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Imagining the Law: The Construction of Disabiltiy in the Domains of Rights and Welfare – The Case of Israeli Disability Policy

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IMAGINING THE LAW

THE CONSTRUCTION OF DISABILITY IN THE DOMAINS OF RIGHTS AND WELFARE

THE CASE OF ISRAELI DISABILITY POLICY

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CONTENTS

=== PART I: INTRODUCING THE PROJECT ===

INRODUCTION 6

CHAPTER ONE: Enter Disability Legal Studies:
A New Theoretical Framework 19
A. Disability Studies - A Paradigm Shift 19
a. The Social Construction of Disability 23
b. The Cultural Production of Disability 25
c. Transforming the Academia 28
B. Introducing Disability Legal Studies 30
a. What is Missing in Contemporary Writing on Disability and the Law 30
b. Methodological Directions 35
c. Constitutive Theory 36
C. A Disability Legal Studies Critique of Welfare 41

=== PART II: IDEOLOGICAL GROUNDS AND LOCAL ORIGINS ===

CHPATER TWO:
Heroic Bodies, Deformed Bodies: Disability in Israeli
Collective Ethos and Public Imagery 49
A. The Aesthetics of the Zionist Body and Zionism's Ableism 51
a. Zionism – A Collectivist Project 52
c. The Pioneer and the *Sabra* 60
d. Exclusion and Difference 63
e. Zionism's Ableism 68
B. Embracing Heroic Bodies: Disability in the Service of the Collective 73
a. Productivity and Labor – Zionism's Early Phase 74
b. Self-Defense, Security, and Militarism – The Rise of Power in Zionism . 82
C. Conclusion: Bodies of Glory, Bodies of Denial:
The Negation of Disability 92

CHAPTER THREE:
Questioned Solidarity: Disability and Social Welfare in Practice
During the Pre-State Era 96
A. Welfare Policy Under the British Regime 97
B. Three Local Mechanisms 102
a. The *Histadrut* 103
b. The National Council 106
c. Voluntary associations 108
C. Concluding Remarks 110

=== PART III: BETWEEN CHARITY WELFARE AND WARFARE:
PRIVILEGES AND NEGLECT IN THE POLITICS OF DISABILITY POLICY ===

CHAPTER FOUR:
Poverty and Neglect: Productivity
Ableism and Orientalism in the Sa'ad System 114
A. The Place of Sa'ad in the Differentiated Structure of the Social Welfare System 116
a. National Insurance: Between High Values and Interest Politics 116
b. A Missed Opportunity for Disability Insurance 126
c. The Differentiated Structure of Disability Benefits 128
B. The Sa'ad System – General Public Assistance for the Poor 132
C. Productivity – The Hidden Factor 137
D. The Role of Productivity in National Insurance Legislative History 140
E. The Mutuality of Israeli Ableism and Orientalism 147
F. Between Deserving Poor and Undeserving Citizens 155

CHAPTER FIVE:
Dignity to the Workers, Glory to the Soldiers:
The Privileged Spheres of Disability Benefits 159
A. Work Injury – A Civil Model for Disability Benefits 161
a. The Flagship Program of National Insurance 162
b. Hollow Generosity 166
c. Gate-keeping Citizenship: Denying Civil Dignity 168
B. Disabled Veterans – Heroism and Activism 172
a. Legal and Institutional Setting 173
b. Heroism and Sacrifice 175
c. The Rationale: Compensation 178
d. Activism and Group Consciousness 183
e. A Model to Follow 186
C. Escaping Disability: The Invalids Law Impact on Disability Policy Dynamics 190

CHAPTER SIX:
The Failure of Universality – A Missed Opportunity
for Disability Insurance 196
A. Seeming Universality and Growing Particularity 198
B. Defining Disability and Terms of Entitlement 204
C. The Material Gap 208
D. Disability Insurance – Still a Charity Mechanism 214

=== PART IV: A RADICAL IMAGERY? THE PREDICAMENTS OF DISABILITY RIGHTS AND DISABILITY ACTIVISM ===

CHAPTER SEVEN:
Ideological Shifts:
Counter-Hegemonic Activism in Context 220
A. The Changing Conditions of Ableism: A Mixed Impact on Disability 221
a. Patterns of Change – 1970s-1980s 221
b. Enduring Nationalism and Israeli Body Politics 226
c. The Rise of Rights Language and Rights Activism 231
d. Neo-Liberalism and the Decline of Social Welfare 241
e. Social Activism in Late 1990s – The Rediscovery of Social Welfare 246
f. The Persistent Structure of Disability Cash Benefits 250
B. The Changing Forms of Disability Activism: From Cooperation to Confrontation 252
a. Welfare Activism in the First Decades: Between Resistance and Cooperation 253
b. Winds of Change: Preliminary Rights Activism 258
i. First Signs of Adversarial Activism 258
ii. The Parents' Board: A Preliminary Rights Language 262
c. Formulating Disability Rights: Confrontation and Structural Change 267
d. Voices from the Bottom: Disability Insurance Now 273

CHAPTER EIGHT:
The Failures of Disability Rights:
A Critique of Essentialism, Heroism, and of Rights, After All 279
A. The Equal Rights for People with Disabilities Bill as a Site of Counter-Hegemonic Resistance 279
B. The Promise of Disability Rights – Dismantling / Abolishing Ableism. 283
a. Setting a Supreme Court Precedent 284
b. The ERPWD Bill's Provisions: Principles, Guidelines, and Concrete Rights 286
c. A New Meaning for Disability, a New Model of Justice: From Charity to Dignity and Difference 292
d. Actual and Potential Impact on Rights, and Welfare 297
e. The Impact on the Disability Community: Identity Formation and Coalition Building 303
C. The Shape of Rights: Three Critical Comments on the Limits of the New Disability Discourse: Another Missed Opportunity? 313
a. A Limited Language of Power – A Critique of Essentialism after All? 314
b. Heroism Untouched – A Critique of Collectivism after all? 322
c. No Vision for Disability Insurance – A Rights Critique after all? 332

CHAPTER NINE:
Between Evil and Hope: A Preliminary Framework
For Re-constructing Disability Allowances..... 351
A. Listening To Voices of PWD..... 353
B. Challenging Relationships: Disability and Poverty..... 355
C. Rights and the Persistence of Poverty – A Process Approach 359
D. Possible Directions for Reconsidering Disability Allowances..... 362

CONCLUSION..... 368

ACKNOWLEDGEMENTS..... 372

PART I:

INTRODUCING THE PROJECT

Hidden and disregarded for too long, we are demanding not only rights and equal opportunity, but are demanding that the academy take on the nettlesome question of why we've been sequestered in the first place.

Simi Linton, Claiming Disability.[1]

[1] SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 185 (1998).

INRODUCTION

> *We have no problems with [the ideology of rights] but there is a great distance between theory and reality and life requires compromises so that people happiness would not be sacrificed for that ideology … Our vision about allowances is the same … but in the meantime nobody should starve.*
>
> *Yoav Kraim, Campaign for Handicapped Persons in Israel, 2002.*[2]

In 1999 and 2001 two long sit-in strike campaigns of people with disabilities (PWD) in Israel have brought their plight to the forefront of the national agenda and spurred strong and compassionate public support. The two strikes had similar characteristics. They were both organized by a core group of PWD, mostly with mobility impairments, and attracted many additional disabled and nondisabled people who spontaneously joined the struggle. Both strikes were mainly concerned with social welfare benefits for PWD, particularly with cash benefits according to the disability insurance program of the National Insurance Institute (a general social security program for PWD). In addition, both strikes lasted several weeks and came to an end after an agreement was signed with the Israeli government which partially accepted some of the strikers' demands. But the definite significance of the strikes was as events of movement building; as unique instances where the voice of PWD was heard, and rare moments of solidarity in action.

[2] Interview with Yoav Kraim, conducted on May 9, 2002.

Take for instance the 2001 strike.[3] The strike lasted eleven weeks (77 days) from December 2001 to March 2002. A group of PWD spent that entire time in a tent located in the central square before the central buildings of the Israeli government in Jerusalem, protesting against their economic and social conditions. A core of around 20 persons lived, slept, and ate in the tent despite the cold, rain, and snow and despite the physical difficulties it involved, especially for people who use wheelchairs or beds. Others came on a daily basis or occasionally visited the site.

The organizers of the 2001 strike were the veterans of the 1999 strike that started spontaneously but became a quick success. After the first strike a group of its veterans have formed a new organization called the Campaign for Handicapped Persons in Israel (hereinafter: Campaign for the Handicapped). The activists' main demands from the state were to improve allowances and services to which PWD are entitled according to Israeli social welfare laws. One such demand was to double disability insurance allowances, then worth $400, and bring them to par with minimum wage in Israel, which is regarded a minimum standard of living.[4] In addition, they demanded that PWD at pension age (60-65) will continue to receive their disability stipend in addition to, or at least instead of, old-age stipend which were even lower than disability payments. The strike ended with the signing of an agreement with the Israeli government. In the agreement some of the demands were partially accepted (a 20% raise in allowances' rates instead of 100%), and

[3] The information on the Campaign for the Handicapped and on their activities during the strike is based on interview with two of its primary figures, Arie Zudkevich and Yoav Kraim; *In Struggle – The Bulletin of the Disabled Union*, Vol. 1-3; the organization's website (*see*: http://www.media4u.co.il/nechim/main.asp (in Hebrew)and reports from Israeli newspapers from that time (particularly Ma'ariv and Ha'aretz). See also Chapter 7 and 8 for additional analysis of the strikes, their background, and consequences.

[4] The minimum wage in Israel was approximately $800 per month, and average wage $1500 per month.

it was decided to establish a committee to review the situation of PWD in Israel that will issue operative suggestions.

The pubic support to the strike was accompanied by extensive media coverage. Many PWD who were not part of the organizing group heard about the strike through the media and joined the strikers or supported their from afar. In addition, non-disabled people came to identify with the strikers, set in their tent, and brought food and additional help. Thus, for example, a group of Chinese medicine students came from Tel Aviv to offer massage treatments to the strikers, and some of Israel's leading singers participated in a "live aid" concert for the disabled. The strike also prompted journalists' columns criticizing Israel's unjust social and economic policy, including for instance a criticism of the government's preference for funding settlements in the occupied territories over needy citizens within Israeli borders.[5]

However, within the disability community, the strikes brought to the surface inner tensions and conflicts. While all activists in the field agree that the strikers' demands were justified, not all agreed with the goals the strikers chose to highlight, the language they used, the message they conveyed with regard to the meaning of disability, and with the social vision that their struggle carried with regard to the place that PWD occupy in society.[6] A particularly conflicted atmosphere was among disability rights advocates, whose project was to turn away from the old schemes of welfare and charity towards the new possibilities that rights entail. For them, the struggle was an old type of struggle, of

[5] Anat Gov, *The Public's Right to Know,* 12/26/01, Ynet online newspaper (claiming that "with the money that we have we could have been a state where the disabled are smiling").

[6] The strikers were criticized for using images that evoked pity and mercy among the general public and not dignity and rights. *See* Chapters 7.

the kind they wished to transform. By emphasizing disability allowances and by using images of PWD as miserable, poor, hungry, and sick, the strikes seemed to represent a step backward and a threat to the fragile achievements of the disability rights era.

In this thesis I trace the historical roots of this tension between the rights advocates and the strikers. This study explores the place of disability allowances in the scheme of Israeli ableism (the power structure that supports the subordination of PWD),[7] their historical formation, and their continuing significance. I examine their ideological background, their material, political, and symbolic effect, their relationships to other disability benefits programs, and how the introduction of disability rights had impacted them. The strikes, I argue, expose a fundamental tension that underlie disability politics with regard to the role of disability allowances, and particularly disability insurance in this context, in the endeavor to improve the life conditions of PWD – are cash benefits archaic and outdated form of assistance to PWD, or is it still a relevant mode of response to systematic marginalization and exclusion? Are they a manifestation of ableism or a way to fight it? In my critique I show how disability benefits became a major site in which disability was and still is constituted. A helpful way to think of disability allowances throughout the reading of this thesis is therefore as located in a complex and intriguing tension between evil and hope, as I elaborate on in the last chapter of this study (Chapter 9). Yet the purpose of this study is to beyond disability allowances to a more general critique of ableism, of welfare and rights and an examination of the role of law in these processes.

[7] Ableism is the power structure that supports the privileged status and conditions of non-disabled persons in relation to disabled persons. For an overview of the tenets of disability critique including ableism, *see* Chapter 1.

The history and structure of disability insurance are contextualized and problematized through an in-depth examination of the ways in which disparities in disability benefits among three major groups of disabled people are translated into social hierarchies with implications that extend beyond material aspects. The three groups are *Nechei Tzahal* (Israel Defense Forces (IDF) disabled veterans), *Nechei Avoda* (the work injured) and *Nechim Klaliyim* (the "general" or "common" disabled) which are in fact the residual, non-specific majority of PWD. I show how hierarchies of welfare benefits reflect national values and collective imageries, but at the same time reinforce and re-constitute those values and modes of imagination. I find three missed opportunities for the introduction of a progressive regime of disability allowances and show how different sets of values in hegemonic as well as counter-hegemonic sites led to the same result – a neglect of people who live on the margins of society and below poverty lines.

The theoretical approach that guides this research is Disability Studies, a relatively new academic field that is gradually gaining prominence throughout the academic sphere (particularly in the humanities). Like feminist, race, and queer studies, Disability Studies provides a conceptual framework for a disability critique of law, culture, and society. Disability Studies deconstructs and reconstructs the meaning of disability through investigation of subjects such as the social construction of disability, the power structure that supports and enhances ableism, the genealogy of normalcy, and the role of politics of the body. The basic approach that all disability studies scholars share is that disability is not an inherent, immutable trait located in the disabled person,

but a social construct, a result of socio-cultural dynamics that occur in interactions between society and the persons that inhabit it.[8]

Utilizing Disability Studies in legal research is a growing phenomenon, but I suggest that thus far the level of synthesis between the two was insufficient. Through this study I seek to demonstrate what disability critique of law should become. I suggest that such an analysis should be termed Disability Legal Studies (DLS) to emphasize its commitment to the field of critical legal theory and its close association with Disability Studies. Although DLS is not altogether new to some legal scholars, it has not yet gained adequate recognition in legal discourse. I argue that the time has come to identify, introduce, and label this field, bring it to light, attend to its premises, and incorporate its lessons into legal theory and practice.[9]

This study demonstrating Disability Studies in action as it questions and destabilizes several assumptions regarding the place of people with disabilities in Israeli society. Thus, this study's major claim is that people with disabilities in Israel are subjected to two interrelated systems of power, which mutually inform one another and together contribute to the overall marginalization and exclusions of *all* people with disabilities. One concerns the construction of difference between disabled and non-

[8] This fundamental argument is part of the distinction drawn in Disability Studies between the medical model and the social model of disability. For a more detailed discussion, *see* Chapter 1, Part A, particularly notes 20-27 and accompanying text. A preliminary list of renowned works in the field include: LINTON, *supra* note 1; LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY (1995); MICHAEL J. OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990) (hereinafter: OLIVER (1990)); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996).

[9] Incorporating the lessons of disability critique into legal education is a radical move as it seeks to transform mainstream legal education. In the context of disability that is an act of resistance since usually people with disabilities are expected to be mainstreamed into the "normal" education system. Shifting the burden of mainstreaming from the individual person to social institutions is a first step in employing disability critique, as I shall soon explain.

disabled people; the second examines the divisions and fragmentation among the three main categories of people with disabilities that I have already mentioned: disabled veterans, the work injured, and the general population of people with disabilities.

The critique of the role of welfare policy in the construction of disability in Israel is particularly interesting because of the gap that exists between Israeli society's self-image of a society that "takes care of the disabled" and the reality of neglect, exclusion and marginalization that people with disabilities in Israel experience. It is within this gap, I argue, that Israeli social welfare laws constitute "disability." The common view among scholars (and others) that Israel cares for people with disabilities is pertinent primarily with regard to Israel IDF disabled veterans, who enjoy a most privileged position in terms of social glory, extensive benefits, a powerful organization, and a strong political lobby.[10] Yet that view has also been extended, not by scholars and PWD, but in popular public discourse, at least historically (until the recent campaigns of PWD), to additional groups of people with disabilities due to Israel's ethos of a modern welfare state with a strong socialist background, which guarantees work injury benefits and general disability insurance to its citizens.[11] Yet I argue that even disabled veterans suffer from the same hierarchies of power; even their disability is eventually understood as inferiority, and efforts to compensate them do not manifest acceptance of disability, but rather its rejection and denial.

[10] For a detailed discussion on IDF disabled veterans' benefits and social status, *see* Chapter 5, Part B. To read on struggles of additional groups that their disability is related to national causes to enjoy similar benefits and social esteem, *see* Chapter 5, Part B.e.

[11] That view has changed throughout the years with the erosion of the Israeli welfare state in the decades since the 1970s. Most recently, following vocal campaigns led by people with disabilities in 1999 and 2002, the public in Israel has realized that people with disabilities living on social security suffer from severe destitute. But for the purpose of my analysis it is enough that the popular view that I describe above was true for a long period of time since my critique is directed at the very roots of the Israeli welfare state.

By focusing on disability allowances this project opens a host of questions regarding the role of the modern welfare state and the relationships between rights and welfare in improving the social conditions of PWD. Throughout the last century, the modern welfare state has been widely considered a major source of rescue and relief for people with disabilities. By providing mechanisms of cure and care, so the common view goes, the welfare state has improved the social conditions of disabled people, rescuing them from a life of starvation and severe destitution. In this view, welfare is perceived as a refuge, while the real culprit for people with disabilities' persistent poverty lies primarily with the structure of the market economy, with the existence of negative social attitudes (e.g., stigma and stereotypes), and with people with disabilities' "objective" and inherent limitations. In this study, I challenge this view, arguing that although welfare has indeed provided some relief to people with disabilities, welfare laws and policies have also had a significant role in developing, furthering and reinforcing the power hierarchies to which people with disabilities are subjected. I ask whether welfare has improved the lives of people with disabilities, and in what ways the welfare state has participated in the construction of disability. I also examine the visions of disability communicated through welfare policies and explore the role of power in these processes.

Another popular belief is that disability rights provide the ultimate solution to the problems of marginalization, exclusion, isolation, and dehumanization of PWD. This belief is based on two assumptions, one, that once disability rights are protected by law the social status of PWD has been transformed, and their daily lives are much better. Another, that disability rights are an all encompassing solution that to a large extent substitutes the former regime of social welfare, or at least that welfare's entitlements

become marginal in comparison to disability rights. In this study, I challenge this view as well, arguing that the gap between the promise of rights and their realization is a substantial one that should implicate the popular understanding of rights, from a "guarantee of protection" to "an opportunity for action."[12] I also argue that the continuing impact of social welfare as a major site in which ableism was produced and reproduced proves the opposite – that social welfare is still an important factor in the marginalization of PWD. Consequently, I argue that disability rights discourses, as they evolve in various contexts, should not separate themselves from social welfare but rather engage with it and create bridges of meaning between the two spheres as complementary sites where disability is constituted. Finally, this study shows that disability rights discourses although (rightly) understood as counter-hegemonic creations, are also, to a large extent, a product of the society in which they were produced, and should therefore be scrutinized to locate their own misconceptions and false assumptions.

The implications of this study are of general as well as local interest. As to disability hierarchies, I suggest, that although the particularities and contexts of these hierarchies differ from one country to another, the result is the same: those at the top, usually disabled veterans and disabled workers, enjoy better compensation or social insurance schemes, but in fact suffer from similar patterns of ableism and power as other disabled persons, and these patterns eventually render them equally inferior to and of a lesser value than the non-disabled. The Israeli case is also interesting in terms of the relationships between welfare and rights. Israeli disability rights model was particularly committed to incorporate social welfare into the scheme of disability rights, yet

[12] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 145 (1990)

eventually even this seemingly inclusive and sophisticated formula neglected a fundamental realm of ableism – the realm of disability allowances. The local benefits from the finding of this research are for scholars, activists, and policymakers, all at the same time. Understanding the particularities and intricacies of Israeli ableism and its multifaceted manifestations is a fundamental step before reconstructing anti-ableist strategies and reforms.

In order to understand how disability was constructed, contested, and imagined over the years, I turn to the specifics of its formation: the conditions in which it was situated, the relationships that shaped it, the institutional settings in which it was produced, and the sites in which it was contested. Accordingly, after introducing the field of Disability Legal Studies, the analysis examines three main sites: Chapter 2 looks at Zionist ideology and body politics; Chapter 3 to Chapter 6 discuss the structure of welfare policies as it was shaped during the pre-state era and the first decades of statehood; and Chapter 7 and Chapter 8 take disability activism as their main arena of interrogation, focusing particularly on the emerging disability rights movement and the counter activism of a neo-welfareist type that the 1999 and 2001 strikes represented. Chapter 9, the last chapter in this study, presents an initial attempt to reconceptualize disability allowances in a way that responds both the rights critique and to the voices of PWD who demand a dignified scheme of disability insurance as a matter of social justice.

Chapter 1 in this study outlines the contours of Disability Legal Studies, and situates my research within this new field. In it I argue that despite the burgeoning writing on disability and the law, disability critique in the curriculum is still marginal,

and its implementation is quite narrow.[13] My main argument is that what is missing from contemporary writing on disability and the law is substantial research regarding *the constitutive role of law in the production of disability*.[14] Accordingly, I call to reengage with the study of social welfare as an important arena where disability is constituted. In Part II I begin the actual contextual inquiry I undertook in investigating the structure and manifestations of Israeli ableism. Chapter 2 examines the relationships between the Zionist ethos and the Zionist politics of the body, and shows the local ideological roots of the two hierarchies of power that I discuss in this study – between disabled and nondisabled people and among PWD. Chapter 3 examines the local origins for the disability policy that was later developed in Israel. It explores the mechanisms of disability benefits that were developed during the pre-state by the Jewish community in Palestine.

Part III, delves into the intricacies and complexities of the differentiated structure of disabilities benefits as it has evolved during the first decades of statehood and exposes their significance in creating the foundations for subsequent eras, and informing future policies. Chapter 4 examines the first and principal layer of Israeli ableism, the hierarchy of power between disabled and non-disabled people as it was institutionalized and legalized in the welfare system. Particularly, it examines the neglect of a general disability insurance program in the enactment of the National Insurance Law[15] (the central social insurance mechanism in Israel) and analyzes the relationships between the inferiority of the Sa'ad system (a public assistance mechanism) to which the majority of

[13] *See* Chapter 1, Part B.a., particularly notes 53-55 and accompanying text.

[14] *See* Chapter 1, Part B, particularly notes 58-61 and accompanying text.

[15] National Insurance Law, 5714-1954, 8 L.S.I. 4 (1953-54).

people with disabilities were subject, and the inferiority of disability itself in Israeli society. Chapter 5 examines the value-based hierarchies that operate internally among three main groups of people with disabilities in Israel. Looking at the pyramid of benefits between IDF disabled veterans, the work injured and the majority of people with disabilities it exposes the complex reality in which some (privileged) people with disabilities were elevated at the expense of others in material, symbolic, and political respects. Chapter 6 shows how the enactment of the 1974 disability insurance program became a second missed opportunity to transform the social condition of PWD and the legal and social relations in which they are situated. The failure of universality and the persistence of need as rationale of the program resulted in the reproduction of the Sa'ad system and many of its fallacies.

The last part, Part IV, examines the impact of the introduction of rights on the local scheme of ableism and particularly its effect on the differentiated structure of disability benefits. In this part the locus of analysis shifts from sites of state action to sites of counter-hegemonic activism. Chapter 7 begins with a review of the changing conditions of Israeli ableism since the 1970s and their mixed impact on PWD and concludes with a detailed analysis of the changing forms of disability activism, particularly the shift from cooperation to confrontation. In both parts social welfare and rights contest and challenge each other, exposing each other's limitations. In Chapter 8, I introduce and critique the Israeli disability rights discourse, eventually arguing that while it aimed to transform the conditions of ableism through structural social changes, it too neglected to address disability allowances as a major site where the power system of dis/ability is constituted. Moreover, by ignoring the differentiated structure of disability

benefits, it participated in maintaining the material, symbolic, and political disparities among PWD. Chapter 9 provides a preliminary attempt to reconceptualize disability allowances as located in a tension between evil and hope. It proposes a model of disability allowances that attempts to reconcile between the grassroots view of disability allowances as the most pressing issue of PWD everyday life and the rights perspective which is concerned that disability allowances only reproduce the conditions of ableism.

CHAPTER ONE:
Enter Disability Legal Studies:
A New Theoretical Framework

> *Enter disability studies: a location and a means to think critically about disability, a juncture that can serve both academic discourse and social change … Disability studies takes for its subject matter not simply the variations that exist in human behavior, appearance, [and] functioning … but, more crucially, the meaning we make of those variations. [It is a new paradigm] used to understand disability as a social, political, and cultural phenomenon.*
>
> *Simi Linton, Claiming disability*[16]

In this Part, I provide a general overview of Disability Studies' guiding principles of inquiry. I then turn to examine the current use of Disability Studies in legal scholarship. I claim that its place is still marginal, and that even when employed, it is used in a narrow and instrumental manner. I then outline the contours of Disability Legal Studies, and explicate the place of my research in this new field.

A. Disability Studies - A Paradigm Shift

The emergence of Disability Studies as a distinct academic field can be traced back to the 1970s, but it became organized, institutionalized, and influential during the 1990s. In a parallel and mutually reinforcing course of expansion, the disability movement has gained power both in grassroots activism and in academic settings. As a

[16] LINTON, *supra* note 1, at 1-2.

result, a critical perspective emerged, which powerfully challenged the place and meaning of disability in society.[17]

Taking a disability critique perspective mandates a shift from treating disability as a given category to studying the production of disability and the ways power and knowledge participated in its formation. It requires focusing on the social and cultural construction of disability, including, primarily, resisting the overpowering medicalization and pathologization of disability. A central mechanism of domination explored in disability-centered inquiries is *ableism*, the power structure which, like sexism and racism, distinguishes between social groups based on their "dis/abilities" and renders one group of persons – people with disabilities or disabled persons – inferior to and dominated by another – the non-disabled or "able-bodied."[18] Disability Studies explores the role and manifestations of ableism in social practices and institutions, which resulted in a portrayal of people with disabilities as useless, marginal, abnormal, a burden on society, and perhaps most offensively, as living a life that is not worth living.[19]

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[17] On the history of Disability Studies, *see* David Pfeiffer, *A Bit of History*, 21 DISABILITY ST. QUART. 1 (2001); Lennard J. Davis, *The Need for Disability Studies*, *in* THE DISABILITY STUDIES READER (Lennard J. Davis ed., 1997); LINTON, *Id*.

[18] On ableism, *see* FLINTON, *Id*., at 9; Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, *in* DISABILITY STUDIES: PAST PRESENT AND FUTURE 160 (Len Barton & Mike Oliver eds., 1997).

[19] Within Disability Studies an elaborated discussion is dedicated to eugenics, euthanasia ("mercy killing") and the social legitimacy of genetic testing, screening, and eventually aborting fetuses with projected impairments. These are depicted by disability activists as a form of genocide, as most clearly advocated by the organization Not Dead Yet (http://www.notdeadyet.org/). Two most recent events in the United States have brought those issues back to the fore front of the struggle: the movie Million Dollar Baby, and the Terry Chiavo case.

For scholarly works on the subject, *see* Martin Pernick, *Defining the Defective: Eugenics, Aesthetics, and Mass Culture in Early 20th-Century-America*, *in* THE BODY AND PHYSICAL DIFFERENCE: DISCOURSES OF DISABILITY 89 (David T. Mitchell & Sharon Snyder eds., 1997); Steven Selden, *Eugenics and the Social Construction of Merit, Race and Disability*, 32 J. CURR. ST. 235 (2000); Ruth Hubbard, *Abortion and disability – Who Should and Who Should Not Inhabit The World*, *in* THE DISABILITY STUDIES READER, 187 (Lennard J. Davis ed., 1997).

A useful starting point in the deconstruction of disability is the distinction between impairment and disability. Just as feminist critique has relied on the sex/gender dichotomy to explain the complex relations between one's biological sex and the construction of gender through social roles, so has disability critique developed a valuable distinction between *impairment*, which stands for the biological condition that a person might have, and *disability*, which signifies the social and cultural barriers that are imposed on that person in various ways due to the impairment.[20]

However, the deeper meaning of that distinction lies in the conceptual framework that was developed in Disability Studies between the medical/individual model and the social model of disability.[21] The medical model, also known as the individual model, represents a "conflation between impairment and disability,"[22] as one's whole

[20] MICHAEL J. OLIVER, UNDERSTANDING DISABILITY – FROM THEORY TO PRACTICE 19-29 (1996) (hereinafter: OLIVER (1996)). For a critical view of the distinction, *see* Tom Shakespeare & Nicholas Watson, *The social model of disability: an outdated ideology?* 2 RESEARCH IN SOCIAL SCIENCE AND DISABILITY 9, 14-15 (2002) (addressing the analogy between the two frameworks, but claiming that just like feminist theory abandoned the strict binary between sex/gender, so should Disability Studies abandon the social/medical and the disability/impairment binaries).

A useful typology in that regard is the much-cited definition of disability as developed by the World Health Organization in 1980, which was adopted by the UN as well, which distinguishes between *impairment* as anatomical loss, *disability* as restriction resulting from the impairment, and *handicap* as disadvantage resulting from the impairment or disability. *See* World Health Organization, International Classification of Impairments, Disabilities, and Handicaps: A manual of classification relating to the consequences of disease (Geneva, 1980). Adopted by the United Nations in: The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96 (20 December 1993).

[21] That distinction was first developed in British grassroots organizations and was introduced to academic audience by Michael Oliver, *see* OLIVER (1990), *supra* note 8, and OLIVER (1996), *supra* note 20, at 30-42. For additional general materials that support the following review of the social and the medical model, *see* LINTON, *supra* note 1, WENDELL, *supra* note 8; CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT (1988); Gareth Williams, *Disability Definitions, Models, Classification Schemes, and Applications*, *in* HANDBOOK OF DISABILITY STUDIES, 171 (Gary L. Albrecht et al eds., 2001). For a good review of the differences between the models, *see* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649-660 (1999).

[22] LINTON, *id*., at 134-135.

personhood is reduced to her disability.[23] Under this model, disability is viewed as an immutable trait located in the disabled person's physical body.[24] This view, which was shaped by the mutual growth of 19th century scientific discourse and the expansion of the modern administrative welfare state, perceives the individual as a locus of permitted interrogation and intervention, a subject to imposed practices of cure and care. Under this view, the individual is the problem that should be fixed, adapted, rehabilitated, and "mainstreamed" to fit social norms. The role of society in disabling persons within this discourse remains unnoticed.

In contrast, the social model focuses on the complex ways that economic relations, cultural meanings, social practices, and institutional settings participate in the disablement of persons.[25] It explores how the many daily activities and basic pleasures that people with disabilities cannot enjoy are rooted not in their own limitations, but in the way society's institutions were designed – by the non-disabled and for the non-disabled. And it is that design that *socially* burdens people with disabilities – not their biological impairments. Disability, then, is a social construct, a product of social

[23] That reduction is commonly exemplified through the naming of people with disabilities. While the old terminology address people with disabilities by their impairment, e.g. retarded, blind, autistic, crazy/insane/mentally ill, a terminology that is also used in society as a denigrating way, the new terminology under the social model emphasized personhood of which disability is just one aspect (i.e. a person with disability, with Down syndrome, or with mental disability, or a disabled p+erson, bind person, and so forth. These terminologies are not free of debate within the disability community, yet they do signify a shift in the field. *See* LINTON, *id.*, at 9-14; Wendell, *id.*, at 11-35 (on the politics of defining disability and who is disabled). *See* also Crossley, *supra* note 21, at 647.

[24] For additional reading to the list above (*supra* note 21) on the medical model, *see* Simon Brisenden, *Independent Living and the Medical Model of Disability*, *in*: THE DISABILITY STUDIES READER – SOCIAL SCIENCE PERSPECTIVES, 20 (1998); and Simi Linton, Susan Mello, & John O'Neill, *Disability Studies: Expanding the Parameters of Diversity*, 47 RADICAL TEACHER 4 (1995).

[25] For additional reading to the list above (*supra* note 21) on the social model, *see* Colin Barnes, *The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?*, *in*: THE DISABILITY STUDIES READER – SOCIAL SCIENCE PERSPECTIVES, 65 (1998); Patrick Fougeyrollas & Line Beauregard, *Disability: An Interactive Person-Environment Social Creation*, *in* HANDBOOK OF DISABILITY STUDIES, 171 (Gary L. Albrecht et al eds., 2001);

relations and interactions; it is a difference that was constituted by society and that was, and still is, magnified and translated into a power structure.[26]

The relationships between the medical and the social model of disability should not be understood as a rigid distinction, but rather as a general explanatory analytical framework. The power of its simplicity, therefore, is also its weakness. Taking an extreme view in this regard might incur oversimplification, such as the denial of pain, suffering, dependency, and other bodily and functional limitations that impairments entail; or the risk of disregarding the multifaceted relations between impairment and disability, and between the social and the biological experiences of impairment/disability.[27] To me, it seems that the point of the social critique is not to deny the pain, but rather to realize that the social meaning attached to pain and impairment/disability is the source of people with disabilities' perceived inferiority, and not their "inherent" condition.

a. The Social Construction of Disability

In the context of this project, which focuses on the formation of social welfare policy and its continuing impact, it is important to stress the complex ways that society disables people beyond accessibility and accommodations.[28] Although contemporary

[26] The social model is in fact an umbrella term for many variations within Disability Studies. David Pfeiffer, for instance, has identified nine different models of Disability Studies, including: the social constructionist-, the social-, the impairment-, the oppressed minority, the independent living-, the post-modern-, the continuum-, the human variation-, and the discrimination versions (David Pfeiffer**,** *The Philosophical Foundations of Disability Studies*, 22 DISABILITY STUD. QUART. 3 (2002)).

[27] Tom Shakespeare & Nicholas Watson, *The social model of disability: an outdated ideology?* 2 RESEARCH IN SOCIAL SCIENCE AND DISABILITY 9-28 (2002) (claiming that the success of the social model became a problem in itself and calling for another paradigm shift in disability theory).

[28] Accessibility and accommodations were inserted to conventional legal discourse following the enactment of the ADA. They address the ways that facilities, services, programs, clubs, job opportunities, and forms of communications are blocked before people with disabilities, by exposing the unstated norms

and revolutionary, these concepts mainly focus on environmental and institutional design. Susan Wendell has provided a detailed picture of these and additional dimensions of the social construction of disability, including the generation of disabling events and circumstances through war, crime, technology, and innovation; the availability and distribution of basic resources such as water, food, shelter, and clothing; socio-environmental factors, such as abuse and neglect of children, public-safety standards, pollution, stress, and poverty; and the availability and forms of medical care and practices.[29]

Wendell also examined additional less tangible methods of disablement through what she portrayed as "the social construction of disability *through expectations of performance*."[30] These expectations are embedded in the very organization of modern life. Thus, as the pace of life increases, more people who cannot meet those growing demands become disabled.[31] Wendell also addresses the failure of society to provide people with the amount of help that they need to participate fully in society as a form of

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that underlie them. For a sociological account of the rights movement in the United States, its struggles and achievements, *see*, DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION (2003).

[29] WENDELL, *supra* note 8, at 36-42. *See* also Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABILITY, HANDICAP AND SOCIETY, 5 (1987) (on the role of poverty, work and other social factors in disabling persons).

[30] WENDELL, *Id*., at 37 ("Societies that are physically constructed and socially organized with the unacknowledged assumption that everybody is healthy, non-disabled, young but adult, shaped according to cultural ideals, and, often, male, create the a great deal of disability through a sheer neglect of what most people need in order to participate fully in them." *Id*., at 39). *See* also BARBARA HILLYER, FEMINISM AND DISABILITY, Chapter Four: Productivity and Pace (1993).

[31] In a personal example Wendell illustrates that claim, showing that as a professor, teaching one more course per semester would make her more disabled. Since she would have to request half-time disability leave, while currently she is on one-quarter-time disability leave. Moreover, such a requirement might disable additional professors, since their level of performance might now become inadequate (*Id*., at 38). She also shows how the lack of resting areas in a supermarket, for instance, rests on the assumption of fitness and health, "as though no one were ever dizzy, or incontinent, or simply needed to sit or lie down" during shopping (*Id*., at 39).

disablement, e.g., through the rules governing social welfare benefits, including financial assistance or actual services.[32]

b. The Cultural Production of Disability

The cultural production of disability is a complementary dimension of the social critique in the study of dis/ability as a system of power. Such a cultural critique focuses on meanings, language, and images that inform the social barriers that people with disabilities encounter, and that in turn are reinforced by them.[33] It exposes the roots and manifestations of the unstated norms that underlie disabling social practices and structures, showing their contingency and unstableness. Disability critique of this sort unpacks and challenges popular representations of people with disabilities as inferior and worthless and as deserving pity and mercy by identifying the cultural patterns that produce those images. It also challenges the confinement of the meaning of disability to negative attributes such as deficiency, burden, ill fate, deviance, deformity, and the related inability to imagine anything but negative aspects in the experience of disability.

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[32] In this regard Wendell reminds us that modern industrialized societies provide to their non-disabled citizens a significant amount of help through education, training, transportation, recreation and more. *Id.*, at 40.

[33] On the role of language and the power of naming, *see*: Irving Kenneth Zola, *Self, identity and the naming question: Reflections on the language of disability*, 36 SOCIAL SCIENCE & MEDICINE 167-173 (1993); LINTON, *supra* note 1, at Chapter Two: Reasigning Meaning; Michael Oliver, *Politics and Language: Understanding the Disability Discourse* (paper prepared for inclusion in the MA in Disability Studies Programme: Dept of Psychotherapy, University of Sheffield, 1994) (http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/pol%20and%20lang%2094.pdf. Last visited: March 15, 2005). On the role of disability as a literary device, *see* David T. Mitchell, *Narrative Prosthesis and the Materiality of Metaphor*, *in* DISABILITY STUDIES – ENABLING THE HUMANITIES 15 (Sharon L. Snyder et al eds., 2002). On images and disability, *see* Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, *in* THE DISABILITY STUDIES READER 172 (Lennard J. Davis ed., 1997); IMAGES OF THE DISABLED, DISABLING IMAGES (Alan Gartner & Tom Joe eds., 1987).

Consequently, a host of new discussions appeared regarding disability culture and disability pride, as ways to assert the positive aspects of life with a disability,[34] and to challenge the centrality of beauty, fitness, and health in contemporary culture.[35] They also brought an increasing interest in disability art as expressing the lived experience of disability, as well as the possibility of disability as creativity. Thus the missing voice in today's popular culture and academia, is for Simi Linton, a "voice that speaks not of shame, pain, and loss, but of life, delight, struggle, and purposeful action … [Demonstrating] that for many disabled people, oppression is not experienced as a bodily force, but as a political force."[36] One such example is the view that a wheelchair is not a device that "bounds" PWD, but rather a liberating and enabling power device, as John Hockenberry's personal narrative of his injury reveals.[37] In Neil Marcus illuminating words: "Disability is not a 'brave struggle' or 'courage in the face of adversity' ... disability is an art. It's an ingenious way to live."[38]

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[34] On disability culture, *see* Steven E. Brown, *What is Disability Culture*, 22 DISABILITY STUD. QUART. 34 (2002) (providing the best definition I found for disability culture: "People with disabilities have forged a group identity. We share a common history of oppression and a common bond of resilience. We generate art, music, literature, and other expressions of our lives and our culture, infused from our experience of disability. Most importantly, we are proud of ourselves as people with disabilities. We claim our disabilities with pride as part of our identity. We are who we are: people with disabilities). *See* also LINTON, *id.,* at 5; THE DISABILITY STUDIES READER (Lennard J. Davis ed., 1997) (dedicating an entire section to disability culture); HANDBOOK OF DISABILITY STUDIES (Gary L. Albrecht et al eds., 2001) (dedicating an entire section to disability and culture). A particularly lively discussion exists with regard to Deaf culture and pride, *see, e.g*., CAROL PADDEN & TOM HUMPHRIES, DEAF IN AMERICA: VOICES FROM A CULTURE (1988). *See* also online: Institute on Disability Culture (http://www.dimenet.com/disculture/. Last visited: March 15, 2005), and Disability Pride, (http://www.disabledandproud.com/parade.htm. Last visited March 15, 2005) (the Disability Pride Parade's website).

[35] *See, e.g.*, Harlan Hahn, *Can Disability Be Beautiful?*, 18 *SOCIAL POLICY* 26 (1988); Michael J. Oliver, *What's So Wonderful About Walking?* (Inaugural Professorial Lecture, 1993) (http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/PROFLEC.pdf Last visited: March 15, 2005)

[36] LINTON, *supra* note 1, at 113-114. *See* generally on disability art and creativity, *id*., at 112-115.

[37] JOHN HOCKENBERRY, MOVING VIOLATIONS – WAR ZONES, WHEELCHAIRS, AND DECLARATIONS OF INDEPENDENCE (1995).

[38] Neil Marcus is an artist living with dystonia (a rare neurological impairment) who is also using a wheelchair. Cited on the homepage of Disability Social History Project website:

The centrality of the body in these analyses is evident, since disability as a system of meaning is based on the interpretation and disciplining of bodily variations.[39] Disability critique, as Rosemarie Garland-Thomson contends, "questions our cultural fantasy of the body as a neutral, compliant instrument of some transcendent will." Furthermore, it shows how "privileged designations as beautiful, healthy, normal, fit, competent, intelligent … provide cultural capital to those who can claim such statuses."[40]

Cultural readings of disability have yielded intriguing challenges to prevailing meanings of concepts such as normalcy, deviance, and pathology. Moving beyond stigma and labeling analyses,[41] they engage in a post-structuralist and particularly Foucauldian critique through the genealogy of social categories and the deconstruction of differences and dichotomies.[42] Thus, Lennard Davis in his genealogy of the term

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(http://www.disabilityhistory.org/. Last visited on March 15, 2005).

[39] Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA JOURNAL 1, 4 (2002). *See* also WENDELL, *supra* note 8, particularly at Chapter 5 & 7 ; THE BODY AND PHYSICAL DIFFERENCE: DISCOURSES OF DISABILITY (David T. Mitchell & Sharon L. Snyder, eds., 1997); and FREAKERY: CULTURAL SPECTACLES OF THE EXTRAORDINARY BODY (Rosemarie Garland Thomson, ed., 1996) (examines the construction and meaning of freakishness and its exhibition in Western societies, aiming at demonstrating how public displays of extraordinary bodies facilitated the definition of cultural distinctions as natural, thereby promoting a variety of social hierarchies and inequitable power relationships).

[40] Garland-Thomson, *id*., at 4-5.

[41] On stigma, *see* ERVING GOFFMAN, STIGMA – NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963); and ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). On labeling, *see* FRANCIS CULLEN & JOHN CULLEN, TOWARD A PARADIGM OF LABELING THEORY (1978).

[42] *See e.g.*, DAVIS, *supra* note 8; JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL TETARDATION IN THE UNITED STATES (1994); GEORGES CANGUILHEM, THE NORMAL AND THE PATHOLOGICAL (1943, trans. 1991) (the book was originally published in 1943 and was warmly adopted by Disability Studies scholars).

Obviously, Michel Foucault's work had tremendously contributed to Disability Studies research. *See* a recent collection: FOUCAULT AND THE GOVERNMENT OF DISABILITY (Shelley Tremain ed., 2005) (the contributors examine a variety of concepts and ideas, including community care, impairment, normality, inclusion, prevention, accommodation, and special education). And *see* his own work, including: MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1961, Richard Howard trans. 1965); THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION, (1963, rev. ed., 1972, trans. A. M. Sheridan Smith, 1973); DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975, trans.

"normal" has gone beyond the claim that the binary normal/abnormal is in fact a continuum, or a relational dyad. In *Enforcing Normalcy* Davis has powerfully showed that the term "normal" was not always available in its current meaning but was in fact invented around the years 1840-1860 as a product of 19th century occupation with human sciences and the rise of statistics. According to Davis, only at that time did the concept of an *average* person emerge and become the *normal*, the *standard* against which human deviation is measured, whereas before the standard was a "*divine* body," an "*ideal* body" that "is not attainable by a human."[43]

c. Transforming the Academia

Finally, before turning to the implications of Disability Legal Studies, I should mention Simi Linton's seminal work *Claiming Disability*. In that book, Linton provided a comprehensive manifesto for the inclusion of Disability Studies' critique and disabled people's perspectives and voices in the academic curriculum, and a detailed picture of the directions that Disability Studies scholarship should take.[44] Thus, Linton challenges the prominence that the applied fields (e.g., social work, healthcare services, rehabilitation, and additional forms of therapy, cure, and care) have gained during the last two centuries as a dominant sphere in which disability was located, and where its meaning was produced and imported from to other fields. Instead, Linton calls to make disability a category of social, political, and cultural critique, a change that would end the primacy of the applied fields, and transform the meaning of disability in all fields. Hence, Disability

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Alan Sheridan, 1977); POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977 (Colin Gordon ed., 1980).

[43] DAVIS, *id.*, at 24-25 (emphasis mine).

[44] LINTON, *supra* note 1, The following mentions only part of the many points that Linton is making throughout her book, but I find them most comprehensive and essential.

Studies scholarship would be interdisciplinary and focus on the "vast realm of meaning making that occurs in metaphoric and symbolic uses of disability."[45] A related critique in that regard is the absence of agency and subjectivity of people with disabilities, and inadequate attention to wishes and proposals coming from the disability community.[46]

Linton also focuses on the importance of treating disability as a prism through which to investigate general themes and social phenomena. This way disability is not isolated, but rather becomes more relevant and contextualized. Linton shows that existing research usually studies people with disabilities in their particularity, and their particularity is the subject of that research. Similarly, people with disabilities are usually excluded from research on the "general population" for which they are considered too particular and therefore irrelevant.[47] A Disability Studies approach, in contrast, shows how a disability perspective might enrich our understanding of the world and of broad-spectrum issues, such as body, care, and community.[48] In my own study I engage with issues pertaining to the meaning of productivity, the limits of social welfare policy, and to the understanding of law as a socio-cultural power.

In the following section I propose what the incorporation of Disability Studies should mean for legal scholarship. I argue that law is more than a mechanism of oppression or a tool for social change, but rather a socio-cultural power that participates in the construction of disability, and that DLS should engage in investigating its operation.

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[45] LINTON, *id.*, at 123-129 .

[46] *Id.,* at 134-135.

[47] *Id.*, at 73.

[48] *Id.*, particularly at 117-122.

B. Introducing Disability Legal Studies

> *Hidden and disregarded for too long, we are demanding not only rights and equal opportunity, but are demanding that the academy take on the nettlesome question of why we've been sequestered in the first place.*
>
> *Simi Linton, Claiming Disability*[49]

a. What is Missing in Contemporary Writing on Disability and the Law

The current place of Disability Studies critique in legal writing is growing and developing. Since the 1990s, just like other academic domains, the legal field has witnessed a rapid growth in the writing on disability from a critical perspective. The rising power of the global movement of disability rights,[50] and the increasing influence of the Americans with Disabilities Act (ADA)[51] as a model for civil rights legislation for people with disabilities,[52] have altered the boundaries of the legal discourse to accommodate the new claims of people with disabilities for equal citizenship. The utilization of law for the promotion of social change was not new in the realm of disability, but it has intensified and transformed with the introduction of disability rights discourse.

However, although the writing on disability and the law became more prevalent, and even though most of it was in support of disability rights, the infusion of disability

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[49] *Id.*, at 185.

[50] Katharina C. Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 ASIAN-PAC. L. & POL'Y J. 7 (2000) (on the impact of international standards relating to disability on Japanese disability law); Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 201 (2003).

[51] Pub. L. No. 101-336, 104 Stat. 327-33 (codified at 42 U.S.C. §§ 12101-13 (1990)).

