the economy – an option I am not dismissing here – the tactical utilisation of State intervention in economies to create the conditions for social protection and support seems to remain an important strategy to address the structural dimensions of ableism.

In all of the above, there is an ongoing tension. On one hand, today's colonial capitalist State, and all its violence, has imposed itself into almost all social, political, and economic relations; as a result, for many people on the planet, including people with disability, everyday life is experienced through the lens of State violence and deprivation which forms part of the fabric of ableism as a structural relation. On the other hand, the State often appears as a 'rational and realistic' solution when social movements consider how to seek justice: the State, as Ben-Moshe and Steele observe in their two books, often presents itself as the remedy, even if it is cause and source of injury. Part of the challenge here is the pervasiveness of the State; our social relations have, it would seem at least, been captured by it. Gayatri Chakravorty Spivak suggested a need for a "persistent critique of what one cannot not want" to describe the approach challenging institutional forms of power and discourse that we find ourselves surrounded by and which dominate our imaginations (Danius, Jonsson and Spivak, 1993: 20). Perhaps critical disability studies faces a similar dilemma in its theorisation of the State. How might it be possible to desire something other than what everyone says we cannot not want?

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