[52] Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOC. INQUIRY 723 (2002); Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 (2002) (examining the effect of the ADA on disability reform in Israel, the United Kingdom and Sweden).

theory into the scholarship was slower.[53] Few law students and legal academics are familiar with Disability Studies' basic tenets, whereas they are very often conversant with, for example, critiques of gender and race as social constructs that are shaped by social systems of domination. In part, this is probably related to the process that Disability Studies has undergone in moving from the margins to more visibility and distinction. But in part it was also connected to change in sophistication regarding the understanding of disability and the relationships between disability and the law. Thus, a gradual shift can be traced from the traditional doctrinal analysis that adopted the view that discrimination on the basis of disability is forbidden,[54] to a more elaborated understanding of people with disabilities as a minority group, and growing attention to disability as a social construct.[55]

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[53] Crossley, *supra* note 21, at 627 (noting that "Unlike its race and gender counterparts, however, disability theory by and large has not filtered into the legal literature on disability"). And indeed, a quick search on westlaw.com database (conducted on March 15, 2005) reveals that in 1990 twenty-eight essays had the word disability or disabilities in their title. From 1992 to 1997 the number grew to 70-100 titles a year and from 1998 to 2002 the numbers grew bigger to 120-170 per year. Interestingly, in 2003 and 2004 the numbers decreased to around 100 titles a year again. Another search looking for references to Disability Studies within the text has yielded seven entries for the years 1990-1994, twelve entries for the years 1995-1999, and 66 entries for the years 2000-2004. Analyzing the data is beyond the scope of this study but they do indicate a general trend in legal writing.

[54] *See*, e.g., Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 423-24 (1997); William J. McDevitt, *Defining the Term "Disability" Under the Americans with Disabilities Act*, 10 St. THOMAS L. REV. 281 (1998); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L.L. REV. 99, 160 (1999); Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Peter David Blanck & Mollie Weighner Marti, Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act, 42 VILL. L. REV. 345 (1997).

[55] *See*, e.g., Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, (1993); Crossley, *supra* note 21; Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Mary Crossley, *Reasonable Accommodation as Part And Parcel of the Antidiscrimination*, 35 RUTGERS L.J. 861 (2004); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination*, 153 U. PA. L. REV. 579 (2004).

I argue that the time is ripe to identify and mark this emerging field of inquiry as *Disability Legal Studies*. In this term I refer to the two fields to which the field is related: Disability Studies and critical legal theory. By critical legal theory I refer to schools of thought within the law (including critical legal studies, feminist and queer legal theory, critical race theory, and socio-legal studies) that seek to expose the relationships between law and power, claiming that the law is not neutral or value-free, but rather an active participant in power dynamics.[56]

By introducing this new field and explicating what it entails I seek to achieve two primary goals. The first goal is to draw the attention of the legal academia, including other critical theorists, to the innovativeness and significance of disability critique to the understanding of law in general and to law and power in particular. Incorporating a disability critique would enhance the research on issues such as citizenship, poverty, autonomy, dependency, competency, and rationality, and would also advance the study of identity, group formation, and intersectionality.[57] The second goal is to invite the scholars who are already engaged in the field to expand their critiques and their views about the relationships between disability and the law.

I argue that, in order for legal writing on disability and the law to become a branch of critical legal theory, it need not only adopt the view that disability is a social

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[56] For a detailed analysis of critical legal theory, *see* IAN WARD, AN INTRODUCTION TO CRITICAL LEGAL THEORY (2nd ed., 2004). For collections providing a general overview of critical legal theory through variety of essays and approaches, *see* RADICAL CRITIQUES OF THE LAW (Stephen M. Griffin & Robert C.L. Moffat eds., 1997); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3rd ed., 1998).

[57] *See, e.g.,* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996) (explaining the potential transformation in employment law following the terminology of the ADA); Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN'S L.J. 81 (1998) (showing what feminist legal scholars can learn from disability critique of the law).

construct, but to be actively engaged with research that explores the role of law in the social construction and the cultural production of disability.[58] Indeed, contemporary legal scholarship concerning disability is increasingly familiar with the primary research produced by Disability Studies and with its general conceptual framework. It is particularly familiar with the renowned distinction between the medical/individual model and the social model of disability. However, I argue that these concepts are usually employed in an instrumental fashion, only to evaluate courts' decisions and legal policies.[59] Thus, most legal scholars prefer the "minority group model" or the "rights model" of disability as their mode of analysis which represents an understanding of disability as elaborated by the social model and "transforms it into a political call for action."[60] This perspective is important for the promotion of disability rights, yet it views

[58] For a list of legal scholarship in feminist, queer and critical race theories that perform the kind of analysis which I advocate in this study, *see infra* note 81.

[59] For a list of such essays, *see supra* note 54. To demonstrate what I mean by instrumental use of disability critique let me refer to the following two illuminating essays. Thought-provoking and original as they are, they still explicitly limit their project to policy analysis. One is Mary Crossly's *The Disability Kaleidoscope* (*supra* note 21). Crossley's skillfully investigate the politics of defining disability in various United States' disability laws while explaining and applying the core of Disability Studies' critique. However, she narrows the goal of her work to exposing lawmakers to disability critique: "Looking at the law of defining disability through a disability studies lens may bring into focus how some legal decisionmakers continue to act on the assumption that biology is destiny when it comes to disability. More positively, infusing disability theory into the legal literature might enable legal decisionmakers to shift their own perspectives on the nature of disability and who should be considered disabled. That is the mission of this article" (*Id*., at 627). Samuel R. Bagenstos in *The Future of Disability Law* analyzes the limitations of the rights language, as formulated in the ADA, to bring about social change. Yet Bagenstos stresses that his article makes no effort "to offer any deep normative justification for or critique of disability law. My basic goal is more instrumental – to assess which policy tools are most likely to achieve the objectives that the disability rights movement has itself articulated" (Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 7 (2004)).

[60] *See, e.g*. Crossly, *Id.*, at 659; Drimmer, *supra* note 55, at 1355-1359; Diller, *supra* note 55. For Disability Studies writing on the minority model, *see* Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L., 41, 53 (1996); Anita Silvers, *Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities*, 10 HYPATIA 48 (1995); Anita Silvers, *Formal Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (1998); Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6-14 (1988); James I. Charlton, Nothing About Us Without Us: Disability Oppression and Empowerment 127 (1998).

the law as merely an apparatus of power or an instrument in the struggle for social change, and the required change is merely in the content of law (through statutes, judicial doctrines, and policy directions). The law in this view is separate from the society; it is a *reflection* of social relations and cultural meanings.[61] Legal scholarship, I contend, did not develop thus far its own contribution to the understanding of the legal construction of disability, and of *law as constitutive of society and culture*, as I shall soon explain.

What I stress in this project is that we require a different approach to the study of law and disability. Such an approach understands that the rise of disability as a contested category and as a subject of struggle and resistance has also involved the law in more than one aspect. It acknowledges that the law was, and to a large extent still is, an active participant in the marginalization and exclusion of people with disabilities, in the medicalization of disability, in granting to the applied fields their power, and in understanding disability as a state of worthlessness and inferiority. At the same time, it is now, and to some extent has been for a while, a resource for social change, and a mode of imagination to envision new paths. Therefore, the critical turn means not only mobilizing the law to support and advance the abandonment of the medical model, dismantling ableism, and giving less weight to knowledge that was produced by the applied sciences. It rather means understanding the constitutive, generative power of law in maintaining hierarchies of power, producing diverse meanings, and providing an arena for them to interact and compete, to be formed and transformed. At the same time, maintaining a critical tone requires acknowledging that (and studying how) the legal field tends to

[61] I shall elaborate that critique below in my discussion on socio-legal constitutive theory's valuable theoretical and methodological contribution to the directions that I promote here for DLS.

privilege certain meanings and practices as it is closely linked to general schemes of dominance.

b. Methodological Directions

In this section I suggest a general guideline for the type of DLS analysis that I promote. Clearly, what follows is not a full-fledged theory for Disability Legal Studies, but rather provides initial directions for research. In specifying these guidelines, I also point at the conceptual framework that inspired my own study.[62]

The foundation for a DLS inquiry would be a fundamental resistance to grand narratives and a deep suspicion towards taken-for-granted categorical schemes. Thus, in my study I engage in a critique of productivity as a grand narrative of social welfare policy and in questioning the differentiated system of disability benefits which established a value-based hierarchy among its recipients. Inspired by critical and postmodern theory, the proposed analysis combines social, cultural, and historical perspectives, as it entails a call for contextual and relational analysis, which means focusing on the local ("the bottom"), on the webs of relations within which every phenomenon or category is situated, and on the historical construction of these categories.[63]

A DLS analysis would also typically express a deep commitment to social change, even though it would not necessarily take the form of a blueprint for social

[62] A full fledged theory of Disability Legal Studies should still be developed The arguments that I make here represent the nucleus of such an analysis.

[63] FOUCAULT, POWER/KNOWLEDGE, *supra* note 42; JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984); IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); MARTHA MINOW, MAKING ALL THE DIFFERENCE – INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

action. Reforming and transforming the social conditions and relations within which people with disabilities are situated requires an initial stage of identifying and studying the various systems of power in which they are located and the diverse hierarchies of difference that inform them. Therefore, despite seeming impractical, a DLS study is usually designed with, and motivated by, the hope of informing future legal decision-making and supporting grassroots resistance.

c. Constitutive Theory

The most comprehensive legal theory which I believe can provide the necessary tools for such an analysis, and which motivated me, is the constitutive approach to law, a branch of sociolegal studies, which has created a theoretical and methodological framework for critical readings of the relationships between law, society, and culture.[64] This approach is just a recommendation of course since part of Disability Studies' spirit is to be liberated from methodological constraints. I would therefore suggest seeing it as a useful guiding tool and not a restraining method.[65] At its core, sociolegal constitutive

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[64] For essential writings in constitutive theory of law (partial list), *see* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY – TOWARDS A CONSTITUTIVE THEORY OF LAW (1993); MICHAEL W. MCCANN, RIGHTS AT WORK – PAY EQUITY REFORM AND THE POLITICS OF POLITICAL MOBILIZATION (1994); JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996); HELENA SILVERSTEIN, UNLEASHING RIGHTS – LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996).

The methodological directions proposed here are influenced by additional related legal approaches as well, such as feminist contextual and relational analysis of law (*e.g.*, Minow, *Id.*; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); Mari J. Matsuda, *Pragmatism Modified and The False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990). cultural analysis of law (*see*, Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001); and Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, *in* LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998)), and critical legal history (*see* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61 (1984)).

[65] Michael J. Oliver, *Using Emancipatory Methodologies in Disability Research* (1st Annual Disability Research Seminar, Hosted by The National Disability Authority and The Centre for Disability Studies, University College Dublin, 2003) (http://www.leeds.ac.uk /disability-studies/archiveuk/Oliver/Mike%27s%20paper.pdf; Last visited March 15, 2005).

theory asserts, as Helena Silverstein puts it, that "legal meaning [is] being constituted by and constitutive of society."[66] Silverstein further argues that,

> Legal meaning becomes constitutive of society as it permeates, informs, and structures the social realm, that is, as it becomes a part of the way people think, understand, and act. But the constitutive process is neither unidirectional nor determinate. People do not simply absorb legal meaning into their consciousness. Incorporating legal meaning into thought and action involves reconstruction of legal meaning. Hence, just as legal meaning constitutes individual and social identity, so too does individual and social identity constitute legal meaning. Understanding, speaking and acting in legal ways can re-create and redefine legal meaning. Such reconstruction reverberates back through state institutions where meaning is continually constituted and reconstituted."[67]

Scholars of constitutive theory do not see the law as one cohesive system of rules operating autonomously of society, but rather as decentered, pluralistic, and inconsistent field of human action.[68] The law, in this view, is an arena of struggle, a terrain for competition over power and meaning.[69] And even though some meanings prevail, they are constantly contested by local legal traditions or contending social actors as they use the law. Clearly, within this framework it is impossible to conceive of the law as a command of a sovereign, or a crude ideological tool at the hands of the powerful in society.[70] Nor is it a pure emancipatory mechanism. A complex understanding of law acknowledges that it is "at once imposed from above and created from below,"[71] and that it operates simultaneously as a limiting and an enabling force. Furthermore, power, ideology, and hegemony are constant concerns in the constitutive approach to law, and

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[66] SILVERSTEIN, *supra* note 64, at 8.

[67] *Id*,.

[68] MCCANN, *supra* note 64, at 8. *See* also HUNT, *supra* note 64, at 11.

[69] MCCANN, *id*., at 9-10, and 304.

[70] Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field* 38 HAST. L. J. 205 (1987),

[71] SILVERSTEIN, *supra* note 64, at 5. *See* also Buordieu & Terdiman, *Id*., at 225.

even though law is portrayed as a site of resistance as much as it is a site of maintaining power hierarchies,[72] legal meanings are not assumed to be equal in power.[73] Hence, the relationships between law and power are of great concern to constitutive theory. Finally, despite possible contrary impressions, the law in constitutive theory is not omnipotent but rather regarded as having only a partial and limited force. Although inseparable from society, it is just one among many forces and forms that operate together in producing, reinforcing, and contesting meanings.[74]

Michael McCann provides a useful account of a context-specific socio-legal research that follows constitutive theory's framework of analysis. He enumerates three guiding dimensions for such a study. First, it should involve "a systematic attempt to distinguish the differential social positions of various individuals and groups in the particular institutional site under study." Second, it includes "emphasizing the degree in which actors are situated in at the intersection of multiple institutions or 'organizational fields.'" And third, it should highlight "the changing and temporal dynamics of evolving political struggle."[75]

Before I continue I should stress the importance of the temporal dimension of law, which McCann has aptly addressed. The type of research that I envision for Disability Legal Scholarship necessarily incorporates historical perspective into the analysis. Law in these accounts is a process, not a static state of affairs. The risk, however, lies in employing an evolutionist-functionalist approach, as Robert Gordon has labeled it in his

[72] MCCANN, *supra* note 64, at 9-10.

[73] SILVERSTEIN, *supra* note 64, at 10.

[74] MCCANN, *supra* note 64, at 8.

[75] *Id*., at 287.

analysis of critical legal history. Gordon rejects any view that assumes that "there is an objective, determined, progressive social evolutionary path,"[76] that "legal systems should be described and explained in terms of their functional responsiveness to social needs,"[77] or that "the legal system adapts to changing social needs."[78] A classic example would be research showing that legal rules become more and more efficient, more certain, more predictable, or more liberating. Instead he suggests examining contradictions, indeterminacies, and paths that were not taken, which illuminate how the law participates in the conditioning of the human imagination. Gordon concludes with the claim that the goal should be to "thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life."[79]

Law is therefore not outside of society, reflecting societal views or adjusting to changing social norms, but rather an active participant, a *constitutive power*, in socio-cultural processes. Law is located *in culture*, *in society*, and *in history*.[80] This type of research is clearly not foreign to legal scholarship, but its place is regrettably relatively marginal. The writing of Critical Race Theorists provides inspiring examples for integrating the above-mentioned method into legal analysis, particularly in the context of social and legal construction of social groups and its impact on identity formation.[81] As

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[76] Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61 (1984).

[77] Id., at 63.

[78] Id., at 64.

[79] *Id*., at.125.

[80] On the view of law *in culture* and the type of analysis it requires, *see* Mezey, *supra* note 64; and Sarat & Kearns, *supra* note 64.

[81] *See, e.g*., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HAVR. C.R.-C.L. L. REV. 323 (1987); Richard Delgado, *Two Ways to Think*

Angela P. Harris recently suggested, "'race law' consists not only of anti-discrimination law, but law pertaining to the formation, recognition, and maintenance of racial groups, as well as the law regulating the relationships among these groups."[82]

Within disability critiques of law, this type of writing, as I have already said, is hardly represented if not totally absent. One such compelling work, which was written before disability was as prevalent as it is today, is Martha Minow's book: *Making All the Difference – Inclusion, Exclusion, and American Law*. In *Making All the Difference* Minow critiqued the crucial role of categories and difference in legal thought, and advocated "a shift in the paradigm we use to conceive of difference, a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions."[83] In her general critique of law Minow incorporates many examples related to disability, including mental health law and special education, claiming that "the name of difference is produced by those with the power to name and the power to treat themselves as the norm" yet people tend to "locate the problem in the

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About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection, 89 GEO. L.J. 2279, (2001); IAN FIDENCIO HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); and Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L. J. 1 (1996). For a feminist analysis of the legal construction of gender, *see* Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1062 63 (1992); Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861 (1997); Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family"*, 4 THEORETICAL INQUIRIES L. 797 (2003). For an illuminating analysis in Queer Theory, *see* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L .REV. 1, 346-50 (1995).

[82] Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1928 (2000).

[83] MINOW, *supra* note 63, at 15.

person who does not fit in rather than in relationships between people and social institutions."[84]

Another more recent work was produced by accomplished socio-legal scholars David M. Engel & Frank W. Munger. In *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*, Engel and Munger provide a comprehensive view of the constitutive impact that the introduction of the rights language had in identity formation processes among people with disabilities in the U.S. In their words, "Although relatively few [of the interviewees] have actually asserted their rights by using the legal mechanisms made available under the Americans with Disabilities Act (1990) (ADA), many have found their lives and careers changed by the indirect, symbolic and constitutive effects of rights."[85] *Rights of Inclusion* is a fascinating work, but Engel and Munger's project was not about disability critique. Disability in this study was just a site in which to locate their interest in the constitutive power of law. It seems as almost a coincidence that the life narratives they examined were of people with disabilities. What is needed then is work that combines socio-cultural analysis with disability critique and that is equally committed to both.

C. A Disability Legal Studies Critique of Welfare

In the following paragraphs I review some basic Disability Studies perspectives on social welfare, explaining the centrality of welfare to disability critique. I then argue that in current disability legal scholarship there is a tendency to neglect social welfare

[84] *Id.*, at 111.

[85] DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 4 (2003).

benefits, and I conclude with a call for Disability Legal Studies to study social welfare as a major avenue through which to examine the history of the legal construction of disability and its continuing manifestations

By focusing on social welfare, this study joins the growing literature by disability rights advocates and Disability Studies scholars critiquing the faults and failures of welfare policy, which has rendered people with disabilities powerless, patronized, dependent, and stigmatized.[86] Thus, one type of analysis traces the origins of the place of disability in modern society to the roots of the welfare state. In this analysis the welfare state is constitutive of disability particularly in light of industrialization and the rise of capitalist market economies.[87] In *The Disabled State*, Deborah Stone provides a detailed account of the rise of disability as an administrative category for welfare policy purposes in England, Germany, and the United States. She shows how in England, for instance, the category of disability has evolved as a result of attempts to distinguish between the deserving poor who could live on charity and the undeserving ("idle") poor who were expected to work.[88]

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[86] It is impossible to list all the works dealing with critique of welfare, as they are vast and numerous. I mention some of them throughout this chapter. I should add to those a few additional resources that chronicle the struggles of people with disabilities: RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2nd ed., 2001) (on the enactment of section 504 of the Rehabilitation Act of 1973, the first United States' Federal law to prohibit discrimination on basis of disability (*see* 29 U.S.C. § 794(a) (1994)); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993); ZAMES FLEISCHER & ZAMES, *supra* note 28.

[87] OLIVER (1990), *supra* note 8, particularly at Chapter 3; DEBORAH A. STONE, THE DISABLED STATE, (1984). Deborah Stone provided the most influential scholarship in that regard, even though she is not a disability studies scholar. Yet Stone's analysis does examine the social construction of the category of disability and its effect on people with disabilities' lives. *See* also Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996) (hereinafter: Diller (1996)).

[88] SRONE, *Id*., at Chapter 2.

Another kind of research elaborates on the social construction of disability through patterns of distribution of wealth and resources. In the absence of public funds, socioeconomic gaps become even more imperative in the disablement of the powerless and the poor; if resources are allocated unequally, people who are entitled to less experience more limitations and become more socially disabled than others with similar impairments.[89] A critical assessment therefore examines the role of socioeconomic disparities, availability of financial and medical resources, and other social services in treating injuries and illnesses, and even avoiding them.[90] It also explores to what extent welfare policies diminish that disparate impact.[91] An additional contemporary direction of inquiry shows how social welfare is still a major locus of government control, of disciplining and normalizing people with disabilities and their bodies.[92]

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[89] WENDELL, *supra* note 8, at 36-37; Michael J. Oliver, *Capitalism, Disability and Ideology: A Materialist Critique of the Normalization Principle*, 2-5 (available on The Disability Archive UK: http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/cap%20dis%20ideol.pdf; Last visited March 15, 2005); GARY L. ALBRECHT, THE DISABILITY BUSINESS 14 (1992) ("A person's position in society affects the type and severity of physical disability one is likely to experience and more importantly the likelihood that he or she is likely to receive rehabilitation services. Indeed, the political economy of a community dictates what debilitating health conditions will be produced, how and under what circumstances they will be defined, and ultimately who will receive the services"). For a similar claim regarding the link between poverty and health, *see* Jake M. Najman, *Health and poverty: Past, present and prospects for the future*, 36 SOCIAL SCIENCE & MEDICINE 157-166 (1993).

[90] Kathrine Seelman & Sean Sweeny, *The Changing Universe of Disability*, 21 AM. REHABILITATION 2 (1995); Regina Austin & Michael Schill, *Black, Brown, Poor, and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J. L. & PUB. POL'Y 69 (1991); Jennifer Pokemoner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L. J. 425 (2001) (claiming that disability and illness are distributed in ways that reflect gender, racial, and economic inequalities).

[91] OLIVER (1996), *supra* note 20, particularly at Chapter 5 (claiming that the welfare state had the potential to accord people with disabilities many rights of citizenship (*Id*., at 52), but that it failed them primarily because it provided services on basis of individual need and not on rights. *Id.*, at 75-77)

[92] *See, e.g.*, Margrit Shildrick & Janet Price, *Breaking the Boundaries of the Broken Body*, 2 BODY & SOC. 93 (1996) (discussing disciplinary practices in procedures surrounding disability benefits); Jenny Morris, *Creating a Space for Absent Voices: Disabled Women's Experience of Receiving Assistance with Daily Living Activities*, 51 FEM. REV. 68 (1995).

In contrast to the vibrant discussion in Disability Studies of the consequences of welfare for people with disabilities, in contemporary disability critiques of law, there is a tendency to focus less on social processes that occur in the domain of welfare and instead to concentrate on the new civil rights era and the quandaries posed by laws providing equal rights to people with disabilities, such as the ADA, and their applications pose.[93] With some exceptions,[94] the study of welfare benefits was largely neglected by disability rights advocates whose projects have tended to focus on the missions of making people with disabilities full rights-bearers and altering the language of rights to include the life experiences of people with disabilities.[95] Welfare benefits, so it seemed, were regarded as anachronistic, as part of the old regime which was supposed to be replaced.

Hence, by focusing on welfare benefits in this study, I make an additional point about the desirable direction of disability research.[96] First, attention to welfare is important as a temporary measure for those who suffer from poverty in the meantime.

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[93] *See* Bagenstos, *supra* note 59, at 3 n. 4 (arguing that, "Much of the legal academic commentary on the ADA criticizes various decisions of the Supreme Court and other courts that have narrowed the scope of the ADA").

[94] The following is a list of recent essays that link between disability rights and social welfare: Diller (1996), *supra* note 87; Matthew Diller, *Dissonant Disability Policies: the Tensions between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123 (1998); Mark C. Weber, *Disability and the Law of Welfare: A Post Integrationist Examination*, 2000 U. ILL. L. REV. 889 (2000); Mary Crossley, *Medicaid Managed Care and Disability Discrimination Issues,* 65 TENN. L. REV. 419 (1998); Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities*, 52 ALA. L. REV. 51 (2000); Drimmer, *supra* note 55; and Pokemoner & Roberts, *supra* note 90. *See* also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 930-52 (2003). *See* also Bagenstos, *supra* note 59, at 4, n. 6, *arguing* that "[t]here are remarkably few exceptions to the ADA-centrism of post-1990 academic discussions of disability law" and urging more discussion on social welfare.

[95] *See* Bagenstos, *Id*., at 6, claiming that, "[s]ince its enactment in 1990, the Americans with Disabilities Act (ADA) has dominated discussions of disability law in the legal academy" (*Id*., at 3 footnotes omitted), and that "disability rights advocates ultimately grew a great deal more ambivalent about the very idea of welfare."

[96] This is also Bagenstos claim: "In short, the future of disability law lies as much in social welfare law as in antidiscrimination law (*Id*., at 4).

That temporariness derives also from the realization that rights are a process, and not an outcome; that the struggle over social justice is an ongoing one, a never-ending effort.[97] Second, with the exception of the welfare rights movement, which attempted to establish a right to welfare benefits, advocates of rights have largely neglected the "here and now" issues of poverty and unemployment.[98] Yet these issues seem to persist and remain a long-standing matter that needs to be revisited. As such they represent a much deeper challenge to the rights discourse and therefore threaten to destabilize it. Paraphrasing the well-known critique of rights, we should ask: What is the value of an accessible restaurant for a person who cannot pay her meal? What is the meaning of an accommodated hospital for a person who has no healthcare insurance? And indeed, it seems that recently, an emerging trend of drawing the attention back to social welfare can be identified.[99]

Yet I contend that social welfare is not only a material issue, it also bears symbolic significance and carries political consequences. Symbolically, it deserves more inquiry as a site in which disability was historically produced and where it keeps

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[97] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 145 (1990) (based on her field work on rights, Merry found that "rights come to be opportunities for action, not guarantees of protection").

[98] On the welfare rights movement, *see* MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995); and Williams H. Simon, *Rights and Redistribution in the Welfare System* 38 STAN. L. REV. 1431, 1436-1441, 1486-1504 (1986) (reviewing the interplay between the welfare rights movement and Charles Reich's conception of the New Property in welfare policy, and their role in the history of welfare policy). On the contribution of the movement to the enactment of the SSI program, *see* Diller, *supra* note 55, at 437-438.

[99] *See Id.*, at 54-70. Bagenstos identifies a shift in disability pactice, in the work of rights advocates on the ground (*Id.*, at 55). Yet I see an emerging parallel shift in legal scholarship, as Berganstos own essay indicates. For additional interesting research direction, *see* Peter Blanck's writing on the role of post Civil-War pensions to disabled veterans in the history of disability policy, *see* Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109 (2001); and Peter Blanck & Chen Song, *"Never Forget What They Did Here": Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America*, 44 WM. & MARY L. REV. 1109 (2003).

reproducing continually. As I explained before, social welfare is one of the most important participants, together with medicine and the related applied sciences, in assigning disability its current meaning. The consequences of social welfare are of great importance for political reasons as well. As I show in this study, the configuration of welfare benefits has tremendously impacted the political organization of people with disabilities, rendering them passive and silenced on the one hand, and divided, fragmented, and lacking internal solidarity on the other. Thus, one would find lack of solidarity among people with disabilities in an era where welfare was a dominant paradigm. While disability activism did exist it was largely on a narrow basis of shared impairment or shared circumstances of injury.

In my research I am interested in the general pattern of welfare-based hierarchies among people with disabilities. While this study focuses on Israeli welfare policy, the pattern is basically similar among a variety of societies as disabled veterans are located at the top and then on a sliding scale one finds the work injured, disabled workers, and the "general" disabled who have always been outside the working system.[100] A contextual analysis requires a thorough examination of the concrete nature and content of those hierarchies in each society. A Disability Legal Studies analysis would ask whether and in what ways the law has participated in forming those hierarchies and how they are related to the overall exclusion and marginalization of people with disabilities.

[100] The differentiation in disability benefits is high in many countries. Thus, in the United States, they include: social security for disabled workers, civil service retirement system for employs of the Federal system, a few pensions programs for to disabled veterans, the railroad retirement system, and many state and municipal retirement plans (STONE, *supra* note 87, at 4). In Europe, as well, next to the central social insurance system there are disability benefits arrangements for workers who historically have been well organized, including railroad employees, miners, farmers, civil servants, and more.

The hierarchies of disability benefits, the dynamic relations between the material, symbolic, and political dimensions of those hierarchies, and their joint impact on the place of *all* people with disabilities in society are the thrust of this study. They demonstrate, I argue, a more complex understanding of the mutuality of law and society and expose an additional, as of yet unexplored face of ableism.

PART II:

IDEOLOGICAL GROUNDS AND LOCAL ORIGINS

The State of Israel is first and foremost, a state of rescue and cure of masses of Jews, the cure of the body and the balancing of the soul. It is primarily about – the healthy Jew, the Jew who senses a solid ground and a meaning to his life, the Jew who is liberated from the fear of discontinuity, the Jew whose life is not so fragile anymore (lo tluyim mi-neged).

Haim Ben-Asher, The Knesset Records, during the introduction of the National Insurance Law. [101]

[101] Haim Ben-Asher (*Mapai*), The Knesset Records to the National Insurance Law, 11 Knesset Records, 1296 (1952).

CHPATER TWO:

Heroic Bodies, Deformed Bodies: Disability in Israeli Collective Ethos and Public Imagery

This chapter examines the details of the place of disability within the Zionist ethos and values through the lens of ableism. I start with a discussion about the politics of the body in Zionism. I argue that the Zionist project to reinvent the Jew by creating a "new Jew" had an exclusionary impact on PWD. By attempting to "cure" the Jews from what non-Jewish society depicted as their inherent condition of being "ill" and "deformed," Zionism essentially adopted and internalized these stereotypes, and disability became an open yet hidden issue which Zionism wished to overcome. Zionism's view of disability was open in the sense that Jews' perceived disabilities were an explicit and even major concern; yet it was hidden to the extent that its marginalizing effects remained uncovered.

In the second part of this chapter, I turn to the role that the values of labor and productivity, and self-defense and security played in the construction of disability. My first purpose is to provide an additional layer to the study of PWD as a group excluded from fulfilling national missions. My second purpose is to analyze the ways those values have shaped the inner hierarchies among PWD, namely between disabled veterans, work injured, and the majority of PWD, in Israeli public imagery. I suggest that adoration of the values of labor and security and admiration for the working-fighting body explain the privileged status of people who became disabled in circumstances related to the fulfillment of those tasks (disabled veterans and the work injured) as compared to the

status of other PWD. At the same time, by showing the process within Zionism by which the value attached to labor declined and militarism and security became primary, I contextulize the glory and extra privileges that disabled veterans eventually enjoyed and that positioned them above the work-injured in every social, cultural, or political aspect.

My final argument is that this very clear hierarchy among the various groups of PWD, in which disabled veterans were located at the top, work-injured in the middle, and the rest of the population of PWD at the bottom, has contributed to the overall subordination of PWD and to their exclusion from Zionist imagery. By elevating some groups of PWD and by accepting only some disabling circumstances as the entry ticket to Israeli citizenry, this internal hierarchy participated in the societal intolerance towards disability and in the very deep self-negation of privileged PWD with regard to their own disability.

This chapter provides a significant step in the developing of an original account of disability critique that is relevant to the history of disability in Israeli society by focusing on the relationships between Zionist values and ethos, and the image of the ”new Jew.” Such an account would provide a window to the central elements and complexities of disability in Israel’s past and present.

One caveat before I proceed, the issues explored in this chapter involve broader and heated debates among historians, sociologists and other scholars concerning the essence of Zionism and the nature of Israeli nationalism which are beyond the scope of this project. Although I cannot avoid touching upon those debates, I try to use them as context for and not the subject of my study, and to draw conclusions despite the fact that PWD are hardly ever mentioned in these discussions.

A. The Aesthetics of the Zionist Body and Zionism's Ableism

> *The promised land [is] where we could have ugly nose, black or red beard, and a crippled leg without being laughed at. … [W]here we could have dignity … and live in peace with all nations.*
>
> *T.Z. Herzl*[102]

This quotation from Herzl's personal diary, who is commonly acknowledged as "the prophet of the Jewish state," is unfortunately a marginal and rare depiction of the Zionist project. It is non-representative since it celebrates the weaknesses of the Jew, his negative stereotypes, and his "crippledness;" it is a vision of a place where all Jews "can be themselves."[103] Yet that vision was rejected, if it was ever suggested seriously, not only by other Zionist thinkers, but also by Herzl himself, who was occupied with Jewish honor and pride, obsessed with overcoming those very anti-Semite stereotypes, and admired manifestations of Jewish masculinity and heroism.[104]

My attempt to understand the complex social relations within which disability is constituted and contested in Israel has brought me to reconsider Zionism's legacy. In this chapter I argue that the Zionist ethos was a primary mechanism which shaped the values and body images that were cherished and prioritized in Israeli society..

I do not argue, however, that ableism or the dominant values in Zionism, namely labor, productivity, self-defense, and security, were unique and peculiar to Zionism or to

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[102] THEODORE HERZL, SIFREI HA-YAMIM, 98 (1920) (Cited in: DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN 301-304 (1997), and in ANITA SHAPIRA, LAND AND POWER, 27-28 (1992) (Hebrew)).

[103] SHAPIRA, *Id*. at 28.

[104] *Id*. at 29-31; DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN 301-304 (1997); Gluzman, *supra* note 102; *See* also *infra* Parts B.d. and B.e. on the image of the "old Jew" as "crippled," feminine, and homosexual.

Israeli society. Zionism was rather a concrete manifestation of values that were dominant in various places during that era. But it is its concreteness that is important for this study as it provides a rich account of Israeli history, policy, and deep cultural assumptions that keep inform today practices.

a. Zionism – A Collectivist Project

Zionism was a revolutionary 19th century movement that aspired to "normalize" the Jewish people by transforming it into a nation with a territory and a homeland of its own.[105] As a product of its era, Zionism was shaped by various, sometimes conflicting, influences, including enlightenment, secularization, nationalism, and socialism.[106] Nevertheless, Zionism was primarily a nation-building project to which all other ideals were subordinated. As the following discussion shows, the result was a unique blend of strong collectivist ideals with little place for individualism or liberal ideas.

The three major components of Zionist-Israeli collectivist ethos were nationalism, socialism and Judaism.[107] Yaron Ezrahi describes them as the three master narratives of

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[105] For an overview of the history and ideology of Zionism's various strands, *see* generally BENJAMIN BEIT-HALLAHMI, ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL (1993). For a more detailed account, *see* GIDEON SHIMONI, THE ZIONIST IDEOLOGY (1995). In its early years, Zionism's purpose was not necessarily to obtain a state for the Jewish people, but more about finding a territory for the Jewish people that would become the center of its national revival project. In David Ben-Gurion words: "What we want is not the state of Israel, but the land of Israel. Our aspiration is not to rule but to have a homeland." DAVID BEN-GURION, *Crossroads* (November 14, 1917) *in* FROM CLASS TO NATION: REFLECTIONS ON THE VOCATION AND MISSION OF THE LABOR MOVEMENT 11 (1933) (Hebrew).

[106] The following is an overview of Zionism's collectivist ethos. But before I proceed it is important to note that Zionism was not a cohesive movement. It was comprised of various strands which competed, and still compete, among themselves over primacy. Moreover, within each strand a plurality of thinkers with diversity of worldviews existed. Nevertheless, since the purpose of this chapter is mostly introductory, and the scope of this project does not allow a detailed inquiry into those intricacies, I will mostly address the hegemonic or dominant voices within Zionism which have shaped its ideology and practice.

[107] Yonathan Shapiro, *The Historical Origins of Israeli Democracy*, *in* ISRAELI DEMOCRACY UNDER STRESS (Larry Diamond and Ehud Sprinzak, eds., 1993).

Zionism. The religious narrative "draws upon the long Judaic tradition of viewing the individual as a member of a community of faith designated by God to carry out a divine mission."[108] The national narrative, while inspired by Jewish texts, was mostly influenced by secular European nationalism, in which "the Jew was a member of a persecuted minority, and the fate of the individual was determined by his or her membership in the group," a fate which he or she could not escape.[109] The third, socialist, narrative "integrates the idea of Jewish return with the ideal of a socialist community."[110]

While nationalism was the dominant narrative scheme, the other two concepts have shaped nationalism's particular nature, despite the complex relations between the three. Thus, labor Zionism, the most dominant Zionist strand, saw itself committed to socialist ideals and has widely used socialist rhetoric.[111] Its ideology had combined nationalist and socialist commitments and attempted to reconcile the possible tensions between them. In the words of David Ben-Gurion, the most prominent leader of the labor movement and later the first Prime Minister of Israel:

> Our movement has always had the socialistic idea which holds that the party of the working class, unlike the parties of other classes, is not only a class-party solely concerned with the matters affecting the class but a national party responsible for the future of the entire people. It regards itself not a mere part of the people, but as the nucleus of the future nation.[112]

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[108] YARON EZRAHI, RUBBER BULLETS: POWER AND CONSCIENCE IN MODERN ISRAEL 82 (1997).

[109] *Id*.

[110] *Id*. at 83.

[111] The labor movement maintained a hegemonic status in Zionist and Israeli politics for many decades, until its final defeat during the 1970s which is marked by the 1977 elections.

[112] DAVID BEN-GURION, *The Parties of the Zionist Movement and the Labor Movement* (August 7, 1931), *in* FROM CLASS TO NATION: REFLECTIONS ON THE VOCATION AND MISSION OF THE LABOR MOVEMENT 270 (1933) (Hebrew) (cited and translated in: ZE'EV STERNHELL, THE FOUNDING MYTHS OF ISRAEL: NATIONALISM, SOCIALISM, AND THE MAKING OF THE JEWISH STATE 225 (1998)). *See* also: DAVID BEN-GURION, *The National Purpose of the of the Workers Class* (1925), *in* FROM CLASS TO NATION, *Id*. at 231.

Ben-Gurion's comments notwithstanding, the precise nature of this blend of nationalism and socialism has remained a matter of a heated debate among scholars of Zionism's history and theory.[113] Traditionally it was agreed that labor Zionism created a unique synthesis of the two philosophies and was committed to both ideologies at the same time.[114] However, Ze'ev Sternhell has persuasively challenged this perception, arguing that the advocacy of a complete unity of interests between the class and the nation erased practically all contradictions and tensions between nationalism and socialism,[115] such that national unity and cohesiveness were advanced on the expense of class struggle.[116,117] According to Sternhell, although labor Zionism's agenda was wrapped in socialist rhetoric, the commitment to socialism was essentially abandoned and subordinate to the service of the nation. On the other hand, Anita Shapira maintains that use of socialist rhetoric was not a manipulative tactic, but reflected a genuine

[113] For a detailed review of the various strands within labor Zionism and the impact of socialist thought on Zionism's theory and practice, *see*: SHIMONI, *supra* note 105, at 166-235. Yet the nature of Zionist socialism is a matter of heated debate among Israeli scholars, most notably among two of its leading historians, Ze'ev Sternhell and Anita Shapira. The following provides a glimpse at the essence of that debate.

[114] ANITA SHAPIRA, FUTILE STRUGGLE: THE JEWISH LABOR CONTROVERSY 1929-1939, 183 (1977) (Hebrew); DAN HOROWITZ AND MOSHE LISSAK, ORIGINS OF ISRAELI POLITY: PALESTINE UNDER THE MANDATE, 133 (1978); YEHUDA SLUTSKY, INTRODUCTION TO THE HISTORY OF THE ZIONIST MOVEMENT IN ISRAEL 20-21 (1973) (Hebrew).

[115] ZE'EV STERNHELL, NATION BUILDING OR A NEW SOCIETY: ZIONIST LABOR MOVEMENT AND THE ORIGINS OF ISRAEL (1904-1940) 168, 285 (1995) (Hebrew).

[116] Sternhell, *Id*. at 18-19. Therefore both liberalism and Marxism were considered great threats – the first perceives society as a battlefield between individuals motivated by narrow self-interests, and the second views society as a site of constant conflict between competing classes. *Id*. at 18.

[117] Although there was a debate within the labor movement regarding the commitment to class struggle, eventually Ben-Gurion's view, which was named 'constructivist socialism' and coincided with 'practical Zionism' prevailed. The idea of class struggle was abandoned and the gradual construction of a strong infrastructure for a Zionist-socialist society was preferred. HOROWITZ & LISSAK, *supra* note 114, at 124-126, 140-142; SHIMONI, *supra* note 105, at 194-201.

socialist consciousness to which labor movement leaders were committed.[118] Although highly influential during the pre-state era and still dominant in Israel's early decades, the place of socialism has declined through the years and today has disappeared from mainstream public discourse almost entirely.

In contrast with socialism's decline, Judaism has gained power over the years. Initially, Zionism's relationships with Judaism were complicated and even paradoxical.[119] On the one hand, Zionism was a project of cultural revival and reconstruction of the Jewish identity and tradition. On the other hand, Zionism was not merely a secular movement, but one that was based on the negation of exile and denial of Jewish life in 19th century Europe. While the 'new Jew' rejected the 'old Jew' form of existence to the level of despise and disgust he also could not deny their commonalities. Ultimately, Judaism had a major role in the shaping of Israeli/Zionist collective consciousness. Zionism was a movement of Jews that aspired to create a Jewish nation; it emerged as a response to the growing anti-Semitism in Europe and the failure of assimilation; the territory it aspired to make its homeland was the mythic Land of Israel; biblical texts were widely used in Zionist rhetoric; and the movement adopted the Hebrew language and incorporated Jewish symbols in its flag.[120] Later, after Israel was established as a Jewish state and the religious strands within Zionism grew dominant,

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[118] ANITA SHAPIRA, *Sternhell's Complaint*, *in* NEW JEWS, OLD JEWS 316 (1997) (Hebrew). *See* also SHIMONI, *supra* note 105, at 201.

[119] S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY 89-93 (1985); BEIT-HALLAHMI, *supra* note 105, at 55-58.

[120] On the role of Judaism in shaping Zionist ethos and Israeli collective identity, *see*: Baruch Kimmerling, *State-Society Relations in Israel*, *in* ISRAELI SOCIETY: CRITICAL PERSPECTIVES 338-339 (Uri Ram ed.. 1993); EISENSTADT, *Id*. at 89-93; ZIONISM AND RELIGION (Shemu'el Almog, et al., 1994).

conflicts between state and religion, and between democracy and religion became a central part of Israeli politics.

The place of the individual in this ideological blend was marginal if not totally absent.[121] Ezrahi claims that "by elevating the spiritual and moral significance of the collective narrative, the religious, nationalist, and socialist Zionisms have converged in diminishing the individual. In all of these narratives, the individual in modern Israel is variously portrayed as misguided, culturally ignorant, assimilated, faithless, degenerate, materialistic, and egoistical."[122] Elsewhere Ezrahi argues that many Israelis regard the State of Israel "primarily as a collective expression of the Jewish people, not as a creation based on a social contract among free autonomous individuals,"[123] and that "Israelis tended to identify individualism with a lack of solidarity, narcissism, the materialist egoism of the 'economic man,' and capitalism, all of which appeared to oppose fraternity, personal sacrifice, and service."[124]

In other words, Zionism included a message for the individual Jew, but that message was not individualistic, since the individual was to become an organic part of the collective whole. Therefore, Zionism advocated a message of personal reform that would liberate the individual from his exilic condition and enable him to become the subject of the collectivist project and the bearer of the collective's tasks.[125]

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[121] YONATHAN SHAPIRO, AN ELITE WITHOUT SUCCESSORS: GENERATIONS OF POLITICAL LEADERS IN ISRAEL 26 (1984) (Hebrew)

[122] EZRAHI, *supra* note 108, at 83.

[123] *Id.* at 163.

[124] *Id*. at 258.

[125] STERNHELL, *supra* note 115, at 18-19; HOROWITZ & LISSAK, *supra* note 114, at 131-133.

Among these collective tasks, productivity, physical labor, self-defense, and security played a central role.[126] Although these tasks depict complementary aspects of the search for national revival, they also have had varied in prominence as the leading ideal of Zionism. Thus, at first, labor and settlement were the primary means to establish the modern link between the Jewish people and the Land of Israel, and the use of force was considered a matter of last resort. Subsequently, through a gradual process, the emphasis on security and militarism increased, as belief in a peaceful resolution to the struggle over the land lost its hold.

As I explain later, these values represented a vision of the Jewish people as an earthly, self-sufficient and productive nation. These missions required a certain type of 'Man' that would be able to perform these tasks, a fighter-worker person that did not resemble the pail, spiritual, soft image of the exilic Jew.

Not surprisingly, then, there was no place for PWD in the Zionist vision. The values Zionism endorsed were inaccessible to PWD and the images it employed were exclusionary. The following sections examine the subtle politics of the body that underlay the Zionist vision and that still plays a central mechanism in the marginalization of PWD. It is the ideology of "the chosen body," manifested in "Zionist idealization of health, power, and perfection," as Meira Weiss argues.[127]

b. The New Jew

[126] For a detailed discussion about the role of these values in the Zionist movement, *see* Part B.

[127] This is Weiss's main argument in her book: MEIRA WEISS, THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY 4 (2002).

The realization of the Zionist national vision was embodied in the image of the "new Jew," which emerged from the writing of Zionist thinkers and other writers of the era.[128] That vision incorporated strong bodily images, since the new Jew was not merely a person of ideals but also an imaginary figure in which those ideals and values were embedded.[129]

In general, the "new Jew" was imagined in contrast to the "old Jew." Anita Shapira suggests there were four models of the new Jew, with each representing various strands within Zionism and reflecting various dimensions of the image that eventually prevailed. The weakest among them was the enlightenment-based figure which embodied the aspiration to create a person whose personality synthesized the Jewish spiritual world and a liberal worldview.[130] The second model adopted a negative view of the old Jew, which ironically was grounded in anti-Semite stereotypes, as a person who lacks courage, dignity, integrity, physical fitness, and aesthetics.[131] The new Jew was supposed to exhibit those desired characteristics, with, as I elaborate below, a special emphasis on the body, its aesthetics and physical strength ("Jewery of muscles"). A third model, which Shapira found to be the most influential, emphasized power, pride and emotionality and focused on making the new Jew a motivated person who takes his destiny in his hands and that actively creates for himself a place in history; a person who lives close to nature,

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[128] *See* OZ ALMOG, THE SABRA – A PROFILE 127-153 (1997) (Hebrew). *See* also ANITA SHAPIRA, *The Myth of the New Jew*, *in* NEW JEWS, OLD JEWS 155, 157 (1997) (Hebrew).

[129] WEISS, *supra* note 127, at 18-20. Weiss's work shows how this neglected component of Zionist thought influences Israeli culture until today. It manifests itself, for example, in the popular use of genetic screening and high abortion rates due to fetus's "defects," and in high desertion rates and general treatment of newborns with disabilities, especially visible impairments that affect the child's appearance. It also is revealed in military-related contexts, such as the pre-military screening of youth to serve in "selective units" of the army, and in commemoration and bereavement rituals of the fallen.

[130] SHAPIRA, *supra* note 128, at 159-160.

[131] *Id*. at 160-162.

who cultivates the land; a worldly and not a spiritual person.[132] The fourth model was a socialist one, which, consistent with socialism's ideal of a just and equal society, rejected competition and egoism as capitalist values, and encouraged altruism and the subjection of the individual's desires to the collective will.[133] Notwithstanding conflicting elements among these four ideals, such as universalism versus particularism, and devotion to the Jewish people versus contempt towards the old (exilic) Jew,[134] an image with common characteristics has emerged: "a secular, modern person, who loves his people and his homeland, a person close to nature, a civilized man, a man of honor, integrity and courage."[135]

As I will demonstrate later, despite its seeming universality, the image of the new Jew was in fact gendered and exclusionary.[136] Therefore, when I talk about the new Jew I use masculine language and do not adhere to interchangeable masculine and feminine language as contemporary critical scholarship requires. This is an intentional choice: since the new Jew and its derivatives (the *Sabra* and the pioneer) were essentially heterosexual-able bodied-Ashkenazi-male figures, I find using a 'she' in that context a misleading act. I prefer to ignore the 'new Jewish woman' than to reconstruct her as an equal participant in the Zionist project.

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[132] *Id*. at 164-167.

[133] *Id*., at 167-168.

[134] *Id*., at 173; EISENSTADT, *supra* note 119, at 87.

[135] SHAPIRA, *supra* note 128, at 171.

[136] *See* Part A.d.

c. The Pioneer and the *Sabra*

The pioneer (the *halutz*) and the *Sabra* (the *tzabar*) are two concrete figures that exemplify Zionism's occupation with the Jewish body: the pioneer was primarily a pre-state icon, and the *Sabra* was the icon of the nation-building era.[137] The pioneer and the *Sabra* integrated in their bodies the national with the socialist project. They were both a product and a carrier of the collective and were expected to unconditionally serve that collective.[138]

The pioneer figure represented the Jew who transformed himself from exile to liberation, from an 'old Jew' to a 'new Jew.'[139] The ideal of pioneering was of 'avant-garde', a person who "consciously go[es] ahead of a broader mass of followers in carrying out a commonly conceived social project."[140] The pioneer represented the combination of Zionist ideological commitment with Zionist praxis of immigrating to Israel to make that ideology into reality.[141] His image was of a young person who left all behind and immigrated to Palestine to fulfill the Zionist missions of labor, defense and settlement by building the country with his own hands, cultivating its soil, paving roads and holding a rifle when necessary.[142] That image was a product of labor Zionism.

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[137] WEISS, *supra* note 127, at 5.

[138] SHAPIRA, *supra* note 128, at 168; HOROWITZ & LISSAK, *supra* note 114, at 129, 131; S.N. EISENSTADT, ISRAELI SOCIETY, 17 (1967); WEISS, *supra* note 127, at 19. As Weiss argues, unlike the American pioneer, "[t]he tropes of the pioneer and the sabra were cleverly packed to appear individualistic, while in fact represent[ed] a collective practice." *Id*. at 19. Individuals were expected to sacrifice their personal interest for the sake of the collective; therefore the pioneer was denied individuality. *Id*. at 19-22.

[139] On the competing ideals of pioneering among the left and right in Zionism and the triumph of the left, *see* HOROWITZ & LISSAK, *supra* note 114, at 129.

[140] SHIMONI, *supra* note 105, at 233.

[141] *Id*. at 234.

[142] SHAPIRA, *supra* note 128, at 168; HOROWITZ & LISSAK, *supra* note 114, at 129; EISENSTADT, *supra* note 138, at 17-19; SHAPIRO, *supra* note 121, at 15-16, 20-21.

Alternative visions advocated by the right wing revisionist movement of the pioneer as having a macho-like character with greater emphasis on militarism initially failed, but re-emerged later as heroism and sacrifice became more dominant themes.[143]

The *Sabra* was the first generation of native-born, who unlike the parents was strongly and authentically connected to the land, a natural worker and fighter.[144] The image of the *Sabra* was of a practical, worldly person, very direct in personal interaction ('*Dugri*'), simple in his clothes, and physically strong, ready for hard work and willing to fight for his people.[145]

The body of the *Sabra*, which was idolized as one that can carry out those missions, was portrayed as masculine, healthy, young, beautiful and attractive. More specifically, it was thin, tall, athletic, strong and suntanned.[146] This fascination with bodily characteristics diverged from the values that Judaism traditionally stressed, namely, intellectual and spiritual life. It also differed from the stereotypes surrounding the exilic Jewish body, which was depicted as pale-faced, weak, fragile, and unattractive.[147]

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[143] SHIMONI, *supra* note 105, at 235.

[144] WEISS, *supra* note 127, at 23; Almog, *supra* note 128, at 227. *Sabra* in English means prickly pear, a cactus plant typical to the landscape of Palestine/Israel (though ironically brought from Central America in the 18th century). Starting from the 1930s the sabra became a widely used cultural icon that represented the new generation's connectedness to the land and the authenticity of that connection. For a detailed analysis of the *Sabra*'s image, *see* Almog's book: The Sabra – A profile, *see* especially his discussion on the origins of the *Sabra* as a cultural icon, *Id*. at 14-26; *See* also WEISS, *Id*. at 18-26.

[145] WEISS, *supra* note 127, at 22-26. ALMOG, *supra* note 128. On the *Sabra* as a myth and the tension between mythology and reality in that figure, *see* ALMOG, *Id*. at 388-390.

[146] ALMOG, *Id*. at 132-133. Almog claims that these characteristics were alien to Judaism and fitted more the Christian-European, Roman based bodily standards. He further notes that those images were initially inspired by Soviet propaganda posters and later by charming Hollywood figures, such as Gerry Cooper and Johnny Weismuller ("Tarzan"); Shohat, *supra* note 158, at 41.

[147] *Id*. at 132-137.

Moreover, these features were about the physical experience of the new Jew in the world, his belonging to nature and connection to the land. For that purpose, health and physical fitness became central values in Zionist education, and the worldliness of the *Sabra* was depicted in romantic terms.[148] As Oz Almog has put it, "the *Sabra* was a person of open space – a youngster to whom the field is a home and physical activity is a habit and even a pleasure."[149]

The individual and collective physical rehabilitation of the Jew was perceived as interrelated to the moral and political one. As Max Nordau who coined the term 'Judaism with Muscles' or 'Jewery of Muscles,' maintained: "… [G]ymnastics and physical training are important for us Jews …. [W]e lack muscles and that can be developed through physical exercise…. It will give us self-confidence and self-respect."[150] Many Zionist activities were connected to physical fitness, from the establishment of various local Jewish sport associations mainly at the end of the 19th century in Europe,[151] to educational emphasis on physical training, demanding fieldtrips and developing scouting and camping skills of native-born *Sabras*.[152] Slogans connected to health and fitness were still popular in 1970s Israeli activities. Thus, one renowned motivating slogan to participate in sports activities taught: "a healthy soul in a healthy body," and another abbreviated the word *Sabra* to stand for "Youthful, Healthy and Fresh."[153]

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[148] *Id*. at 223.

[149] *Id*. at 226.

[150] Max Nordau, Address to Second World Zionist Congress (Basle, Switzerland, 1898).

[151] SHAPIRA, *supra* note 102, at 31-33.

[152] ALMOG, *supra* note 128, at 263-288.

[153] TZaBaR equals TZa'ir, Bari, Ra'anan.

The admiration for masculinity and physical fitness entailed the negation of the characteristics that the new Jews attempted to overcome and transform. Just as the Zionist ideals had a real effect on the character of the pioneer and the *Sabra*, they also shaped the negative attitudes towards those who did not live up to that vision. Thus, for example, the rejection of the Diasporic Jew as weak, fearful and submissive informed the condemnation of European Jews who survived or even those who died in the Holocaust for not forcefully resisting the Nazi regime and for being "led like sheep to slaughter."[154] The negation of exile was understood by the young generations not only as negation of the Jewish existence in exile, but the negation of the 'exilic Jew' himself, a term which represented the opposite of the *Sabra*'s ideal.[155]

d. Exclusion and Difference

Yet the fascination with strength and power had more subtle consequences, and recent ideological critique has exposed the impact on the inclusiveness of the Zionist project. Contemporary critical studies of Israeli citizenship re-read those images as cultural texts, and in a manner similar to critical investigations of Whiteness,[156] demonstrate that the Pioneer and the *Sabra*, although portrayed as abstract and genderless figures, were in fact exclusionary fictions. Some of these critiques also show how the design of historical arrangements and institutions reflected preferences for hidden values

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[154] That idiom was first used in a pamphlet published by Abba Kovner in 1941 in Ghetto Vilna, calling Jews to resist the Nazis. *See* SHAPIRA, *supra* note 102, at 447-451, for a historical and cultural analysis of that idiom.

[155] TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST (1991) (Hebrew); SHAPIRA, *Id*. at 449.

[156] *See, e.g.* WHITENESS: THE COMMUNICATION OF SOCIAL IDENTITY (Thomas K. Nakayama & Judith N. Martin eds., 1999); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); WORKING THROUGH WHITENESS: INTERNATIONAL PERSPECTIVES (Cynthia Levine-Rasky ed., 2002).

and unstated norms, and how their relics continue to inform contemporary Israeli politics.[157] Most obvious is the construction of the Palestinian as the ultimate Other of the Zionist imagination.[158] The Palestinian people who inhabited and cultivated the land of Palestine clearly could not have a share in the Zionist pioneering ethos or its nation-building project.

Even more revealing has been the critique that the abstract image of the new Jew was exclusionary also with regard to Jews themselves. One such excluded group was the Mizrahi ("Oriental") Jews. The immigrants who came from Arab and North African countries were treated not only with arrogance as exilic Jews who needed to be transformed, but also with paternalism as primitive people who needed to be educated and civilized.[159] The Sabra's body, although suntanned and strong, was imagined as a White Euro-Christian figure, modeled with features of the Greek sculpture.[160] This was in part a response to Jew's perceived 'blackness' due to their popular portrayal as dark-haired and dark-skinned, a portrayal that did not fit the Aryan model of the perfect body

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[157] *See*, for example, a structural economic analysis of the formation of the Ashkenzai-Mizrahi labor relations, Shlomo Svirsky & Deborah Bernstein, *Who Worked in What, For Whom, and for How Much? – The Economic Development of Israel and the Formation of the Ethnic Division of Labor*, *in* ISRAELI SOCIETY: CRITICAL PERSPECTIVES 120 (Uri Ram ed., 1993) (critiquing the assumption that Mizrahi Jews came from primitive and traditional societies and that the receiving Israeli society was a developed and modern one).

[158] ELLA SHOHAT, ISRAELI CINEMA: EAST/WEST AND THE POLITICS OF REPRESENTATION 38-53 (1989) (analyzing the place of the palestinian-Arabs in early Israeli cinema, especially in the movie *Sabra* (Tzabar, 1933)).

[159] Ella Shohat, *Sepharadim in Israel: Zionism from the Standpoint of its Jewish Victims*, 19/20 SOCIAL TEXT 1 (1988); Henriette Dahan-Kalev, *Feminism Between Mizrahiyut and Ashkenaziyut*, *in* SEX GENDER POLITICS: WOMEN IN ISRAEL 217 (Dafna Izraeli et al eds., 1999) (Hebrew); Ella Shohat, *Id.* Chapter 3; ALMOG, *supra* note 128, at 153-161.

[160] ALMOG, *supra* note 128, at 133. On the relations between "white"-ashkenazi concepts of beauty and their impact on Mizrahi persons, *see*: Henriette Dahan-Kalev, *"You Are So Beauty –You Don't Look Marrocan"*, 6 ISRAEL STUDIES 1 (2001).

that was prevalent in 19th century Europe, especially in Germany.[161] European Zionism's typical reaction to those stereotypes was dual: it denied them on the one hand, but sought to change them by transforming the Jew on the other.

Similarly, or even more so, the "chosen body" was a gendered body – specifically, a heterosexual male body. In its search for masculinity and power, the Zionist movement sought to eradicate feminine and homosexual characteristics that were negatively attributed to the old exilic Jew.[162] As previously argued, Zionist thinkers ironically adopted the negative anti-Semitic stereotypes of the Jew. These stereotypes were based on ridiculing Jewish maleness, which was perceived as inherently and pathologically deformed.[163]

Such a feminist critique has encountered unique difficulties. In Israeli education and public discourse, Zionism was constructed as an egalitarian movement, where women were integral part of the national effort. Women even served as a source of pride, a proof for Zionism's egalitarianism and openness. Heroic stories of the era tell about women pioneers and women soldiers and fighters; pre-state era institutions included women representatives and some were even concerned solely with women's rights, needs and social conditions; legally, when the state was established, women were subject to mandatory military service just like men, enjoyed the right to vote from the very beginning, and were allegedly protected by the law relatively early, through the

[161] SANDER GILMAN, FREUD, RACE, AND GENDER 19-22 (1993).

[162] WEISS, *supra* note 127, at 15.

[163] DANIEL BOYARIN, *Outing Freud's Zionism; or, The Diaspora Politics of a Bitextual Jew*, *in* QUEER DIASPORAS, 71 (Cindy Patton & Benigno Sánchez-Eppler eds., 2000).

enactment of Women's Equal Rights Law, 1951, and other protective labor laws.[164] However, in reality these achievements had not been advocated by Zionist male leaders, but came from hard-won struggles fought by women. Furthermore, as hard-earned accomplishments, they presented a continuing source of conflict, frustration, and compromise.[165] Put simply, and without undermining the early and even impressive achievements of Zionist feminists, neither Zionist or Israeli society was never an egalitarian society. The place designated for women was either a traditional role of caring for the men's and children's needs, or, in rarer cases, adopting the demanding masculine characteristics that the new Jew's image posed.[166] The feminine-masculine dipole presented with a no-win situation since the space for negotiating these competing identities was limited and constraining. Feminist critique of the Zionist ethos therefore primarily focused on showing that despite popular views, Israeli society, like all other societies, was an unequal society. They demonstrated how traditional assumptions about gender roles were never really challenged by the movement, and at the very least, were

[164] Women's Equal Rights Law, 5711-1951, 1 L.S.I (Laws of the State of Israel) 171 (1948-51).

[165] On the struggles of the women pioneers for representation, participation, and voting, *see* Dafna N. Israeli, *The Women Workers' Movement: First Wave Feminism in Pre-State Israel*, *in* PIONEERS AND HOMEMAKERS: JEWISH WOMEN IN PRE-STATE ISRAEL 183 (Deborah S. Bernstein ed. (1992); Sylvia Fogiel-Bijaoui, *On the Way to Equality? The Struggle for Women's Suffrage in the Jewish Yishuv*, 1917-1926, *in* PIONEERS AND HOMEMAKERS: JEWISH WOMEN IN PRE-STATE ISRAEL, 261 (Deborah S. Bernstein ed., 1992); and Pnina Lahav, "*When the Palliative Only Damages:" The Debate Over the Women's Equal Rights Law*, 46/47 ZEMANIM: JOURNAL OF HISTORY 149 (1994).

[166] For two excellent collections on the complexities in women's positions and roles in early Zionism, *see* JEWISH WOMEN IN THE *YISHUV* AND ZIONISM: A GENDER PERSPECTIVE (Margalit Shilo et al eds., Jerusalem, 2001) (Hebrew), particularly: Henry Near, *What Troubled Them? Women in Kibbutzim and Moshavim*, *Id*. at 162, and Yael Feldman, *Equality Between the Sexes or Gender Discrimination? Mativa Ben Yehuda's Palmah Story*, *Id*. at 175; and PIONEERS AND HOMEMAKERS: JEWISH WOMEN IN PRE-STATE ISRAEL (Deborah S. Bernstein Ed., New York, 1992), particularly: Margalit Shilo, *The Women's Farm at Kinneret, 1911-1917: A Solution to the Problem of the Working Woman in the Second Aliyah*, *Id*. at 119. On the representation of these two roles in early Israeli cinema *see*: Ella Shohat, *Making the Silences Speak in the Israeli Cinema*, *in* CALLING THE EQUALITY BLUFF: WOMEN IN ISRAEL (Barbara Swirski & Marilyn P. Safir eds., 1991)

never a first priority, as they were always subjected to the ultimate goal of nation-building.[167]

The queer critique of Zionism faced different challenges. The exclusion of lesbian and gay men from Israeli history is not a surprising revelation, and no one would claim that they were ever part of Zionist collective imagery. These scholars therefore have turned to an examination of the deep cultural assumptions and social conditions that underlay Zionist exclusionary mechanisms, especially with regard to gay men. Yet their contribution to a critical understanding of Zionist imagery extends much further, as it enhanced the feminist critique, and, as I shall later argue, laid the foundations for the disability critique.

In an original and brilliant work, Daniel Boyarin deconstructs Zionism's view of masculinity and presents a genealogy of the place of homosexuality and femininity in European Jewish culture. He shows not only how things went wrong, but also how they could have been different. Claiming that Judaism's gender structure was once a site of "oppositional resistance" to the dominant culture,[168] Boyarin suggests that in the pre-modern era, the Talmudic culture deployed an ideal of a husband and man who was marked by "scholarliness, quietism, modesty, and a spiritual aptitude," characteristics that made him not male or Aryan enough for the dominant culture, but not less an object of female desire within the Jewish community.[169] However, that perception changed

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[167] YAEL YISHAI, BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS, (1997); Deborah S. Bernstein, *Human Being or Housewife? The Status of Women in the Jewish Working Class Family in Palestine of the 1920s and 1930s*, *in* PIONEERS AND HOMEMAKERS: JEWISH WOMEN IN PRE-STATE ISRAEL 235 (Deborah S. Bernstein ed., 1992).

[168] BOYARIN, *supra* note 104, at 23.

[169] *Id*. at 63-64. Boyarin celebrates these cultural differences since in his account they were not defined against the dominant culture's standards but developed their own terms and hierarchies based on

when prominent Jewish figures adopted the "anti-Semitic imagination" and accepted popular views associating the Jew with femininity and homosexuality.[170] Modern leadership responded by endorsing assimilation or committing to Zionism, two seemingly contradictory solutions that were essentially based upon accepting those stereotypes and working to eradicate them by transforming the Jew into a masculine, healthy and normal male.[171]

As I have already suggested, the queer critique's contribution to my inquiry is more than merely pointing to another excluded social groups. In the next section, I show how the queer critique exposes the connection within Zionism between scientific anti-Semitism and arrogant intolerance towards bodily "imperfections" and "abnormalities."

e. Zionism's Ableism

> *The Jew had a designated central role in the European discourse on the Other. The anti-Semitic European discourse depicted the Jew as ugly, hunchback, dirty, with deformed physically proportions and pathologic sexuality.*[172]
>
> *… The State of Israel is first and foremost, a state of rescue and cure of masses of Jews, the cure of the body and the balancing of the soul. It is primarily about –*

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local practices (*Id*. at 4, and 127-150, esp. at 142). Nevertheless, although Boyarin's political project is to "reclaim the eroticized Jewish male sissy," (*Id*., at xxi), he does not fall into nostalgic notions of Jewish egalitarianism. He acknowledges that dominance of men over women in the Talmudic era did exist, yet finds it oppositional since it was not based on the superiority of masculinity over femininity, but mainly on their exclusion from the Torah (*Id*., at xx-xxi, and 151-185, esp. 153-155).

[170] Boyarin shows that Freud "has been putting himself into the very categories that the antisemitic discourse of the nineteenth century would put him in: feminized, pathic, queer – Jewish." *Id*. at 209. With regard to Herzl he observes that "He adopted all of the most vicious stereotypes of Jew hatred … Threre were two kinds of Jews in the world. The "true Jews," the manly, honorable, dueling … were Zionists. The others were … frightened, unresponsive to beauty, passive, queer, effeminate…". *Id*. at 296.

[171] Boyarin shows that Zionism and assimilation were not that far apart as options, *see Id*. at 277. Of course, the emphasis on healthy and masculine body was not unique to Zionism but prevalent in other European cultures as well which were influencial during the 19th and early 20th century, *see* GEORGE MOSSE, THE IMAGE OF MAN: THE CREATION OF MODERN MASCULINITY (1996). In another work Mosse also discusses how the politics of the body in German nationalism had also exclusionary effects with regard to various disadvantaged groups, GEORGE MOSSE, NATIONALISM AND SEXUALITY (1985).

[172] Gluzman, *supra* note 102, at 146.

> *the healthy Jew, the Jew who senses a solid ground and a meaning to his life, the Jew who is liberated from the fear of discontinue, the Jew whose life is not so fragile anymore (lo tluyim mi-neged). And first things first – balancing of the nerves of the nation … The nation is still sick … A progressive national insurance legislation is one path to create a mental balance on the way to cure the nation.*[173]
>
> *The State of Israel is the state of the Jews who want to be healthy.*[174]
>
> *Haim Ben-Asher, The Knesset Protocols.*

Substantiating the claim that the physical and mental pathologies that were attributed to the Jew were in fact gendered and sexualized required rigorous analytical work. Nonetheless, a plain reading of these very texts would reveal an open and explicit rejection of, and even disgust with, the sick and disabled body. Additionally, it exposes an ambition to reform that body, to re-invent it, or for the first time, to re-make it as a vital part of Jewish identity and pride. As Meira Weiss claims,

> Zionism was not just a national, political, and cultural movement of liberation, but also a bodily revolution. … [It] involved a 'return' to Zion, to nature, and to the body. … The essential feature of Jewish collectivity … was traditionally disembodied; Zionism regarded itself as a revolutionary attempt to re-embody the Jew.[175]

Although no significant academic work has been dedicated to uncovering the ableist assumptions that underlie Zionism and to the exclusion of PWD from that national project, it seems safe to argue that if Zionism was about redeeming the Jew from his femininity and homosexuality, it was even more fundamentally about liberating him from his physical and mental pathologies, or in other words, from his perceived inherent condition as a disabled person.

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[173] Haim Ben-Asher (*Mapai*), The Kneset Records to the National Insurance Law, 11 Knesset Records, 1296 (1952).

[174] Haim Ben Asher (Mapai), *Id*. at 1297.

[175] WEISS, *supra* note 127, at 1.

The connection between the queer and the disability critiques of Zionism can be found in the pervasively growing scientific discourse that has evolved during the 19th century and which expressed itself in extreme medicalization of the body and of sexuality.[176] Sander Gilman's work shows how Jews, like other social groups, were racialized through a scientific depiction of their body as impaired and damaged. Gilman provides a detailed analysis of the ways in which the practice of infant circumcision rendered the Jews different from an "objective" medical perspective, as imperfect males and as a source of sexually transmitted diseases.[177] He shows that Jews were perceived not only as physically but also as mentally ill.[178] They were commonly depicted as suffering from sexual pathologies and as predisposed to various mental disabilities, especially nervous illnesses of all types, most well known among them hysteria, then considered a typically female mental illness.[179] Additional diseases studied by Gilman as historically attributed to Jews include leprosy, tuberculosis, cancer, syphilis, alcoholism, homosexuality, drug-addiction, and – "Jewishness." These, together with other well-known physical characteristics of the Jew as ugly, long-nosed, hunchbacked, dirty, dark haired and skinned, physically disproportionate, etc., all contributed to and derived from the excessive obsession of the era with bodily characteristics and racial classification

[176] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (trans. by Robert Hurley, New York, 1978).

[177] GILMAN, *supra* note 161, at 49, 61. For Gilman's discussion of the cultural meaning of circumcision, *see*: *Id.* at 49-92, where he claims, for instance, that "Circumcision marks the Jew as damaged and potentially damaging." (*Id.* at 51).

[178] *Id*, at 37.

[179] *Id*, at 93-113. Gilman mentions additional mental diseases associated with Jews, such as neurasthenia (*Id.* at 100), paranoia (*Id.* at 140, 146), and schizophrenia (*Id.* at 148). *See* also the following on diseases historically attributed to Jews: Joseph Jacobs & Maurice Fishberg, *Nervous Diseases*, in Jewish Encyclopedia: http://www.jewishencyclopedia.com/view.jsp?artid=193&letter=N (last visited: 9/15/2004).

which reflected and constituted scales of normality and abnormality, of perfection and imperfection.

Hence, the same 19th century scientific and medicalized discourse of which the normalizing power, regulatory practices, and oppressive effects were so brilliantly exposed by Michel Foucault, gave rise to various phenomena with connections both subtle and intense. Thus, the rise of scientific anti-Semitism and the emergence of Zionism, the pathologization and medicalization of homosexuality and the invention of heterosexuality, the dehumanization of PWD and the emergence of disability as a distinct category were all products of the same era and were connected not only by the similar mechanisms that shaped them but also through the ways they cooperated to constitute each other.[180] Consequently, the Jew, the queer, the woman, the disabled, were all inferior and were used as interchangeable labels to denigrate the members of those social groups.

For Mosse, Gilman, Boyarin, and Gluzman, then, the importance of the bodily characteristics of the Jew is connected to his feminization and to the depiction of the Zionist project as a project of masculinity.

Yet, even more relevant to the present purpose, is the fact that their critique reveals the way health-ism and able-ism operated as specific mechanisms of exclusion from which PWD suffer. Healthism and ableism, I argue, were inseparable parts of the Zionist project and PWD were therefore destined to be outcasted from the Zionist imagery. PWD were perceived as too sick, too deformed, too weak, and too dependent; in

[180] See LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY (1995).

other words – they represented all that Zionism wanted to disconnect the new Jews from. It is not only that the occupation with labor, physical fitness, and militarism prevented PWD from being full participants in the new Hebraic society in the physical sense. But more importantly:

> *Handicap is … a reminder of the Jew's 'crippled' condition in pre-Israel times, undermining the dreams, the exaggerated visions of naïve Israeli ideology*, and is therefore rejected as counterproductive to the enterprise of rebirth.[181]

This is why I find Herzl's alternative vision, which was never adopted, so powerful. Remember his neglected statement:

> *The promised land [is] where we could have ugly nose, black or red beard, and a crippled leg without being laughed at. … [W]here we could have dignity … and live in peace with all nations.*[182]

As noted, this depiction of the Zionist vision is rare and marginal, but it opens a window to a possible alternative understanding of difference in general, and of disability in particular. It suggests that "a place of our own" is a place of dignity for "who one is," and *not where one is transformed to meet others' expectations*. Therefore, it could have constituted an inclusive and truly egalitarian Zionist project.

I contend then, that within the hierarchy of values and bodies that Zionism created, PWD were located at the bottom. Yet not all PWD were treated equally. The second part of this chapter explores the roots for the hierarchy of disabled bodies that has evolved within Israeli society and that consequently divided its disability community. It claims that PWD were indeed at the bottom unless their disability was a direct result of

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[181] WEISS, *supra* note 127, at 91.

[182] *See supra* note 102.

participating in activities that were part of fulfilling the Zionist project, of achieving the primary values that Zionism endorsed.

B. Embracing Heroic Bodies: Disability in the Service of the Collective

> *In a nation in arms and an army of labor, the desired bodies are those of soldiers and workers. People unfit for such national services are bound to be deemed marginal. And that is exactly the case in Israel.*
>
> *Meira Weiss, The Chosen Body.*[183]

Meira Weiss's words concisely describe the roots of PWD's marginal place in Israeli society and the sources of the differentiated treatment that various PWD groups receive. In the following section, I will delve into that process.

I will focus on two sets of values: labor and productivity, on the one hand, and self-defense, security, and militarism on the other. Through these, I will develop my primary argument that the values endorsed and objectives advanced by the Zionist movement were inaccessible to PWD, and will provide a more concrete picture of the bodies that the Zionist movement did embrace and valued.

By exploring the historical and ideological meaning of these collective values I further show their decisive force in bringing about the differentiation and fragmentation among the various groups of PWD. Therefore, the fundamental point to me is not only that persons who participated in accomplishing these collective missions were valued,

[183] WEISS, *supra* note 127, at 88.

but also that those who became disabled as a result of their participation in those missions were valued as well, and sometimes even glorified, *despite* their disabilities.

Finally, I examine the ideological shift that took place within Zionism with the decline of labor and the rise of security and militarism, and its impact on the changing hierarchy of bodies as the soldier's heroic figure has surpassed the naïve image of the worker. I suggest that this shift can shed light on the hierarchy that has evolved between the more valued fighters to the less valued, although not totally devalued, workers.

a. Productivity and Labor – Zionism's Early Phase

> *We are a parasitic people. We have no roots in the soil; there is no ground beneath our feet. And we are parasites not only in an economic sense but in spirit, in thought, in poetry, in literature, and in our virtues, our ideals, our higher human aspirations. … We are nothing in the eyes of other peoples either.* [184]
>
> *From now on, our primary ideal should be – labor. We have been impaired by labor* [lakinu ba-avoda] *(I do not say sinned because it was not our fault that we have reached this point) and by labor we will be cured. We should make labor the center of all our aspirations; the foundation of all our creations. If we'd only realized the ideal of labor – we could be cured from the affliction we were contaminated with, we could heal our rapture from nature*.[185]
>
> *A.D. Gordon.*

Productivity and labor were highly estimated values in the Zionist movement and remained dominant in early Israeli society until the 1970s. As A.D. Gordon's words demonstrate, the cure to the "parasitic" condition of the Jew was labor. Using images of impairment and healing Gordon idealized the productivization of the Jew through labor as the only way to recreate him as an earthly and authentic person.

[184] A.D. Gordon, Some Reflection, (1911) (Hebrew).

[185] A.D. Gordon, On Labor, (1913).

The connection between productivity and labor is rooted in 18-19th century Jewish Enlightenment (*Haskala*) ideas. Inspired by European Enlightenment, the *Haskala* was an intellectual movement which promoted the secularization of Jews and their assimilation in the European countries where they lived.[186] The main idea was epitomized in the call to be "Jewish at home and human outside." A central aspect in Enlightenment belief was the productivization of the Jewish people, by praising physical labor and encouraging Jews to engage in worldly fields such as agriculture, crafts, arts, and science.[187]

The growing value of productivity in that era was connected to the changing economic structure of 17-18th century Europe and the rise of capitalism,[188] and was rooted in Enlightenment ideas about citizenship. But for the *Haskala*, focusing on productivity was also a response to the condition of the Jews in exile who were banned from working in more productive occupations (e.g. unable to own land and therefore to cultivate it and support themselves), to the negative attitudes that developed among Jews towards physical labor, and to the related anti-Semitic stereotypes of the Jews as 'parasites.'[189]

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[186] BEIT-HALLAHMI, *supra* note 105, at 18-27.

"Haskala" Encyclopædia Britannica from Encyclopædia Britannica Premium Service. http://www.britannica.com/eb/article?tocId=9039461 (last visited: 9/15/2004).

"The Haskalah" (by Shira Schoenberg) Jewish Virtual Library http://www.jewishvirtuallibrary.org/jsource/Judaism/Haskalah.html (last visited: 9/15/2004).

[187] SLUTSKY, *supra* note 114, at 37-39; BEIT-HALLAHMI, *Id.* at 54; "Haskala," Encyclopædia Britannica, *supra* note 186; "The Haskalah," Jewish Virtual Library, *supra* note 186.

[188] SLUTSKY, *supra* note 114, at 33-35.

[189] *Id*, at 33-48.

In the Zionist movement, which followed the *Haskala* and was influenced by its ideas, productivity became a central value with an added collectivist meaning of nation building.[190] While the *Haskala*'s concern was successful assimilation within Europe, Zionism, which emerged after the disillusionment from Enlightenment's promises, was about finding a political solution to the "Jewish question" outside Europe – in Palestine, the historic Land of Israel.[191] Productivity in Zionist thought was connected to ideas of self-sufficiency and self-reliance of Jews as a people, and to individual reform through productive labor that would make the individual a useful member of society, and by that will serve the interest of the collective, as well.[192]

For Zionism, labor became a central value that established the contemporary link between the reviving Jewish nation and its historical land. Moreover, according to that view, only the sweat and labor that were invested in the land could provide the justification for defending it.[193] In David Ben-Gurion words:

> At the center of the realization (*hagshama*) of Zionism, at the center of the building of the land, at the center of the settlement and the *Aliya*, at the center of redemption and resurgence (*tkuma*) – we see labor. Labor is the breath of the *Yishuv* and the Zionist enterprise; Hebraic labor is the glue between the nation and the land, the covenant of life and future that we re-endorse with the land of our past. Labor is the only guarantee to our integration and groundedness in the land we were disconnected from for thousands of years.[194]

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[190] *Id*. at 41-42.

[191] EISENSTADT, *supra* note 119, at 85.

[192] STERNHELL, *supra* note 115, at 83; Abraham Doron, *The* Histadrut*, Social Policy and Equality*, *in* THE *HISTADRUT* FROM WORKERS SOCIETY TO TRADE UNION 693, 695 (Yosef Gorny, et al eds., 2000) (Hebrew).

[193] SHAPIRA, *supra* note 102, at 146.

[194] BEN-GURION, *The Worker in Zionism*, *in* FROM CLASS TO NATION, *supra* note 112, at 301.

As this quotation demonstrates, labor as a Zionist value derived its power and form from both socialism and nationalism, which collaborated to glorify its place in the Zionist movement's early ethos.

For socialism, manual labor was the number one productive power.[195] But the broader meaning of labor and the idealization of labor made it part of the effort to establish in Palestine a new society, based on principles of justice and equality; one that would serve as an example to socialist ideas, including a large based working class and a central economy with extensive state involvement in the market.[196] For that purpose, a strong working class was essential as the class that will lead the revolution and will found a classless society.[197] These and additional socialist ideas of solidarity and mutual aid among the workers were reflected in the goals of the various forms of cooperative and other organizations which were established by the pre-state community in Palestine, including labor unions, sick funds, political parties and associations (such as *Ahdut Ha-Avoda*), and diverse forms of communal life, most famous among them the *kibbutz* and the *moshav*.[198]

But labor was also a significant aspect of romantic nationalism that traditionally praised the return to nature and the simplicity and authenticity of village life.[199] In Zionism, it was manifested in promoting the connection between a nation and its land through cultivation, and in physical labor as a means of salvation to the Jewish people

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[195] ANITA SHAPIRA, VISIONS IN CONFLICT 360 (1989) (Hebrew).

[196] SHAPIRA, *supra* note 128, at 167-169; SHAPIRO, *supra* note 121, at 20-23.

[197] SHAPIRA, *supra* note 195, at 360-364; and SHAPIRA, *supra* note 118, at 310.

[198] EIZENSTADT, *supra* note 119, at 20-21; ZEEV TZAHOR, ON THE ROAD TO *YISHUV* LEADERSHIP 8-75 (1981) (Hebrew).

[199] STERNHELL, *supra* note 115, at 39; SHAPIRA, *supra* note 114, at 15.

that had been spoiled during hundreds of years of unproductive life.[200] From a nationalistic perspective, fostering a broad-based Jewish working class was necessary for the creation of an independent Jewish society.[201] The less romantic aspect of this ideal was that the "conquest of labor" was not only an inner-Jewish issue, since it aimed at taking that labor from the hands of the Palestinian-Arab workers. The ultimate goal was conquering the Palestinian land through labor.[202] From the beginning of the 20th century, it was widely believed and agreed within the Zionist movement that the Jewish people's right over the Land of Israel cannot be accomplished solely by claiming the historical right over the territory and using political means, but would ultimately be earned through physical labor, and it is the worker who was to fulfill that right.[203] Later on, while labor will remain a vital tool for that purpose, its role will decline and a more militaristic approach will emerge.[204]

In that era the worker (*ha-Poe'l*) became the subject of the national revival project.[205] For early labor Zionism the "Hebraic worker" (*ha-Poe'l ha-Ivri*) epitomized the ideology of pioneering and symbolized the transition to the purest type of productivity, that which involved manual labor and working the land. [206]

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[200] ALMOG, *supra* note 128, at 254-256. See also SLUTSKY, *supra* note 114, at 168-172.

[201] SHAPIRA, *supra* note 118, at 310.

[202] GERSHON SHAFIR, LAND, LABOR AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT 1882-1914, Chapter 3 (1989), particularly at 81. On the complex relations between the conquest of labor and the conquest of land, *see*: SHAPIRA, *supra* note 114; SLUTSKY, *supra* note 114, at 194-203.

[203] SHAPIRA, *supra* note 128, at 100; STERNHELL, *supra* note 115, at 88-92.

[204] *See infra* Part B.b.

[205] STERNHELL, *supra* note 115, at 155.

[206] LEV LUIS GRINBERG, THE HISTADRUT ABOVE ALL 20 at FN2 (1993) (Hebrew).

But the spread of the worker's image was wider than the narrow group of people that actually tried to live up to it, since many more people identified with the ideal and were proud of its fulfillment. According to Sternhell, behind the notion of the worker was not a classical Marxist distinction between the proletariat and the bourgeoisie (the capital holders), but between "producers" and "parasites."[207] As Sternhell explains, "the producing class was made up of all sectors that shared in the process of production, from the workers standing in the production line to factory owners and shareholders. … Thus, the productive worker had an interest in the success of the factory in which he worked, and there came into being a communion of interests between all the productive elements in society."[208]

Labor, then, was the common ground for the nationalist and socialist aspirations of the Zionist forebears and became the mutual interest that united the Zionist movement in its first decades. However, beneath it was productivity that connected between non-socialist circles and the idea of labor, and thus enabled those groups to support the labor movement which became the dominant strand within Zionism.[209]

With the generational shift, from pioneers to *Sabras*, the relation to labor changed. While the pioneers adjusted themselves with great effort to manual labor out of ideological commitment, the *Sabras* were natural born farmers. They were raised by that ideal, and since they practiced labor in their daily lives their love for nature and labor was

[207] STERNHELL, *supra* note 112, at 8. Sternhell stresses that this was not a unique Zionist creation, but a local version of national socialism which emerged in Europe as a response to anti-Marxist and anti-reformist trends, and which reflected a shift in emphasis from distribution to production (*Id.*).

[208] *Id.* at 161. According to Sternhell "This was also the nature of the distinction between productive capital and parasitic capital. Productive capital was capital invested in an enterprise. Such capital contributed to an increase in national wealth; it created jobs and competed with foreign industries." (*Id.*).

[209] SLUTSKY, *supra* note 114, at 41-42.

considered more spontaneous and authentic.[210] A popular lullaby that was written around 1929 expressed that expectation:

> Rest in peace my son … here you shall grow, here you shall mature
> In the Land of Israel,
> Towards the joy, towards labor,
> Like father you will become a worker.[211]

For PWD there was no place in a world of worship and adoration for productivity and labor. The effort to cure the Jew from his "parasitic nature" and the belief in hard physical work as the ultimate answer for that "illness" were intolerant towards people who could not live up to that ideal and who were perceived ill and dependant themselves. Disability stood in total contradiction to the language and images employed by the Zionist vision. It was "a reminder of the Jew's 'crippled' condition in pre-Israel times," as Meira Weiss argued. The worthy bodies of the workers were so treasured and idolized for their physical and mental health that it seems that no room or vocabulary were left to include 'deformed' or 'imperfect' bodies.

Yet there was a group of PWD who did transcend that wall of bodily (im)perfection, While the majority of the population of PWD lived a life of poverty and depended on private charity during the pre-state era, the workers generally enjoyed a much better system of social responsibility in case of injury. The *Histadrut* (The Union Federation of Labor), an organ of the labor movement and the largest labor union in Palestine, established various mechanisms of social insurance to its members and lobbied before the British authorities for the enactment of the Workers' Compensation

[210] ALMOG, *supra* note 128, at 226-228.

[211] Imanuel Harussi, Rest My Son, Rest in Peace (Cited in: ALMOG, *supra* note 128, at 53).

Ordinance, 1927. Although limited due to lack of resources, the Histadrut's services were provided to any Jewish worker who was injured, be the circumstances of injury work related or not.

It is not surprising, therefore, that when the State of Israel was established and a general social security mechanism was created, the majority of PWD were totally neglected and their interests were easily compromised. Left to the mercy of a minimal public assistance program (*Sa'ad*), they now lived on a public charity system with a little added value than the previous private-based one. At the same time, injured workers benefited from an advanced and comprehensive disability insurance that was considered the flagship of the new National Insurance Institute. Only in 1974 was a disability insurance program enacted, but it was still insufficient as it was based on principles of need and provided less economic security to its recipients.

I argue that the distinction between valued and devalued, worthy and unworthy bodies has directly contributed to the crystallizing hierarchy of welfare benefits that began to emerge during the pre-state era. For people whose body represented the Zionist ideals and that were able to serve these national tasks there was a place of value in the public imagery, even if they were injured. In fact, this was so not *despite* their disability, but *because* of their disability. Because disability was perceived as a personal disaster, a damaging event, the collective felt responsible for compensating those who were injured. Consequently, a workers' disability was understood differently – it was perceived as a sacrifice, an event that the commitment to national ideals has brought upon him or her.

With time, the centrality of labor as a principal value in Israeli society has eroded. Two processes have played a crucial role in its decline. One was the increasing belief in

military power as a means to establish a Jewish state in Palestine, a process which I discuss later in this chapter. The second was a general decline of the socialist influence in Israeli society and the rise of capitalism and individualism, especially since the 1970s (that is discussed in Chapter Seven). Unlike labor, productivity remained a dominant value which changed its meaning from a romantic idea with a socialist flavor to a capitalist oriented one, of free market economy and belief in will power and self-motivation as the reasons for economic success. Yet as I show later on, even in its initial form it was not an innocent ideal. Echoing Sternhell's claim regarding the basic distinction between parasites and producers in Zionist ethos, I argue that this dichotomy directly contributed to the construction of PWD as non-productive; consequently, it was the underlying motivation for the neglect of PWD in Israeli early social welfare policy. Thus, both meanings of productivity pose significant challenges for PWD since each meaning is based on somewhat different, but still exclusionary, social, cultural, and economic assumptions.

b. Self-Defense, Security, and Militarism – The Rise of Power in Zionism

From a cave of rot and dirt
In blood and sweat
A new race shall rise
Proud, generous, and cruel.

Anthem of the Zionist revisionist movement by Ze'ev (Vladimir) Zabotinsky.[212]

> *At the heart of the Zionist revolution that culminated in the creation of the State of Israel in 1948 was the transformation of the Jew from a member of a disempowered and vulnerable religious minority into an armed citizen-soldier of a sovereign state governed by a Jewish majority.*
>
> *Yaron Ezrahi, Rubber Bullets.*[213]

[212] Translated in: BEIT-HALLAHMI, *supra* note 105, at 102.

Self-defense was another cherished value of early Zionism. Like productivity and labor, it was connected to the interrelated projects of nation building and personal reform.[214] Zionism was a reaction to persecution and anti-Semitism that Jews faced in their countries despite the promises of equality.[215] After encountering growing violence against Jews at the turn of the 20th century, especially in Eastern Europe, self-protection and self-defense became major concerns.[216] Dreams of a state for the Jewish people were dreams about a place where Jews as a people and as individuals would feel safe and secure. Accordingly, the new Jew should be able to defend himself, his dignity and pride.[217] The words of the anthem of the revisionist movement, the right wing strand within Zionism (cited above), express this aspiration to become superior, strong and honorable. Consequently, as Ezrahi puts it, "Zionist ideology [that] has rested on a Jewish narrative of redemption, of return and liberation, […] has encouraged fantasies of force as monumental as the dream itself."[218]

Yet historically, while Jewish heroism and power were integral parts of the Zionist project from its early days, it took time for militarism to become dominant.[219,220]

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[213] EZRAHI, *supra* note 108, at 175. *See* in general his chapter on Historicizing the Fantasy of Jewish Power. *Id*., at 175-205.

[214] Dan Horowitz, *The Israel Defense Forces: A Civilianized military in a Partially Militarized Society*, *in* SOLDIERS, PEASANTS, AND BUREAUCRATS – CIVIL-MILITARY RELATIONS IN COMMUNIST AND MODERNIZING SOCIETIES 77-106 (Roman Kolkowicz & Andrzej Korbonski eds., 1982). Horowitz defines three dimensions of security in Zionist ideology: individual security, collective auto-emancipation, and "the rejection of the insecurity of Diaspora existence." (*Id*. at 82).

[215] SHAPIRA, *supra* note 102, at 19-23.

[216] *Id*. at 58-67.

[217] *Id*. at 29-37.

[218] EZRAHI, *supra* note 108, at 180.

[219] For an elaborated and detailed account of that process, *see* URI BEN ELIEZER, THE EMERGENCE OF ISRAELI MILITARISM 1936-1956 (1995). Ben Eliezer defines militarism as "a cultural phenomenon which indicates and reinforce the understanding of reality in which war, or organized violence, is a right and just solution for political problems" (*Id*., at 20), and that "militarism exists only when the use of

Today it is still a widely held view that Israel was established by peaceful political and legal means and not by force[221] and that the use of force was only a last resort, a matter of necessity.[222] According to Anita Shapira, the early defensive ethos was, at least on its surface, non-aggressive. The revisionist way that advocated a more offensive approach initially represented only a marginal voice.[223]

The labor movement dictated the tone, stressing that Palestine should be conquered through peaceful actions on the ground, such as immigration (*Aliyah*), settlement, legal purchase of the land and political negotiations with the British regime.[224] The mission of self-defense was accomplished by local brigades that defended Jewish settlements, or by the settlers themselves.[225] The fallen in violent encounters with the Palestinian-Arabs were depicted as workers that died while defending their land and harvest. According to the defensive ethos fighting was not their goal, but when needed the settlers were willing to fiercely defend the land that they acquired with sweat.[226]

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military power is perceived as legitimate, a value and a virtue, presented as right and just and often as a result of necessity" (*Id*., at 21).

[220] Shapira and Ben-Eliezer studied the roots of Israeli militarism and show its development from a marginal approach within Zionism to a principal method. Ben-Eliezer's book explores the rise of militarism and argues that militarism became an ideology. Shapira's work in LAND AND POWER details the transition from defensive to offensive ethos in Zionist approach to the use of force. *See* also BEIT HALLAHMI, *supra* note 105, at 112-116 on the triumph of right wing Zionism.

[221] BEN ELIEZER, *supra* note 219, at 13.

[222] SHAPIRA, *supra* note 102, at 9.

[223] The founder and most prominent advocate of the revisionist movement in Zionism was Ze'ev Jabotinsky, who opposed Labor Movement's emphasis on labor and production, and stressed that "unfortunately it is more important to know how to shoot, otherwise we would inevitably lose the settlement contest." BEN ELIEZER, *supra* note 219, at 16-17.

[224] SHAPIRA, *supra* note 102, at 68.

[225] Though some of them were more militant, their influence was minor. BEN ELIEZER, *supra* note 219, at 15.

[226] SHAPIRA, *supra* note 102, 146. Shapira illustrates that approach through an in length analyzes of the development of the myth of Tel Chai. Tel Chai was an isolated settlement in the Galilee. In 1920 a

Shapira later claims that the defensive ethos was an effective ideological concept which served to reconcile between the colonialist essence of the Zionist project, and the socialistic worldview of many Zionist settlers who felt committed to justice and had to deny the possibility of constant war as part of their vision.[227] The self-image that this ethos carried was one of the Zionist settlers as "persons of labor and peace" who came to defend Jewish land and pride, but did not come to fight.[228]

Within Zionism, the dominant approach to power changed its form over time, and was transformed from mostly reactive-defensive version to a more proactive-offensive mode. Scholars of Zionism's use of power agree that it gradually gained prominence in Zionist theory and practice since the 1920s. During the 1920s and 30s, violence rose in Palestine as a result of growing conflicts between the Palestinians and the Jews. During the 1940s violence further escalated as a result of encounters with the British regime, regarded by the Jews as a foreign colonizer.[229] World War II and especially the trauma of the Holocaust also contributed to the development of Israeli militarism, as they generated calls for revenge, furthered the negation of exile, and strengthened the voices that believed a Jewish state should be established soon and that this goal should be achieved even by force.[230] Shapira claims that the 1930s-1950s were the years of the rise of the

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deadly encounter between the Jewish settlers and local Arab took place and became a symbol of Jewish resistance in the Zionist movement. *Id*, at 141-156.

[227] *Id*. at 481.

[228] *Id*. at 146, 155.

[229] During those years underground military organizations of the pre-state Jewish community were established – the Haganah (1920), Etzel (1931), and Lehi (1940). Each became more militant and a stronger defender of the use of arms as a means to achieve national liberation.

[230] BEN ELIEZER, *supra* note 219, at 115-157; and SHAPIRA, *supra* note 102, at 377-402, 433-462.

offensive ethos.[231] Ben-Eliezer goes even further to argue that "in the years 1936-1956 the military based solution to the Arab-Jewish conflict increasingly became a value, a method, an ideology."[232]

During those years the image of the Zionist settler shifted and the emerging image of the new Jew as a "worker-fighter" embodied those tensions.[233] It gained visibility during the 1930s following the rising violence in Palestine and the growing debates within Zionism regarding the proper use of power. Shapira claims that it was then that the prestige of the fighter, as an ideal which is separated from the worker, started to spread.[234] That image was vividly portrayed by Yitzhak Tabenkin, a prominent educator in the Labor Movement, as "a person with a shovel in his hand and a rifle on his shoulder."[235] It was a person who is at once ready to work and willing to fight.

Interestingly, the evolution of the rise of the *Sabra* and the decline of the pioneer correlated with changing patterns of primacy among Zionism's collectivist values. While the pioneer image represented the effort towards conquering land though labor, the *Sabra* persona manifested a taken for granted connection to the soil and was admired for its fierce and courage.[236] Moreover, in this transition, the young *Sabras* had an actual important role. As a result of their natural, practical, worldly, and simple approach to the land, and as a product of their education to maintain the pioneering project that their

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[231] SAHPIRA, *Id*. especially at Chapters 6, 7.

[232] BEN ELIEZER, *supra* note 219, at 10-11. For a more detailed account, *see Id*., at 35-53.

[233] BEN ELIEZER, *supra* note 219, at 86. SHAPIRA, *supra* note 102, at 407.

[234] SHAPIRA, *Id*, at 347.

[235] SHAPIRA, *supra* note 128, at 169.

[236] Ben-Eliezer argues that that generation of native born was also the first to employ and promote a militaristic ideology, even before it penetrated the more general public discourse among neither the general society nor its leaders. BEN ELIEZER, *supra* note 219, at 10.

parents started, they urged the Zionist leadership to use more power, to show more muscle, and to be more proactive.[237]

The shift of balance between these competing value systems was completed after the 1948 War (the War of Independence). Although labor and productivity remained dominant values in Zionist movement and in Israel's early decades, self-defense, security, and militarism seemed to prevail. Ben-Eliezer claims that after the 1948 War militarism transformed, once again, from an ideology employed by exclusive elite groups to a general project of the entire Jewish society.[238] Shapira claims that both the defensive and the offensive ethos served to support and justify the war.[239] Thus, by using the 'no-choice/alternative' war rhetoric, Zionist leadership sent a complex message condemning and legitimizing the war at the same time.[240] By the end of the war, the fighter's image prevailed and the worker was pushed aside. Now it was the fighter's image that created a common ground uniting all sections of society.[241]

When Israel was established, a centralized army was founded and became a dominant institution in the state's life. That dominance resulted not only from the rise of militaristic approach within Zionist ideology. It was also part of a new project of etatism (*mamalachtiyut*) that sought to replace the former voluntary military structure of competing Zionist groups with one central army.[242] Finally, its centrality was also a result of a deliberate intent to assign the military a unique place in Israeli collective

[237] *Id*. at 213.

[238] *Id*. at 280.

[239] SHAPIRA, *supra* note 102, at 494.

[240] SHAPIRA, *Id*. at 485.

[241] *Id*. at 494.

[242] BEN ELIEZER, *supra* note 219, at 280.

consciousness.[243] In Israel's first decades, the army became a central institution that carried civil and nation-building tasks. Military sociologists point to its role as a melting pot and immigration absorption mechanism for Jewish groups, as a vehicle to further settlement, and a socialization agent for good citizenship and love of the country.[244] But as Ben-Eliezer stresses, it was not so much that Israeli army was 'civilized,' but that Israeli civilization and society was militarized,[245] as the army was in itself a central apparatus around which the nation was formed.[246] Consequently, security became a sweeping concept in Israeli public discourse and civil goals and missions were framed in a militaristic manner. Thus, immigration, settlement, economic independence, research and science, were all defined as security matters.[247] The terminological shift from defense to security was more than semantic. During the preparations to the 1948 War, David Ben-Gurion deliberately expressed his realization that the Zionist movement problems will be resolved only by force – by a Jewish military.[248]

As the triumph of militarism reached its peak, with the establishment of the State, the collective consciousness of the Jewish-Israeli nation changed from a weak,

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[243] *Id*. at 282.

[244] Moshe Lissak, *The Israeli Defense Forces as an Agent of Socialization and Eucation*, *in* THE PERCEIVED ROLE OF THE MILITARY 325-39 (M.R. Van Gils ed., 1971); AMOS PERLMUTTER, MILITARY AND POLITICS IN ISRAEL: NATION BUILDING AND ROLE EXPANSION (1969); Victor Azarya and Baruch Kimmerling, *New Immigrants in the Israeli Armed Forces*, 6 ARMED FORCES AND SOCIETY 22-41 (1980).

[245] BEN ELIEZER, *supra* note 219, at 283

[246] Uri Ben-Eliezer, *A Nation-in-Arms: State, Nation, and Militarism in Israel's first Years*, 37 COMPARATIVE STUDIES IN SOCIETY AND HISTORY, 264-285 (1995).

[247] *Id*. at 276; BEN ELIEZER, *supra* note 219, at 283, 288-290.

[248] *Id*. at 228. Ben Eliezer claims that Ben-Gurion became fascinated with the concept of security and wanted to make it a dominant component in every aspect of life. *See* also *Id*., at 294-5. In Israel, the Ministry of Defense, for example, is called until today the Ministry of Security.

powerless, spiritual, and stateless people to a strong, powerful, worldly and 'normal' nation.

The effect that these processes had on PWD was tremendous. Neither the worker-fighter nor the fighter alone was a welcoming image to PWD and the change in emphasis from labor as a civil vision to power as a militaristic solution exacerbated the conditions of their exclusion.

In fact, the centrality of the army in Israeli society had a significant role in the marginalization of all disadvantaged social groups. In general, serving in the army is viewed as an "admission ticket" to Israeli society. This is not only because service is mandatory, but also because serving in specific units and roles opens doors in the civil spheres as well (such as politics, and the job market),[249] and because service is considered a legitimate eligibility criteria for state social services and subsidies which were designed to benefit only those who served in the military.[250] As a result, serving in the army, or not, became a constitutive experience and a defining element in the identity of every Israeli citizen, at least among the groups that serve (Jews, Druses, Bedouins).

Moreover, social groups who do not serve in the army (most obviously the Palestinian minority, but also gays until relatively recently and PWD) have also limited access to Israeli citizenship. Even women, whom the Zionist ethos celebrates as equal members of the collective and whose equal duty to serve in the army is typically

[249] A 1999 study has claimed that the army does not provide for women the same jump-start as for men, and found a correlation between security-related expenditures and women representation in politics. SHLOMO SWIRSKI & YARON YECHEZKEL, WOMEN'S REPRESENTATION IN THE LEGISLATURE AND THE EXECUTIVE IN ISRAEL AND WORLDWIDE, (Adva Center Publication, 1999), can be accessed at: http://www.adva.org/womrep-e.html.

[250] DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 99 (1990).

mentioned to support that claim, served mainly in segregated positions, mostly providing (traditionally 'womanly') services to the male-fighters, and thus were not permitted to enter the "hall of fame" and to fully enjoy the benefits and prestige that men did.[251] Finally, Israeli militarism and the gender hierarchy within the army contributed to the creation of a sexist and chauvinist culture which valorizes power and masculinity, and to the marginalization of women and of non-masculine attributes, such as emotionality and dependency.[252] That culture has obviously impacted additional disadvantaged groups as well, particularly PWD who are constructed as needy and dependent.

Furthermore, as I discussed previously, Zionist body politics rejected the disabled body by explicitly aspiring to recreate the Jew as a masculine healthy and powerful, and implicitly to redeem the Jewish body from the old anti-Semite stereotypes it was captivated in, which perceived him as imperfect and even deformed. If the naïve and romantic image of the worker was inaccessible to PWD, then the fierce, courageous, and heroic image of the soldier was fully blocked before them.

The glorification of the body of the soldier is especially evident in the culture of commemoration and bereavement in Israel.[253] The bodies of the fallen are portrayed in one of the canonical texts of Memorial Day as "the silver platter" on which the Jewish state was granted to the Jewish people.[254] In another canonical song called *Ha-Re'ut* (comradeship or friendship) that valorizes the fallen and the comradeship among the soldiers, their beauty is emphasized:

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[251] YISHAI, *supra* note 68, at 9.

[252] *Id*. at 8.

[253] WEISS, *supra* note 127.

[254] Natan Alterman, Magash Ha-Kesef (The Silver Platter), a poem.

And we shell remember them all,
With their beautiful pompadours and magnificent look,
Because this kind of comradeship,
Shall never let our hearts forget.
Love hollowed in blood,
You will return to blossom among us.[255]

Similarly to those who died, those who were wounded in war or during their military service also occupy a unique place in Israeli culture. *Nechei Zahal* (IDF (Israel Defense Forces) Handicapped), Israeli disabled veterans, enjoy the most prestigious place among all groups of PWD, and the most generous system of benefits and services. Despite their disabilities and imperfections, their bodies are not just valued, but even glorified. The heroism they represent transcends the inferiority that their "deformed" and devalued disabled body suffers from.

But here another aspect in this scale of bodies emerges, which affected the relationships of PWD among themselves. It is the connection between the changing hierarchies of values within Zionism and the formation of inner hierarchies among the three main groups of PWD – disabled veterans, work injured, and the general population of PWD. This hierarchy is central to the understanding of disability policy and history in Israel, and to the continuing dynamics within the disability movement, which will be explored below.

Finally, I should briefly note here that the close relationship between the military and citizenship in contemporary Israel provides not only despair, but also some hope for PWD and other disadvantaged groups. Recent social changes that brought about some decline in the military's status have served the struggles of these marginal groups. During

[255] Haim Guri, *Ha-Reut* (Comradeship), a poem.

the 1980s and 1990s the role of the army in Israeli society has gradually changed and in some respects even declined. A milestone in that process was the 1973 War (*Yom Kipur* War), which brought with it doubts and questions concerning the centrality of the military in Israeli society and regarding the willingness of its citizens to live by the sword. The decline of the military's place in Israeli society deserves more elaboration but in this context suffice is to mention that it was an important part of a general process in those years, which included the decline in Israeli collectivism and the rise of individualism, the decline in belief in and reliance on the state, and the rise of group based politics. These social and cultural changes had affected Israeli society tremendously. For marginalized groups, they brought a mixed message of hope and hardship. On the one hand, Israeli solidarity and its developed welfare policy eroded. On the other hand, Israeli civil society and rights discourse emerged, allowing more space for excluded voices to be heard. These processes contributed to the rise of disability consciousness and activism.[256]

C. Conclusion: Bodies of Glory, Bodies of Denial: The Negation of Disability

In this chapter I explored how Zionist ideology and values created an environment, conditions and norms that reinforced and contributed to the marginalization, exclusion, and subordination of PWD. I demonstrated that tracing the history of the elevated status of disabled veterans and work injured, on the one hand, and

[256] *See* Chapter 7.

the rejection of imperfect bodies, on the other, provides a basis for realizing the marginal status and limited place of all kinds of PWD in Israeli society.

I have claimed that the rejection of imperfect bodies did not encompass those who were injured in the service of national values and missions, as these privileged PWD, i.e. disabled veterans and work injured, represented in their bodies the sacrifice and suffering that accomplishing the tasks of labor and defense involved.

Yet, I would like to further suggest at this point that Israeli society took responsibility only over *some* PWD and only in certain circumstances *precisely because*, as part of the general idealization of bodily perfection, becoming a person with disability was perceived as becoming imperfect, it was a "crippling" event. It was perceived as the worst that could happen to a person, since it threatened to transform not only his or her body, but also his or her social position and *value as a person*. In return, society valorizes the persons who were injured during "sacred," "worthy," or "admirable" activities with the purpose of elevating them above those who are "truly" imperfect, defected or abnormal.

The relationship between the various groups of PWD, the worthy and the unworthy, the needed and the needy,[257] informed the structure of benefits that PWD received, as I shall show in the following chapters. Zionist social values and the effects of the changing patterns of primacy among them played a significant role in the development of the Israeli welfare state. The shift from labor to security and militarism

[257] I took the expression "the needed and the needy" from: John Gal & Michal Bar, *The Needed and the Needy: The Policy Legacies of Benefits for Disabled War Veterans in Israel*, 29 INT. SOC. POL. 577-598 (2000). I believe that it nicely illustrates the diffreent social position that the various groups of PWD occupy in isareli society.

brought with it a change of emphasis from workers' rights to soldiers' privileges, from admiration of the working body, to fascination with the soldier's image. Subsequently, I also demonstrate the consequences of that differentiated welfare system on the divided structure of the disability community in Israel.

Based on the discussion in this chapter, I can also already point out at a paradox that is so successfully disguised under these conditions. The fundamental paradox that this structure masks is that the "price" that an esteemed person with disability, especially a disabled veteran, pays for being socially valued is the negation of his or her very own disability. I do not claim here that a disabled veteran does not feel the physical pain or loss of capacity as a result of his or her impairment. My argument is that these individuals do not share the *social* experience of disability because they have to distance themselves from it in order to be valorized and accepted. The existing material, institutional, and cultural separation between disabled veterans, the work injured, and the majority of the common PWD, is so effective that each group fights its own struggles and promotes its own agenda. Hence, for example, disabled veterans and work injured hardly participate in the struggles for the enactment and implementation of the Equal Rights for People with Disabilities Law (ERPDL),[258] which is aimed at making Israeli society accessible, inclusive, and open to all PWD.

Thus, as I shall elaborate later on, the possibility of future cooperation among the various groups of PWD will depend on a shared understanding of the similarities in the

[258] The Equal Rights for People with Disabilities Law bill was submitted to the Knesset (the Israeli parliament) in 1996. The bill encompassed a wide range of issues concerning all life aspects of PWD, but after an agreement was reached between its advocates and the Knesset members, only parts of it have passed as law. The rest of it is still under debate and deliberation, waiting for its completion.

forms and mechanisms of exclusion, marginalization, and isolation to which all PWD are subjected. Behind these similarities is the essence of ableism that Israeli society upholds and preserves. It is the deeply rooted assumption that a disabled body is a defected, deformed and inferior body and that a disabled person is similarly inferior, deformed and defected. Yet, in order to challenge that assumption one needs to first acknowledge her or his own disability, i.e. that he or she also suffers from exclusion and subordination *as a person with disability*. The negation of the social aspects of one's disability inhibits the emergence of that critical moment. And the hierarchy of bodies and values which defines and shapes the meaning of disability in Israel encourages that self-negation.

The following chapters (3-6) show that if Zionism was an ideological field in which the disabled body was constructed as imperfect, deficient, and threatening to the Zionist ethos, then welfare policy was the site in which the concreteness of that understanding of disability was manifested in the form of differentiated treatment and overt neglect.

CHAPTER THREE:
Questioned Solidarity: Disability and Social Welfare in Practice During the Pre-State Era

Chapter Three begins my exploration into the history of disability policies in Israel from the pre-state era to the 1970. It focuses on the pre-state era which was a formative period in the shaping of Israeli polity and society and locates it within the global developments of the mergence of the modern welfare state. The Chapter provides a general overview of the early years where Zionist practice in the field of social welfare began to form and which subsequent eras drew upon or departed from. It turns from the rhetoric and values of Zionist ideology to the actual assistance programs and legal entitlements that PWD enjoyed, or were denied.

This historical inquiry suggests that the pre-state era was an era of institutional voluntarism and mutual aid associations, yet lacked "attention" to disability as a distinct category. Despite the rapid spread of social welfare mechanisms in various places around the globe (particularly relevant was Britain which was ruling the territory at that time), Palestine remained dominated by charity programs and PWD were perceived as part of the general poor population and did not enjoy any dignified welfare mechanism. The legacy of the pre-state era in terms of institutions, interests, and politics has influenced Israel's future mechanisms.[259]

[259] For such claim in the context of the welfare system, *see*: Rivka Bar-Yosef, *Welfare and Integration in Israel*, *in* THE WELFARE STATE AND ITS AFTERMATH 247, 254 (S.N. Eisenstadt and Ora Ahimeir eds., 1985). For a more general argument, *see*: HOROWITZ & LISSAK, *supra* note 114, at Chapter 8.

A. Welfare Policy Under the British Regime

During the pre-state era, under either the Ottoman rule or the British regime, no central comprehensive welfare mechanism existed, certainly not one to provide for the needs of PWD. Britain officially received the mandate over Palestine from the League of Nations in 1922, but had an effective control over the territory since 1917. Although it was responsible for the territory's development, the British Mandate, in general, offered only limited social services.[260]

At that time many countries had already enacted some labor laws and developed social security programs which responded to the changing life conditions of workers during the industrial era, among them, the most important for PWD were health, work-injury, and disability insurances.[261] Early welfare legislation started with limited programs that addressed the direct risks that modern labor relations and technology posed to the workers and their families during the 19th and 20th centuries. The enactment of the Bismarck laws in Germany in the 1880s, which included the 1881 work-injury

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[260] ABRAHAM DORON AND RALPH M. KRAMER, THE WELFARE STATE IN ISRAEL: THE EVOLUTION OF SOCIAL SECURITY POLICY AND PRACTICE, 7 (1992) (Hebrew). Doron & Kramer note that one reason for not creating a comprehensive system was the complex relationship between the two communities in Palestine, the Arab and the Jewish (*Id*., at 8). Lotan claims that the Jewish community's call for such legislation was rejected by the Mandate regime, which refused to differentiate between the Jews and the Arab, saying that the Arab's population is not ready yet to the introduction of social security. GIORA LOTAN, TEN YEARS OF NATIONAL INSURANCE – AN IDEA AND ITS REALIZATION 2 (1964) (Hebrew).

In other fields the Mandate regime was more active and involved, including strengthening the legal system, founding modern bureaucracy, monetary and fiscal policy, policing, licensing and taxing, *see*: Baruch Kimmerling, *State-Society Relationships in Israel*, *in*: ISRAELI SOCIETY, CRITICAL PERSPECTIVES, 328, at 331-332 (Uri Ram ed., 1993).

[261] For a historical review on the emergence and evolution of modern welfare policies, *see*: THE EVOLUTION OF SOCIAL INSURANCE 1881-1981 (Peter A. Kohler and Hans F. Zacher eds., 1982), particularly the parts of Germany and Great Britain; THE EMERGENCE OF THE WELFARE STATE IN BRITAIN AND GERMANY 1850-1950 (Wolfgang J. Mommsen ed., 1981); DOUGLAS E. ASHFORD, THE EMERGENCE OF THE WELFARE STATES (1986). The following is based on the above bibliography and on the following materials, unless otherwise stated: GIORA LOTAN, TOWARDS A WELFARE STATE 14-19 (1973) (Hebrew); IZAAK KANEVSKY, SOCIAL INSURANCE IN THE LAND OF ISRAEL – ITS ACHIEVEMENTS AND PROBLEMS, Part 1 (1942) (Hebrew).

compensation law, the 1883 illness insurance law, and the 1889 disability insurance pensions, is regarded as the beginning of this era.[262] England's social legislation was also considered pioneering in the field, yet it did not export those mechanisms to Palestine. The limited labor laws that were enacted were not only poor and insufficient but also outdated.[263] The two most important laws among those were the Workmen's Compensation Ordinance of 1927,[264] and two ordinances concerning employment of Women and Children.[265]

The Workmen's Compensation Ordinance of 1927 is the most important to my discussion due to its direct relevance to PWD's legal status, and as the only legal mechanism to address their needs. Like all work injury laws, the Ordinance assumed employer responsibility even in the absence of proved negligence. Nevertheless, it exhibited a most minimal and outdated model, as it employed a narrow, tort-based rationale of risk, and it failed to provide for any state responsibility in the form of supervision or enforcement.[266] The flaws of the program were numerous.[267] In the

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[262] However, it is widely known that Bismarck promoted these laws for the purpose of stopping the socialist movement and to quiet their protests. That concern is true of course with regard to almost all social welfare policies and it is at the core of the neo-Marxist critique of the welfare state.

[263] DORON & KRAMER, *supra* note 260, at 7-8; Raphael Roter and Nira Shamai, *Social Security and Income Maintenance Policy*, *in* ECONOMIC AND SOCIAL POLICY IN ISRAEL: THE FIRST GENERATION 241, 242 (Moshe Sanbar, ed., 1984). For a full review of labor laws during the Mandate regime, *see* KANEVSKY, *supra* note 260, at 50-51.

[264] Workmen's Compensation Ordinance, 16th January, 1927, The Laws of Palestine, R.H. Drayton ed., 1934, Vol. II, Rev. Ed., p. 1550.

[265] The first ordinance concerning women and child labor was enacted in 1927 and was related only to industrial workers (Women and Children (Industrial Employment) Ordinance, 29th December, 1927, The Laws of Palestine, R.H. Drayton ed., 1934, Vol. II, Rev. Ed., p. 1547). In 1933 an additional ordinance was passed, which prohibited hiring women under age 17 for housekeeping works that exceeded a one-year term (Female (Contracts of Employment) Ordinance, 23rd August, 1933, The Laws of Palestine, R.H. Drayton ed., 1934, Vol. I, Rev. Ed., p. 693).

[266] ZVI BAR-NIV, NATIONAL INSURANCE ACT, 11 (1958) (Hebrew). Bar-Niv provides three different tort-based rationales that a workers' compensation program could exhibit and compare those rationales with a social welfare justification. The first is a classic torts reasoning, which maintains that

beginning, it covered only manual labor injuries which were caused by job-related accidents resulting from a closed list of dangerous vocations. The Ordinance meant to compensate only those whose work involved extraordinary risks. The level of compensation was very low, and was often paid as a lump-sum payment only (which commonly turned its recipients into charity or public assistance dependants[268]). An additional, important problem was the Ordinance's failure to require employers to cover medical expenses that are related to the injury. Moreover, until 1947 no supplementary tort law existed in Palestine.[269] During the next two decades, the Ordinance was amended a few times, and in 1947, just prior to end of the Mandate, a new ordinance was enacted. The new Ordinance introduced some major changes but still suffered from various problems from a social welfare perspective: It still tended to focus on manual labor and to some extent on low-income people; it lacked any medical expenses coverage; and most significantly, it still obliged the employers to compensate an injured worker, but it did not compel them to insure their workers. As a result, the injured worker was left at the mercy of the employer's private insurance, or the lack of it.[270]

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running an inherently risky enterprise imposes special duties upon its owner. The second assumes the employer has control over the employees and holds him responsible for their well being just as he or she would be held responsible for any other asset under their supervision. The third maintains that both the employer and the employee share the task of providing a service or producing a product, and since the employer's role is to fix prices that reflect expenses and risks, damages to the workers can be externalized by the employer while pricing products. *See* BAR-NIV, *supra* note 266, at 54-56.

[267] For a detailed review of the law's provisions and flaws, *see* KANEVSKY, *supra* note 260, at 52-54. *See* also JOSEPH NEIPRIS, SOCIAL WELFARE AND SOCIAL SERVICES IN ISRAEL: POLICIES, PROGRAMS, AND ISSUES 57 (1984) (Hebrew); Roter & Shamai, *supra* note 263, at 245. For a thorough historical account of the Ordinance, its criticisms, and the various reform attempts, *see* John Gal, *Business and Social Policy: A Case Study of the Adoption of Workers' compensation in Israel*, 23, 11-18 (unpublished manuscript on file with author).

[268] BAR-NIV, *supra* note 266, at 77.

[269] Gal, *supra* note 267, at 11. Only in 1948 was a Civil Wrong Ordinance introduced. Id., at 18.

[270] LOTAN, TEN YEARS, *supra* note 260, at 3.

In a gradual process that reached its peak after World War Two, the limited view regarding protection from industrial risks has changed and developed into a general commitment of the state to all groups in society whose socioeconomic conditions have deteriorated as a result of the changes in industrial relations and the strengthening of capitalism. Thus, in the year 1951 at least 45 states had some sort of social security program.[271] The focus has shifted from the benevolence of the state by creating programs to protect the weak and poor, to redistribution of national income and establishing a comprehensive regime of secured income and social services for those who were left outside labor and productive life, as they are now defined. The goal was to decrease the social and economic gaps and at the same time to promote productivity and the general standard of living. This goal was achieved through progressive social policies.[272]

Although social insurance was only one element of social security, it became its core in the post-war modern welfare state. Following the two world wars, suffering and impoverishment were widespread and governments needed new tools to respond to them. The social solidarity that has strengthened in Europe, and the new economic theories that defended governmental interference with the economy, have also supported this trend. Thus, the unique circumstances of that era contributed to the willingness of most regimes to accept social insurance as part of their responsibilities and to establish such instruments.[273]

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[271] ZVI BAR-NIV, NATIONAL INSURANCE ACT, 11 (1958) (Hebrew).

[272] LOTAN, TOWARDS A WELFARE STATE, *supra* note 261, at 14, 18.

[273] DORON & KRAMER, *supra* note 260, at 54-55.

The Beveridge Report, which was presented to the British parliament in 1942, represents this new era.[274] The Report suggested that a general social security system is a necessary part of a state's social welfare policy. It introduced an entirely new approach in the field of social welfare in England, which included a general social insurance system, national health and rehabilitation services, and family allowances, and which stressed the importance of full employment. The Report was not fully implemented, but following its proposal, England enacted into law family allowances in 1945, and National Insurance and the National Health Service in 1946. In addition, full employment became government policy.

Following those changes, the British regime started to change its approach to social welfare in Palestine.[275] One example was the 1947 amendment to the Workmen's Compensation Ordinance. Another example was its growing openness to the continuing pleas by the Jewish community for a comprehensive social security system.[276] For the first time the British mandate did not dismiss a draft proposal for a social security plan in Palestine initiated by a major Jewish organ, but promised to consider it seriously.[277] That draft later served as a model for social insurance legislation in Israel and provided the basis for the debates over its content and structure.[278]

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[274] Social Insurance and Allied Services, Report by Sir William Beveridge, Presented to Parliament by Command of His Majesty, November 1942 (hereinafter: the Beveridge Report, or: the Report). *See* the report on: http://www.weasel.cwc.net/beveridge.htm.

[275] DORON & KRAMER, *supra* note 260, at 10.

[276] *Id.*

[277] *Id.* LOTAN, TEN YEARS, *supra* note 260, at 2. The program was submitted by the *Histadrut*, the General Federation of Labor.

[278] *See* Chapter 4 on the establishment of the National Insurance Institute.

B. Three Local Mechanisms

In the absence of strong central labor laws and social or welfare institutions, local mechanisms were developed by the *Yishuv*, the pre-state Jewish community in Palestine, to protect the workers from labor-related risks, to support the poor, and to provide direct services to various populations in need.[279] As the following review shows, PWD received help from those mechanisms in two major ways. One way was direct financial assistance, mainly though general services to the poor and in some cases to the work-injured. The second way was through services such as healthcare, education, and vocational training. These services were specifically designed to help PWD, mostly for certain groups among them, such as children with special needs. These mechanisms provided only modest relief, yet their contribution was invaluable.

The agencies that provided these various types of assistance were voluntary yet sometimes quasi-sovereign organizations.[280] Some of them continued in their work a long-established tradition of local mutual aid services in Jewish communities,[281] and others, that were more modern, promoted the new Zionist missions of nation-building or general causes such as social welfare.[282] Consequently, three complementary welfare systems evolved: the *Histadrut* (General Federation of Labor), the National Council

[279] For detailed analyses of the political and social structure of the pre-state Jewish community, *see* S.N. EISENSTADT, ISRAELI SOCIETY (1967); S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY (1985); HOROWITZ & LISSAK, *supra* note 114; and THE HISTORY OF THE JEWISH COMMUNITY IN ERETZ-ISRAEL SINCE 1882 – THE PERIOD OF THE BRITISH MANDATE: PART TWO (Moshe Lissak chief ed., 1994).

[280] ILANA SILBER & ZEEV ROSENHEK, THE HISTORICAL DEVELOPMENT OF THE ISRAELI THIRD SECTOR 4-8 (2000).

[281] SILBER & ROSENHEK,, *Id*. at 8-19.

[282] DORON & KRAMER, *supra* note 260, at 8; BAR-NIV, *supra* note 266, at 11.

(*HaVaad HaLe'umi*), and various voluntary associations.[283] All mechanisms were supported by donations from Jewish communities from abroad, which were mainly philanthropic funds that provided assistance only to organized groups,[284] and some were locally financed by voluntary taxes or members' fees as well.

a. The *Histadrut*

The *Histadrut* (the General Federation of Labor) was established in 1920 as a cooperative association of the working class of the Jewish community in Palestine. It was a major organ of the labor movement in implementing its social and political agenda, and as such its role was to establish the conditions for the creation of a large based Hebraic working class including the creation of economic sectors in which it could function. With time the *Histadrut* became the largest labor union and a powerful economic actor in Palestine and later in Israel.[285] Influenced by the developments in Europe concerning labor laws and social policies, the *Histadrut* provided a variety of social services to its members, which included health insurance, financial support for the elderly and the temporarily unemployed, daycare and education services, and vocational training.

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[283] DORON & KRAMER, *Id.* at 8-10. The following survey of the three systems is based in general on Doron & Kramer's account, and on Neipris's review (NEIPRIS, *supra* note 267), unless otherwise noted.

[284] RALPH M. KRAMER, THE VOLUNTARY SERVICE AGENCY IN ISRAEL 10 (1976).

[285] EISENSTADT (1967), *supra* note 279, at 38-41; LEV LUIS GRINBERG, THE HISTADRUT ABOVE ALL (1993) (Hebrew); ZEEV TZAHOR, ON THE ROAD TO *YISHUV* LEADERSHIP (1981) (Hebrew); THE *HISTADRUT* – FROM WORKERS SOCIETY TO TRADE UNION (Yosef Gorny et al eds., 2000) (Hebrew), especially: Israel Kolat, *The Idea of The* Histadrut*: Inception and Change (1920-1948)*, *in* Gorny at el, *Id*. at 5, and Zeev Tzahor, *Establishing the* Histadrut, *in* Gorny at el, *Id*. at 38. Additional labor unions were established by various workers associations and by competing Zionist strands, but the *Histadrut* was the largest and strongest among them.

The *Histadrut*'s most important service was the healthcare system it developed through *Kupat Holim Klalit*, the General Sick Fund (GSF).[286] The GSF was a mutual aid association funded by members' fees, and also supported by the *Histadrut* and philanthropic donors from the Jewish Diaspora. It was an insurance-based service that entitled its members to full medical treatment in an elaborated system of clinics and hospitals, which were owned by the *Histadrut*, and to additional benefits. Additional services the *Histadrut* provided beyond medical treatment included sickness stipends, preventive medicine, recreation facilities, and assistance to family members.[287]

The GSF was the primary source of care for people who became ill or disabled, or for PWD who needed urgent or temporary treatment. Although relatively advanced and successful, that mechanism was inadequate for people who became chronically ill or permanently disabled.[288] Therefore, the GSF and the *Histadrut* decided in 1929 to establish a Handicapped Fund (*Keren Nechut*).[289] Its goals were to provide funds for continuing recovery expenses, long-term hospitalization, work placement and training, and to financially support institutions that were treating that population.[290] A primary indication of the Fund's relatively advanced vision was its support to all members who became disabled whether the injury or sickness was work-related or not.[291] In reality,

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[286] Sick funds were pre-state, voluntary, mutual-aid healthcare associations, which later provided the basis for the health system in Israel. The GNF of the *Histadrut* was the largest among the sick funds. For a general review of the history of the GSF, *see*: SHIFRA SHVARTS, KUPAT HOLIM, THE HISTADRUT, AND THE GOVERNMENT: THE FORMATIVE YEARS OF THE HEALTH SYSTEM IN ISRAEL, 1947-1960 (1999).

[287] KANEVSKY, *supra* note 260, at 71.

[288] Until 1930, sickness stipends were paid for two months and thereafter for four months. *Id*., at 112.

[289] *Id*, at 113.

[290] *Id*, at 73.

[291] Interestingly, unlike the *Histadrut*'s scheme, the National Insurance Institute's work injury program covers only work-related injuries and not any accident or illness that a worker was involved in. the

however, the Fund's activities were pretty narrow. Its resources were very limited since, unlike other programs, members' fees was its only source of income. In addition, in most cases allowances were paid directly to providers, and only in rare cases of severe destitution was payment given directly to the insured or the insured's family.[292] Moreover, the Fund typically provided support for 12-18 months, an impressive period of time for a poor agency, but utterly insufficient for those who became permanently disabled.[293] On the other hand, having the Fund not only allowed better treatment for its members but also reduced the workload and financial burden on other voluntary associations.[294] Writing in 1942, Izaak Kanevsky, who later became a prominent figure in the establishment of the National Insurance Institute, criticized the present situation, claiming that "precisely those disabled, who mostly need care – are completely deserted right after the Fund completes its part, and sometimes they are destined to degeneration and hunger, because no other agency that cares for them exists in our country."[295] Kanevsky further criticized the municipal and national authorities for expecting the workers to carry both the duty of paying taxes and the burden of sustaining their social services.[296]

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latter were covered only later through the general disability insurance program which was enacted in 1974. *See* Chapter 6.

[292] KANEVSKY, *supra* note 260, at 73.

[293] *Id*. at 130.

[294] *See* KANEVSKY, *supra* note 260, at 117-121 for a detailed example of the case of tuberculosis, a chronic illness which required special treatment and which was treated relatively successfully within the pre-state Jewish community, thanks to the activities of the tuberculosis association.

[295] *Id*. at 130.

[296] *Id*. at 130.

The *Histadrut* was unique in understanding those services not as philanthropy or charity but as stemming from duties of solidarity and social responsibility.[297] Yet the *Histadrut* services were limited to its members, who were working people and their families. It seems that PWD who were not workers in the first place could not become members and enjoy those services at all. While this might seem fairly reasonable for a labor union, it should be less acceptable for a semi-governmental agency with wide-ranging aspirations, and which is the major organ of the dominant Zionist strand – the labor movement. The subsequent sections show that the interests of the general population of PWD were compromised again and again, and as I will elaborate later, I believe that financial hardship is not enough of an explanation, and that behind that priority-making lies the *Histadrut* and the labor movement's complicated treatment of "unproductive" sectors of society, meaning primarily the unemployed and PWD who did not work.[298]

b. The National Council

The second complementary welfare system was developed by the National Council. The National Council (*HaVa'ad HaLe'umi*) was the self-governing body of the pre-state Jewish community and its representative before the British administration.[299] In 1927, it was authorized by the British regime to develop social services, and among them a social security program. However, instead of establishing a social security program, the National Council established local welfare offices that granted minimal support for needy

[297] NEIPRIS, *supra* note 267, at 13.

[298] *See* Chapter 4.

[299] HOROWITZ & LISSAK, *supra* note 114, at 42.

individuals who were severely destitute. Since its activities were funded by voluntary taxes of the Jewish community, the level of support was minimal. However, unlike the *Histadrut*, the National Council targeted it services to the general population.[300] PWD could apply for these programs as their last resort, just like any other poor person. Yet the assistance was limited and based on individual examination and not on a general entitlement. The left wing criticized the National Council's services for following the traditional approach of charity, but as this Chapter shows, they too did not offer a better solution for the general poor. Later on, as more people applied for assistance, the distribution method changed and organized workers' groups received their support through their organizations without having to visit the local welfare office. That practice created two subsystems that contributed to the stigmatization of the unorganized individuals, namely those who were not working, as unproductive and needy.[301]

The National Council was engaged in additional social services that did not involve direct financial assistance to individuals. It supported, for instance, educational activities and facilities for children in need, including equipment and funds. These were directed primarily to children who could not be supported by their families, but also included children with various disabilities, as the National Council was involved in

[300] NEIPRIS, *supra* note 267, at 14-15. Neipris also notes that the services provided by the National Council evoked strong debate with regard to the place of welfare in a society which espouses labor as a central value. *Id*.

[301] *Id.*

placing them in schools or institutions that fitted their needs.[302] It also developed some social services for blind people and people with developmental disabilities.[303]

c. Voluntary associations

The third mechanism was essentially comprised of a variety of voluntary local associations. These too fulfilled two main functions: financial assistance to individuals, and direct social services through various organizational and institutional settings.[304] Most of those organizations were traditional ones, and were founded as religious-based charities by the historical Jewish community in Palestine, before the Zionist immigration arrived. Other associations were established later, mainly by women and other Zionist groups, or by local philanthropic initiatives of private people. The later ones expressed a pragmatic approach toward assistance to the poor, by acknowledging the potential in voluntary mutual-aid programs, combined with a demand for state-supported social services. Most of the financial aid services that these associations provided were open to PWD as part of the general poor. Yet again, these services were still inadequate due to limited resources.

The role of voluntary associations was especially interesting in fostering and promoting the field of special education. During the pre-state era, and later during the state's early decades, voluntary and philanthropic agencies were the ones to respond to

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[302] *The Activities of the Yishuv for Children and Youth*, vol. 21-26 Lema'an Hayeled, 33-37 (Annual Report, The Agency for Children and Youth, 1944) (Hebrew).

[303] DORON & KRAMER, *supra* note 260, at 25.

[304] For an overview of the social structure and the various associations in the pre-state community, *see*: SILBER & ROSENHEK, *supra* note 280, at 8-19; and NEIPRIS, *supra* note 267, at 9. For a review of the activities in the field of children and youth, including those of women's organizations, *see*: The Activities of the *Yishuv*, *supra* note 302; and Hannah Herzog, *The Fringe of the Margin: Women's Organizations in the Civic Sector of the Yishuv*, *in* PIONEERS AND HOMEMAKERS: JEWISH WOMEN IN PRE-STATE ISRAEL 283 (Deborah S. Bernstein ed. (1992).

the neglect of children with all types of disabilities.[305] These activities followed a growing awareness in the world.[306] Again we see that although England was among the leading countries in the field, it did not bring that advantage to the people who lived under its mandate in Palestine. Special education activities started only in the 20th century as private initiatives, and later on, during the 1930s, the quasi-governmental organs of the *Yishuv*, such as the National Council or local municipalities, became more involved by providing partial support or supervising the educational activities. In rare cases, some municipalities even took it upon themselves to expand the activities and establish new facilities.

Thus, for example, the first Hebrew school for disabled children in Palestine was established in 1902.[307] It was a school for blind children, initiated by a Jerusalemite merchant who was touched by an accident he saw of a blind child. In 1933 the National Council and the Jerusalem Jewish Community Board became more involved in supervising the school's activities. By 1945 there were 16 special education schools or classes. Three of them were fully public, but many of them resided in unsuitable environments.

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[305] The following review is based on: Batya Malinowski, *Organically Impaired Children (Blind, Deaf, Handicapped and Feeble-Minded) – Special Education in the Land of Israel*, vol. 21-26 Lema'an Hayeled, 3-39 (Annual Report, The Agency for Children and Youth, 1945) (Hebrew), unless otherwise stated.

[306] In the beginning these were not mandatory education laws, but mostly laws that regulated only already-existing activities in the field. These activities followed a growing awareness in the world, which typically started with sporadic philanthropic experiments since the 16th century, expanded during the 18th-19th centuries, and became more conventional at the end of the 19th and beginning of the 20th century as more Western countries enacted laws concerning special education. *Id*. at 3-4.

[307] The full story of the school, The Jewish Institute for the Blind (*Beit Chinuch Ivrim Lebnei Israel*) is brought in Malinowski, *Id*. at 13 & 33-34.

C. Concluding Remarks

Within this complex matrix of benefits, services, organizations, and associations, a few themes that would become to the understanding of the disability scheme of benefits begin to emerge. First, the roots for the differentiated treatment of different groups of PWD started to surface during this period. It seems that in the pre-state era, the major routes for disability-based support were either as workers, or as poor and needy. The needy received support primarily based on principles of charity, and without acknowledging disability as a distinct category that establishes a unique condition of need in relation to the general population of the poor or the unemployed. The workers were protected in two main ways: One was the 1927 Mandatory law of the Workmen's Compensation Ordinance, according to which employers paid compensations mostly through private insurance companies. The second was through benefits provided by the *Histadrut*'s services and which were open to its members only. Although the options open to workers were insufficient, they did constitute an acknowledgement of work injury as an emerging category of welfare policy, and reflected a clear preference for the disabled worker as opposed to disabled persons who could not participate in labor activities.

Disabled military veterans are the third category that I explore in this thesis. However, the historical practice with regard to disabled veterans was not central in early Israeli disability history and is remarkably under-researched. During the pre-state era, there were also programs for members of the voluntary underground military organizations of the Jewish community who fought against the Palestinians and the British regime. These programs were established by the representative bodies of the

Jewish community and were later supported by the British Mandate.[308] However, it seems that they were informal and resembled an unofficial policy rather than a structured program.[309]

A second theme concerns the emerging tension between a claim to solidarity and universality and actual growing particularity. Despite the ethos that the pre-state era was an era of solidarity and mutual aid, particularly through the central mechanisms of the *Histadrut* and the National Council, in reality it was mainly voluntary associations who provided some relief to PWD. In that era the general structure of disability benefits was scattered and decentralized. The British Mandate as a central regime created only a work injury mechanism, which was insufficient in its coverage and scope. The *Histadrut* cared only about the workers, and the National Council did not establish a progressive universal system either, but rather a minimal, individually based public assistance mechanism. There was no universal coverage, nor uniformity or coherence.

Lastly, the pre-state era illustrates what a charity-based social structure might mean for PWD. During the pre-state era, the vast population of PWD could enjoy only partial and limited help provided by private local initiatives. Even among the work-injured, only a small segment could benefit from the existing services and benefits, and as already indicated, only at a minimal level and for a limited time. Thus, the organized workers, mainly *Histadrut* members, could have enjoyed their benefits for only a short while; the beneficiaries of the British Ordinance received very minimal support; and

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[308] John Gal and Michal Bar, *The Needed and the Needy: The Policy Legacies of Benefits for Disabled War Veterans in Israel*, 29 INT. SOC. POL. 577, 580 (2000).

[309] The Knesset Protocols to the Invalids (Pension and Rehabilitation) Law, 5709-1949, 3 L.S.I 119 (1949) (the law concerning benefits to disabled veterans), 2 Knesset Records 1575-1577, 1636-1638 (1949).

those insured by private companies were among the fortunate few whose employers were kind enough to insure them. For the majority of PWD, charity was the only choice, but it meant social neglect and life on the margins of society; in the absence of personal resources, a charity system of help for the poor meant facing the peril of starvation.

PART III:

BETWEEN CHARITY, WELFARE, AND WARFARE: PRIVILEGE AND NEGLECT IN THE POLITICS OF DISABILITY POLICY

In a nation in arms and an army of labor, the desired bodies are those of soldiers and workers. People unfit for such national services are bound to be deemed marginal. And that is exactly the case in Israel.

Meira Weiss, The Chosen Body.[310]

[310] MEIRA WEISS, THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY 88 (2002).

CHAPTER FOUR:
Poverty and Neglect: Productivity, Ableism and Orientalism in the Sa'ad System

> *The State of Israel is first and foremost, a state of rescue and cure of masses of Jews, the cure of the body and the balancing of the soul. It is primarily about – the healthy Jew, the Jew who senses a solid ground and a meaning to his life, the Jew who is liberated from the fear of discontinuity, the Jew whose life is not so fragile anymore (lo tluyim mi-neged). And first thing first – balancing of the nerves of the nation … The nation is still sick … A progressive national insurance legislation is one path to create a mental balance on the way to cure the nation. We must carve a road in the national psyche to ensure and insure the individual on the foundations of pre-considered national savings.*[311]
>
> *To the extent that we will be able to teach the concept of national insurance to the masses of citizens of Israel, we will advance ourselves in the correction of the national psyche and in its building through cure, immunization, balance, and the nurturing of a productive and etatist feeling that elevates the production power of the person and the citizen of the state.*
>
> *Haim Ben-Asher, The Knesset Records.*[312]

In the next two chapters (Chapters Four and Five) I continue my investigation into the inner hierarchies within the disability community and the meta-power relations between disabled and nondisabled people in Israeli society during the first decades of statehood. They suggest that Israeli welfare policies have institutionalized and legalized the value-based hierarchies that were discussed in Chapter Two, and thus, social welfare became a major site in which Israel's understanding of disability was constituted. Consequently, these two chapters expose the complex role that law had in maintaining

[311] Haim Ben-Asher (*Mapai*), The Knesset Records to the National Insurance Law, 11 Knesset Records, 1296 (1952).

[312] *Id*. at 1297.

and reinforcing those hierarchies, and in deepening and broadening the material, symbolic, and political gaps that resulted from those practices. The current Chapter's locus of inquiry is the early state period where etatism became powerful, and progressive welfare policies enjoyed vast support. It was an era of alleged explicit commitment to welfare policies, yet at the same time it was an era of growing divisions, continuing compromises, and even explicit neglect of PWD who did not belong to any privileged groups.

In this Chapter I suggest a socio-cultural reading of the neglect of people with disabilities in the field of social welfare policy. I focus on the Sa'ad system, which was in effect the primary welfare mechanism to address the needs of the poor and of people with disabilities among them. NEW: I start with reviewing the formation of the differentiated structure of disability benefits and the history of the National Insurance Institute. This review provides a background to the subsequent parts of my analysis but it also demonstrate what type of research dominates Israeli discussion on the matter. Contemporary research of social insurance benefits in Israel is still overpowered by economic factors and micro-politics as the reasons for the narrow scope of programs originally entailed by the National Insurance Law of 1954. In fact, when it comes to disability benefits, there is not even one piece of research providing a rich account of the concrete history of disability insurance and the reasons for its abandonment. The existing writing on the subject did note the disparities among the programs but did not provide an explanation for these gaps.[313] Furthermore, while existing writing addressed the higher

[313] *See, e.g.* ARIE L. MILLER, URIEL PROCACCIA, & DAVID KRETZMER, THE RIGHTS OF THE DISABLED IN ISRAEL: PROPOSALS FOR REFORM 12 (1979) (Hebrew) (stating that their analysis is normative but only in terms of comparative analysis and suggestions for future reform, not in trying to provide an explanation to the roots of the discrepancies).

status of disabled veterans and work injured, none have provided a contextual account for the roots of the low status afforded to the general population of people with disabilities.

This Chapter provides a pioneering study that focuses on the role of productivity in Israeli disability and welfare history, and addresses the contextual meaning of productivity in Zionist ethos and Israeli public discourse during the first decade of statehood. Indeed, the significance of productivity always played an important role in the general history of disability benefits and welfare policy.[314] However, its role in Israeli history has not been fully exposed thus far, but rather concealed by the rhetoric of care for people with disabilities, under which high aspirations were thwarted by economic necessities. In this Chapter, I argue that revealing the role that productivity played out in Israeli social welfare discourse also exposes the ableistic assumptions and practices that it employed.

A. The Place of Sa'ad in the Differentiated Structure of the Social Welfare System

a. National Insurance: Between High Values and Interest Politics

> *With the enactment of this modest law* [the National Insurance Law] *we are creating a corner stone for the building of a society in which there would be no deserted orphan and no old man would shed tears for his old age; not on the charity (chesed) of philanthropists would the weak among us depend, but by right they will receive what they deserve as citizens of the state. And the maxim "all Israel are responsible for each other"* (*kol Israel arevim zeh la-ze*h) *would become a law in the State of Israel.*
>
> *Golda Meir, Minister of Labor,(1952)*[315]

[314] DEBORAH A. STONE, THE DISABLED STATE, Ch.2 (1984).

[315] Golda Meir (*Mapai*), Minister of Labor, 11 Knesset Records, 1216 (1952).

From its early days, the State of Israel has proudly declared itself a welfare state and established various social institutions to execute its social policies. However, the establishment of a central welfare mechanism in the form of a social insurance institute was a debated issue. Although the creation of such a mechanism enjoyed a generally favorable environment with a near consensus within the Israeli polity,[316] long deliberations and difficult compromises were required in order to reach agreement on the details. As expected, while the ruling coalition has celebrated the National Insurance Institute as a triumph of the Zionist vision of justice despite economic hardship and limited resources, the length and the results of the process have disappointed others.[317]

One indication of the favorable environment for central social welfare mechanisms, is that within ten years of its founding in 1948, Israel had enacted several laws to execute its social policies.[318] I suggest three related reasons for that broad agreement. First, a sweeping global trend of social welfare was at its peak – part of a process that started at the end of the 19th century with the Bismarck laws.[319] In a gradual

[316] *See* the Knesset Records, *Id*. at 1212-1216, 1250-1268, 1278-1313. All the parliament parties emphasized the importance of a social insurance mechanism and supported the proposed law, despite expressing reservations about specific sections and provisions.

[317] *See Id*., the Knesset Records.

[318] Several laws preceded the NIL, as some Knesset members noted with pride during the debates over the proposed NIL (11 Knesset Records, 1253, 1293-1294 (1952). These laws included the Compulsory Education Law, 5709-1949, 3 L.S.I. 125 (1949); Annual Leave Law, 5711-1951, 5 L.S.I. 155 (1950-51); Hours of Work and Rest Law, 5711-1951, 5 L.S.I. 125 (1950-51); and Night Baking (Prohibition) Law, 5711-951, 5 L.S.I. 53 (1950-51).

[319] For a historical review on the emergence and evolution of modern welfare policies, *see*: THE EVOLUTION OF SOCIAL INSURANCE 1881-1981 (Peter A. Kohler & Hans F. Zacher eds., 1982), particularly the parts of Germany and Great Britain; THE EMERGENCE OF THE WELFARE STATE IN BRITAIN AND GERMANY 1850-1950 (Wolfgang J. Mommsen ed., 1981); DOUGLAS E. ASHFORD, THE EMERGENCE OF THE WELFARE STATES (1986).

The following is based on the above bibliography and on the following materials, unless otherwise stated: GIORA LOTAN, TOWARDS A WELFARE STATE 14-19 (1973) (Hebrew); IZAAK KANEVSKY, SOCIAL INSURANCE IN THE LAND OF ISRAEL – ITS ACHIEVEMENTS AND PROBLEMS, Part 1 (1942) (Hebrew);

process that reached its height after WWII, social welfare has changed its meaning from limited remedies for the direct risks that modern labor relations and technology posed to the workers and their families, to a general commitment of the state to all groups in society. After WWII and the Beveridge Report, social welfare became almost a consensus in Europe (which was recovering from the war), and it enjoyed substantial support in the United States' post-depression public discourse.[320] Thus, in the year 1951, at least 45 states had some sort of social security program.[321]

Second, Zionists' generally supportive view of social welfare was related to the ideology's aspiration to transform the Jews as individuals and as a nation, and to establish a just society that would provide an example to all other nations. The connection between welfare, social justice, and Zionism was particularly prevalent in the labor movement's rhetoric as part of a general national-socialist worldview.[322] But as the Knesset Records (the protocols of the Israeli parliament) show, almost all Knesset members have expressed a view of a social insurance law that paints it as an integral part

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ABRAHAM DORON & RALPH M. KRAMER, THE WELFARE STATE IN ISRAEL: THE EVOLUTION OF SOCIAL SECURITY POLICY AND PRACTICE, 54-66 (1992) (Hebrew).

[320] The Beveridge Report, which was presented to the British parliament in 1942, represents this new era (*see*: Social Insurance and Allied Services, Report by Sir William Beveridge, Presented to Parliament by Command of His Majesty, November 1942 (hereinafter: the Beveridge Report, or: the Report). *See* the report on: http://www.weasel.cwc.net/beveridge.htm. The Report suggested that a general social security system is a necessary part of a state's social welfare policy. It introduced an entirely new approach in the field of social welfare in England, which included a general social insurance system, national health and rehabilitation services, and family allowances, and which stressed the importance of full employment

[321] ZVI BAR-NIV, NATIONAL INSURANCE ACT, 11 (1958) (Hebrew).

[322] *See* the Knesset Records, *supra* note 316, particularly Golda Meir, (*supra* note 315 and accompanying text), and Mordechai Namir (*Mapai*, the dominant party in the Knesset), *Id.*, at 1254 (referring to the social enterprises of the *Histadrut*). For a detailed review of labor Zionism and the various strands within it, *see*: GIDEON SHIMONI, THE ZIONIST IDEOLOGY 166-235 (1995). Yet the nature of Zionist socialism and the extent to which the labor movement was truly committed to those ideals is a matter of heated debate among Israeli scholars, most notably among two of its leading historians, Ze'ev Sternhell and Anita Shapira. *See* ZE'EV STERNHELL, NATION BUILDING OR A NEW SOCIETY: ZIONIST LABOR MOVEMENT AND THE ORIGINS OF ISRAEL (1904-1940) (1995) (Hebrew); and ANITA SHAPIRA, *Sternhell's Complaint*, *in* NEW JEWS, OLD JEWS (1997) (Hebrew).

of the Zionist project and as an important component in a social, political, or Jewish vision.[323]

Finally, with the establishment of the state, the idea of etatism (*Mamlachtiyut*) gained growing support. Advanced by David Ben-Gurion, the first Prime Minister of Israel and a prominent Zionist leader, etatism powerfully combined social justice with nation-building.[324] It was in part a social ideal typical of that era, of a strong centralized welfare state based on some socialist foundations, expressing a faith in state involvement in the market and government responsibility for the needs of all its citizens. But primarily it was a nation-building project that aspired to construct a united and unified Hebraic nation as part of the Zionist vision. It was a national effort that aimed to replace the scattered and highly divided socio-political structure of the pre-state Jewish community in Palestine.[325]

The National Insurance was a primary mechanism of that scheme. Once founded, it was celebrated as a triumph of the commitment to social welfare and an impressive achievement of a young state.[326] The attempts to establish a central social insurance mechanism in Palestine started before statehood. As early as in 1945, the *Histadrut* (the General Federation of Labor)[327] advocated the need for a general social security system

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[323] The Knesset Records, *id.*

[324] Nir Kedar, *Ben-Gurion's Mamlakhtiyut: Etymological and Theoretical Roots*, 7 ISRAEL STUDIES 177 (2002); URI BEN ELIEZER, THE EMERGENCE OF ISRAELI MILITARISM 1936-1956, 280 (1995) (Hebrew); and ILANA SILBER & ZEEV ROSENHEK, THE HISTORICAL DEVELOPMENT OF THE ISRAELI THIRD SECTOR, 19 (2000).

[325] On the structure of the pre-state Jewish community in Palestine, *See* DAN HOROWITZ & MOSHE LISSAK, ORIGINS OF ISRAELI POLITY: PALESTINE UNDER THE MANDATE (1978). *See* also SILBER & ROSENHEK, *Id*.

[326] The Knesset Records, *supra* note 316.

[327] The Histadrut was a major organ of the labor movement in implementing its social and political agenda, and as such its role was to establish the conditions for the creation of a large based Hebraic

in a memorandum submitted to the Mandate regime.[328] In June 1948, right after the establishment of the state, it submitted a similar report to the new Israeli government.[329] Following that pressure, an interdepartmental committee was appointed in 1949 to prepare a general proposal for a comprehensive social security program. That proposal has laid the foundations for the National Insurance Institute and its recommendations were presented and published in 1950.[330]

Eventually, in 1954, the National Insurance Institute was founded, based on the National Insurance Law. The content of the law reflected a compromise between the various political forces in early Israel. As Doron noted, "it was not … a rational solution to the problems of economic security of the population in Israel, but more of a reflection of the level of the social agreement that could have been reached in those circumstances."[331] While early proposals encompassed unemployment, health, sickness, disability, work injury, maternity, child allowances, and old-age and survivors' pensions, only four programs were eventually adopted: old-age, survivors, maternity, and work-

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working class including the creation of economic sectors in which it could function. With time the *Histadrut* became the largest labor union and a powerful economic actor in Palestine and later in Israel. *See* S.N. EISENSTADT, ISRAELI SOCIETY 38-41 (1967); LEV LUIS GRINBERG, THE HISTADRUT ABOVE ALL (1993) (Hebrew); ZEEV TZAHOR, ON THE ROAD TO *YISHUV* LEADERSHIP (1981) (Hebrew); THE *HISTADRUT* – FROM WORKERS SOCIETY TO TRADE UNION (Yosef Gorny et al eds., 2000) (Hebrew). Additional labor unions were established by various workers associations and by competing Zionist strands, but the *Histadrut* was the largest and strongest among them.

[328] Memorandum submitted to the Director of the Labour, 31 December 1945. It was one of the early initiatives to establish the NII, and probably the most serious among them.

[329] The plan was prepared by the Social Research Institute, an arm of the *Histadrut*, and was published in: Izaak Kanevsky, *A Social Security Program in the State of Israel*, 2 HIKREI AVODA, 6 (1948).

[330] A Social Security Program in Israel, A Report of the Interdepartmental Committee for the Planning of Social Security, Tel Aviv: The Ministry of Labor and General Insurance, 1950. (hereinafter: The Interdepartmental Report). The program was to be implemented in three definitive stages and the report called "to extend the existing social security arrangements, gradually adapting, developing and expanding them into a social security system for the entire nation." (The Interdepartmental Report, *Id.* (translated in: Raphael Roter & Nira Shamai, *Social Security and Income Maintenance Policy*, *in* ECONOMIC AND SOCIAL POLICY IN ISRAEL: THE FIRST GENERATION 241, 243 (Moshe Sanbar, ed., 1984)).

[331] AVRAHAM DORON, THE STRUGGLE OVER NATIONAL INSURANCE, 5 (1975) (Hebrew).

injury insurance.[332] Additional programs were to be added in the future, but no specific dateline was created.[333] The system that was eventually created granted exclusive benefits to distinct social groups, and even the enacted programs exhibited major compromises that resulted from debates regarding the details.

The plainest and most explicit reason to withhold or at least to minimize the social security proposal was related to the poor economic situation in Israel's first years due to the war from which it was still recovering from, and the massive immigration it faced.[334] It was argued that other countries too have created a social security plan only in later stages of their development.[335] But beyond economic concerns, the proposal was also a terrain for political struggles, most interestingly among the left-wing parties.

Current scholarship notes that the second and most elaborated reason for minimizing the social security proposal was the concern within the left regarding the status of the *Histadrut* (the major organ of the labor movement), and the fate of its social enterprises.[336] These enterprises included a social insurance mechanism for the *Histadrut*'s members, the largest organized group of workers during the pre-state era. The strongest effect of this inner debate was on health and old-age insurance, the two most successful achievements of the *Histadrut*, and its primary sources of income.[337]

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[332] DORON & KRAMER, *supra* note 319, at 61.

[333] Golda Meir (*Mapai*), the Minister of Labor, 11 Knesset Records, 1213 (1952).

[334] *Id*. at 4, 8; DORON, *supra* note 331, at 10-12; DORON & KRAMER, *supra* note 319. *See also* 11 Knesset Records, 1213, 1253-4, 1250, 1284, 1291 (1952).

[335] LOTAN, *supra* note 319. at 4.

[336] While *Mapai*, the ruling party, has generally promoted a general social security plan (with some reservations) as an idea that advanced the interest of the general public, it was accused by *Mapam*, its pro-Soviet rival, of destroying the *Histadrut*'s power and autonomy. DORON, *supra* note 331, at 13-19. on the diverse opinions within *Mapai, see Id*. at 18.

[337] *Id*. at 52.

And indeed, these two areas were compromised in the enactment of the National Insurance Law. Health insurance remained unregulated until the 1990s, when the *Histadrut* underwent fundamental transformations.[338] In contrast, an old-age program did pass, but it was minimal and insufficient to provide a life of dignity to its beneficiaries.[339] As a result, social and economic gaps have appeared, putting the *Histadrut* members in a much more privileged position, and effectively leaving health and aging benefits to private market dynamics.

The above controversies reveal the labor movement's complex relation to welfare programs and disadvantaged groups and its problematic role in promoting and hindering social change in Israel. Although it started as the driving force behind the National Insurance initiative, it ended up with a doubtful position that reflected self-interests and other biases. On the level of self-interest, as elaborated above, its supporters were occupied with the *Histadrut*'s self-preservation, and protected its interests in order to remain a primary service provider for the workers – a motivation that at times stood in contrast to the interests of the working class.[340] In addition, the labor movement's leadership, who formerly claimed to support a social justice revolution, went through processes of de-radicalization and adopted a middle class worldview.[341] But also interesting is the multifaceted effect of the socialist legacy. Indeed, social security was

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[338] For a history of history of health insurance in Israel, *see* SHIFRA SHVARTS, KUPAT HOLIM, THE HISTADRUT, AND THE GOVERNMENT: THE FORMATIVE YEARS OF THE HEALTH SYSTEM IN ISRAEL, 1947-1960 (1999).

[339] *See* DORON & KRAMER, *supra* note 319, at chapters 6 & 7, for a detailed analysis of the elderly program, in which they claim that it was designed as a charity-like mechanism.

[340] DORON & KRAMER, *supra* note 319, at 11.

[341] Abraham Doron, *The Histadrut, Social Policy and Equality*, *in*: THE *HISTADRUT* FROM WORKERS SOCIETY TO TRADE UNION , 693, 696 (Yosef Gorny, Avi Bareli, Yitzhak Greenberg eds., 2000). *See* also S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY 226-227 (1985).

certainly understood not as a charity mechanism but as part of a general socialist agenda of equality and state responsibility.[342] However, the belief was that a socialist-based economy would naturally bring an end to poverty and other social problems, and therefore poverty was not an issue to tackle directly.[343] Furthermore, productivity was viewed as a pre-condition for receiving welfare benefits, and physical labor was seen as the way out of poverty and towards personal reform. I shall return to this point later.[344]

The result of all this is that the labor movement in general and the *Histadrut* in particular have promoted and eventually created a *selective* welfare system, which unlike a universal system, furnishes services only to selected groups of persons – the workers, and primarily those workers who were affiliated politically with the labor movement and the *Histadrut*.[345] Furthermore, the protection of the *Histadrut* enterprises resulted in *private* welfare, which further contributed to the differentiation of services and benefits.[346]

Private-sector actors were an additional source of resistance to the social security program, as they were concerned with its negative effect on their share of the markets in their professions. Thus, the Physicians Association objected to the health insurance

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[342] DORON & KRAMER, *supra* note 319, at 9. That understanding has influenced the structure of the *Histadrut*'s own social programs, and also led it to advocate for a general social security system before the British regime, and the Israeli government right after its initiation (*See supra*, notes 328-329 and accompanying text). In fact, it was already involved in the enactment of the Workmen's Compensation Ordinance of 1927 (Workmen's Compensation Ordinance, 16th January, 1927, The Laws of Palestine, R.H. Drayton ed., 1934, Vol. II, Rev. Ed., p. 1550. On the Histadrut's involvement in that process, *see* DAVID BEN GURION, *The Compensations Ordinance* (1927) *in* FROM CLASS TO NATION: REFLECTIONS ON THE VOCATION AND MISSION OF THE LABOR MOVEMENT 175 (1933) (Hebrew); and KANEVSKY, *supra* note 319, at 52-54).

[343] Doron, *Id.* at 695; and DORON & KRAMER, *Id.,* at 9.

[344] Doron, *Id*. at 695.

[345] *Id*. at 700.

[346] *Id*. at 702.

program, worrying that a public healthcare system would hurt its members' private practices.[347] But more important to my discussion is the objection to work injury insurance by private insurance companies, which enjoyed the British Ordinance's arrangement.[348] The insurance companies received substantial political support from the General Zionist Party, a right-wing party that joined the ruling coalition, but eventually they lost the battle.

Interestingly, the right-wing parties were, in general, in support of the National Insurance Law, not only because of the global climate in that era, but also due to their opposition to the labor movement hegemony. Caught in a paradoxical situation, they understood that an inclusive state-managed social security program would reduce the role of the labor movement and the *Histadrut*'s enterprises in Israeli society and economy,[349] but also allied with private-sector actors who opposed the proposal and represented their interests in the Knesset debates. The General Zionist Party, for instance, allied with the insurance companies against work injury insurance, but at the same time demanded governmental control over healthcare services.[350]

Finally, socio-cultural assumptions with regard to "unproductive" sectors in society were a hidden yet powerful factor in this process. The dominant position was a fear that allowances carry no incentive, or even a negative one, for people to work, and

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[347] DORON, *supra* note 331, at 20-22; DORON & KRAMER, *supra* note 319, at 61-62.

[348] On the impact of the Worker's Compensations Ordinance on the private insurance market, *see infra* notes 460-467 and accompanying text.

[349] DORON, *supra* note 331, at 18.

[350] Doron, *Id.* at 45. *See*, for example, MK Namir's words in the Knesset: "That worry of Dr. Harel for a bit of questionable nationalization … is totally incompatible with his hearty generosity when he speaks about some nationalization [in healthcare]." (11 Knesset Records, 1255 (1952)). *See* also *infra* notes 194-201 and accompanying text.

therefore that they reinforce non-productivity. But productivity, as I show later, is not a value-free concept. Thus, as a United Nations report from that era reveals, those "unproductive" sectors were actually social groups that suffered from negative stereotypes prevalent in Israeli society and reflected in its welfare system.[351] I argue that underneath the various debates and considerations, the popular view among the Israeli left which promoted the social insurance initiative was that some social groups were unproductive and therefore less deserving of social security type benefits. As a result, the weakest populations were abandoned in the process; since they were "non-workers," their rights and interests were too easily compromised.

In sum, despite the rhetoric of commitment to all programs, in reality some were favored and prioritized over others. Avraham Doron, a major contemporary Israeli scholar in the history of social insurance policy in Israel, claims that some social security programs, such as disability or sickness insurance and child allowances, were never considered seriously in the 1950s atmosphere of poverty.[352] But my conclusion goes beyond those economic concerns, as real and fundamental as they might be. As the discussions above and below show, *a general disability insurance program was not only expensive for Israel's early leadership but also unimportant*.

From a historical perspective, then, the establishment of the NII was a crucial and decisive moment in the development of Israeli welfare policy with significant and extensive implications for the years to come. As the following sections show, the

[351] Phillip Klein, Proposal on Program and Administration of Social Welfare in Israel, (TAO/ISR/29, January 1961) (A report prepared for the government of Israel under the United Nations Program of Technical Assistance) (was not approved by the Administration) (cited in DORON & KRAMER, *supra* note 319, at 28) (hereinafter: the Klein Report).

[352] DORON & KRAMER, *supra* note 319, at 62.

opportunity to create a universal, inclusive, and egalitarian system was not taken. Instead, the contemporary foundations for the differentiated treatment towards people with disabilities in Israel were laid, and the marginality of people with disabilities was first fully exposed.

b. A Missed Opportunity for Disability Insurance

The enactment of the National Insurance Law was the first opportunity for the Israeli welfare system to address the needs of people with disabilities and to create a general mechanism of disability insurance. Yet unfortunately, that opportunity was missed. The promising rhetoric of commitment to welfare and to etatism that characterized the establishment of the state did not bring improvement or benefit to the living conditions of the majority of people with disabilities. The new National Insurance Law, which was supposed to be broad and inclusive and which included in its original draft a disability insurance program, eventually created only one program directly related to people with disabilities – work injury insurance.

The details and role of the work injury program in the general scheme of disability policy shall be explored later on.[353] For now, it is sufficient to say that it was considered the flagship program of the National Insurance Institute and that the benefits it granted were generally progressive and generous (an allowance equal to 75% of former income; healthcare and vocational rehabilitation services). Yet the major pitfall of the program was the scope of workers covered. The law's provisions benefited only a very narrow group of persons who were injured as a result of an accident or illness that

[353] For a detailed analysis of the work injury program, *see* Chapter 5, Part A.

happened at work or was related to work. This restrictive program left out not only people with disabilities who never worked before but also disabled workers whose disability could not be linked directly to work, despite paying National Insurance fees as required by law throughout their lives as workers.

Furthermore, while other parts of the National Insurance proposals, such as health insurance and pension funds for the elderly, were compromised after heated debates and long negotiations, disability insurance was denied without much deliberation.[354] Thus, the Knesset Records show that only two Knesset members among all speakers brought up the issue of disability insurance. Among them, only one addressed the issue directly. Mordechai Namir contended that the inclusion of some pensions for the disabled "might resolve a big, painful, and tragic problem, of people who certainly deserve the help of society." He introduced a study showing that disability insurance would not overburden the state budget, and urged the Knesset to avoid "over-hesitation."[355] The second was Eliezer Shostak from *Herut* (a right-wing national party), who regretted that the law "unfortunately … is missing all those most pressing social insurance programs that the whole population is waiting for," pointing at disability insurance as one among them.[356] Besides these two, no Knesset member mentioned in any way the neglect of people with disabilities. Even *Maki*, the Israeli communist party, the only party that demanded the inclusion of a specific list of additional programs, including unemployment and various health benefits, neglected to address disability insurance.[357]

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[354] DORON & KRAMER, *Id*. at 62 (along with child allowances and sickness insurance).

[355] Mordechai Namir (*Mapai*), 11 Knesset Records, 1255 (1952).

[356] Eliezer Shostak (*Herut*), *Id*. at 1260-1261.

[357] Esther Vilenska (*Maki*), *Id*. at 1262-1263.

The result was that the majority of people with disabilities whose impairment was not related to work injury remained outside the social security system for two decades, until 1974, when a general disability insurance program was enacted.[358]

c. The Differentiated Structure of Disability Benefits

The enactment of the National Insurance Law was a disappointment from a disability perspective. The opportunity to create a general inclusive mechanism was missed, and the increasing fragmentation among people with disabilities through differentiated benefits programs was legitimized. Despite the generally favorable environment and the reassuring rhetoric, the new state did not create even one modern mechanism to address the needs of the majority of people with disabilities. The state's neglect of people with disabilities was not only in its lack of government allowances, but also in its lack of actual services. Although etatism aspired to replace the work of the voluntary associations that existed during the pre-state era, the new government did not assert a general commitment to the needs of people with disabilities, and no new social services were offered in any field related to people with disabilities, such as education, housing, or rehabilitation.[359] The services that did exist were part of the legacy of the Social Department of the National Council (*HaVa'ad HaLe'umi*, the representative body

[358] National Insurance (Amendment No. 13) Law, 5733-1973, 27 L.S.I 233 (1972-73).

[359] RALPH M. KRAMER, THE VOLUNTARY SERVICE AGENCY IN ISRAEL 11 (1976). The only enacted welfare law concerning services to people with disabilities was the Mentally Sick Persons Law, 1955, (9 L.S.I. 132), which regulated the operation of psychiatric institutions, but it concerned only the minimal duties of service providers towards those who already enjoy them and did not grant any direct rights to their beneficiaries, or potential beneficiaries.

of the pre-state Jewish community). Yet, they were minimal and included only services for blind persons and for those with developmental disabilities.[360]

The Sa'ad system was the second major social welfare mechanism that the state created to respond to the needs of persons who could not enjoy National Insurance benefits. The Sa'ad was a residual general public assistance institution that was based on a discretionary method of individual case-by-case determination of benefits for applicants.[361] The Sa'ad was founded based on a government policy and operated under no legislative framework until 1958.[362] In fact, I argue that while the grand rhetoric and the public ethos might have conveyed an impression that National Insurance was the major system and Sa'ad was just residual, the Sa'ad system was essentially the primary program for the majority of people in need, including primarily people with disabilities, and recent immigrants (*Olim*).[363] Yet the Sa'ad was also the most inferior mechanism for welfare benefits. As a result, the majority of people with disabilities were subject to an incoherent system that was associated with a strong negative stigma, and that provided no economic security and no self-dignity.

The differentiated structure of disability benefits that took form during the first decade of statehood was even more complex, as during that time, nine additional particular programs were enacted to respond to the needs of distinct groups of privileged people with disabilities. The major program among them was the Invalids Law in

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[360] DORON & KRAMER, *supra* note 319, at 25.

[361] For a detailed discussion on the Sa'ad system and its role in providing financial assistance to people with disabilities, *see* Part B.

[362] Welfare Services Law, 5718-1958, 12 L.S.I. 120 (1957-58) (I shall call this law The Sa'ad Services Law, 1958, following its Hebrew name).

[363] Elderly people were also among the main populations that the Sa'ad served due to the inadequacy of the old-age National Insurance program.

1949,[364] which created a well-developed and generous system of services and financial assistance for the wounded of the 1948 war (the War of Independence). This was in fact the first state-provided benefits program enacted in Israel, but as I show later, due to its symbolism and high social esteem, it was not perceived as a welfare program, but rather as a program of heroism and glory.[365]

The Invalids Law, then, was the third major social welfare mechanism that, together with the work injury program and the Sa'ad system created the foundation of Israeli disability policy for the years to come. Moreover, these three programs have exhibited *the three spheres of disability policy: the workers, the soldiers, and the unemployed.*

However, I argue that from a disability perspective, it is more accurate to say that the structure of disability benefits was comprised of ten sectarian, particularistic, legal arrangements and one general, residual, yet primary, program – the Sa'ad. The ten laws were particularistic legal arrangements for people with disabilities whose disability was caused during or in connection to national causes or work. In addition to work injury and the Invalids Law, they included benefits to state employees, police personnel, civilians injured in border-related encounters, survivors of the holocaust, and more.[366] The Sa'ad

[364] Invalids (Pension and Rehabilitation) Law, 5709-1949, 3 L.S.I 119 (1949) During the next 10 years the law was amended many times and in 1959 a consolidated version was published: Invalids (Pension and Rehabilitation) Law [Consolidated Version], 5719-1959, 13 L.S.I. 315 (1958-59) (hereinafter: the Invalids Law).

[365] *See* Chapter 5, Part B.

[366] Civil Defense Law, 5711-1951, 5 L.S.I. 72 (1950-51); National Service Law, 5713-1953, 7 L.S.I. 137 (1952-53); Invalids (War Against the Nazis) Law, 5714-1954, 8 L.S.I. 63 (1953-54); Defense Army of Israel (Permanent Service) (Benefits), 5714-1954, 8 L.S.I 149 (1953-54); Police (Invalids and Fallen) Law, 5715-1955, 9 L.S.I. 80 (1954-55); Border Victims Law, 5717-1956, 11 L.S.I. 19 (1956-57); Invalids (Nazi Persecution) Law, 5717-1957, 11 L.S.I. 111 (1956-57); Fire-Fighting Services Law, 5719-1959, 13 L.S.I. 215 (1958-59).

was for the majority of people with disabilities who were not covered otherwise. Unregulated by a primary statute until 1958, it was instead based on administrative directives and *de facto* practices.

Furthermore, by 1970 there were already seventeen such laws, and each constituted a distinct category of disability, mainly according to the circumstances in which the impairment was created, and each required different criteria for eligibility.[367] These programs largely followed the two primary models of work injury and disabled veterans.[368] The result was a complicated, incoherent, and unsystematic web of statutes, regulations and guidelines, which was developed with no clear vision of disability policy or prior planning.[369]

As I show in the next Part, although the Sa'ad was considered marginal in the scheme of social welfare, in effect, it was the only universe of social welfare for most people with disabilities, and its enactment and operation had a crucial role in the construction of disability in Israeli welfare policy.

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[367] During the years 1959-1970 the following disability benefits programs were enacted into law: Prison Service (Invalids and Fallen), 5720-1960, 14 L.S.I. 32 (1960); Life Saving Operations (Casualties) (Benefits) Law, 5725-1965, 19 L.S.I. 314 (1964-65); Life-Saving Operations (Soldier Casualties) (Benefits) Law, 5725-1965, 19 L.S.I. 314 (1964-65); Knesset Building and Precincts Law, 5728-1968, 22 L.S.I. 226 (1967-68); Victims of Hostile Action (Pensions) Law, 5730-1970, 24 L.S.I. 131 (1969-70).

[368] For a detailed analysis of the differences between the various programs, *see* URIEL PROCACCIA & ARIE L. MILLER, THE RIGHTS OF THE DISABLED IN ISRAEL: BASIC ISSUES (1974) (Hebrew). For a table of the eighteen laws that existed in 1974 (including disability insurance), their diverse definitions of injury and the populations they cover, *see Id*, at 32-33. In that book Procaccia & Miller provided the first (and unfortunately the last) comprehensive examination of the legal status of people with disabilities in Israel, but their research was aimed at showing the disparities and not exploring their roots.

For a division of these laws between the two models, *see infra*, notes 468, and 530 (the first details the laws that followed the work injury model, and the second those that followed the disabled veterans model). For a discussion of the those models, *see*: PROCACCIA & MILLER, *Id*. at 16-26 (discussing the different models of statutory definitions of "disability" and listing the laws that followed each definition), and 27-31 (discussing the different models of benefits).

[369] MILLER ET AL, *supra* note 313, at 8-9. In this book Miller et al continued to the second stage of their research and presented a normative analysis of Israeli disability policy and its differentiated structure (the first part was the book THE RIGHTS OF THE DISABLED IN ISRAEL: BASIC ISSUES, *see Id*.).

B. The Sa'ad System – General Public Assistance for the Poor

Understanding the nature of the Sa'ad system is necessary for the analysis of the reciprocal inferiority that the system and its beneficiaries suffered from. As I have already argued, despite the perceived priority of the National Insurance Institute, the Sa'ad system was in effect the primary welfare mechanisms in Israel until the 1970s. All groups that were not included within the new National Insurance Law could turn to the Sa'ad (a word that stands for aid or assistance in Hebrew), a residual public assistance program, which was responsible for all people in need. Unlike a social security system, and as a typical general public assistance program, the Sa'ad was designed as a last resort, a safety net for those who could not survive otherwise.[370] It was an inferior system that rendered its recipients to a much lower social status that National Insurance beneficiaries. The following table summarizes the structural differences between a Sa'ad (public assistance) mechanism and a social insurance program:[371]

[370] The Following review of the Sa'ad system is base on: DORON & KRAMER, *supra* note 319, at Chapter 3; and EISENSTADT (1967), *supra* note 327, at 208-211; and the Klein Report, *supra* note 351. For a shorter summary in Hebrew, *see* Phillip Klein, *The Sa'ad Service in Israel*, *in* WELFARE POLICY IN ISRAEL: A READER 69 (Avraham Doron et al eds., 1969).

[371] DORON & KRAMER, *supra* note 319, at 65.

Sa'ad	Social Insurance
Means test, including relatives' liability	Firm right, not conditioned by income and income test, not linked to family liability
Benevolent giving, state-run charity	Civil right
Discretionary	Granted according to unified and equal rules
Stigmatizing	Social legitimacy
Deterring	Non-deterring
Selective	Universal
Conferred-upon allowance	Acquired right

The Sa'ad was not intended to allow a life of dignity and security, but a minimal relief that was essentially insufficient as it provided support that was lower than the minimum needed. According to the "less eligibility principle" that was adopted, Sa'ad assistance was denied from a person even if his or her earned income was less than customary Sa'ad rates. Moreover, although Sa'ad allowance had two components: a basic sum that is aimed at covering food costs and a supplemental amount for "additional expenses," yet statistics shows that these actual sums were very low. Sa'ad recipients received basic allowances that was worth between an eighth and a half of what a working family required, and a supplemental amount for "additional expenses" that was estimated as a third of their needs.[372]

[372] According to Israeli official statistics a low-class working-family of four persons in 1957 needed an average of 24 IL (Israeli Lira) per person per month (PPM) for food, and an amount of 33 IL PPM for additional expenses. Yet the Sa'ad basic allowances were around 3.20 to 12.75 IL PPM (compared to 24 IL), with an exception to special cases, which were not specified, of 15 IL PPM, and a special allowance to widows and elderly people of 18.3 and 27 IL PPM. The allowance for additional costs, if granted, did not exceed 10 IL PPM (compared to 33 IL). Other needs were covered in various ways, such as rent exemption by the municipal authority, medical care by the Ministry of Health upon recommendation, and clothes were supplied from donations from private resources. The example is based on data from the Klein Report.

Each applicant's eligibility for assistance was based on a means test, an individual assessment of neediness. Consequently, broad discretion was conferred on the local welfare officers in granting financial support. Having no guidelines or clear policy to direct the officers, and taking the role of caring for virtually all the new immigrants in a time of gross economic difficulties, the understaffed and underfinanced system almost collapsed. The result was a lack of uniformity, arbitrariness, and incoherence. Additionally, the Sa'ad isolated and stigmatized its recipients, causing many people to avoid turning to the program for help.[373] In addition, the Sa'ad rules mandated that its recipients would be supervised by the social services. This policy conveyed a message of personal failure that needed correcting and reformation, and it allowed intrusion into peoples' personal lives.

The fundamental reason for the Sa'ad's inferiority as a social welfare system was its inability to establish a citizen's right to receive it. It was instead designed as essentially a public "charity" program. Even after the enactment of the Sa'ad Services Law, 1958, which was supposed to provide more uniformity to the system, its basic flaws remained the same, as Rivka Bar-Yosef's critique expresses so strongly:

> In principle and in practice, *the particularistic system of the traditional charity was continued on the level of state bureaucracy* … In essence, this was the secular statement of the Jewish charity philosophy, which was reinforced by the case-study method of the professional social worker. But unlike the charity in the traditional Jewish community, public assistance was not an integral part of a total social conception: it did not assume a common value system or express norms of mutuality between givers and receivers.[374]

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[373] LOTAN, *supra* note 319, at 117. On the stigmatizing aspect of Sa'ad, *see* Lotan *Id*. at 108.

[374] Rivka Bar-Yosef, *Welfare and Integration in Israel*, *in* THE WELFARE STATE AND ITS AFTERMATH 247, 255-256 (S.N. Eisenstadt & Ora Ahimeir eds., 1985) (emphasis added).

Other indications of the problems with the services the Sa'ad provided include the testimonies about the low physical conditions in the Sa'ad chambers, the patronizing attitudes of Sa'ad workers, and the outbursts of rage and sometimes even violence that occurred within them. In a report published in 1958, it was claimed not only that the assistance did not cover the needs of Sa'ad recipients; it was also many times delayed, causing hostility and anger. Moreover, the waiting rooms were usually too small, unpleasant and poorly maintained, and the Sa'ad officers sometimes responded by shutting the doors instead of listening to the complaints. In some places, doors of steel were in use, creating a prison-like atmosphere.[375]

The very existence of such a program was important in itself, and indeed the role that the Sa'ad had in providing relief, as minimal as it might be, should not be overlooked. However, having a Sa'ad program was not a high priority among Israel's early leadership. The labor movement leadership objected to the establishment of a Ministry of Sa'ad, claiming that it contradicted the socialistic goals of the new state, that it would perpetuate traditional approaches of charity and philanthropy, and that it did not offer a genuine answer to the difficulties faced by the weak groups in society.[376] But the history of their involvement in the *Histadrut*'s exclusive services to the workers, and later in the easy compromises during the enactment of the NIL, suggests that their commitment to those very groups was a weak one in the first place. The result was that the Sa'ad was left quite unnoticed, continuing the old policies of the formerly National

[375] The Klein Report, *supra* note 351. *See also* M. A. Kurz, *Ten Years to the Sa'ad Services Law*, *in* WELFARE POLICY IN ISRAEL: A READER 117, 120 (Avraham Doron et al eds., 1969) (reprinted from: (1968) SA'AD 3) (explaining that the introduction of Appeal Committees within the Sa'ad have reduced the amount of violence in the Sa'ad chambers).

[376] DORON & KRAMER, *supra* note 319, at 25; Doron, *supra* note 319, at 695.

Council's services, and employing the same personnel.[377] The Ministry of Sa'ad was put in the hands of the small religious parties, and thus was doomed to be powerless and marginal with insufficient resources to fulfill the tasks it was supposed to execute.[378]

During the years, the Sa'ad went through substantial changes, as a response to the pressing needs on the ground. These changes took two forms. The first were internal reforms towards formalization and efficiency, which included the enactment of the Sa'ad Services Law, 1958, and the issuance of internal guidelines. Both have just served to codify the existing Sa'ad's working practices.[379] The second type of change was more substantive, as additional NI programs were enacted, reducing the number of Sa'ad beneficiaries. Such were the 1957 elders stipends (which were three times higher than Sa'ad), and the 1959 first child allowance program, which was gradually revised and expanded. But the major reforms took place only in the mid-1970s, with the 1973 unemployment insurance, the 1974 general disability insurance, the 1975 general child allowance program, and concluding with the Assurance of Income Law, 1980.[380]

Those changes were triggered by three main factors. Internally, the Sa'ad officials had worked to formalize and improve the efficiency of the service.[381] Internationally, a few reports written by United Nations officials criticized the state of

[377] DORON & KRAMER, *Id.*, at 25.

[378] *Id*, at 25.

[379] *Id*. at 27-28. The Sa'ad Services Law was criticized as lacking both a formulation of the individual's entitlement to benefits and a clarification of the government responsibilities in the operation of the law. Although the government did provide most of the funding it was not anchored as its duty by law (Kurz, *supra* note 375, at 118-119).

[380] Assurance of Income Law, 5741-1980, 35 L.S.I. 28 (1980-81). *Id*, at 15, and 30.

[381] For an insider's account of those efforts, *see*: Kurz, *supra* note 375.

welfare in Israel and especially the situation of the Sa'ad system.[382] And maybe most importantly, a national protest movement, the local Black Panthers, brought the issue of poverty and ethnic divide to the forefront of the national agenda.[383] Although the Black Panthers' rage was mostly known for its ethnic tone, the effects of their protest have reached far beyond Ashkenazi-Mizrahi relations as they pointed to the roots of poverty in Israel, and, as I claim below, were among the major triggers to the enactment of a disability insurance program in 1974.[384]

C. Productivity – The Hidden Factor

In this Part, I argue that the inferiority of the Sa'ad system was directly indicative of the perceived inferiority of the population that turned to the Sa'ad for help. As I claim later, the inferiority of people with disabilities was not usually openly discussed, but it was exposed through the discourse of productivity, which labeled people with disabilities as worthless. In order to prove this argument, I begin by rejecting the existing explanations of the establishment of the Sa'ad and instead suggest that socio-cultural factors have played a crucial role in that process. I then look at the general and unspecific concerns regarding the promotion of productivity and examine the underlying roles of prejudice and stereotypes, especially with regard to *Mizrahi* new immigrants. Finally, I suggest a way to look at the place of people with disabilities in that scheme.

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[382] The primary among them is the Klein Report (*supra* note 351), which was already mentioned. But there were two additional reports that expressed criticism against the Sa'ad system: T.S Simey, The Coordination of Social Services in Israel, Report of Expert Appointed by the Technical Assistance Administration of the United Nations (1952); and Dorothy C. Kahn, Organization and Operation of Welfare Services in Israel, Report of Expert Assigned from the Secretariat of the United Nations (1953) (ST/TAA/K/Israel/2).

[383] *See infra*, notes 419-420 and accompanying text.

[384] *Id.*

While direct stereotypes and social criticism against people with disabilities as such is unavailable, I support my analysis by considering the ableist rhetoric that labeled immigrants as sick and disabled and therefore worthless, together with additional evidence, such as the plain fact that people with disabilities have comprised more that 50% of Sa'ad recipients.

The two existing explanations thus far for the neglect of people with disabilities during the enactment of the National Insurance Law reflect the changing agenda of Israeli academia.[385] During the first decades, the academics were largely fascinated with the realization of the Zionist project and identified with the state. Thus the Sa'ad system was prevalently viewed as a better-than-nothing solution. Under emphasized economic constraints it was the best the state could do and therefore the least harmful solution in the circumstances.[386] As the academia matured, a more critical view appeared which stressed interest-group politics and analyzed the dominant, ruling labor movement through the lens of elitism. Consequently, it yielded a micro-level political analysis that stressed major actors' choices and agendas.[387]

However, I argue that these existing accounts are insufficient to explain the neglect of people with disabilities. The economic account can only explain the general necessity to make hard choices but cannot explain why some options were considered and others were not, or the hierarchy of priorities among those who were considered.

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[385] URI RAM, THE CHANGING AGENDA OF ISRAELI SOCIOLOGY – THEORY, IDEOLOGY, AND IDENTITY (1995).

[386] *See* primarily, EISENSTADT (1967), *supra* note 327; and HOROWITZ & LISSAK, *supra* note 325.

[387] *See* Part A.a. This is the type of analysis employed by DORON & KRAMER (*supra* note 319). For an analysis from a perspective of elitism, *see* YONATHAN SHAPIRO, DEMOCRACY IN ISRAEL (1977), and YONATHAN SHAPIRO, AN ELITE WITHOUT SUCCESSORS (1984).

While I maintain that sociopolitical choices are always, at least partially, value based, the economic account neglects to explore, and sometimes even masks, the ideological, political, or cultural dimensions behind a selection decision.

The micro-politics explanation is even less convincing in the context of disability insurance because, unlike health and old-age insurance, the labor movement and the *Histadrut* had no special interest in a disability insurance program. Quite to the contrary, as the case of the work injury program reveals, the *Histadrut* had an opposite interest in taking it off the table because there was no profit in it.[388] Disability insurance was therefore a program that the *Histadrut* was less interested in and that the labor movement in general saw as less worth fighting for. The question is therefore what in disability insurance was unworthy of a fight.

I contend that the existing research has overlooked the socio-cultural environment within which those decisions were made with regard to people with disabilities and the visions about disability that guided those decisions.[389] The proposed entitlements for children, disabled people and the unemployed were easily compromised because they reflected a hierarchy of values that rested on the assumed distinction between productive and unproductive persons. The aspiration was first and foremost to transform the "unproductive" into being "productive." Then, those who were doomed as "chronically unemployable" were abandoned. Nevertheless, as I show below, even those who did

[388] *See infra* note 457 and accompanying text.

[389] Indeed, along with the shift in scholarship towards interest-politics, a critical analysis has also emerged, including, for instance, feminist and ethnic critiques of Israeli politics. Yet, a disability critique is still missing from Israeli scholarship.

participate in "corrective" programs were not treated with dignity and did not enjoy economic security.

The two groups who were most affected by this line of policy, or lack of policy, were people with disabilities and recent immigrants from Muslim, Arab and North African Countries, i.e. the "Mizrhaim" (the "Orientals"). These two groups were the vast majority of Sa'ad recipients and the subjects of the "corrective" programs. In my analysis, I try to establish a link between the two. Although that link might seem remote, it is that remoteness that interests me. Interestingly, the link that I discover is in fact very strong, as ableism and orientalism have mutually informed, constituted, and reinforced each other.

D. The Role of Productivity in National Insurance Legislative History

> *The fundamental principle of social insurance is – to protect the person from the risks he is facing in life and thus to create an environment of social security. Our country is facing now the tremendous tasks of production growth and productivity increase. For these missions it is necessary to strengthen the working person's sense of social security. The fear of losing one's labor capability, the worry about deprivation or hunger, and the resentment toward charity-taking (matat chesed) – can all potentially damage the efficiency and productivity of labor.*
>
> *Golda Meir, The Minister of Labor, introduction to the NIL*[390]

The roots of productivity in Israeli welfare policy can be traced in part to its role in Zionist thought.[391] For Zionism, productivity was a central value with a dual meaning

[390] Golda Meir (*Mapai*), 11 Knesset Records, 1284 (1952).

[391] On the productivization of the Jewish people, *see* YEHUDA SLUTSKY, INTRODUCTION TO THE HISTORY OF THE ZIONIST MOVEMENT IN ISRAEL 37-39 (1973) (Hebrew); BENJAMIN BEIT-HALLAHMI, ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL 54

of personal reform of the Jew from a "parasite" to a self-sufficient person through productive labor, and a collectivist project of nation-building.[392] Although influenced by socialist ideas, Zionism's version of productivity embraced all sectors that contributed to the Zionist project of productivization, including capital owners who invest in national enterprises.[393] The result was less commitment to the lower classes, which had no access to labor and therefore were considered unproductive.[394]

These views were reflected in the objections to the public assistance program during the pre-state era, and later oppositions to the establishment of a Sa'ad mechanism and any improvement in Sa'ad benefits. They were also present during the debates over an unemployment program.[395]

The leading explicit concern was the fear that any form of financial assistance would discourage people from work and would bring moral decay. This view was held by the *Histadrut* even when it established the Unemployment Fund for its own workers during the pre-state era. The Fund's resources were dedicated to eradicating the problem of lack of work, and only in rare circumstances did it provide direct assistance to the

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(1993); "Haskala" Encyclopædia Britannica from Encyclopædia Britannica Premium Service http://www.britannica.com/eb/paper?tocId=9039461 (last visited: 9/15/2004); And "The Haskalah" (by Shira Schoenberg) Jewish Virtual Library http://www.jewishvirtuallibrary.org/jsource/Judaism/Haskalah.html (last visited: 9/15/2004).

[392] STERNHELL, *supra* note 322, at 83; Abraham Doron, *The* Histadrut*, Social Policy and Equality*, *in* THE *HISTADRUT* FROM WORKERS SOCIETY TO TRADE UNION 693, 695 (Yosef Gorny, et al eds., 2000) (Hebrew).

[393] STERNHELL, *supra* note 322, at 8.

[394] *See* also the various explanations for the *Histadrut*'s complex relation to welfare programs, *supra* notes 340-346, and accompanying text.

[395] For references to the relationships between productivity and labor movement resistance to assistance programs, *see* DORON & KRAMER, *supra* note 319, at 49-50, 120-129.

unemployed. As Izaak Kanev, the head of the *Histadrut*'s social insurance department and the primary advocate of social insurance during the transition era to statehood, put it,

> Unemployment makes the person miserable; beyond taking the worker's source of living it affects him in a negative way. Accepting assistance for a long period of time brings with it physical and mental degeneration and destroys valuable labor-force.[396]

Understood this way, the Fund's potential to function as a social insurance mechanism was evidently lost.

The same concern has shaped the Sa'ad system, as the following two complementary principles demonstrate. The first was the "less eligibility principle," which originated in 19th century England and dictated that a person would not receive Sa'ad even if as full-time worker his or her income was less than the customary Sa'ad rates.[397] The second was the English "wage stoppage policy" that was in effect until the end of the 1960s, and which assured that a person who lived on Sa'ad should never be in a better economic position than those who work full-time.[398] Thus, requests for supplemental income were practically meaningless.[399]

When the State was established, the proposed unemployment insurance program faced strong opposition, including members of the Interdepartmental Committee, and a coalition of all elite groups in Israeli society. The opponents favored state-funded labor programs (*avodot dahak*) for the unemployed. The participants received wages for their work, but the wages were low and insufficient. These works were preferably in manual

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[396] KANEVSKY, *supra* note 319, at 77.

[397] DORON & KRAMER, *supra* note 319, at 31-32.

[398] *Id.* at 47.

[399] *Id.*

labor according the belief in physical labor as the way out of poverty and into integration in society.[400] Nevertheless, it was practically a Sa'ad program, a charity mechanism which provided only minimal relief and which stigmatized its participants. Therefore people avoided it and preferred even lower-paying jobs.[401]

The concern with productivity was also evident during the enactment of the National Insurance Law, and it informed the debate in various ways. On the one hand, increasing productivity was a motivation behind the law, as Golda Meir's, the Minister of Labor, words in the beginning of this section reveal:

> Our country is facing now the tremendous tasks of production growth and productivity increase ... The fear of losing one's labor capability, the worry about deprivation or hunger, and the resentment for charity-taking (*mi-matat chesed*) – can all potentially damage the efficiency and productivity of labor.[402]

On the other hand, the concern about the decline in productivity was also raised, as one MK put it (interestingly calling the national insurance programs "Sa'ad"):

> The question is whether this law would not increase the number of people living on Sa'ad? And whether it would not decrease the motivation to productive work, to productivity of labor, to professionalism and to the economic growth of the individual, who would delude himself to think that his future is in any way more or less secured, with the enactment of this law.[403]

Furthermore, the priority was to help those who already work. Thus, instead of a comprehensive supplemental income program, the government created special programs that were designed to help workers in need, such as bread allowances and other subsidies.

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[400] GIORA LOTAN, TEN YEARS OF NATIONAL INSURANCE – AN IDEA AND ITS REALIZATION 110-111 (1964) (Hebrew); and DORON & KRAMER, *Id.* at 124.

[401] DORON & KRAMER, *Id.* at 127.

[402] Golda Meir (*Mapai*), 11 Knesset Records, 1284. *See* also 11 Knesset Records, 1267.

[403] Kalman Kahana (*Agudat Israel*), *Id.* at 1284.

The programs were a result of negotiation between the *Histadrut*, employers' unions, and the government. The grants were received directly from one's employer, who was later reimbursed by the National Insurance Institute.[404] Another example is the child allowances program, which passed only in 1965 and even then granted allowances only to the children of workers.[405] Similarly, even maternity insurance, which provided maternity leave benefits and passed without opposition, included only working women and left out women who were homemakers or unemployed (§28).[406]

But underneath the ideological and economic concerns, which preferred employment to direct financial assistance, were negative attitudes and stereotypes toward those who were "unproductive." These negative views were expressed particularly with regard to "Mizrahi" ("Oriental") Jews, the immigrants (*Olim*) from Arab and Northern African countries. These immigrants were in general treated as primitive and uncivilized,[407] and in the context of labor they were particularly suspect as having a "different mentality,"[408] as lacking the motivation to work, and were at risk of being spoiled by the opportunity to receive cash assistance.[409] Thus, in one occasion, in 1957,

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[404] DORON & KRAMER, *supra* note 319, at 48.

[405] *Id*. at 103-106.

[406] The neglect of the non-working mothers was widely criticized, *see* particularly 11 Knesset Records, 1251, 1261, 1283 (1952).

[407] *See* MOSHE LISSAK, THE MASS IMMIGRATION IN THE FIFTIES: THE FAILURE OF THE MELTING POT POLICY 58-62 (1999); SAMMY SMOOHA, ISRAEL: PLURALISM AND CONFLICT, 86-95 (1978); Ella Shohat, *Sepharadim in Israel: Zionism from the Standpoint of its Jewish Victims*, 19/20 SOCIAL TEXT 1 (1988); Henriette Dahan-Kalev, *Feminism Between Mizrahiyut and Ashkenaziyut*, *in* SEX GENDER POLITICS: WOMEN IN ISRAEL 217 (Dafna Izraeli et al eds., 1999) (Hebrew); ELLA SHOHAT, ISRAELI CINEMA: EAST/WEST AND THE POLITICS OF REPRESENTATION, Chapter 3 (1989); and OZ ALMOG, THE SABRA – A PROFILE, 153-161 (1997) (Hebrew).

[408] DORON & KRAMER, *supra* note 319, at 29.

[409] For various quotations on the subject, *see*: DORON & KRAMER, *Id.* at 125-126. Even S.N. Eisenstadt, the leading sociologist of Israeli society in its early decades expressed this concern, claiming that "the immigrants could be unwilling to work more than the necessary for the maintenance of their

Mordechai Namir, the Head Secretary of the *Histadrut*, and later on the Minister of Labor, said that

> The vast majority of unemployed among us are *Olim* (new immigrants), that the very problem of including them within the labor circle, of introducing concepts of labor, and of technically accustoming them to manual labor, is the greatest revolution in our society, and a very deep and far-reaching individual revolution, in the heart, soul and body of each and every *Ole* (new immigrant).[410] What is the reason in taking new *Olim*, that most of them have never worked, and tempting them with gifts of money, by cash assistance, until they will consider whether they should go to work, or whether they should fund the lower income sufficient and live life of unemployment. This is a very serious consideration.[411]

The Prime Minister, David Ben-Gurion, has expressed similar concerns when he stated that

> Transforming this human dust (*avak adam*) into a cultured, independent nation with a vision – it is no simply task, and the difficulties are of no lesser magnitude than the difficulties of economic absorption.[412]

These views were so popular and prevalent that only a foreign report could have exposed and critiqued them in a manner that would bring public turmoil and that would trigger change. In 1958, Professor Philip Klein, an American social work professor, was appointed by the United Nations to conduct a thorough research of welfare policy in Israel for the Israeli government. The report revealed that the low level of support for persons living on Sa'ad was actually a result of intolerance towards "unproductive" sectors in society, arrogance towards recent immigrants and stereotypes employed with

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present level of needs, and would be especially unwilling to work to pay taxes" (EISENSTADT (1967), *supra* note 327, at 130).

[410] DORON & KRAMER, *supra* note 319, at 125.

[411] LISSAK, *supra* note 407, at 103 (citing the Knesset Records from 26.3.1957).

[412] David Ben-Gurion, State Yearbook, 25 (1951) (cited in LISSAK, *Id*. at 63 (translated in Nadav Davidovich & Shifra Shvarts, *Health and Hegemony: Preventive Medicine, Immigrants and the Israeli Melting Pot*, 9(2) ISRAEL STUDIES 150, 153 (2004)).

regard to the poor who were perceived as "lazy and unbalanced in their nature."[413] While some Knesset members have expressed strong concerns, others have questioned the data. Thus, one MK asked: "If the situation is so severe, how come people are not starving to death?" Klein bluntly answered, "Indeed, they do starve, but very slowly."[414] Although the Israeli government's pressure succeeded in preventing the publication of the official report, the report's influence was significant, as it triggered reforms in the Sa'ad system.

An additional problem with those views was that they focused on the individual as the source of trouble and as the target of "correction," but ignored the structural factors that contributed to poverty in Israel. Emphasizing mental and other personal elements was also part of the professional ideology of the social workers who dominated the field of welfare policies. As the executors of those programs, they influenced and shaped public opinion with regard to the programs' beneficiaries.[415]

The serious move towards unemployment insurance happened in the second half of the 1960s, when the economy was down and unemployment became prevalent not only among Mizrahi people. In addition, new immigrants came from Western "developed" countries and no one believed in the need to redeem them through work. Even Yosef Almogi, the Minister of Labor at that time, who was critical toward the labor programs as "bad to the country and bad to those employed through them," was quoted saying that "the danger that new immigrants would prefer cash assistance over labor has passed" and that "the old type of *Aliyah* with its unique human makeup has ended."[416]

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[413] The Klein Report, *supra* note 351.

[414] DORON & KRAMER, *supra* note 319, at 29.

[415] *Id*. at 50.

[416] *Id*, at 130.

But the major changes in Sa'ad policy happened only in the third decade of Israeli history, which was characterized by intensive activity in the field of social policy.[417] These changes were a response to the "rediscovery of poverty" as Doron and Kramer put it,[418] following the protests and rage expressed by the Israeli Black Panthers movement. They protested against the growing inequality and the disparities in distribution of income, mobility opportunities, and political power between Ashkenazi and Mizrahi Jews in Israel, exposing strong feelings of alienation and resentment of many Mizrahi people against the Ashkenazi establishment.[419] Bringing political turmoil the protests led to the appointment of public committees that recommended on extensive reforms. The result was vast public support for extensive social welfare reforms. Most importantly to this section, it triggered reforms in Sa'ad, including the enactment of the disability insurance program, unemployment insurance and Asssurance of Income Law, 1980, that eventually brought the abolishment of the Sa'ad.[420]

E. The Mutuality of Israeli Ableism and Orientalism

> *We should not allow in any way a reverse or adverse selection: that the healthy, the young, the skilled, and the well-off would remain in their communities of exile and the retarded, backward, and uncivilized (nechshalim) would be brought to Israel. This would be the complete distortion of Zionism.*

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[417] JOHN GAL, SOCIAL SECURITY IN ISRAEL 29-31 (2004).

[418] *Id*. at 14.

[419] DORON & KRAMER, *Id*. at 14-16, and 32-35; Shlomo Avineri, *Israel: Two Nations?, in* ISRAEL: SOCIAL STRUCTURE AND CHANGE 281 (Michael Curtis & Mordechai Chertoff eds., 1973); and Celia S. Heller, The *Emerging Consciousness of the Ethnic Problem Among the Jews of Israel*, *in* ISRAEL: SOCIAL STRUCTURE AND CHANGE 313 (Michael Curtis & Mordechai Chertoff eds., 1973).

[420] And indeed, a comparison between poverty levels in the years 1968 and 1975 reveals that although the percentage of poor families, individuals, or children before getting allowances has hardly changed, the percentage of poor after receiving allowances did declined in 36%-40%. *See* a table on The Poverty Sector in Israel, in S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY 228 (1985).

Eliezer Livne, 'Davar' newspaper (1952).[421]

The place of disability in the scheme of productivity was quite complex. On the one hand, it is clear that there was no place for people with disabilities in a world of worship and adoration for productivity and labor. The effort to cure the Jew from his "parasitic nature" and the belief in hard physical work as the ultimate answer for that "illness" were intolerant towards people who could not live up to that ideal and who were perceived ill and dependant themselves. Disability stood in total contradiction to the language and images employed by the Zionist vision. It was "a reminder of the Jew's 'crippled' condition in pre-Israel times," as Meira Weiss argued.[422] The worthy bodies of the workers were so treasured and idolized for their physical and mental health that it seems that no room or vocabulary were left to include "deformed" or "imperfect" bodies.[423]

On the other hand, unlike the "Mizrahi" new immigrants, people with disabilities were not directly depicted by explicit stereotypes and social scrutiny. Although people with disabilities were not considered productive according to the parameters of Zionism and its ableist undercurrents, it is hard to find negative rhetoric about people with disabilities *per se* as unproductive, probably due to the prevalent assumption that a disability is not one's fault.

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[421] *Id*. (Citing Eliezer Livne, *Beterem*, 15.5.1952).

[422] WEISS, *supra* note 310, at 91.

[423] For general materials on the Zionist body politics, the role of anti-Semite stereotypes in it, *see* ANITA SHAPIRA, *The Myth of the New Jew*, *in* NEW JEWS, OLD JEWS 155 (1997) (Hebrew); WEISS, *Id.*; and OZ ALMOG, THE SABRA – A PROFILE 127-153 (1997) (Hebrew). Specifically on the rejection of the exilic "old" Jew as deformed, *see* DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN 301-304 (1997); SANDER GILMAN, FREUD, RACE, AND GENDER 19-22 (1993); and DANIEL BOYARIN, UNHEROIC CONDUCT: THE RISE OF HETEROSEXUALITY AND THE INVENTION OF THE JEWISH MAN 301-304 (1997). I develop and study this point further in my dissertation.

However, as Haim Ben-Asher's speech before the Knesset reveals, the Zionist rhetoric of bringing physical and mental cure to the Jews as a nation and as individuals, was still widespread. According to Ben-Asher:

> The State of Israel is first and foremost, a state of rescue and cure of masses of Jews, the cure of the body and the balancing of the soul. It is primarily about – the healthy Jew, the Jew who senses a solid ground and a meaning to his life, the Jew who is liberated from the fear of discontinuity, the Jew whose life is not so fragile anymore (lo tluyim mi-neged). And first thing first – balancing of the nerves of the nation … The nation is still sick … A progressive national insurance legislation is one path to create a mental balance on the way to cure the nation. We must carve a road in the national psyche to ensure and insure the individual on the foundations of pre-considered national savings.[424]

He also added that:

> To the extent that we will be able to teach the concept of national insurance to the masses of citizens of Israel, we will advance ourselves in the correction of the national psyche and in its building through cure, immunization, balance, and the nurturing of a productive and etatist feeling that elevates the production power of the person and the citizen of the state. [425]

This speech shows that the ongoing negation of the exilic Jew as fundamentally sick and crippled, and the preoccupation with physical health and productivity, kept informing the cultural environment within which social policy and other decisions were made.

The link between people with disabilities and a lack of productivity becomes even more explicit when Israeli authorities and its popular media discuss the actual and perceived prevalence of illnesses and disabilities among Mizrahi immigrants and their implications on Israeli immigration policy; thus revealing that the new immigrants were

[424] Haim Ben-Asher (*Mapai*), The Knesset Records to the National Insurance Law, 11 Knesset Records, 1296 (1952).

[425] *Id*. at 1297.

not rejected only as "primitive" but also as diseased and disabled. As one journalist complained,

> This immigration has been allowed without screening people: a large place was given to all the ill-fated: the extremely weak among the old-aged (*zkenim tshushim*), chronically ill, handicapped, and other social cases … The bringing of tens if not hundreds of people of an unfit type did not add powers to the state, did not benefit the *Yishuv* (the pre-state Jewish community in Palestine), did not bring a better hope for the future, and did not help the immigrants themselves, who in many cases became more miserable and bitter than they had ever been over there, among their neighbors.[426]

An editorial in *Ha'aretz* newspaper expressed a similar view:

> Israel is ready and capable of continuing to absorb *Olim*, who come to the country and are ready to undertake any effort of labor … But Israel is unable to keep absorbing *Olim* who need Sa'ad and are incapable of the construction effort. As a matter of fact, Israel would never be able to do so. It is not enough to prop up the fire of messianic enthusiasm. 'Earthly Jerusalem' (*Jerusalem shel matah*) would be built only by working hands.[427]

Yet an even more disturbing piece was published in *Davar*, the labor movement's newspaper, by Eliezer Livne,

> We should not agree in any way that out of all people the part that is morally or physically backward (*mefager*) and dubious (*mefukpak*) would be immigrating to Israel. It is not just a matter of material resources to support those immigrants … The problem is not essentially financial, bur rather social and spiritual. *Israel is not a refuge for the backward and unproductive circles of the Diaspora communities, but a center to their pioneers and the best among their sons*. Even if foreign elements would become involved to generously support all the 'social cases' – we should not accept these offerings for principled reasons.[428]

In his piece, Livne further questioned the motives for immigration of those "backward" immigrants, claiming that they cannot be compared to the old immigrants who arrived

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[426] Lissak, *supra* note 407, at 60 (Citing Shmuel Osishkin, *HaBoker*, 16.11.1951)

[427] *Id*. (Citing *Ha'aretz*, 29.6.1953).

[428] *Id*. at 64. (Citing Eliezer Livne, *Davar*, 9.11.1951 (emphasis added)).

"out of tremendous yearning of the soul, heroic adventures, and without knowing what future holds for them." In another place (cited above in the opening to this section) he concluded that allowing such immigration would be the complete distortion of Zionism.

The data show that the mass of immigration indeed brought with it many people who were sick or disabled, but they were definitely not a majority among immigrants. The number of Sa'ad recipients among the immigrants due to "limited work capability" was estimated at 111,000 out of 745,000 persons, which is about 15%.[429] Another estimate counted 10% among the immigrants as living with chronic illnesses.[430] A special organization, *Malben*, was established in 1944 to take care of the immigrants who were sick, old, disabled, or needed significant help from the social services. *Malben* was a typical pre-state organization, which was funded by private Jewish money but executed state-like missions. Even after the establishment of the state, it kept working and was praised for sharing the load of work with the general welfare services.[431]

The amount of people with special needs for extensive healthcare shocked the receiving Jewish community, which responded with panic. The "Mizrahi" immigrants were the main targets of that panic, partly because of additional stereotypes against them as "primitive" and "uncivilized." Consequently, a medicalized discourse – and practices of screening, curing and inspecting the immigrants – became prevalent, which resulted in

[429] *Id*. at 43.

[430] *Id*. at 42. Among those diseases were trachoma, tuberculosis, smallpox, polio, and malaria.

[431] Malben means Mosad le-Tipul be-Olim Nechshalim (the Institute for Treating Backward Immigrants). On its role in providing services to immigrants, *see Id*, at 42-43.

the treatment of the entire population of "Mizrahi" new immigrants with suspicion and paternalism.[432]

To be clear, my purpose here is not to argue that the new immigrants were not in fact disabled or sick and therefore did not deserve such treatment, but rather to show the *pervasive use of the language of disability as an instrument of demeaning a population and rendering it useless*.

These attitudes were also reflected in the official immigration policy of the era. The restrictions on immigration were not only a result of the policy employed by the British regime,[433] but also a product of priorities made by the Zionist leadership.[434] A continuing issue in that respect was the preference given based on political affiliation, as each Zionist strand was interested in bringing people that would support and advance its social and political vision. Thus, ever since the 1920s, the emphasis of labor Zionism on pioneering immigration has resulted in a preference for encouraging the immigration of unmarried people, and "courageous people who believe in idealism of the pioneering type, that physical labor does not deter them."[435]

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[432] Nadav Davidovich & Shifra Shvarts, *Health and Hegemony: Preventive Medicine, Immigrants and the Israeli Melting Pot*, 9(2) ISRAEL STUDIES 150 (2004). Davidovich & Shvarts focus on the vaccination policy as a practice of power and disciplining of the body of the new immigrants.

[433] Moshe Lissak, *Immigration, Absorption and Society Building in the Jewish Community in Eretz-Israel (1918-1930)*, *in* THE HISTORY OF THE JEWISH COMMUNITY IN ERETZ-ISRAEL SINCE 1882 – THE PERIOD OF THE MANDATE: PART TWO 214-219 (Moshe Lissak chief ed., 1994). The British Immigration Ordinance, 1933, for example, provided in sec. 5(1)(a) that "no foreigner … shall enter Palestine who is a lunatic, idiot or mentally deficient …" (31st August, 1933. The Laws of Palestine, R.H. Drayton ed., 1934, Vol. II, Rev. Ed., at 745). According o the British immigration policy Israel would be open to any Jew "mentally and physically healthy, that has guaranteed income and that would not present an economic or political risk to society" (*Id*. at 216).

[434] *Id*. at 219-234.

[435] *Id*, at 220.

But as the mass immigration of the 1950s arrived, a formal decision was made, exposing the ableism and healthism underlying Zionism's practices. On November 18, 1951, the Jewish Agency, a central organ of the Zionist movement, which among other tasks administered and executed the Zionist immigration policy, issued selection criteria that should be used to select among the immigrants.[436] According to these criteria, 80% of the immigrants should have been either pioneering youth, skilled people of young age (under 35), or families whose provider was under 35. The remaining 20% who did not meet those criteria could immigrate only if they accompanied a family whose provider was capable of working, or if they had family in Israel who requested their arrival and were ready to support them. Still, all immigration certificates were granted only after comprehensive physical examinations. Although, at first glance, these criteria do not seem so different from the earlier policy, their ramifications were dreadful in the context of these immigrants, who in general were older in age and included more families than those who immigrated during the 1920s and 30s. As Lissak noted:

> The immediate consequence of that decision was a separation of families; the old, the disabled, and those incapable of vocational training (hasava miktzo'it) have remained in their countries of origin, while the young and the capable have immigrated to Israel.[437]

These regulations were not applied to all groups of immigrants and did not last long. Excused from the screening policies were immigrants who were defined as "rescue immigrations" (*Aliyot Hatzalah*) and therefore, the criteria did not apply to the survivors of the holocaust from Eastern Europe and the immigrants from Yemen and Iraq.[438] But

[436] LISSAK, *supra* note 407, at 16.

[437] *Id*. at 20.

[438] *Id*. at 18.

even with regard to other groups, the criteria were not always enforced due to the pressure of families who were not willing to break apart. The regulations were also criticized by opposing political parties. In 1953 they were amended to be less rigid, by elevating the age criteria to 40 and allowing disabled people to join their family if it had a provider who was capable of working.[439]

The following is a powerful testimony that conveys both the role of disability in the marking of the new immigrants as the "Other," and the complex link between the experience of disability and the role of disabling social practices. The experience of being rejected and subjected to constant scrutiny as hopeless and useless has left its marks on the immigrants who could not understand why they were treated this way. Lev Hakak, an immigrant from Iraq, tells in his biographical book that he started fearing that he was truly *impaired*:

> The fear – because *society has planted in me the feeling of impairment* (*Mum*): a primitive man from a primitive origin, a son to an ethnic group that would succeed in nothing … a man whose childhood was taken away with 'dirty,' 'morons, 'lost case.' And if I didn't excel, wouldn't I justify what my foes and oppressors have sentenced me to?[440]

The responses to the new immigrants expose, therefore, not only deep negative attitudes towards the poor, but also towards people with disabilities.

The complex link between *ableism* and *orientalism* that I expose here deserves more research.[441] However, I believe that it is already possible to argue that the mutual relationships between the "disablement" of the Mizrahi immigrants and the

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[439] *Id*, at 20. Lissak claims that the real reason for loosening the criteria was the decline in number of immigrants.

[440] LEV HAKAK, HA'ASUFIM 65 (1977) (emphasis added). Cited in: LISSAK, *Id*, at 75.

[441] *See* EDWARD W. SAID, ORIENTALISM (1978).

"orientalization" of people with disabilities have contributed to the marginalization of both groups and rendered them even less productive and less worthy than they were perceived in isolation. In other words, just as the Mizrahim were imagined as disabled so have people with disabilities were imagined as Mizrahim. Once this link is exposed it is also less surprising that the Black Panthers have triggered the change in welfare policy towards people with disabilities. Both modes of exclusion were rooted in closely related sets of socio-cultural assumptions.

F. Between Deserving Poor and Undeserving Citizens

I argue that the uninhibited language used with regard to people with disabilities and people who live with severe illnesses among the "Mizrahi" new immigrants is indicative of the deeply negative perception that people with disabilities were unproductive and unwanted members of society.

Moreover, as I have just suggested above, recent immigrants and people with disabilities that comprised the majority of poor people in Israel were not two separate groups, but in fact, two groups with a vast overlap between them. They did not just inhabit similar socio-cultural spheres where assumptions were made regarding their non-productivity, but many of the people with disabilities, if not the majority among them, were new immigrants, and vice versa – a large amount of new immigrants who were Sa'ad recipients had disabilities.

Thus, according to the data, people with disabilities have comprised about 50% of all Sa'ad recipients,[442] and at the same time, 95% of the families who were supported by

[442] DORON & KRAMER, *supra* note 319, at 69.

the Sa'ad, immigrated to Israel after 1949, and 80% of those families came from Asian or African countries.[443] More concretely, it seems that people with mental and developmental disabilities were almost automatically considered under the Sa'ad, which even ran some basic special programs for them. However, people with physical disabilities participated in the "corrective" "back to work" programs, which granted money for work and which aspired to transform the participants into productive citizens.[444]

Furthermore, if people with disabilities have comprised 50% of Sa'ad beneficiaries than that means that all debates with regard to Sa'ad had clear and direct impact on them. But it also suggests that policymakers must have realized the effects of their decisions on people with disabilities when considering Sa'ad-related issues. Nevertheless, people with disabilities did not receive higher levels of assistance, nor were they exempted from the power of the "less eligibility" principle or the "wage stoppage" policy.[445] Such an option was possible and even utilized with regard to civilians who were injured during the 1948 war, or later in attacks against Israeli civilians. Although they received their benefits from the Sa'ad administration and were still subjected to a case-by-case scrutiny, once a person was declared eligible, she would enjoy a special arrangement that entitled her to the same level of allowance like disabled veterans and to extensive medical treatment.[446] Alternatively, people with disabilities could have

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[443] EISENSTADT (1967), *supra* note 327, at 210.

[444] *Id*. at 126.

[445] I am not suggesting here that such actions were the right ones to take, but pointing at the solutions that could have demonstrated a different view about people with disabilities.

[446] Uri Yanay, *Assistance to Civilian Causalities of Hostile Actions*, 3 SOCIAL SECURITY 137, 39-40 (1994) (Hebrew).

received higher levels of allowances, just like widows and elderly people who starting from 1957 received special grants, though still insufficient.[447]

It seems that a dual understanding has dominated the field. On the one hand, disability was not established yet as a separate category in the local welfare discourse. People with disabilities seemed to be considered part of the general unemployed poor who should be carefully kept with enough support to survive, but not more than that. The orientaization of people with disabilities has probably furthered that "transparency" of disability as they belonged to the masses of "unfit immigrants." As such they were a burden on the welfare system and an impediment on the realization of the Zionist project.

On the other hand, the spirit of the Poor Laws, which were still influential at that time, depicted people with disabilities as the "deserving poor," the poor that deserved assistance without being required to work.[448] In addition, traditional Jewish *Tzedaka* (charity) laws might have had a similar influence.[449] Although it has been argued that Zionism in general aspired to distance itself from Jewish philanthropy as an exilic practice and therefore rejected charity-like services for the general poor,[450] it is probable that the attitudes towards people with disabilities, who are usually perceived not as responsible for their condition, were a little more forgiving. Thus, when the Sa'ad started to develop its own guidelines during the 1950s and 60s, which codified its previous "unofficial," and probably uneven, practices, disability was acknowledged as a criterion

[447] The Klein Report, *supra* note 351.

[448] STONE, *supra* note 314, at Chapter 2.

[449] Translating *Tzedaka* as charity misses much of its unique meaning which treats giving to the poor and the needy as a matter of justice and not good-hearted benevolence.

[450] DORON & KRAMER, *supra* note 319, at 49-50.

for receiving public assistance. That change has helped people with disabilities to be eligible for Sa'ad benefits, but did not result in higher levels of assistance.

The paradox here is that people with disabilities were in a dual position of being noticed and unnoticed, pitied and abandoned, at the same time. They were the "deserving poor" on the one hand, but worthless citizens on the other. Hence, although early proposals for a social security system did include disability insurance among them, at the moment of truth, that proposal was quickly and easily deserted. It was not until 1974 that people with disabilities were finally acknowledged as a separate category for social welfare benefits with specific needs and different circumstances. For the first time, they were included in the National Insurance system and were expected to receive a higher and more dignified allowance. Nevertheless, that program still suffered from problems, which can be traced to the Sa'ad system, and which their effects still shape today's challenges.

For the majority of people with disabilities, then, Israel was not a modern welfare state, but *a charity* – a Sa'ad – *state*, which offered only minimal aid to prevent their starvation. Yet that state-run charity lacked even the compassion that charity has traditionally employed. Instead of expressing a norm of mutual aid and solidarity, its bureaucratic structure exhibited mercy or pity, at the most, as it *deliberately* supplied less than dignified living, due to people with disabilities' perceived lack of productivity. The particularities of the Sa'ad system reveal the sociocultural atmosphere within which the decisions regarding disability social welfare policy were made, thus exposing a fundamental aspect in the power relations between disabled and non-disabled persons.

CHAPTER FIVE:
Dignity to the Workers, Glory to the Soldiers:
The Privileged Spheres of Disability Benefits

The neglect of the general population of people with disabilities is especially striking when compared to the situation of disabled veterans and the work-injured, the sectarian and more prestigious groups of people with disabilities. These two groups of people with disabilities achieved legal recognition in the first years after independence. The distinctive stories that stand behind each one of those programs shed light on the different social position that each group occupied, their different structure as groups, and the different understandings of disability in that era.

This Chapter shows the clear pyramid of benefits and the rigid boundaries that were created between the various categories of people with disabilities. Each category was entirely different from the others, such that they inhabited almost a separate universe of material, social, and political conditions. Furthermore, they contribute to the understanding of the meta-power structure that underlie Israeli disability policy – that of ableism.

As I previously argued, and as I elaborate further below, contemporary research on disability benefits in Israel has indeed recognized and was concerned with the disparities among disabled veterans, the work injured, and the general population of people with disabilities. However, except in rare cases the roots and reasons for those gaps were not researched, but rather briefly mentioned as a matter of common unchallenged knowledge. More importantly, current writing on disability policy does not

identify and acknowledge the *ableist meta-power structure* to which the entire scheme of disability policy is subject. Ableism, as elaborated earlier, views disability as inferiority and worthlessness and ignores the role of society in *disabling* people. Without acknowledging this power structure the current criticism of welfare benefits is focused on the details and loses sight of the grand picture. Advocating an inclusive and egalitarian program for all people with disabilities while ignoring ableism misses the grand context in which all disability related policies are located.

In the following I do not dedicate much attention to the details of the additional legal arrangements for particular groups of people with disabilities apart from disabled veterans and the work injured.[451] Nevertheless, they are important to my analysis in two main ways. First, they emphasize further the relatively low status of the majority of people with disabilities that did not belong to any privileged category. And second, inner dynamics among those various groups which aspired to be associated with disabled veterans and to disassociate themselves from the National Insurance have played a role in the growing fragmentation within the disability community and eventually in the decline of the status of the work injury program, as I explain below.

The following part, then, further contributes to the understanding of Israeli ableism and to the diverse ways in which it operates. It shows that the inferiority of the general population of people with disabilities, the "truly disabled," is constituted not only through direct practices but also indirectly through the inner system of power that exists within the disability community and among the various groups of people with disabilities.

[451] On the differentiated structure of disability benefits, *see supra* notes 366-369 and accompanying text.

The result was, as this chapter's conclusion suggests, that *all* people with disabilities suffer from this power structure.

A. Work Injury – A Civil Model for Disability Benefits

> *A superior mission is awaiting for the social security in the Land of Israel: to preserve the creation powers of the nation's pioneers who are building a homeland to the persecuted people, in demanding conditions of sub-tropic climate, a country filled with illnesses, and while transitioning to labor life.*
>
> *Izzak Kanevsky.*[452]

Work injury constitutes a type of disability category, which enjoys a favored position in Israeli collective imagery and its welfare system, though not as privileged as disabled veterans, which will be discussed later. It was enacted into law relatively early, in 1954, as one of the first programs that the National Insurance Institute executed.[453] It was the first civilian-oriented program to address the needs of a group of people with disabilities.

It seems that when the various National Insurance programs were discussed, no links were drawn between a general disability insurance program and a work-injured program. The two have occupied separate understandings of disability and its place in society, which were mostly based on the position of the person as a worker, or a productive member of society, and more specifically on the work related circumstances of the injury.

Although established relatively early and celebrated as the flagship of the new National Insurance Institute, even this program was not free of struggle. As I previously

[452] KANEVSKY, *supra* note 319, at c.

[453] National Insurance Law, 5714-1954, 8 L.S.I. 4 (1953-54).

showed, almost all National Insurance programs were debated and questioned. The success of each program depended on the identity and interests of the actors who were involved in its enactment and the extent to which these interests have converged, and on the place that its beneficiaries occupied in the national imagery. I have further suggested that the *Histadrut*'s interest in the program was a crucial factor and that the value of productivity had an essential role in sentencing the programs to pass or fail. The following examines those factors in the context of the work-injury program.

a. The Flagship Program of National Insurance

The legislation of the work-injury program was situated in the most favorable conditions in terms of institutional history, global atmosphere, interests involved, and national values, which together enabled its successful enactment. From an ideological perspective, work-injury insurance was a paradigmatic program for the *Histadrut* to promote and for the state to adopt. It reflected the values in which labor Zionism believed and which the various Zionist strands could agree upon: labor, productivity, and nation-building.

Yet as previously argued, for a program to succeed in the legislative process, it was not enough to be "ideologically correct." In this case, various factors came together to create the conditions for its success. First, even before WWII, work-injury insurance was already the leading internationally recognized welfare mechanism.[454] Even in Palestine, the Workmen's Compensation Ordinance (1927) was the leading among very

[454] John Gal, *Business and Social Policy: A Case Study of the Adoption of Workers' compensation in Israel*, 4-5 (unpublished manuscript on file with author); BAR-NIV, *supra* note 321, at Chapter 7.

few welfare-oriented laws which the British regime created.[455] But in the global atmosphere of post WWII, with the growing commitment to progressive welfare policies, many countries have changed their workers' compensation scheme from an employee-based responsibility to a state monopoly mechanism.[456]

On a local level, the various options open to workers' compensation during the pre-state era, i.e., the British Ordinance and the *Histadrut*'s programs, were insufficient, but constituted an acknowledgement of work injury as an emerging category of welfare policy. That environment reflected a clear preference for the disabled worker as opposed to people with disabilities that could not participate in labor activities.

But most importantly, in the case of work injury, the *Histadrut* had an interest in the program because it was aware to the limited services it could provide to its members who became permanently disabled. The *Histadrut* was also concerned by its lack of resources. Therefore general social security insurance was not only an agenda to promote but also a financial necessity to resolve.[457]

Throughout the legislative process the commitment to the work-injured was particularly high. The Interdepartmental Committee, which was appointed in 1949 to prepare a social insurance proposal, suggested a relatively generous and progressive scheme which was almost entirely adopted by the National Insurance Bill of 1951 and

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[455] *See supra* note 342.

[456] Gal, *supra* note 454, at 7-8.

[457] In 1929 the *Histadrut* established a Handicapped Fund (*Keren Nechut*). Its goals were to provide funds for continuing recovery expenses, long-term hospitalization, work placement and training, and to financially support institutions that were treating Histadrut members who became permanently disabled or chronically ill. In reality, however, the Fund's resources were very limited. In addition, in most cases allowances were paid directly to providers, and only in rare cases were given directly to individuals. Moreover, the Fund typically provided support for 12-18 months only. KANEVSKY, *supra* note 319, at 73, 112-113, and 130.

had an immense impact on the final shape of the National Insurance Law.[458] During the proceedings, the work-injury program enjoyed the strong support of the Minister of Labor and the Head of the Knesset Committee on Labor and received special attention as one that would bring a much-needed "radical reform" to the field.[459]

The major source of opposition to the program came from private insurance companies, who dominated the market until then, but the commitment to the work-injured was strong enough to resist that opposition.[460] The British Ordinance mandated that it is the employer's obligation to pay compensations to injured workers in specific cases. As a result, a private market of work-injury insurance has flourished.[461] The impact of the proposed work-injury insurance could and actually did have an immense impact on that market, so they initiated a campaign against the "nationalization" of work-injury insurance, which was forcefully supported by the General Zionists' Party, a right-wing party that has joined the ruling coalition, and other Knesset members.[462] Other opponents to the work-injury program have also stressed that as an already regulated

[458] Gal, *supra* note 454, at 18-22.

[459] As noted by Golda Meir, the Minister of Labor, in the Knesset, *see* 11 Knesset Records, 1214 (1952). *See* also the speech of Reuven Shari, the Head of the Knesset Committee on Labor, *Id*. at 1279-1280; and Gal, *Id.* at 23.

[460] For a detailed account of the unsuccessful attempts of the business sector to successful mobilize in order to oppose the proposed social insurance program, *see*: Gal, *supra* note 454. Gal argues that the failure of the insurance companies' campaign was not rooted solely in the hegemony of the labor movement, but was in lack of solidarity and coordination among the various business actors. *Id*. at 27-30. On the opposition of the insurance companies, *see also*: LOTAN, *supra* note 400, at 10. DORON & KRAMER, *supra* note 319, at 62-63; DORON, *supra* note 331, at 54-56.

[461] However, a fundamental problem with that arrangement was that the employer was not obliged to acquire insure for such cases and many workers were left with no compensations at the end. On the development of the workers' compensation insurance market in Mandatory Palestine, the detrimental effect of the NIL on it, and the campaign of insurance companies, *see*: Gal, *Id*.

[462] *See* the debate in the Knesset over the nationalization of the workers' insurance market, especially at 11 Knesset Records, 1252, 1255, 1279, 1281, 1284, 1285, 1207-1308 (1952).

field, a few amendments should suffice and that the legislative attention should be directed at other, more pressing fields, where no law existed.[463]

The proponents of the bill claimed that many workers did not get their compensations, that the rates of coverage were influenced by the negotiating power of each group of workers, and that lengthy litigations resulted in charity-like out-of-court arrangements instead of dignified and rights-based resolutions.[464]

The insurance companies almost succeeded in impeding the work-injury program, but were forced to withdraw their demands after they declined a crafty suggestion to keep working in the field on the basis of free competition with the NII.[465] Overall, Roter and Shamai claim, the National Insurance Law "proposed a higher level of protection for employees which the insurance companies were unable to match."[466] Working on a tort-like basis, they lacked a social security orientation, which the NII was expected and intended to provide.[467]

As I have already mentioned, the work injury program became a model that six additional statutes followed, though with variations. These statutes included mainly employment related categories, such as state, army and firefighting services employees.[468] Nevertheless, as the following section on disabled veterans show, the

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[463] *See* Eliezer Shostak (Herut Party), 11 Knesset Records, 1259-1260 (1952).

[464] *See* Reuven Shari (*Mapai*), the Head of the Knesset Committee on Labor, *Id*. at 1279-1280.

[465] DORON, *supra* note 331, at 54-56; DORON & KRAMER, *supra* note 319, at 62.

[466] Roter & Shamai, *supra* note 330, at 245.

[467] *Id*.

[468] The following is a full list of the laws that followed the work injury model (as compiled by PROCACCIA & MILLER, *supra* note 368, at 16): State Service (Benefits) Law [Consolidated Version], 5730-1970, 24 L.S.I. 57 (1969-70); Defence Army of Israel (Permanent Service) (Benefits), 5714-1954, 8 L.S.I 149 (1953-54); Fire-Fighting Services Law, 5719-1959, 13 L.S.I. 215 (1958-59); National Service Law, 5713-1953, 7 L.S.I. 137 (1952-53; Border Victims Law, 5717-1956, 11 L.S.I. 19 (1956-57); and Life

groups who were powerful enough have struggled to escape the association with the National Insurance Institute and aspired to be associated with disabled veterans both for the benefits they received and the glory they enjoyed.[469]

b. Hollow Generosity

In general, it seems safe to say that the work injury program did bring the anticipated change and did not fail the high expectations that surrounded its enactment. It introduced a whole new approach to workers' compensation that has survived until this day with very few amendments and no fundamental changes.

The general provisions of the work-injury insurance included wide coverage for all salaried workers, including additional categories of people, such as members of cooperative associations (covering kibbutz and moshav members this way), persons in vocational training or rehabilitation programs, members of first aid societies, and the self-employed. That broad definition demonstrates a commitment to all productive members of society and not only to proletariat-like workers. But still, a close examination reveals that two main groups were left out. The most evident group is women who are homemakers, who were totally excluded from the law.[470] The second group was Arab-Palestinian workers, whose terms of employment did not conform with the law's definitions, either because they received actual harvest as their wage or because many of

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Saving Operations (Casualties) (Benefits) Law, 5725-1965, 19 L.S.I. 314 (1964-65). However, the structure of benefits and eligibility criteria for state employees and soldiers in permanent service were different in various aspects (Procaccia & Miller view them as a distinct category in their analysis).

[469] *See* Part B.e.

[470] Homemakers were left outside the entire National Insurance Law's provisions, *see* §3(b), (c).

them did not enjoy a permanent job at all and were not organized to defend their rights and lobby before state agencies.[471]

The law provided two types of benefits to work injured: in-kind and cash benefits. In term of cash benefits, the law granted a relatively generous level of compensations based on 75% of the previous earnings of the injured, multiplied by the degree of individual disability. The calculation was based on a detailed table of impairments that determined the percentage of disability in every case. As to in-kind benefits, those included medical treatment, medical rehabilitation and vocational training and rehabilitation.[472] The main criticism of in-kind benefits was the limited understanding of rehabilitation as connected to work only, and not as a broad category regarding all life aspects, as it was understood with regard to *Nechei Tzahal* (IDF disabled veterans).[473]

However, the primary flaw of the program was in not covering injuries that occurred outside the workplace. According to the law work injury was defined as an accident or illness that occurs *while* the person is working, or *as a result* of his or her work (including accidents on the way to or back from work). The result was extensive litigation on the meaning of work injury in an attempt to establish the link between the injury and work, and to enter the law's generous compensation scheme.[474] Otherwise the person would find herself under the inadequate and stigmatizing Sa'ad system. From an

[471] Rustum Bastuni (*Mapam*), 11 Knesset Records, 1292-1293 (1952).

[472] Those services were subject to subsequent regulations to be issued by the Minister of Labor, and to guidelines to be issued by the responsible institutions. BAR-NIV, *supra* note 321, at 71-72.

[473] *Id*. at 72. For a detailed critique of the rehabilitation system, *see* Victor Florian & Nira Dangoor, *Issues Related to the Rehabilitation System in Israel*, 19 SOCIETY AND WELFARE 193 (1999) (Hebrew).

[474] Bracha Ben Zvi, *Over Protection versus Discrimination in Legislation for the Disabled (the Work-Injured, the Generally Disabled)*, 43 SOCIAL SECURITY 45, at 48-49 (1995); LOTAN, *supra* note 400, at 107 (suggesting already in 1964 to create a general accident insurance that would not focus on work-related injuries).

insurance perspective, the problem here was that people, who worked all their lives, who paid their social insurance fees, and whose employers paid insurance on their behalf, were now deprived of benefits. But the criticism was not only whether it is desirable to draw such a distinction, but also whether it is possible in a modern industrial society to isolate the causes and circumstances for each injury or illness.[475]

Finally, another problematic issue remained unresolved: The legislative arrangement did not include within it a section for cases of employer negligence. According to the law, employees would be required to privately litigate such claims at the civil torts system and in case of victory the employer would refund the National Insurance Institute for any amount paid to the worker.[476] That arrangement was clearly complicated and overburdening both for the individual litigant and for the system as a whole.

c. Gate-keeping Citizenship: Denying Civil Dignity

The establishment of the new National Insurance Institute, then, created a clear hierarchy between the general population of people with disabilities and the work-injured. The differences were evident in each and every aspect of the distinct welfare

[475] Arie L. Miller, *The Problem of the Class Differentiation of Disability Benefits: A Case for Going Beyond the No-Fault Principle*, 12 ISR. L. REV. 434, 441 (1977) (according to Miller "it becomes more and more difficult to draw a line between risks of occupational and non-occupational accidents" (citing G. Calabresi, The Cost of Accidents, 78 (1972)); Ben-Zvi, supra note 474, at 47-48 (on the complexities of work-related illnesses and their changing definitions). *See* also infra notes 485-487 and accompanying text, for a more general argument regarding the role and responsibility of society and the state in creating and failing to prevent those risks.

[476] Gal, *supra* note 454, at 25. Gal mentions there that it might have been a result of private negotiations between the *Histadrut*'s insurance company (HaSneh) and the Ministry of Labor, so that the private market of work insurance would not collapse entirely.

mechanisms, starting with their place in the public ethos and imagery, and ending with the very content and details of the programs.[477]

Compared to other people with disabilities who did not enjoy any program, the work-injured received comprehensive services and generous allowances. Other people with disabilities had to prove their neediness before the Sa'ad officer, subjecting themselves to his or her sole discretion, and even then receiving only a minimal grant, which was far below dignified living. In opposition, the aim with the work-injured was to restore their previous ability to work through medical treatment and rehabilitation programs, and if impossible, to retain a standard of living that is close to the one that was lost.

In terms of welfare policy then, while the rationale behind the Sa'ad was merely *need*, the work-injury program combined two higher allocating principles of social welfare: *compensation* and *insurance*.[478] These three allocating principles, need, insurance, and compensation, guide any welfare system and help distinguish between the various mechanisms of distribution that each program employs. Each principle reflects a different value system, and shapes the type and level of benefits that a specific program offers.[479] Exploring those allocating principles therefore assists in uncovering the social

[477] *See* the table comparing between a Sa'ad (public assistance) mechanism and a social insurance program, *supra* note 371 and accompanying text.

[478] John Gal, *The Perils of Compensation in Social Welfare Policy: Disability Policy in Israel*, 75 THE SOCIAL SERVICE REVIEW, 225, 235 (2001) (In this article, Gal provides a detailed account of the relationships between these three allocative principles and the various welfare programs for people with disabilities in Israel). To read more on the three principles, see N. Gilbert and H. Specht Dimensions of Social Welfare Policy (2nd Ed., 1986).

[479] Gal, *Id*. at 225.

hierarchies that underlie the seemingly "innocent" and technical welfare programs, which allow various groups to receive differentiated treatment.[480]

The differences between Sa'ad and work injury reflects the appreciation for the contributions of the work-injured to society.[481] The insurance principle "seeks to provide individuals with protection against income loss because of … preidentified risks," and to preserve the living standard of the insured,[482] while the compensation element reflects the social value that was attached to labor in Israeli society at that time.[483] As Gal claims, it is the compensation component that is problematic since it "inevitably leads to unjustifiable discrimination among people with similar needs and claims for social benefits."[484] By contrast, an insurance rationale can lead to more egalitarian arrangements, especially if the element of modern risks is understood broadly.

An alternative and broader insurance rationale would have employed a more complex understanding of the nature of modern risks. It would have questioned not only the possibility of finding the responsible and establishing the link between the generator of the risk and the injured, but also challenge the availability of choice in avoiding those very risks. Therefore it was suggested that both the state and society have a role in creating and maintaining those risks and thus should be held accounted for them. According to this view the interest of society and the state in technology and innovation requires state responsibility regarding the very risks they entail and the possible harm

[480] I later show how these different allocative principles shaped the other welfare programs of work injury and general disability.

[481] Miller, *supra* note 475, at 440.

[482] Gal, *supra* note 478, at 231, 234-235. *See* also Florian & Dangoor, *supra* note 473, at 201.

[483] *Id*. at 235. *See* also *infra*, Part B.c. (regarding the role of the compensation principle in welfare benefits to disabled veterans).

[484] *Id*. at 227.

they may inflict upon "innocent" people through accidents and diseases.[485] As Miller argued, since the purpose and function of the modern state is the proper organization of social life, the state is responsible for failing to manage modern life's risks.[486] Furthermore, as Miller, Procaccia and Kretzmer maintained, in today's society one cannot really avoid those risks since they are present in any modern life activity, including using facilities, such as roads and public spaces, or using products, such as electronics, medications, foods and drinks. Hence, since society imposes those risks on the individual, they concluded, it should also compensate for them through disability benefits.[487]

Yet those critiques did not go beyond the inner logic of social welfare and did not examine what role the programs played in the constitution of disability, and what message they employed and communicated with regard to the meaning of disability. I contend that by narrowing the scope of National Insurance beneficiaries, the program was serving as the major gatekeeper of civil dignity. Drawing the boundaries of civil desert around restrictive circumstances of work related injuries reinforced the view that the majority of people with disabilities are unworthy of dignified living. The extensive litigation that this benefits scheme has generated exemplifies what was at stake for individual disabled workers and demonstrates the broader impact on the ground it had – a divided disability community. That is regrettable since the work injury program could

[485] Miller, *supra* note 475. It is interesting to mention in this context that after the introduction of the general disability insurance program, two additional specific laws were enacted: Road Accidents Victims (Compensation) Law, 5735-1975, 29 L.S.I. 311 (1974-75); and Defective Products (Liability) Law, 5740-1980, 34 L.S.I. 92 (1979-80). These laws represented a concern regarding modern risks but they also demonstrate how narrow its understanding was.

[486] Miller, *Id*. at 441-442 (suggesting a universal "no-fault no-cause" scheme to address all accidents and injuries).

[487] MILLER ET AL, *supra* note 313, at 46-47.

have served as a sensible, progressive, and dignified model for all disability benefits. However, as I show later, an even more devastating impact on the scheme of disability benefits and the structure of the disability community was resulted by the Invalids Law, the compensation system for disabled veterans.

The following section shows even deeper disparities in the Israeli welfare system and further complicates the relationships between disability, power, and the law. Although the program for the work-injured was progressive and satisfying, the program for IDF disabled veterans was far more generous and enjoyed an even wider political and social consensus. The consequences were larger differences in benefits' methods and further inequalities. The differences between the programs show again the different understandings of disability in Israeli society. First, they vividly demonstrate the unique place that militarism and security occupy in it and the unique status that disabled veterans enjoy as a result. And second, they show the process of decline in the allure of the civil alternative.

B. Disabled Veterans – Heroism and Activism

> *In his book about American Manhood, Mark Gerzon, an American Jew, glamorizes Israel as a nation in arms that knows how to treat its fighters. He describes, for example, how as he was traveling by bus to Tel Aviv from a hospital in Jerusalem (where he was treated after a car accident) in 1969, "the women on the bus all stare at me. Whether grandmothers or teenagers, they smile warmly. Their smiles are not the stiff acknowledgement of urban strangers, but the sensual, affirming, nurturing beam of old friends, old lovers. 'Why are they looking at me like that?' I ask my friend. 'They think you are a wounded soldier' she replies" (p. 47). With a bandage around his head, the American traveler in Israel – more than two years after the 1967 war had ended, and while Americans were still coming to terms with the Vietnam War – feels like a hero. For the two-hour drive he is (in his words) John Wayne.*

Meira Weiss.[488]

> *The idea of self-sacrifice must have come to me from other sources [than my family]: my friends, my teachers, the books I read, and the strong impression left on me by soldiers dressed in uniform and the state military parades. My friends and I became very enthusiastic when we saw war veterans marching in the streets of Tel Aviv. Some of them were visibly wounded, while others appeared invincible. We admired them the way the youth admired the Italian infantry in De Amicis's novel. Still a boy, watching a military parade with my father one Independence Day, I asked myself whether my father would like me to be such a soldier. I felt, though, that he never could have written me a letter like the one ritten by the father in De Amicis's novel, tying his love to my exhibition of courage and self-sacrifice on the battle field. Still, when I saw his admiration for the young soldiers marching in the streets of Tel Aviv, I wondered whether he did not, sometimes, think like the Italian father.*
>
> *Yaron Ezrahi*.[489]

If the disparities among the beneficiaries of the work-injury program and the Sa'ad recipients seem high, the comparison to the benefits that IDF disabled veterans (*Nechei Zahal*) receive and the story of their enactment reveal a totally distinct and almost isolated sphere of social policy.

a. Legal and Institutional Setting

After the 1948 War (the War of Independence) the State of Israel exhibited a strong sense of commitment to the many soldiers and civilians who were injured (among its Jewish population). Its response to their needs was incredibly fast despite the difficult

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[488] WEISS, *supra* note 310, at 27.

[489] YARON EZRAHI, RUBBER BULLETS – POWER AND CONSCIENCE IN MODERN ISRAEL, 152 (1997). The novel Ezrahi refers to is: EDMONDO DE AMICIS, IL CUORO (1866). In the Hebrew translation the book was titled *The Heart*; in the English translation – *The Heart of a Boy*. The nineteenth century novel praises Italian heroism and national values. The father mentioned by Ezrahi warns his son that if some day in the battlefield he will "save his life" instead of "courageously fight," he will lose his father's love. Ezrahi reflects on how popular this book was among generations of young Israelis and the great effect it had on him personally. *Id*, at 147-151.

organizational and budgetary conditions. Already during the first months of the war, the army created a program to meet the needs of the wounded soldiers.[490] A few months later, the Ministry of Defense took that responsibility under its auspice and provided employment and housing assistance, vocational training when needed, and a limited amount of cash allowances.

In 1949, within a year since statehood, the Knesset, enacted the Invalids (Benefits and Rehabilitation) Law, 1949.[491] The Invalids Law was among the first laws that the Knesset enacted, the first legislated social welfare program, and the first to create a state-run mechanism to address the needs of a specific group of people with disabilities. It provided generous non-means-tested benefits, a variety of medical and occupational rehabilitation services, business and home loans, and access to personal social welfare services and counseling.[492] The law also acknowledged Zahal (IDF) Disabled Veterans Organization (ZDVO) as the official representative of disabled veterans. In the years that followed, the Invalids Law was amended numerous times which largely aimed at liberalizing the law, expanding its coverage, and improving the benefit levels.[493]

Within a few years, in the mid-1950s, the Ministry of Defense established the Rehabilitation Department, which executed the Invalids Law's provisions by providing financial compensations for disabled veterans and the families of the fallen, setting up medical facilities for the injured, and facilitating their return to normal life, particularly to

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[490] The following history of compensation programs for disabled veterans is based on John Gal & Michal Bar, *The Needed and the Needy: The Policy Legacies of Benefits for Disabled War Veterans in Israel*, 29 INT. SOC. POL. 577 (2000).

[491] *See supra*, note 364.

[492] Gal & Bar, *supra* note 490, at 580-581.

[493] Gal, *supra* note 478, at 234.

the labor market.[494] Until today, unlike most other disability-based programs, the disabled veterans program is under the authority of the Ministry of Defense, and the benefits it provides are part of the security budget.[495]

Finally, the expenditure on disabled veterans' programs was remarkably high and demonstrated further the commitment to disabled veterans' needs. In 1949/1950, the cost of the various rehabilitation services was nearly a tenth of the state budget.[496] While other welfare programs have continually struggled with the limited resources argument, which was traditionally linked to the state's early developmental stage and pressing security needs, the expenses over disabled veterans were always considered part of the security and defense budget.[497] As I later show, these legislative and institutional separations significantly impacted Israeli disability policy and politics.

b. Heroism and Sacrifice

Following my previous contentions regarding the role of productivity in disability related welfare mechanisms I suggest here that the admiration of the soldier-fighter as a heroic national figure, the role of self-defense and security as national values, the rise of militarism, and the centrality of the army in Israeli society, have all contributed to the deep commitment shared by the state and the public to the wounded soldiers who made

[494] Gal & Bar, *supra* note 490, at 581.

[495] A few attempts were made to change the administrative framework and transfer the responsibility for disabled veterans from the Ministry of Defense to the NII, but they failed at the very beginning.

[496] Gal & Bar, *supra* note 490, at 592.

[497] Though not without a struggle, *see* Part B.d.

the ultimate sacrifice for their country.[498] David Ben-Gurion, the first Prime Minister of Israel, expressed that commitment when he introduced the 1949 Invalids Law:

> I am not aware of times in the history of our people, when there were peaks of heroism and glory as those exhibited in the lives and deaths of our young men … The state has fulfilled its duty to all those who were injured during the War of Independence. Of course, there are things that the state is unable to do … it cannot return the lost limbs of the injured. Yet I believe that I do not exaggerate when I say that the state has made every possible effort to rectify and to rehabilitate what can be rehabilitated.[499]

After fifty years that rhetoric has remained the same. In 1998, when Israel celebrated its fiftieth anniversary, Ezer Weizman, the President of the State of Israel, and a legendary pilot, proudly declared that "the assistance to the disabled in his rehabilitation process is a supreme value in Israeli society."[500]

But according to my argument that commitment did not stem solely from willingness to compensate for the pain that such an injury involves. I suggest that Zionist body politics rejected the disabled body by explicitly aspiring to recreate the Jew as a masculine healthy and powerful, and implicitly to redeem the Jewish body from the old anti-Semite stereotypes it was captivated in, which perceived him as imperfect and even deformed.[501] Thus, if the naïve and romantic image of the worker was inaccessible to people with disabilities, then the fierce, courageous, and heroic image of the soldier was fully blocked before them.

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[498] On the turn from a defensive to offensive ethos in Zionism and the rise of militarism in Israeli society, *see* ANITA SHAPIRA, LAND AND POWER (1992) (Hebrew); and URI BEN ELIEZER, THE EMERGENCE OF ISRAELI MILITARISM 1936-1956 (1995) (Hebrew).

[499] David Ben Gurion, The Invalid Law proposal. Translated in John Gal, *Values, Categorical Benefits, and Categorical Legacies*, *in* INTO THE PROMISED LAND: ISSUES FACING THE WELFARE STATE , 115, 131. (Asher Ben-Arieh and John Gal eds., 2001).

[500] GIBORE HAYIL (TRUE HEROES): ZAHAL DISABLED VETERANS ASSOCIATION 1948-1998 2 (Yosef Lobenberg ed., 1998).

[501] For materials that support this claim, *see supra* note 423.

Consequently, because the disabled body was regarded as a deformed body, *becoming disabled was perceived as becoming imperfect and even defected*, and in order to overcome that common perception, the body of disabled veterans was glorified as one that carries the marks of war. And indeed, that view was not only expressed by Prime Minister Ben-Gurion in presenting the Invalids Law before the Knesset.[502] Fifty years later, Israel's top public figures expressed that same view. Opening the ZDVO's jubilee album, President Weizman said: "The fifty years of statehood were characterized by war and ongoing struggle for the State's independence and security … In their daily rehabilitation efforts, *Nechei Zahal* (IDF disabled veterans) *carry in their bodies and souls the traces of this struggle* which unfortunately has not ended yet." Prime Minister Binyamin Netanyahu said: "Unfortunately, on our way to independence … we have paid a precious price … You, members of ZDVO, have a large share in this precious price. *You carry in your bodies and souls the marks of that persistent struggle* of our people."[503]

Furthermore, disabled veterans' contribution to society was praised in those passionate expressions of admiration as exceptional and unique; they were not portrayed as a burden on society, or as poor and miserable, but as still productive and valuable citizens. Thus, the Minister of Defense, Yitzhak Mordechai, has expressed before the disabled veterans "deep appreciation to your unique and fundamental contribution to Israel's security … and to the value what you symbolize … I am filled with appreciation for your persistence capacity, your sternness, your heroism, and especially your

[502] Ben-Gurion declared that it aimed to fulfill "part of the debt that we owe *those who with their bodies helped liberate the nation* and the homeland" (2 Knesset Records, 1572 (1949) (emphasis added)).

[503] GIBORE HAYIL, *supra* note 500, at 2-3 (emphasis added).

contribution to Israeli society as a *unique and virtuous group*, despite facing injury and rehabilitation." And Shaul Mofaz, IDF Chief of Staff, said: "In your daily struggle to maintain normal life, we find the strength to continue with creation and innovation. The education for values, as it is manifested in the dedication and devotion of each and every one of you, assures us to have a society which is built on mutual aid … as we must have when military and society coalesce."[504]

Disabled veterans themselves have expressed this sense of pride and dignity as well. In 1949, an enraged veteran responded to a journalist's claim that disabled veterans take advantage of their disability to make a profit, and wrote:

> I do not know whether you have ever considered the sanctity of the site in which you stand. If you did, you would not dare publishing these repulsive words of hatred … Attend to this! How much glory and heroism, fierce and self-sacrifice [disabled veterans] have proven. Most importantly, how many rivers of blood and sweat, skin and nerves, flesh and bones, [they] have given away … Thanks to [them] … who gave their lives, blood and limbs … you and many like you – are still alive.[505]

c. The Rationale: Compensation

In terms of welfare policy, the rationale behind the Invalids Law was compensatory. The disabled veterans' program was aimed at compensating "deserving" people with disabilities that society takes responsibility over their loss or damage by making up for it.[506] As such, it reflects a view of social justice that emphasizes the principle of "desert," which Gal critically described as dictating that "the truly needy will

[504] GIBORE HAYIL, *Id*. at 4-5 (emphasis added).

[505] *Id*. at 17.

[506] Gal, *supra* note 478, at 227.

receive the essentials necessary to meet their basic needs, while society grants the deserving (however defined) a greater share of the common resources to meet theirs."[507]

In Israel then (though not only there), compensating disabled veterans is part of the state's commitment towards its citizens who made the ultimate sacrifice for their country.[508] Since in Israel military service is mandatory, the state's obligation towards its citizens is intensified, as it is perceived necessary for public and military morale, and for the willingness of others to make that sacrifice.[509] That concern is echoed in a pamphlet published by the ZDVO in a 1987 campaign against the state's attempt to cut their benefits. The raging brochure contended:

> We were not passively led to the war. We went for it knowing that upon our shoulders lays the sacred duty to defend the existence of the State of Israel, and knowing that if god forbids (*halila*) we will not return, or will return disabled, the government of Israel will take care of our families and us.[510]

The main problem with the compensation principle is that it collides with equality, a competing central social justice principle, which dictates that individuals with similar needs receive similar resources. Hence, a compensation-based system, as Gal concisely expressed, "inevitably leads to unjustifiable discrimination."[511]

The particularities of the disabled veterans program demonstrate how the compensation principle was translated into the concrete details of a very generous program. One aspect is access to benefits, which was unrestricted by material need or

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[507] *Id.* at 226; *see* also MILLER ET AL, *supra* note 313, at 41-43.

[508] Gal & Bar, *supra* note 490, at 580.; Gal, *supra* note 478.

[509] Florian & Dangoor, *supra* note 473, at 201. For a critique of that view, *see* MILLER ET AL, *supra* note 313, at 40-49.

[510] GIBORE HAYIL, *supra* note 500, at 113.

[511] Gal, *supra* note 478, at 226-227.

prior participation in an insurance program; and indeed, a disabled veteran's eligibility for benefits does not depend on his or her financial situation or work capacity, or on his contribution to social insurance.[512] In addition, the Invalids Law defines disability broadly, as it examines the recipient's capacity to undertake "regular activity," and is based solely on a medical test. By that it acknowledges a vast spectrum of harms, relating to all life aspects, unlike work injury that define disability based on ability to work.

The basic level of compensation that the law provides is relatively high and does not depend on the actual previous income of the veteran. Rather, the "basic wage" for calculating a disabled veteran's stipend is that of a medium grade state employee (civil servant).[513] That basic amount is equal among all recipients (depending on their level of disability), and in cases of persons in need is supplemented by additional allowance.[514]

Finally, a compensation-based program typically emphasizes rehabilitation and reintegration into society.[515] Similarly, disabled veterans enjoy comprehensive rehabilitation services that require the investment of large-scale resources, and include medical treatment, vocational training, placement services, assistance in housing solutions, and more. Moreover, they are encouraged to engage in paid work and to increase their income with no negative effects on their basic benefit level; again an

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[512] *Id.*

[513] The Invalids Law, §5 and §1. According to the law the basis for calculation is 86% of a salary of a rank 10 in the "unified wage scale" for state employees. But if the person has no children, it is 78% of that salary.

[514] For a detailed analysis of that provision, *see* PROCACCIA & MILLER, *supra* note 368, at Chapter 6.

[515] Gal, *supra* note 478, at 230.

incentive system that is based on a willingness to pay benefits even to those who do not "need" them,[516] and that allows disabled veterans to enjoy high living standards.[517]

As the argument goes, then, the generous compensation program is a way for society to encourage and provide incentives to its members to keep serving in the army and to compensate those who were injured while serving. In reply, Miller, Procaccia and Kretzmer have claimed,[518] that the compensation is the same whether the act is heroic or banal, and whether the injured was a soldier in a special unit or doing a clerical job. Therefore it does not necessarily encourage exposure to danger. At the same time, civilians who are injured as a result of a military-related activity, such as getting hit by a car of the military, do not receive benefits like disabled veterans. In addition, the extension of the benefits of disabled veterans to other groups of people with disabilities, like police personnel and the Knesset's guard, demonstrate the flexibility of that category in some cases.

Yet I argue that the real question that had not been asked yet is: *What are the assumptions behind the compensations rationale that justify such an enormous gap* between the groups? How come the disparities are so high? I am not asking why the Invalids Law and its related policies gave so much to disabled veterans, but why so little was provided to the general population of people with disabilities. And most importantly, why do we assume that receiving the same, means receiving so little? The question in reply to the incentive argument should be therefore *whether people would*

[516] *Id*. at 236.

[517] Gal & Bar, *supra* note 490, at 583.

[518] MILLER ET AL, *supra* note 313, 40-46 (discussing the various reasons to provide greater benefits to disabled veterans and the work-injured over the generally disabled).

avoid joining the army had they knew that a wounded soldier receives the same benefits as any disabled person but that that level of benefits is high. This point is acute as it truly undermines the incentive rationale that is so powerful in the public discourse: there is a good reason that a person going to military service would expect excellent care in case of injury, *but* this expectation should not rest on the assumption that other disabled persons receive less. The care should be excellent in itself and not in comparison to a lower level of care that others get.

The disparities, I argue, serve not only to glorify the "deserving" and "needed" disabled veterans, but also at the same time to downgrade the rest of people with disabilities as "undeserving" and as "needy." Underneath these benefits there is an assumption regarding the inferiority of disability and the need to compensate a person that was put by society into a disabling event. That event, I suggest, was a "crippling event" because it not only threatened to transform the person's body, but also to alter his or her social position from a worthy to a worthless citizen.

Within the Israeli disability discourse, then, disabled veterans were, and to a large extent still are, in a paradoxical position of being *the* handicapped of Israeli society but at the same time the *non-handicapped* of the disability community. As I show in greater details below, the disassociation between the various groups of people with disabilities created a growing divide in which more and more groups of people with disabilities wanted to become associated with disabled veterans and to distance themselves from the others.[519]

[519] *See infra* part B.e.

d. Activism and Group Consciousness

Another aspect in which disabled veterans are noticed in the Israeli landscape is their level of self-organization and group consciousness. The Invalids Law was the first to constitute a segment of people with disabilities as a distinct legal category. In that process disabled veterans became a group not only because of the similar benefits they received, but also due to the relationships they developed in the course of their activism, and the confidence in their entitlement which motivated them to act. While for welfare researchers and policymakers the enactment of the Invalids Law is largely considered exceptionally quick in time and comprehensive in content, for the wounded of the 1948 war it was a result of a long process that involved uncertainty, despair, and activism.[520] The ZDVO was initiated during gatherings of wounded war veterans in the "Paraplegic Building" (*Bitan HaMeshutakim*) in Tel-HaShomer Hospital. These veterans sought to guarantee adequate assistance and proper rehabilitation policies and were very assertive in their struggle.[521]

Representatives of the activists participated in the Knesset meetings over the drafting of the new Invalids Law. Rafi Kotzer, the leader of the wounded, recalls: "I was brought in a stretcher to the committee meetings. The stretcher was placed on four chairs, and by their side there was additional chair that served me as a desk." Their demands were remarkably similar to the agenda of today's disability movement.

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[520] The following is based on the information provided on Zahal (Israel Defense Forces) Disabled Veterans Organization (ZDVO) website (the website can be accessed at: http://www.zdvo.org.il/ (last visited: 10/1/2004), and in Gibore Hayil, *supra* note 500.

[521] Ultimately, after four of the wounded went on strike, they even achieved the direct involvement of the Prime Minister, Ben-Gurion, in support of their struggle.

> Our first demand was not to take the disabled to [housing in] Jaffa, and to guarantee that they would be able to *return to their natural environment*. The practice of the hospital and the Ministry of Defense was to take the disabled that completed treatment to one of the empty apartments in Jaffa,[522] to give them an allowance, and in that essentially, to see the primary treatment for the most severely disabled. *We demanded employment, vocational training, or academic studies, in accordance with each one's ability and will*.
>
> An additional important thing was employment. We demanded that a disabled would be able *to work in a suitable place*, [and] that there will be enough suitable places, some of them sheltered and reserved first and foremost to disabled. *The stipends should be a supplement that will enable a disabled*, despite his limitations, *to be on equal par with a person who is not disabled*. Our last demand was to determine the Rehabilitation Department's *duty to consult with us* and to take into account the positions of the disabled.[523]

In that first struggle the activists among the disabled veterans set the principles that guided the future activities of ZDVO and its relationships with the government. The veterans established themselves as advocates for themselves, who would have a say in the designing of policies that concern them, who should be consulted in the process, and who go out to the streets if they are unsatisfied with those policies.

The involvement and clear voice of disabled veterans themselves in the process has contributed not only to the basic notion that they should be rewarded and compensated, but has also influenced the goals and methods of the various programs. Throughout its history, the ZDVO kept insisting on reintegration into mainstream society, on the return of each one to his or her original neighborhood, on finding a suitable job and receiving a stipend that allows closing the gaps between the disabled and the non-disabled. In contrast, the general population of people with disabilities started

[522] These were probably apartments of Palestinian refugees as a result of the 1948 war.

[523] This testimony appears both on the website and in GIBORE HAYIL, *supra* note 500, at 17 (emphasis added).

fighting for these benefits and principles only many years later. Disabled veterans, then, enjoyed not only receptive social and cultural conditions, but also an inner belief in their "desert."

The ZDVO achieved the veterans' goals in two main ways: first, through consultation practices and political lobbying, and second, by becoming a service supplier itself. ZDVO's use of political power was unique in the organizational landscape of voluntary associations in 1950s-60s Israel.[524] Its unique status was first acknowledged in 1949 by the Invalids Law as a collective representative of the disabled veterans, and throughout the years it has developed substantial bargaining capacities. Thus, it succeeded in establishing long-term relationships with the Ministry of Defense through formalized annual negotiations over the state of benefits for disabled veterans,[525] and it was able to pass progressive legislation even against the Ministry of Defense's opinion thanks to wide support from Knesset members and the general public.[526] When their demands were not met, or when implementation required further struggle, disabled veterans went out to the streets on strikes and campaigns to make their demands visible, confident that their plight was a matter of public concern.[527]

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[524] KRAMER, *supra* note 359.

[525] Gal, *supra* note 478, at 234.

[526] KRAMER, *supra* note 359, at 60. According to Kotzer, even in 1949, in those first meetings in the Knesset, the parliament members were sensitive and open to the demands of the veterans, and preferred their positions over those of government officials.

[527] The following are examples of various campaigns and strikes during the 1950s, mostly organized by the ZDVO, as reported in GIBORE HAYIL, *supra* note 500: In 1950 four veterans opened a hunger strike demanding certain rehabilitation services (*Id.* at 18); In a 1951 sit-in strike six veterans protested against delays in granting taxi licenses (*Id.* at 20); in 1952 more than 400 ZDVO members blocked the entrance to the Ministry of Treasury which objected to some amendments to the Invalids Law that were initiated by the organization (*Id.* at 23); in 1953 members of ZDVO opened a sit-in strike against protesting against rehabilitation policies which they viewed as inefficient and ineffective (*Id.* at 24); in 1958, ZDVO's picket lines demonstrated against Gat Cinemas in Tel Aviv for not taking disabled veterans

As a service supplier, ZDVO has gradually created supplemental programs to those of the state in various fields of social services, including education, vocational training, counseling and work placement, and even direct financial aid.[528] On its website, ZDVO explains:

> The aid to the disabled in their rehabilitation process represents a fundamental value in Israeli society. Yet the State of Israel, despite its significant support … through medical treatment, granting allowances, assistance in housing, and vocational training, does not have enough means to establish the kind of rehabilitation system which is necessary for the long path to successful rehabilitation.[529]

The ZDVO supplied additional services in the field of social and recreational activities, including the establishment of The Fighter's Home (*Beit Halochem*), a club-like gathering place for disabled veterans in various major cities around Israel.

The political, organizational and economic strength of ZDVO are indicative, therefore not only to the social esteem that IDF disabled veterans enjoy in Israeli society, but also to the sense of desert and self-esteem that they manifested collectively.

e. A Model to Follow

Because of the generous program and the social prestige that disabled veterans enjoyed many other groups struggled to achieve similar benefits and to share the glory. These were mainly groups perceived as related to national missions, either because of the position of their members, such as police and civil guard (*Mishmar Ezrahi*) personnel, or

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as ushers, despite the legal obligation to do so. Consequently, Gat agreed to take two of the three veterans who applied for the job (*Id*. at 36);

[528] KRAMER, *supra* note 359, at 85

[529] ZDVO website: www.zdvo.org.il/keren.asp

because of the circumstances of injury, such as people who were injured during "hostile actions," or survivors of the holocaust.[530]

The material stakes in these struggles were tremendous, especially for people with a very low prior income or no income at all. For these people stipends were calculated based on a minimal or low income, and were far lower than what was received by a similarly situated soldier who was injured during military service.[531] Thus, in order to achieve better benefits and to receive higher social recognition, some groups have struggled to get closer to the disabled veterans model and to distance themselves from the work injury model by evoking national values.[532]

Two illuminating struggles in this context concern the benefits for the veterans of WWII and the civilian injured by "hostile actions" (a term which I shall soon explain). The veterans of WWII are those who participated in the various forces that fought against the Nazi regime.[533] In 1952, the government proposed a draft program that would be administered by the Ministry of Labor (the National Insurance Institute was not yet established then). Yet that program encountered a strong lobby of veterans'

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[530] The following is a list of laws that followed the disabled veterans' model: Invalids (War Against the Nazis) Law, 5714-1954, 8 L.S.I. 63 (1953-54); Invalids (Nazi Persecution) Law, 5717-1957, 11 L.S.I. 111 (1956-57); Police (Invalids and Fallen) Law, 5715-1955, 9 L.S.I. 80 (1954-55); Prison Service (Invalids and Fallen), 5720-1960, 14 L.S.I. 32 (1960); Knesset Building and Precincts Law, 5728-1968, 22 L.S.I. 226 (1967-68); Security Service Law [Consolidated Version], 5719-1959; Civil Defense Law, 5711-1951, 5 L.S.I. 72 (1950-51) ; Victims of Hostile Action (Pensions) Law, 5730-1970, 24 L.S.I. 131 (1969-70); and Life-Saving Operations (Soldier Casualties) (Benefits) Law, 5725-1965, 19 L.S.I. 314 (1964-65).

[531] The most relevant example in that respect is the National Service Law of 1953 (*Sherut Leumi*), which modeled its service-related injuries provision after the work-injury program. The National Service was designed for religious women who were exempted from military service on religious grounds, but since its participants had just graduated from high-school, their stipends were calculated based on a minimal income, and were far lower than disabled veterans benefits. On the history of the National Service program, *see*: http://www.carmelinstitute.org.il/YouthService/ nysinisrael.htm (last visited 9/15/2004) (the National Service example taken from PROCACCIA & MILLER, supra note 368, at 31).

[532] Gal, *supra* note 499, at 128-134; Gal & Bar, *supra* note 490.

[533] The following is based on: Gal, *Id.* at 129.

organizations and Knesset members who called to equalize the status of all disabled veterans. In the end, although the benefits were not identical, the structure of the programs was similar. Yet one of the striking changes to the law was the transferring of the program from the Ministry of Labor to the Ministry of Defense, a change which was accepted by the veterans of WWII as a signal that their status in society was at least formally equal to that of IDF disabled veterans.

The second and more telling example was the struggle over the compensations of victims of hostile actions, namely civilians who were injured in attacks performed by Arabs.[534] The compensation for those civilians was always under the care of the Israeli government, but its administration and legal basis have changed with the changes in circumstance and the nature of those actions. Interestingly, an early program from 1956 (Border Victims Law, 1956) was celebrated for being modeled after the work-injury program. But in 1969, when the issue was brought again before the Knesset through the Victims of Hostile Action (Pensions) Law, 1970, the lobby for the victims successfully changed the law so that its beneficiaries would enjoy benefits similar to, and updated with, those of disabled veterans.

The lobby argued that the gap between the benefits for disabled veterans and for victims of hostile actions, if remained similar to work injured, is too broad[535] and that "there is a moral aspect and social justice" to the equalization of their entitlements, as it "prevents injustice (*kipu'ach*) of low-income people and [it] bases the allowances on the

[534] The following is based on: Yanay, *supra* note 446; and Gal, *Id.*

[535] Uzi Feinerman (HaMa'arach), 56 Knesset Records, 285 (1969).

equal right of each victim regardless of his income."[536] The struggle, however, has failed in transferring the program to the Ministry of Defense.[537]

Interestingly, during the enactment of the Compensation for Victims of Hostile Actions Law in 1970, MK Yehudah Sha'ari (The Independent Liberal Party) asked: "Isn't it the time to develop general disability insurance? … then we would be able to simplify all proceedings and to cover all risks including those that are not yet covered?"[538] As it is clear by now from my analysis, such a question challenged the deep structure of disability policy and contradicted its basic assumptions. It is not surprising then, that Sha'ari's challenge was ignored. As Yanay has noted, there was a clear intension among the MKs to distinguish between the victims of hostile actions and other people with disabilities.[539]

As it is clear by now, these groups not only wanted the material support that disabled veterans receive, but also sought a similar symbolic capital and social status, a recognition that their injury was a valued one, and that they were deserving citizens.[540] In both cases, these welfare programs were initially placed under the auspice of the National Insurance Institute, with a benefit structure different from that created for disabled veterans. And in both case an effective lobby work managed to link their

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[536] Shoshana Arbeli Almozneno (HaMa'arach), Chair of the Knesset Labor Committee, 58 Knesset Records, 2613 (1970).

[537] On the exchange before the Knesset Labor Committee between the representatives of the NII and the Ministry of Defense *see* Yanay, *supra* note 534, at 47. in that debate the NII has complained that it is difficult for the institute to follow the updates in disabled veterans' benefits and that the injured themselves would like to be transferred to the Ministry of Defense, it seems that the Ministry of Defense was not interested in dealing directly with another strong lobby group.

[538] Yehudah Sha'ari (The Independent Liberal Party), 56 Knesset Records 286 (1969).

[539] Yanay, *supra* note 446, at 44.

[540] *Id*. and Gal, *supra* note 499.

benefits and those of disabled veterans, claiming that they should have received similar recognition and enjoyed better benefits than other people with disabilities.

Consequently, as the following section further demonstrates, the disabled veterans' compensation program, and sometime disabled veterans themselves, served at the same time as a model to aspire to and as a dividing force in the field of disability policy (and also relatedly within the disability community). Their achievements are celebrated but the effects of those accomplishments are problematic; their agency and activism are exceptional, but the social conditions and cultural resources that gave rise to this sense of entitlement could not be shared by all disabled people. And finally, while disabled veterans created close affinities among themselves, they did not develop solidarity with the general community of people with disabilities.

C. Escaping Disability – The Invalids Law Impact on Disability Policy Dynamics

As we have seen thus far, there is no way to overstate the remarkable differences between the various welfare programs made for people with disabilities. As this part has illustrated above, those various programs inhabited distinct spheres of symbolic, material, social and political conditions. In the following section I further explore and expose the ideological and institutional separation among the various groups of people with disabilities, which was maintained by all social and political actors, and their effects; I shall also look at the meta-power structure in which all those programs were situated, and how it affected the relationships among them. My focus is on the role of

the Invalids Law in the continuing exclusion and marginalization of people with disabilities.

First, the differences among the various programs' benefits structures are an illuminating example, and basically remain the same today. Thus, a disabled veteran allowance was calculated based on a medium grade state employee, a sum which represented a respectable market salary (and which was supplemented by an additional allowance if needed); a work-injured allowance was calculated based on 75% of the person's previous income; yet a potential disabled Sa'ad recipient could only hope to be eligible for a sum which was insufficient to provide for his or her basic needs.

Yet the most striking difference in that regard is in the concern about productivity and the incentive to work. Since the leading concern regarding Sa'ad recipients was that they would prefer Sa'ad over work, they received less than the lowest income in the market, and lost that allowance once they were even partially working. But with regard to disabled veterans, the logic was the complete opposite: They never lost their basic allowance, no matter how high their salary might have been, and their willingness to work was never questioned. It seems that disabled veterans have never needed to prove their productivity while for the majority of people with disabilities the assumption was lack of productivity. The message was clear. For civilians, work and labor are the way to establish one's citizenship: regain your productivity by restoring your work capacity, or live in the margins of society; only losing productivity *while* working exempts from that maxim. At the same time, it seems that disabled veterans have never needed to prove their productivity; it was taken for granted, as if "once a soldier – always a soldier."

Second, the rationale of dignity, integration, and participation that disabled veterans demanded and achieved as early as 1949 was not extended to all people with disabilities in the eyes of policymakers and the public at large, nor in the eyes of disabled veterans. Most remarkably, these themes were not advocated by people with disabilities themselves. The general disability community would need three to four more decades to start fighting for the issues that disabled veterans accomplished long before then (e.g., not to be isolated and segregated but to remain part of the community, or to be active participants in the legislative process). During those years, it was almost unimaginable that the general community of people with disabilities would raise similar claims – not to mention winning them. Moreover, it was only in the 1980s, and most notably during the 1990s, that additional disability-based associations started to use social change strategies similar to those of the ZDVO. Until then, ZDVO was exceptional in the organizational landscape for its involvement in legislative processes and policymaking institutions.[541] Housing, employment, economic security, consultation, and participation – these are all on the current agenda of the disability movement in Israel, yet they are still highly debated issues.[542]

[541] An additional organization that exhibited a high level of involvement was AKIM, a parents' association for children with developmental disabilities. On ZDVO and AKIM's exceptionality in that respect, *see* KRAMER, *supra* note 359, at 59-69 (stressing that AKIM's activities "can be viewed as the exception that proves the rule" compared to other associations that are concerned with the needs of the general population of people with disabilities).

[542] Thus, the Equal Rights For People With Disabilities Law, 1998 (ERPWDL), contains only part of the original provisions that the bill included. The parts that did pass as law include employment, accessible public transportation, and a section on general principles such as dignity and inclusion. It also establishes a mechanism for consultation with PWD in future regulatory processes that concern their rights. (On the ERPWDL, *see* Ariela Ophir & Dan Orenstein, The Equal Rights For People With Disabilities Law, 1998: Emancipation at the End of the 20th Century, in MENACHEM GOLDBERG BOOK 42 (1999). The rest of the bill, including general provisions about accessibility, and housing, is still is still under debate and deliberation at the Knesset, waiting for its completion.

It is clear that the energies exerted by disabled veterans to improve their social conditions as disabled people were reserved only for their own benefit and were not extended to a more universal agenda. Interestingly, the ZDVO did see the shared interests and experiences of IDF disabled veterans and the veterans of WWII, and actively worked to unite their associations by advocating their joint agenda, and claiming that "without the human bonds that tie us all to one big family of the handicapped, we might lose our moral source of strength."[543] Nevertheless, it refrained from promoting the rights or benefits of other groups of people with disabilities and did not see them as part of this "one big family of the handicapped."

Yet my contention is not only that the elevated status of disabled veterans was a result of social hierarchy, but that their movement played a crucial role in reinforcing that social hierarchy, and the continued exclusion of people with disabilities.

Enlightening examples of this are seen in the struggles of groups of people with disabilities who could associate themselves with disabled veterans, like the veterans of WWII and civilian victims of hostile actions, to follow the Invalids Law's scheme. They did so by advocating national values and distancing themselves from the general population of people with disabilities. For them, the Invalids Law became a model for mobilization, for the pursuit of their claims, and the fight for their place as deserving beneficiaries of the Israeli welfare system. In their struggle, they created for themselves

[543] GIBORE HAYIL, *supra* note 500, at 24. The issue of uniting the various associations is mentioned for the first time already in 1951, when ZDVO warned that having separate associations for the handicapped is a "recipe for 'brothers' wars'" (a Hebrew phrase relating to civil war among Jews), and declaring that "we will aspire with all our hearts to make true peace *among all the handicapped people* in the country." (*Id*. at 21; emphasis added). In 1953 ZDVO successfully united with the veterans of WWII who fought with the Allied Forces or with partisan groups (*Id*., at 24), and in 1956 with the veterans who participated in special brigades comprised of members of the pre-state Jewish community (*Id*., at 31).

an exception, a separate space in the public imagery, which was as close as possible to disabled veterans and as remote as possible from the "undeserving" segments of society.

The result was not only the further elevation of disabled veterans' heroism, but also the continuing downgrading of people with disabilities who were not counted as heroes. Thus, an alarming outcome of their mobilization was the erosion of the work injury program's status, as well as the decline in the prestige of National Insurance benefits. The various groups of people with disabilities who struggled to achieve disabled veterans-like benefits have perceived National Insurance benefits as low and demeaning in comparison to the heroism they believe they deserve to share with disabled veterans. Although that process was part of a larger one in which the value of labor has declined and social welfare lost its allure, it nonetheless contributed to the decline of work injury from a valued program of the National Insurance to a devalued glory-less group of welfare recipients.[544]

That result is indeed unfortunate with far-reaching consequences. Although the work injury program has already played a dividing role in the disability community as the gatekeeper to civil dignity, as I argued above, it still could, and should, have represented a civil and progressive model of disability benefits.[545] In contrast, the Invalids Law as a model has no potential to become inclusive; it is inherently inaccessible to civilians unless they are engaged in some form of national activity.

[544] A striking recent example of that process was exhibited by a 2004 decision given by the Supreme Court of Israel which maintained that the National Insurance programs (work injury and general disability insurance) and the national values-related programs should be distinguished and cannot be compared in terms of society's debt to its members (in that case the association of work injured challenged a law that decreased the level of benefits to work injured but did not touch the benefits to disabled veterans). HCJ 5304/02, The Association of Victims and Widows of Work Accidents in Israel v. The State of Israel – The Knesset of Israel et al., (unpublished).

[545] *See* Part A.c.

Furthermore, as I showed before, its exclusivity rests on the assumption that other disabled people receive less than disabled veterans.[546]

As this Chapter comes to conclusion, the multifaceted picture of disability benefits' socio-cultural dynamics becomes clear. The competition among the various programs and groups does not revolve around scarcity of material resource, but around tightly bounded understanding of productivity that rests on the negation and denial of disability.

[546] *See supra* Part B.c.

CHAPTER SIX:
The Failure of Universality – A Missed Opportunity for Disability Insurance

> *[According to the Disability Insurance Program] It is desirable to relieve the disabled from severe destitution but at the same time it is not wrong if he remains half needy. In other words, the disabled should get enough so he will not face starvation, but he should not get more than that … and in any case, not enough to live with dignity.*
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> *Arie Miller, A New Look at Disability Insurance (1981)*

The disability insurance program, or the "general disability" program as it was officially called, was enacted only in 1974, even though the need for such a regulation was acknowledged much earlier in the drafts for a comprehensive social insurance system in Israel, as the *Histadrut* Report that was submitted to the British Mandate already in 1945 and the Interdepartmental (Kanev) Committee Report from 1951 reveal.[547] And even though it was already clear by then that the disparities between the various programs for PWD were vast, and that a structural reform was needed in order to fix them, neither the government nor the Knesset took that opportunity to do so.

The accepted explanation for the delay in creating the disability insurance program is that the political and economic circumstances of that era did not allow it. But as I have already claimed, a much more complicated matrix of social, cultural, and political conditions has shaped the struggles and compromises over the National

[547] National Insurance (Amendment No. 13) Law, 5733-1973, 27 L.S.I 233 (1972-73). The formal name for the disability insurance program is "Invalidity Insurance," but I shall call it the general disability insurance, or disability insurance.

Insurance Law in general and over the improvement of the life conditions of PWD in particular.

The timing of the enactment of the program was connected to the social, political, and economic atmosphere in Israel at the end of the 1960s. Most importantly, it should be attributed to the "rediscovery of poverty" in Israeli society that was mostly triggered by the protests of the Israeli Black Panthers movement.[548] The protests were vocal and radical enough to convince the government to investigate the socioeconomic gaps in Israeli society and to agree that extensive reforms are needed. As a result, an alliance was formed between senior professionals and political and social groups.[549] Finally, the temporary surplus at the National Insurance Institute made it possible to succeed with such an initiative.[550]

The resources for disability insurance were established already in 1970 with an amendment to the National Insurance Law. But the content of the proposed law was still unclear. A Public Committee on Disability Insurance was nominated, to be headed by Prof. Mann, and was also known as the Mann Committee. The Mann Committee submitted its conclusions to the Minister of Labor in 1972, and the National Insurance Law was finally amended in 1973 to include disability insurance, and the amendment became effective on April 1, 1974.

[548] See Chapter 4, Part E.

[549] Florian & Dangoor, *supra* note 473, at 202.

[550] Florian & Dangoor, *Id.* at 202.

Despite the shift from Sa'ad to social insurance, the result was a program that is the lowest in the hierarchy of disability-based programs.[551] As I claim in this chapter, that lower status was a result of the history of the program, its structure, and its need-based rationale. I further show that the disability insurance program did not bring a major change to the life conditions of PWD, or to their place in Israeli society. They were still at the bottom, as the condescending attitudes against "unproductive" members of society, and the underlying negative assumptions towards disability as a state of imperfection, have remained intact.[552]

A. Seeming Universality and Growing Particularity

> *It is necessary … to initiate a far-reaching reform in the structure of our entire legislation in the realm of disability and in social insurance in general … The current situation is complicated and it creates numerous lacunas and many irrational solutions. … I again express my regret that this law is handicapped and that the handicapped have gained a handicapped law. I see it as only a temporary law that must be later incorporated within or dissolved into a much more comprehensive legislation, which has to come. Only this way would we be able to attain a far-reaching reform that would entail a unification of both legislation and method – and within the method there could be various degrees [of benefits] – and a unification of the executive body.*
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> *Yehuda Sha'ari (Independent Liberal Party), The Knesset Protocols to the disability insurance program (1973)*[553]

[551] Lower than the beneficiaries of the disability insurance program were those who were left outside its scope, see *infra*, note 564 and accompanying text.

[552] Doron & Kramer mention a poll that the Sa'ad Ministery conducted in 1970, according to which 37% of the Israeli population believed that Sa'ad allowances discourage people from wanting to work. Interestingly, unlike in other countries, the more wealthy the interviewee were, the negative their attitudes towards the poor. DORON & KRAMER, *supra* note 319, at 35.

[553] Yehuda Sha'ari (Independent Liberal Party), Knesset Records, 2584 (1973).

Universality is one of the most important elements of a social insurance program.[554] The general disability program was supposed to bring that universality to PWD, and indeed many aspects of the program reflected that aspiration. First, as a social insurance program, it marked the change from a stigmatizing, selective, discretionary-based, charity-like, minimal relief mechanism, to a universal legal entitlement, a social right which enjoys social legitimacy and sufficient means for living.[555] In addition, its residual character represented an inclusive approach, as it seemed to encompass all those PWD who were not covered by any other program.[556] Based on no-fault and no-cause principles, the program covered all people who became disabled in any circumstances, including daily accidents, such as injuries sustained at home, while participating in leisure activity, or while walking in the street; disabilities resulting from events such as criminal offenses or environmental pollution; people who were born with impairment or who became severely ill; and people who were injured while at work or during military service but who did not meet the criteria to enjoy those programs' benefits.[557] The law even had a few pioneering aspects, including coverage for homemakers ("housewives") (§127(23)),[558] and the granting of similar benefits to people with acquired disabilities and to people who became disabled at birth ("birth-defects") or at an early age.[559]

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[554] AVRAHAM DORON, IN DEFENSE OF UNIVERSALITY: CHALLENGE TO ISRAEL'S SOCIAL POLICIES (1995).

[555] *See supra* note 371, a table comparing Sa'ad and Social Insurance.

[556] Although every PWD is granted the option to decide whether to act upon this law or another (§145(c)), it is clear, as the following section shows, that no one would prefer the general disability arrangement over the other existing laws.

[557] Arie L. Miller, *A New Look on Disability Insurance*, 22 SOCIAL INSURANCE 5, 6 (1981).

[558] Miller, *Id.* at 7. But see critiques of that arrangement: *Id*. at 22-23; Ruth Ben-Israel, *Disability Insurance to the Housewife and what Next*, 12-13 SOCIAL INSURANCE 87 (1977).

[559] Miller *Id.*

Yet, despite the above elements, the general disability program denotes a decisive moment in the growing particularity and differentiation among the various groups of PWD. At the time that the program was deliberated and formulated, seventeen different disability laws already existed. As I already noted, they were primarily based on two main models – the national type, which followed the model of disabled veterans' benefits, and the labor-related type, which was based on the work-injury model.

By creating just another residual chapter in the existing chaos of Israeli disability policy, the historical opportunity to provide consistency and coherence to the field was missed. The Public Committee on Disability Insurance (the Mann Committee) and the Knesset that followed its proposal were very aware of the problems of Israeli disability policy, and particularly its incoherence. Its primary setback was that it was not a product of prior planning and comprehensive objectives, but rather a patchwork of sporadic initiatives brought by social groups and political interests, and the state's response to these depended on changing political and economic circumstances.[560] But, instead of systemization, the new law offered further fragmentation, and only reproduced and reinforced that chaotic web of statutes, regulations and guidelines.

It seems that the primary reason not to unify the system was to maintain the separation between the majority of PWD and the other more privileged groups. The great expenditure that such fundamental administrative reform would require also played a role in that decision.[561] Yet apparently the reluctance to do so was most fundamentally about

[560] MILLER ET AL, *supra* note 313, at 8-9. See also the Knesset Records, *supra* note 553, at 2580 (Heike Grossman), and at 2583 (Yehuda Sha'ari).

[561] Raphael Roter and Nira Shamai, *Disability Insurance*, 6-7 SOCIAL INSURANCE 18, (1974), at 20 (Hebrew).

the unwillingness to either tighten the privileged groups' privileges or to expand those privileges to additional PWD.[562] The differentiated treatment among those groups was justified by the scale of values that they stood for. Thus, Roter and Shamai, two senior researchers for the National Insurance Institute's research and planning division, claimed in 1974 that disabled veterans, victims of hostile actions, and the work-injured were exposed to injury while they were serving society. Therefore, "their condition involves an aspect of a special state responsibility towards them …."[563]

Furthermore, even under the new law, many PWD were still left outside the system.[564] Individuals who did not meet that formal criterion were left within the Sa'ad system, and later on were covered by the Assurance of Income Law, 1980. Thus, the disability insurance program is the only one among the various programs to require a minimal qualifying period of 12 months, which means excluding those who were not insured for the last 12 months (§127(23)).[565] In addition, the eligibility criteria for disability insurance were tough to meet (a dual test that combined medical disability with "income incapability"), leaving those who did not qualify with nothing (while the work-injured and disabled veterans with the same level of disability enjoyed lower standards).[566] Also left outside were children with disabilities of uninsured persons. The law authorized the issuance of regulations concerning children of insured individuals

[562] *Id*. at 19-20.

[563] *Id*. at 19.

[564] For a general review of those groups, *see* PROCACCIA & MILLER, *supra* note 368, at 36-42

[565] For criticism of the qualifying period, *see* Miller, *supra* note 557, at 21-22.

[566] *See infra*, note 579 and accompanying text.

(§127(47)(a)), but until 1981 no such rules were issued.[567] Similarly, elderly people who became disabled after retirement could not also enjoy disability benefits.[568] The law also excluded individuals who were not residents of Israel at the time that they became disabled (§127(22)(1)). And finally, the law created two categories of "new" and "old" handicapped, distinguishing between those who became disabled before and after 1970 (§127(21)). For the "old handicapped," the eligibility criteria were more rigid, and the benefits they received were more limited.[569] Along the years, many of these restrictions have changed or abolished, such as the qualification period and the distinction between old and new handicapped, but at the time that the law was enacted, and for years after, they have stirred disappointment and criticism, especially among those who were waiting for that change.[570]

Nonetheless, a unified system was needed not only to equalize the discrepancies between the various disability programs, but also to help the beneficiaries of the general program to navigate the complex system of various administrative bodies that dealt with the diverse issues related to the general population of PWD. As one MK argued, "there is

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[567] National Insurance (Livelihood Allowance, Study Assistance, and Arrangements for Disabled Child) Regulations, 1981. For a criticism of the regulations, see Miller, *supra* note 557, at 24-25. For a detailed study of the parents' struggle to issue these regulations, *see* Michal Bar, *The Involvement of Voluntary Welfare Organizations in Welfare Policy Design – The Design of "Disabled Child" Regulations*, 21 SOCIETY AND WELFARE 129 (2003).

[568] The two programs provided different mechanisms for calculating benefits and it seems that each person was better off with a different arrangement, depending on their individual situation. Roter & Shamai, *supra* note 561, at 29-30; Miller, *Id*. at 13-15. During the debates in the Knesset, many have criticized the neglect of elderly people outside the scope of the law, *see* the Knesset Records, *supra* note 553, at 2582 & 4032.

[569] For criticism of the differentiated treatment between "old" and "new" handicapped, see: Roter & Shamai, *Id*. at 22-23.

[570] Miller et al stressed that during the many discussions and interviews they conducted with PWD "it became beyond any doubt that the question of differentiation preoccupy [the disabled] on a daily basis" and that "it is accompanied by deep feelings of injustice and unfairness (kipuach)" MILLER ET AL, *supra* note 313, at 9.

an irrational division of labor, a labyrinth of ministries and laws that makes the disabled's life miserable."[571] As she further detailed, the Ministry of Treasure handles tax exemptions, the Ministry of Health set the list of physical impairments, the Ministry of Labor deals with vocational rehabilitation, and the Sa'ad Ministry handles all those who do not fall under any law.[572]

Creating a unified system was avoided despite the clear understanding that along with bringing administrative efficiency, it would create a more egalitarian system in terms of financial support and services, would simplify the system, and would possibly generate a better environment for maximizing the utilization of those rights and entitlements.[573] It was also argued that this one central agency would rule and monitor the field, and would also inevitably face and handle the economic gaps.[574]

Interestingly, not much later after the legislation of the disability insurance program, two additional particularistic laws were enacted: Road Accidents Victims (Compensation) Law, 1975; and Defective Products (Liability) Law, 1980.[575] Both laws represent the continuing differentiated treatment of PWD that is based on the circumstances of injury and on the state's interest in it. Here, a modern rationale of risk seems to dictate the legislation, since both laws are "no-fault" tort based rules. While many individuals can turn to the torts system for financial relief, these laws ease the process for certain groups. The two basic goals of these laws were to ensure

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[571] Heike Grossman (*Hama'arach, Avoda-Mapam*), Knesset Records, at 2581.

[572] *Id.*

[573] Roter & Shamai, *supra* note 561, at 19-20; Miller et al, at 51.

[574] PROCACCIA & MILLER , *supra* note 368, at 12 (their first book's main conclusion).

[575] Road Accidents Victims (Compensation) Law, 5735-1975, 29 L.S.I. 311 (1974-75); and Defective Products (Liability) Law, 5740-1980, 34 L.S.I. 92 (1979-80).

compensation for the victims of those events (the hardship of proving the injurer's fault left many uncompensated), and to reduce the amount of litigation surrounding those issues.[576] However, these two laws also seem to suggest greater responsibility towards those who were injured, and at the same time, they express social acceptance of the risks that these activities and products involve and the costs that technological progress and innovation entail. As I have shown before, such a risk rationale, if understood broadly, could justify a system of a truly general disability insurance that includes all types of injuries and disabilities under one umbrella.

The following sections further explain the differences between the various programs. Through the structure of the disability insurance program, they provide a detailed illustration of the failure of universality and the persistence of particularity in Israeli disability policy.

B. Defining Disability and Terms of Entitlement

The bottom line to understand the different ways in which disability is understood and defined in Israeli welfare system is revealed through the way they are translated into the benefits a person may enjoy. This section examines the various definitions of disability and their corresponding eligibility criteria. The following section discusses the material disparities between the programs.

[576] *See* David Kretzmer, *No-Fault Comes to Israel: The Compensation for Victims of Road Accidents Law*, 1975, 11 ISR. L. REV. 288 (1976); IZHAK ENGLARD, COMPENSATION TO ROAD ACCIDENTS VICTIMS (1978); Daniel More, *Products Liability Bill 1978 – A Critical Analysis*, 7 TEL-AVIV U. L. REV. 114 (1979); and Israel Gilead, *Strict Product Liability (Defective Products Liability Law – 1980)*, 8 BAR-ILAN L. STUD. 179 (1990).

According to the disability insurance program, a person is disabled if: because of physical, mental, or developmental impairment, resulting from illness, accident, or birth-defect s/he is unable to reach a minimum income level, or income capacity has been significantly reduced (50% or more). As the table below shows, this definition is dramatically different from other disability programs.

The following table summarizes the major differences between the three primary categories of PWD,[577] and allows a comparative view of the various programs' structures. It is very useful for understanding how welfare programs can be structured differently in ways that embody different social values and create different classes of beneficiaries.

	General Disability	**Work Injury**	**Disabled Veterans (IDF handicapped)**
Definition of Disability	Because of physical, mental or developmental impairment, resulting from illness, accident, or birth-defect, is unable to reach a minimum income level, or income capacity has been significantly reduced (50% or more)	Because of work injury, is unable to do work that a person of his or her age and gender is capable of doing	Because of harm that occurred during, or because of, military service, lost fully or partially the ability to undertake regular activity
Eligibility Criteria (for cash benefits)	Focus on actual income; Determined by dual test: 1) objective medical assessment – needs to reach a minimum of at least **40%**; and 2) a functional test of **50%** "income incapability" – subject to the discretion of a "claims officer."	Relative to previous work; Determined primarily by objective medical assessment (based on impairments scale): requires disability level of **20%** or more. Infrequently assisted by age and gender standards.	Consider regular activity in all life aspects regardless of income capacity or actual income; Determined solely by a medical test: requires disability level of **20%** or more.
Basic Benefit Level	25% of average wage for a single person with at least 50% degree of	The degree of medical disability multiplied by 75% of the previous	91% of the salary of a medium grade civil servant

[577] The table is based on the one in: Gal, *supra* note 478, at 238-239 (with minor changes).

	disability	work income	(originally was 86%)
Average in Israeli Shekel (2001)[578]	1,523 NS	2,262 NS	3,909 NS
Comparison of benefits level using disabled veterans as the standard (100)	100% disability unable to work (39); 60% disability unable to work (31); 35% disability, earns average wage (0).	100% disability unable to work (63); 60% disability unable to work (32); 35% disability, earns average wage (94).	100% disability unable to work (100); 60% disability unable to work (100); 35% disability, earns average wage (100).
Additional Cash Benefits	Dependant increment; Attendance allowance (financial support to hire a personal caretaker); Mobility allowance (by agreement with the NII).	Special pension (attendance allowance) income support; Mobility allowance; Special grants; Compensation for income loss during treatment.	Allowance for needy; Attendance allowance; Mobility allowance; higher education; Travel expenses; Marriage grant; Initial expense grant; higher education grant (children); Telephone expenses; Oversees attendance allowance; Housing allowance; Grant for medical equipment; Compensation for income loss during treatment; Recreation grant; Assistance for new business.
Additional In-kind Benefits	Vocational training;	Vocational training; Medical treatment, and some medical equipment.	Vocational training, employment placement service, and reserved employment; Medical treatment, and medical equipment; Personal social services

As the table shows, the general disability insurance is the only program where eligibility criteria includes a dual test in which the medical or physiological aspect is just a pre-requisite, a threshold test, before a second more crucial stage, which examines the

[578] Average wage in Israel in 2001 was 6,875 NIS; Minimum wage was: 3,266 NIS.

personal-functional aspect, and focuses on the economic capacity of the individual to earn income (the person's "earning capacity"). The latter is in fact an "economic disability" test, a "means test" in a new disguise, while the other two focus solely or primarily on medical disability.[579]

Moreover, by emphasizing economic outcomes, the disability insurance program ignores the possible physical or mental consequences of an impairment a person may suffer. In comparison, the disabled veterans' disability definition takes into account any aspect of regular activity that might have been affected by the injury.[580] Miller, Procaccia and Kretzmer suggest in this context to consider two extreme examples: a teacher who lost two legs but can still teach and a pianist who lost a finger but can no longer play.[581]

In addition, the functional test for the generally disabled is problematic since it is based on a case-by-case analysis, and is determined according to the discretion of a Claims Officer. As such, it is subject to more prejudice than an objective list of impairments.[582]

Finally, a person is eligible for disability benefits only if the total determination of his or her disability is no less than 50% while other programs require less (5% for the work-injured and 10% for disabled veterans).

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[579] *See* MILLER ET AL, *supra* note 313, at 50-58 for an elaborated analysis of the two tests in a comparative perspective. *See* also Miller, *supra* note 557, at 17-19, on the confusion between "earning capacity" and "actual income."

[580] Roter & Shamai, *supra* note 561, at 20-21; Miller, *Id*. at 16.

[581] MILLER ET AL, *supra* note 313, at 52.

[582] MICHAL TABIBIAN, DISABILITY INSURANCES IN THE NATIONAL INSURANCE LAW 5 (The Knesset Research and Information Center , 2002) (Hebrew).

The criteria for receiving a disability allowance reflect not only a narrow understanding of disability but also a limited social responsibility towards the majority of PWD who were injured or became ill in the regular course of life, in circumstances not related to work or military service.

C. The Material Gap

The differences in the level of allowance among the various programs further demonstrate the subtle ways in which a program's structure and details can reveal the ideological choices that guided its framers.[583]

Thus, disability insurance adopted a minimal approach that provides a certain minimum to its beneficiaries but does not seek to restore the person's former level of income.[584] Accordingly, the law provides a flat-rate benefit to all PWD depending on one's level of functional disability. The rate for a single person's full allowance (100% disability) is 25% of the average wage in Israel (§127(37)), a sum which is evidently lower than minimum wage and insufficient for dignified living.[585] In comparison, work-injury allowances are differential and linked to the person's last income before the injury.

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[583] For a more complete analysis of the differences in monthly stipends among the various groups of PWD, *see* PROCACCIA & MILLER, *supra* note 368, at 52-71. See there also a detailed table of the differences among a wider range of groups of PWD: *Id*., at 52-54. Procaccia & Miller also note that the variety indicates the unsystematic and ad-hock nature of those programs. *Id*. at 56.

For an elaborated argument against the different structure of benefits for PWD in Israel and the material disparities that they lead to, see MILLER ET AL, *supra* note 313, at Chapter 2. Miller et al also suggest in their book a reform recommendation for an inclusive mechanism of disability insurance in Israel, see, *supra* note 313, at Chapter 4.

[584] Miller, *supra* note 557, at 6.

[585] A single person's full allowance was originally even lower, 20% of average wage, but the rate was amended in 1975 to 25% of the average income. According to Procaccia & Miller "someone who earns 20% of average income is below what is usually seen as the poverty line." from PROCACCIA & MILLER, *supra* note 368, at 70. They agree that the sufficiency of an allowance is hard to assess but assume that if it is close to average income it is adequate, see *Id*, at 69.

Interestingly, the Mann Committee unanimously supported a method that would protect people from dramatic declines in their income and therefore recommended a two-layer stipend: an equal, flat-rate, basic component, and an additional differential component, which would be paid by the pension funds (based on the view of disability as early retirement).[586] Nevertheless, the Knesset adopted only one layer, the minimal component of the proposal.[587] Alternatively, the stipends of disabled veterans, at least for those who were injured during their mandatory service and did not have previous income, are also flat-rated (based solely on the level of medical disability), yet they are high enough to provide a person with economic security and self-dignity (especially when combined with other services she is entitled to).[588]

The result was that, at the time of the enactment of the law, the basic level of allowance to PWD was the lowest among all NII programs, lower than that guaranteed in elderly and survivors insurances. It was in fact almost the same as the level of Sa'ad assistance that preceded the disability insurance program, and sometime even lower.[589] Consequently, the level of income that the program provided "did not award even symbolic advantages to the disabled who 'purchased' his entitlements by paying his insurance-fees."[590]

As the table shows, the basic allowance for the work-injured is almost 1.5 times more than the generally disabled. Disabled veterans enjoy a much higher basic allowance

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[586] Roter & Shamai, *supra* note 561, at 23-24; Miller, *supra* note 557, at 25-26.

[587] MK Nissim accused the *Histadrut* for sabotaging the recommendation due to its interest in the pension funds. Moshe Nissim, Knesset Records, *supra* note 553, at 4033.

[588] *See supra* note 513 and accompanying text.

[589] PROCACCIA & MILLER, *supra* note 368, at 70.

[590] Roter & Shamai, *supra* note 561, at 25.

level, which amounts to 2.5 times the amount given to the generally disabled, and which is above minimum wage and added to their salary. But the potential for disparities is even more alarming when considering the *highest level possible* for a person among the beneficiaries of the NII. A generally disabled single person's full allowance is 25% of the average wage. A work-injured person's full allowance could reach, according to the person's previous income, up to 75% of three times the average wage, meaning 225% of average wage, or nine times the full disability insurance allowance.[591] Moreover, compensation for victims of car accidents or defected products can amount to even 12 times of that sum.[592]

Furthermore, disabled veterans' higher allowance is not reduced when a person is working, but rather supplements his or her wage. As a result, many disabled veterans enjoy living standards that are higher than those enjoyed by the general population.[593] At the same time, the generally disabled are "encouraged" to work by exactly the opposite mechanism: receiving a minimum of financial support, which is declined once a person is even partially employed (§127(39)). By creating that mechanism, the legislature brought back into the law not only an explicit and narrow "means-test,"[594] but also the "less eligibility principle," and the "wage stoppage policy," which characterized the Sa'ad system and were imported from the English Poor Laws. The results were as expected:

[591] Miller, *supra* note 557, at 9.

[592] *Id.*

[593] Gal, *supra* note 478, at 240. Yet, it is important to remember that disabled veterans' stipends are made of two components: a basic equal allowance and a differential component which is based on individual needs, *see supra* note 514 and accompanying text. The basic component is that part that a person keeps receiving.

[594] Miller, *supra* note 557, at 29.

The majority of PWD whose income depends on disability insurance "often live at, or even below, poverty lines."[595]

But the material gap is not located solely in the realm of basic allowances. Additional cash and in-kind benefits contribute to the different standard of living provided by the various laws. And again, these differences reflect the separate loci that each group occupies in the public imagery. Thus, in the realm of additional cash benefits, it is sufficient to look at the table in order to realize the disparities among the programs, and especially the comprehensive support in various life aspects that disabled veterans enjoy.[596] Yet, also striking is the fact that some of the benefits that disabled veterans receive do not appear in law, but are granted according to administrative guidelines of the Ministry of Defense, such as free equipment (medical and other), housing assistance, and free automobiles.[597] Furthermore, a telling article of the Invalids Law authorizes the Minister of Defense to issue regulations in any matter that "might ease the integration of invalids into the economic life of the state and their settling in it" (§ 45(6)).

As shown in the table above, the only in-kind service provided by the disability insurance program is vocational training. As much as the availability of such a service is important, it again shows overemphasis on work-capacity and lack of attention to other important life aspects. Hence, enjoying vocational training was much easier than

[595] Gal, *supra* note 478, at 240 (citing survey data on living standards of PWD who receive benefits from various programs).

[596] For a general discussion on the diverse benefits that the various programs and laws provide see from PROCACCIA & MILLER, *supra* note 368, at Chapter 4. For a detailed table summarizing those various benefits, see *Id*, at 44. for a specific comparison between the work-injured and the generally disabled, *see* Ben-Zvi, supra note 474, at 48.

To learn more about attendance allowance, see: Miller, *supra* note 557, at 26; Roter & Shamai, *supra* note 561, at 28; and PROCACCIA & MILLER, *Id*. at 50. According to one source, in 1996, only 8% of disability insurance recipients actually receive attendance allowance (Gal, *supra* note 478, at 237).

[597] MILLER ET AL, *supra* note *supra* note 313, at 12-14 (claiming that these benefits are illegal).

receiving cash benefits, as people with 20% disability were entitled to participate in it and no waiting period was required. In comparison, the work-injury program offers generous medical treatment benefits that extend beyond restoring work capacity. But obviously, most generous is the disabled veterans' program. It provides comprehensive services and support that does not focus solely on work-related aspects, but covers fields such as education, medical benefits, and assistance in employment and housing. Furthermore, the services provided by law are supplemented by services provided by ZDVA (the IDF Handicapped Organization), which is highly funded by the state.

In a survey published in 1979, Miller, Procaccia, and Kretzmer have interviewed disabled veterans and the generally disabled in order to learn about the inequalities among them on the ground.[598] The interesting data they gathered reveal that among their interviewees, 44.3% of the generally disabled did not receive any payments for their disability, while 94.9% of the disabled veterans did receive certain payments; while 41.8% of the generally disabled lived in unstable apartments, 77% of disabled veterans lived in suitable apartments; while 27.1% of the generally disabled did not receive *any* free medical treatment, 94.4% of disabled veterans received *full* medical treatment for free (compared to 55.9% among the generally disabled, probably as members of one of the public sick funds). When asked about financial resources used to support themselves during the time they could not work, 44.1% of disabled veterans lived primarily on allowances (compared to 14.6% among generally disabled), while 41.4% of the generally disabled were supported by their parents and 22.9% have used their savings for that purpose. Notice that the gap is even higher than it seems, once one considers the lower

[598] See the results of their survey, MILLER ET AL, *Id.*, at 18-25.

eligibility criteria to receive disabled veterans' benefits. Therefore, among the generally disabled who did not receive benefits, there were people with higher levels of disabilities than in the group of the disabled veterans who enjoyed those benefits

The different types of benefits that the various groups of PWD receive represent different views of rehabilitation, and furthermore – of citizenship. As Dangoor and Florian claimed, the different programs varied in the philosophy of rehabilitation that guided them; while the services for disabled veterans reflected an understanding of rehabilitation as within the community and related to all life aspects, the general disability program offered a much narrower notion of rehabilitation, which focuses on individual services and work-related issues, and promotes mainly segregated mechanisms (e.g., working in sheltered workshops, living in institutions).[599] As I mentioned earlier, disabled veterans began their struggle to receive community-oriented social services as long ago as 1949. They succeeded in their protests, but the rationale was not extended to the general population of PWD. It seems that disabled veterans have never needed to prove their productivity; it was taken for granted, as if "once a soldier – always a soldier." In contrast, it seems that the disability insurance program assumes lack of productivity among PWD. The message was clear: For civilians, work and labor are the way to establish one's citizenship – either regain your productivity by restoring your work capacity, or live in the margins of society.

An additional layer of the material insufficiency of the program is linked to the broader framework of social security benefits. In 1974, there was still no supplemental

[599] Florian & Dangoor, *supra* note 473, at 200-203, 210-212. Florian & Dangoor advocate an alternative comprehensive view of rehabilitation for the general population of PWD. They conclude with a model that employs a full range of services that "sometimes rest on each other and sometimes complement one another." (*Id*. at 212).

income program, no unemployment insurance, no health and sickness insurance, and only a limited program of old-age insurance, which was also criticized as a charity-like mechanism.[600] A comprehensive and complete social insurance system could have mitigated some of the material gaps that PWD faced.[601] Yet in its absence, the content of each particular program became crucial.

In sum, the details of the material gap further expose the failure of universality in the Israeli welfare system. As many commentators agree, while some differences among various welfare programs are tolerated, the divided legal framework resulted in economic gaps and inequalities that are far above what a modern welfare state can approve.[602]

D. Disability Insurance – Still a Charity Mechanism

What, then, is the welfare rationale that underlies the general disability insurance program? Two different explanations are provided in the literature. One celebrates the turn to rights, and the second criticizes the continuing reliance on need. Roter and Shamai, for example, claim that the disability insurance program

> Expresses the enlightened view … according to which even when a person is injured – in his body or soul – due to private life circumstances and finds himself in a condition of disability, which does not allow him to function as he used to and to appropriately provide for his family – he is entitled to receive a disability stipend *by right and not by charity* ….[603]

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[600] *See* DORON & KRAMER, *supra* note 310310310319, at chapters 6 & 7, for a detailed analysis of the elderly program, in which they reach that conclusion.

[601] The Knesset Records reveal some of the concerns and debates regarding those issues. *See*: Knesset Records, *supra* note 553, at 2576-2584, 4031-4037.

[602] Florian & Dangoor, *supra* note 473, at 202; Miller, *supra* note 557, at 8-12; PROCACCIA & MILLER, *supra* note 368,.

[603] Roter & Shamai, *supra* note 561, at 19 (emphasis added).

Bracha Ben Zvi, another NII staff member, wrote much later (in 1995) for the unification of the various disability welfare mechanisms. In her article she claims that disability insurance was the product of an era that did not see disability as a static medical condition, but "as a person whose medical impairment affects his or her functioning." Therefore, as a "citizen who enjoys equal rights and duties, he is expected to fully integrate in labor and family life," and "should be assisted in removing the obstacles he faces due to his impairment."[604]

John Gal, on the other hand, claims that the general disability program still basically maintained a need-based principle. Since the program was "aimed to provide a guaranteed minimum income to disabled individuals," it "assumes that work within the free market is the primary source of income to individuals … and that … work can serve as a powerful tool for social integration." Consequently, "only individuals whose disability resulted in proven economic need are considered eligible for benefits."[605] That was reflected in two primary mechanisms of the program – the two-stages eligibility test, and the emphasis on vocational training and rehabilitation.

These differences are rooted in the gaps between the vision and its realization, between the potential and reality. Compared to the situation prior to the law, the new program marks a great step forward. But in comparison to the potential that a turn to social insurance could have yielded, the actual mechanisms and numbers reveal a pretty disappointing result. As the above discussion shows, the vision of rights was limited, and the resources that were invested in integration were poor.

[604] Ben-Zvi, supra note 474, at 47.

[605] Gal, *supra* note 478, at 233.

It is clear that disability insurance was never founded on a compensation rationale. The state has never took indiscriminate or full responsibility over all circumstances of injury. No social value was attached to the program, and the medical condition of being disabled was not taken as a sufficient basis for compensation. At the most, the general disability program merely attempted to minimize the work-related functional ramifications of the disability.[606]

However, the name of the program suggests that an insurance rationale guided its structure. And indeed, in terms of its mechanics, it is an insurance-based program. Because it is located within the NII, it grants benefits to persons who are insured by the NIL, and because every insured contributes a share of his or her salary for that purpose. Nevertheless, a genuine insurance program should provide more than need-based benefits and "will often seek to preserve living standards by replacing wages."[607] Consequently, by setting restrictive eligibility criteria, by providing only minimal relief which is far behind minimum wage and which can be easily lost with the smallest income, and by making other problematic decisions, as I have just detailed, the general disability insurance program failed to meet the substantive standards of an insurance-based program.

Thus, although the move to social insurance was celebrated as a move from charity to rights, a shift from unmonitored discretion to the rule of law, the general disability program ultimately exhibited a "charity" approach. In a manner typical of need-based programs, it was still guided by the ethos of productivity and provided a negligible

[606] Tabibian, *supra* note 582, at 4.

[607] Gal, *supra* note 478, at 231.

"safety-net," one that is "low enough to discourage individuals from preferring benefits over earned income."[608] The general disability program adopted a minimal approach, according to which PWD should be saved from starvation, but not more than that. The National Insurance Law was never intended to provide them economic security and self-dignity.[609]

Many if not all commentators agree that people with disabilities' lack of lobby power and lack of mobilization are primary reasons for the legal inferiority suffered by the disability insurance program as compared to other programs.[610] Later in this dissertation, I explore the structure of the disability community and elaborate on its organizational landscape. I suggest that the very fragmented structure of the welfare system has contributed to the divisions not only among the various circumstances-based groups of PWD, but also within the general PWD community, as each type of impairment or illness created their own association and struggled for their own share in the social and economic pie.

But still, whatever the reason for that powerlessness may be, the result was that without the support of lobbying power or an appreciation for the place of PWD in society, the disability insurance program created an entirely separate welfare sphere; one that is based on substantially different welfare principles than those that underlie the other programs. Consequently, the general population of PWD was again constituted as a

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[608] *Id.*

[609] Miller, *supra* note 557, at 33.

[610] *See e.g.* Miller, *Id.* at 11; Ben-Zvi, supra note 474, at 53; Gal, *supra* note 499, at 131-132; Tabibian, *supra* note 582, at 8.

stigmatized minority and not as an esteemed social group.[611] The main difference was that, for the first time, a distinct category of "general disability" was created and PWD were no longer hidden behind the broader masses of the general poor.

[611] MILLER ET AL, *supra* note 313, at 37.

PART IV:

A RADICAL IMAGERY?
THE PREDICAMENTS
OF DISABILITY RIGHTS
AND DISABILITY ACTIVISM

CHAPTER SEVEN:
Ideological Shifts:
Counter-Hegemonic Activism in Context

The welfare discourse and its underlying ableist power structure have dominated the field of Israeli disability policy until the 1990s. Although some sporadic challenges to the dominant discourse occurred before, they were mostly partial. Only in the beginning of the 1990s did a contesting view gain enough power to challenge the welfare discourse, proposing a well-rounded alternative which created an opportunity to imagine a different place for PWD in society. The view that provided a possibility for such an alternative, as this chapter shows, was the disability rights language. In this Chapter, I examine the changing social conditions that contributed to the rise of disability rights and disability activism. I suggest that general shifts in Israeli collective ethos and public imagery had a mixed impact on disability. While some changes have contributed to the opening of new possibilities for PWD to challenge the dominant understanding of disability, others provided continuing support for ableism.

The second half of this Chapter focuses on consequent and related changes in the forms of disability activism and further demonstrates that mixed impact and its complex outcomes. While in the first decades a cooperative and non-adversarial welfare type of disability activism prevailed, during the 1970s a more confrontational disability activism emerged which gradually developed a local disability rights language and new alliances among PWD. Two major milestones in that process were the formulation of a disability

rights language (early to mid 1990s), and the surfacing of grassroots disability activism in the form of vocal protests (end of 90s to beginning of 2000s).

A. The Changing Conditions of Ableism: A Mixed Impact on Disability

a. Patterns of Change – 1970s-1980s

The various trends and factors that contributed to the changing conditions of ableism and the rise of disability rights discourse in Israel were related to a complex web of social processes that occurred in Israel at least since the 1970s, and that were also deeply influenced by equivalent global trends. The 1970s represent a turning point in the history of Israel, as new and continuing social processes came together and reshaped its social, political, and economic atmosphere.[612]

As discussed earlier, the pre-state era and the first decades were generally characterized by strong collectivism (comprised mainly of nationalism and socialism, and some Judaism) and little place for individualism.[613] During the 1970s and onward a change occurred in the relationships between collectivism and individualism, and between socialism and capitalism, which was most vividly manifested in the decline of

[612] The following is a short review of processes of great magnitude which are beyond the scope of this project. The review is based on the following works: S.N. EISENSTADT, THE TRANSFORMATION OF ISRAELI SOCIETY (1985), particualrly, Part Four; BENJAMIN BEIT-HALLAHMI, ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL, 153-165 (1993); URI RAM, THE CHANGING AGENDA OF ISRAELI SOCIOLOGY – THEORY, IDEOLOGY, AND IDENTITY (1995); YARON EZRAHI, RUBBER BULLETS – POWER AND CONSCIENCE IN MODERN ISRAEL, (1997); BARUCH KIMMERLING, THE INVENTION AND DECLINE OF ISRAELINESS – STATE, SOCIETY, AND THE MILITARY (2001) ; ABRAHAM DORON & RALPH M. KRAMER, THE WELFARE STATE IN ISRAEL: THE EVOLUTION OF SOCIAL SECURITY POLICY AND PRACTICE (1992) [Hebrew].

[613] *See* Chapter One, Part B.a.

the labor movement hegemony.[614] First, and most clearly, socialism as a rhetorical device and a guiding ideology disappeared from the public discourse.[615] Similarly, labor as a central national value eroded almost completely.[616] In a parallel process, Israel shifted from a central economy with socialistic characteristics towards capitalism and free markets. During the years that followed, capitalism gradually became the leading economic method.[617]

Additional related challenges to collectivism were manifested in the rise of group politics, and less identification with the state and its deeds. During the 70s, a growing number of social groups became organized and confronted their exclusion and marginalization in Israeli society. Most vocal were the protests by Mizrahi Jews, who came from Arab and North African countries in the 1950s. Their protests started earlier but only became organized and known as the Black Panthers movement in the 1970s. As I showed earlier, the effects of these protests were far-reaching, as they were among the primary factors leading to extensive welfare reform, which culminated with the end of the Sa'ad system.[618] The Black Panther movement also had an important impact on Mizrahi identity politics and pride.[619] The 1970s also showed a revival in women's activism,

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[614] KIMMERLING, *supra* note 612, at Chapter 4; EISENSTADT, *supra* note 612, at 409-411; RAM, *supra* note 612, at 85. On the formation of the labor movement's hegemony, *see* YONATHAN SHAPIRO, THE FORMATIVE YEARS OF ISRAELI LABOR PARTY: THE ORGANIZATION OF POWER 1918-1930 (1976).

[615] DORON & KRAMER, *supra* note 612, at 159.

[616] *See e.g.*, EISENSTADT, *supra* note 612, at 409.

[617] For a good collection of articles on that process from a historical-sociological perspective, *see* THE NEW ISRAEL – PEACEMAKING AND LIBERALIZATION (Gershon Shafir & Yoav Peled eds., 2000).

[618] *See* Chapter 3, Part E.e. On the place of the Black Panthers in the history of public protests in Israel, *see* Tamar Herman, *'Do They Have a Chance?' Protest and Political Structure of Opportunity in Israel*. 1 ISRAEL STUDIES 144, 156 (1996)

[619] *See* SAMI SHALOM CHETRIT, THE MIZRACHI STRUGGLE IN ISRAEL: BETWEEN OPPRESSION AND LIBERATION, IDENTIFICATION AND ALTERNATIVE*, 1948–2003* (2004).

manifested in the rise of a local feminist movement,[620] and the beginning of gay activism.[621] It was a time for more activism among PWD as well, including, for instance, the successful struggle of people with mobility impairments for mobility allowances.[622] During the 1980s, the rate of protests and the amount of non-governmental associations grew higher and concerned diverse issues related to peace/war, women's rights, environmental policy, animal rights, and more.[623]

Other events that contributed to that change were numerous. An important one among them was the decline or even breach in the Israeli citizenry's confidence in its government after the 1973 War (Yom Kippur War).[624] Starting with a traumatic failure, the war surprised the Israeli public, who felt unbeatable and omnipotent after the victory in the 1967 War (The Six Days War). Subsequently, the Protest Movement (*Tnu'at HaMecha'a*) emerged, which pronounced a strong public criticism of Israeli militarism and the occupation, and pressured for achieving peace between Israel and its neighboring Arab countries. The Protest Movement was also important in that it marked a new era in

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[620] On the history of the Israeli feminist movement, *see Calling the Equality Bluff* (Barbara Swirski and Marilyn P. Safir eds., 1991), particularly in that volume, *see* Barbara Swirski, *Israeli Feminism New and Old*, *Id.*, at 285, 294-301; YAEL YISHAI, BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS, (1997). On the place of the feminist movement within a larger context of local processes, *see* RAM, *supra* note 612, at 149-153. For a more personal account, *see* MARCIA FREEDMAN, EXILE IN THE PROMISED LAND: A MEMOIR (1990).

[621] Yuval Yonay, *The Law Regarding Homosexuality – Between History and Sociology*, 4 MISHPAT U-MIMSHAL 531 (1998) [Hebrew] (on the struggles to change sodomy laws in Israel).

[622] *See infra* note 753 and accompanying text.

[623] Uri Ben-Eliezer, *New Associations or New Politics? The Significance of Israeli-style Post-materialism*, 4 HAGAR (2003) (available on: http://hsf.bgu.ac.il/hagar/issues/4_12_2003/41220032.aspx); Herman, *supra* note 618.

[624] *See e.g.*, BEIT-HALLAHMI, *supra* note 612, at 153-156; EISENSTADT, *supra* note 612, at Chapter 17.

political activism and protest in Israel.[625] Another event was the loss of the Labor party in the 1977 elections, which symbolized the end of the hegemony of the labor movements and the rise of right wing forces in Israeli politics.[626] The right wing opposed socialism, promoted liberal capitalism, and employed a more overt nationalistic agenda.[627] Its rise was a result of these processes, yet at the same time it reinforced and intensified them.

The rise of capitalism as a preferred social and economic method became explicit in those years but its roots were planted much earlier.[628] In part, capitalism's rise was related to changes in global markets and the global economy. But its roots should be traced back even further, to the years when tendencies towards a capitalist socioeconomic structure emerged even within the labor movement.[629] As Israel's economy became more prosperous and living standards rose, visible economic disparities emerged.[630] As a result, the labor elite, which started as the social-political elite, became the economic elite as well. In that process, labor leadership itself went through de-radicalization and its socialist legacy lost its hold.[631]

Collectivism, however, did not disappear from the ideological landscape, but rather changed its form. It was now mainly supported by nationalism that still maintained

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[625] Herman, *supra* note 618, at 158. Herman claims there that The Protest Movement lived shortly but marked a beginning of a new stage of protest activity in Israel – an era of "maturation"; Ben-Eliezer, *supra* note 623.

[626] *See e.g.*, EISENSTADT, *supra* note 612, at Chapter 17.

[627] *See e.g.*, EISENSTADT, *supra* note 612, at Chapter 18. on the roots of Zionist right wing ideology, see GIDEON SHIMONI, THE ZIONIST IDEOLOGY 252-256 (1995).

[628] On the transformation in Israeli economy, *see*, Shafir & Peled, *supra* note 617 (articles in Part 1 discuss the characteristics of Israeli economy before 1974 ("A State Centered Economy") and articles in Part 2 concern with the post 1974 economical ideology ("Liberalization").

[629] ZE'EV STERNHELL, THE FOUNDING MYTHS OF ISRAEL: NATIONALISM, SOCIALISM, AND THE MAKING OF THE JEWISH STATE 225 (1998)).

[630] For statistical data, *see* EISENSTADT, *supra* note 612, at 226-227.

[631] *Se, e.g.*, DORON & KRAMER, *supra* note 612, at 12-14, 159.

its dominance and existed next to growing capitalism and individualism.[632] This newly reconstructed nationalism was mainly shaped by the concerns of security, defense, and maintaining the role of the state as a rescue for the Jewish people.[633] The role of Judaism or "Jewishness" was strengthening in the changing scheme of nationalism due to the growing power of religion and religious sentiments in Israeli politics.[634] Nationalism, then, continued to impact all fields of civil, social, and political life.[635]

In the following section, I show that the changes that the Israeli society went through, together with additional global influences, provided the conditions, the tools, and the imagination for people to develop an alternative view about disability and an adversarial position towards the state. Yet I also show that the consequences of the shifts in Israeli society were of mixed meaning for PWD. While they brought activism and resistance, hope and even some actual remedies (in the form of disability activism and disability rights), they also allowed the persistence of militarism and nationalism, and contributed to a decline in the commitment to progressive social policies.

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[632] *See* Shulamit Carmi and Henri Rosenfeld, *The Emergence of Militaristic Nationalism in Israel*, 3 Int'l J. of Politics, Culture and Soc. (1989).

[633] *See* KIMMERLING, *supra* note 612, at Chapter 7: *The Code of Security: The Israeli-military Cultural Complex.*

[634] One reason for the growing role of Judaism in Israeli politics and society is the messianic meaning that the 1967 War received as holly and historical sites were now under Israeli rule which brought Jewish heritage back to the collective consciousness. Another was the growing ties with Diaspora communities. EISENSTADT, *supra* note 612, at 360-361, 363; KIMMERLING, *supra* note 612, at Chapter 6, which he tellingly titled The Cultural Code of Jewishness: Religion and Nationalism. A third one was connected to the rise of the right wing and the more central place of Judaism in its ideology, *see* EISENSTADT, *Id*., at 530-532. *See* also Charles Liebman and Yaacov Yadgar, *Israeli Identity: The Jewish Component*, *in* ISRAELI IDENTITY IN TRANSITION (Anita Shapira ed., 2004)

[635] *See infra* Part A.b.

b. Enduring Nationalism and Israeli Body Politics

The maintenance of Israeli collectivism's power is an important point to remember throughout the discussions on the growing place of capitalism, the expansion of groups' politics, and the rise of individualism and civil rights discourse. Despite those changes, collectivism remained an important aspect of Israeli ethos and public discourse mainly through the persistence of nationalism and the rise of the Jewish component in it.

Nationalism and militarism became even more closely entwined. The link between them was founded on the ongoing military conflict between Israel and its neighbor countries, and the continuing sense of identification between the state and its citizenry as the refuge thereof, and the only guarantee for security to the Jewish people. It was also related to the growing religious sentiment in the relationships between Jewish-Israelis and the land. In the words of S.N. Eisenstadt, one of Israel's greatest sociologists (yet one who cannot be associated with radical critiques of Zionism), "security became the very central dimension of Israeli collective identity."[636]

The national-militaristic component remained powerful, then, even though it became more contested and complex.[637] It was now facing two opposing processes, both related to the outcomes of the 1967 and 1973 wars. On the one hand, it encountered criticism as anti-war voices became more vocal and more people demanded active efforts by the Israeli government to promote peace with the Palestinians and with other Arab

[636] EISENSTADT, *supra* note 612, at 411. On Eisenstadt as a "first generation" sociologist whose functionalist sociology was not critical of the Zionist project but was rather a part of the nation building project, see RAM, *supra* note 612, at 30-34.

[637] EZRAHI, *supra* note 612.

countries.[638] Although still marginal, a civil culture that opposed the role of the army in Israeli society was growing, questioning the army's involvement in political and civil life, and providing alternative logic to the militaristic one on issues concerning Israeli invasion into and occupation of other countries and territories.[639] On the other hand, the 1967 and 1973 wars have also generated converse reactions, which together with the rise of right wing forces (after the 1977 elections), made the use of power more open and legitimized.

Despite these contradicting processes, the army remained a central agent in Israel, and its dominance is still demonstrated through the roles it plays in civil matters.[640] Thus, as I noted before, serving in the army was for many years the "admission ticket" to Israeli society. High-ranking army officers, for instance, enjoyed great advantages in politics as well as in the labor market, enjoying their prestige as worriers and persons of action with managerial and executive skills. Military service was also a legitimate eligibility criteria for state-sponsored subsidies.[641] Furthermore, the power of collectivism, nationalism, and security was internalized by rights activists as well. A 1997 study on the feminist movement has demonstrated that point, portraying the feminist movement in Israel as

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[638] MORDECHAI BAR-ON, IN PURSUIT OF PEACE : A HISTORY OF THE ISRAELI PEACE MOVEMENT (1996).

[639] *Id*. See EZRAHI, *supra* note 612, at Chapter 10: Women as Agents of the Anti-epic, on the role of women in anti-war protests, especially since the protest against the 1982 War (Peace to the Galili). Two such knows anti-war protests by women are Women in Black (women against the occupation) and Four mothers (women for withdrawal from Lebanon). *See* also Stuart A. Cohen, *Changing Societal-Military Relations in Israel: The Operational Implications*, in: IN THE NAME OF SECURITY: THE SOCIOLOGY OF PEACE AND WAR IN ISRAEL *IN* CHANGING TIMES 103 (Majid Al-Haj & Uri Ben-Eliezer eds., 2003).

[640] For a good collection of contemporary article on the subject, *see* IN THE NAME OF SECURITY: THE SOCIOLOGY OF PEACE AND WAR IN ISRAEL IN CHANGING TIMES (Majid Al-Haj & Uri Ben-Eliezer eds., 2003).

[641] *See* Chapter One, notes 148-149 and accompanying text.

trapped "between the banner and the flag,"[642] and arguing that collectivist goals and acceptance of national narratives have hindered the possibility of a radical attack on society's patriarchal and sexist institutions.

The persistence of nationalism and collectivism had impacted all fields of civil, social, and political life and shaped Israeli body politics as well. Two major sites that illustrate that link are civil rituals relating to the army, and reproduction policies. Both arenas also illuminate manifestations of current ableism that is still a defining component in Israeli body politics. As to army related rituals, the culture of commemoration and bereavement that glorifies and mythologizes the fallen soldiers remained powerful.[643] Additional civil rituals concern pre-military service youth culture that was flourishing during the 1990s. Thus, Meira Weiss shows that the strenuous and demanding screening tests to the army, particularly to special combat units, are perceived as the ultimate badge of bodily perfection and failing them is therefore perceived as a sign of imperfection and is usually attributed to a physical or mental "defect."[644] As Weiss emphasizes, both soldiers and parents took the army's role in defining masculinity and perfection for granted and did not challenge that military logic.

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[642] YISHAI, *supra* note 620.

[643] MEIRA WEISS, THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY (2002). Though there are changes in that realm as well, as parents are more likely now to question the reasons for the loss of their sons and daughters.

[644] Meira Weiss, *The 'chosen body': A semiotic analysis of the discourse of Israeli militarism and collective identity*, 145-1/4 SEMIOTICA 151 (2003). Weiss quotes an interview with a mother who told her "The training was so tough. … treks in the desert, water drills – jumping to the cold sea in the middle of the night. It was because they were selecting the best of the best. I knew that my son had to try it, it was the ultimate achievement of masculinity for him." *Id*., at 161. *See* also WEISS, *supra* note 643, at 46.

Similarly, in *Making The Body Beautiful*,[645] Sander L. Gilman provides comprehensive research on aesthetic surgeries. Looking at practices of such procedures among young Israeli males, he shows that before joining the military (when Israeli males are ages 16-18), there is a significant rise in number of males looking for surgical corrections in two main areas: feminine breasts and non-standardized shapes of penises. Interestingly, nose surgeries are sought by Israeli males only later, when they are in their twenties. The reason for the earlier procedures, Gilman shows, is the will to "pass" as "normal" in the military, with a particular fear about the shared baths. While one's nose has always been public, more private parts were concealable. Gilman identifies it as part of the body politics of the "new Israeli" (which is rightly distinguished from the new Jew), with its contemporary cultural codes of who is a "real man." The civil rituals surrounding the preparing and screening before military service have greatly contributed to the continuing adoration to the new-Jew-new-Israeli whose fierceness, courage, and beauty are standardized.

Reproduction also illustrates contemporary body politics through both the bodies of women and the unborn or the newly born. Reproduction and family planning, which were shaped by strong family values in the first place, became mobilized and linked to two national causes: the "demographic threat," according to which higher birth rates contribute to outnumbering the growing Palestinian-Arab population, and the producing of more soldiers to fight for the nation.[646] Thus, persons who choose not to have children,

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[645] SANDER L. GILMAN, MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY 199-201 (1999).

[646] SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL (2000); SUSAN SERED, WHAT MAKES WOMEN SICK: MATERNITY, MODESTY AND MILITARISM IN ISRAELI SOCIETY (2000), especially chapter 1.

particularly women, face strong negative responses, and women who cannot have children experience severe shame and guilt.[647] Similarly, as new reproductive technologies arrived, Israel became an international leader in providing related treatments, such as prenatal screenings and advanced fertility methods.[648] Moreover Israel's health policy puts no funding limits on people seeking fertility treatments, thus encouraging and subsidizing them indirectly.[649] At the same time, the extensive use of tests available to screen for impairments among fetuses expose over-occupation with a perfect baby even before she or he is born and the sociocultural norms that inform the expectation for bodily perfection.[650]

In the following sections, the role of nationalism will be mentioned in relevant places. Its impact on the scope of rights – which were not extended to Palestinians in the occupied territories and were very formal with regard to the Palestinian citizens of Israel – and on social welfare – which was put into a zero sum competition with security over the state budget – further shows the pervasiveness of security, the long arm of nationalism, in withholding progressive causes.

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[647] Larissa Memennick, *Childless in the Land of Imperative Motherhood: Stigma and Coping Among Infertile Israeli Women*, 43 SEX ROLES 821 (2000); SERED, *Id*., at Chapter 2.

[648] KAHN, *supra* note 646; SERED, *supra* note 646; Memennick, *Id.*,at 824; WEISS, *supra* note 643, at 32; Vered Levi-Barzilai, *Get Six, Get Seven, Get Eight Children*, Ha'aretz newspaper, Magazine 1/28/2005.

[649] Memennick, *Id.*, at 823; WEISS, *Id*.

[650] WEISS, *Id.*, at 2 (arguing that "Israeli women hold the record for fetal diagnostics"). Weiss also researched the practices of neglect of newborns with physical impairments during the end of the 1970s, showing high rates of abandonment in hospitals and inadequate care of those who are taken home. WEISS, *Id*.

c. The Rise of Rights Language and Rights Activism

The rise of rights language and rights activism was a part of, and a response to, the social processes mentioned thus far. Before then, rights were not a part of the public discourse and played only a marginal role in the legal arena. Having no written constitution, the Supreme Court was sporadically developing a "judicial bill of rights" on a case-by-case basis.[651] In addition, until the 1980s the rights discourse was narrow in scope and did not penetrate the public discourse.[652] The Zionist collectivist ethos was one of duties the individual owed towards the state, and not one of a person's rights against the state.[653] The type of democracy that has developed in Israel was characterized by Yonatan Shapiro as "formal democracy," which emphasizes majority rule and lacks a substantive protection of civil rights.[654]

During the 1970s and 80s the place of equality and civil and human rights in Israeli society has gradually expanded and developed. In both the legal and the political

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[651] On the early attempts of the Supreme Court to develop a local rights language, *see* Pnina Lahav, *Foundations of Rights Jurisprudence in Israel – Chief Justice Agranat's Legacy*, 24 ISR. L. REV. 211 (1990). On the development of a judicial Bill of Rights in Israel, *see* Amos Shapira, *Judicial Review without a Constitution: The Israeli Paradox*, 56 TEMPLE L. QUART. 405-62 (1983); Amos Shapira, *The Supreme Court as the Defender of Fundamental Civil Rights in Israel – A Protected Fortress or a Paper Tiger?* 3 IYUNEI MISHPAT, 625 (1973) [Hebrew]. For a more elaborated account of the history of rights discourse in the Israeli Supreme Court before 1992, *see* Pnina Lahav, *Rights and Democracy: The Court's Performance, in* ISRAELI DEMOCRACY UNDER STRESS 125, 127-141 (Ehud Sprinzak and Larry Diamond eds., 1993). *See* also Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 ISR. STUD. 81-89 (1998).

[652] The book *The Essential Story – Three Decades of the Association for Civil Rights in Israel* reveals much about the environment in the 1970s and 1980s and the absence of rights culture in Israel during those years (NAAMA YASHUVI, THE ESSENTIAL STORY – THREE DECADES OF THE ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL 35 (2002). In it, Ruth Gavison, a prominent civil rights scholar and activist, was quoted saying that in the middle of the 1980s "there was nothing, no book on human rights, not an article on human rights, and this whole [rights] discourse did not exist at all." *Id*., at 35.

[653] Eisenstadt, supra note 612, at 409. In a telling statement by David Ben-Gurion he argued: "In a free state like the state of Israel there is no need for a bill of rights . . . we need a bill of duties. . . duties to the homeland, to the people, to aliyah, to building the land, to the security of others, of the weak." Cited in Lahav, Rights and Democracy, *Id*., at 131.

[654] Yonatan Shapiro, *The Historical Origins of Israeli Democracy*, *in* ISRAELI DEMOCRACY UNDER STRESS 65 (Ehud Sprinzak and Larry Diamond eds., 1993).

realms new organizations with rights agenda emerged and were soon proliferating.[655] In addition, the Supreme Court became a central arena for negotiating rights claims, and was viewed by the public as their leading protector.[656] The Knesset as well became a terrain for civil rights legislation which resulted in the enactment of labor laws prohibiting employment discrimination of women and later on of additional social groups. The first among them was the Employment (Equal Opportunities) Law, 1981,[657] which originally addressed only discrimination on basis of sex, marital status or being a parent. In 1988 it was amended and renamed as the Equality of Opportunities in Labour Law, 1988,[658] yet still protected the same categories of people. A few years later it faced a few amendments that expanded the list to include discrimination on basis of age, race, religion, personal (marital) status, country of origin, nationality, personal opinions, military service, political affiliation or sexual orientation. Yet in none of these vibrant sites of rights activism disability was included. Until 1992 no organization protecting the rights of PWD was established, the Supreme Court did not prohibit disability based discrimination until 1996, and disability was not acknowledged among the protected categories in the Equal Opportunities in Labor Law until 1998.

A closer look at the rising role of the Supreme Court in that process shows that from the end of the 1970s onward, the Supreme Court took a more activist mode of operation. One aspect of this was its style of legal reasoning, which more explicitly

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[655] In 1972. *Ratz*, the first political party with clear civil rights agenda was established and has contributed to the penetration of rights to the public discourse. As to legal organizations, *see infra* notes 679-691 and accompanying text on the public interest movement.

[656] *See* discussion starting next paragraph on the Supreme Court role in the developing rights discourse.

[657] Employment (Equal Opportunities) Law, 5741-1981, 26 L.S.I. 103.

[658] Equal Opportunities in Employment Law, 5748-1988, 42 L.S.I. 31.

emphasized the role that values played in its decision-making.[659] Primary examples of that tendency included a growing use of judicial review (mostly on grounds of equality), framing legal issues as a tension between competing values, and revealing the role of choice and creativity in a judge's work.[660] The activism of the court was also manifested in developing legal doctrines that allowed such reasoning; central among them was "reasonableness" as a cause for judicial intervention in administrative law.[661]

An additional dimension of the activist turn was the broadened spectrum of cases that were allowed to be litigated before the Court. By loosening the restrictions on standing and justiciability, the Supreme Court opened its gates to petitions that were formerly denied entry if they raised issues of general interest to the public.[662] Nevertheless, the Supreme Court stopped short of holding Knesset legislation void.[663] In a mutually reinforcing process, more petitions came before the court that addressed issues of rights, and the court was more willing to try them and to provide protection on grounds of rights and equality.[664] During the 1980s, the Supreme Court expanded the judicially made bill of rights by issuing landmark decisions in civil rights cases, particularly in the

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[659] On the changes in the style of reasoning, *see* MENACHEM MAUTNER, THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW (1993). But see his note citing other opinions in that regard, *id*., at 34, note 4.

[660] For a detailed list of examples, *see* MAUTNER, *Id*., at 33-68.

[661] Reasonableness allowed the court to scrutinize the substantive grounds of an agency's decision as it essentially examined how reasonable a decision was. On the evolution of reasonableness and its critique, *see* Ronen Shamir, *The Politics of Reasonableness – Discretion as Judicial Power*, 5 THEORY AND CRITICISM 7 (1994) [Hebrew]; Menachem Mautner, *The Reasonableness of Politics*, 5 THEORY AND CRITICISM 25 (1994) [Hebrew].

[662] David Kretzmer, *Forty Years of Public Law*, 24 ISR. L. REV. 341 (1990); ZE'EV SEGAL, STANDING IN THE HIGH COURT OF JUSTICE (2nd ed., 1993) (Hebrew). For a comparative analysis between Israel and the United States, *see* John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73 (2002).

[663] Though it did show signs of willingness to do so, *see* H.C. 142/82, *Laor Movement vs. Speaker of the Knesset*, 44 P.D. 529 (1982) [Hebrew]. Gross, *supra* note 651, at 82-87.

[664] Lahav, *Rights and Democracy*, *supra* note 651, at 143-144; Gross, *supra* note 651, at 85.

fields of free speech and women's rights.[665] Nevertheless, the Supreme Court's progressivism, activism, and civil rights jurisprudence were not free of critiques. The primary among them was that they were not extended to the Palestinians living in the Occupied Territories and did not serve the Palestinian minority living within Israel.[666]

Clearly, this local process was also heavily influenced by global trends as well. The growth of rights talk since the 1970s was significantly influenced by the American civil rights and feminist movements, and to some extent by the development of universal human rights and the increasing number of international documents that supported and advanced the protection of rights by nation states.[667] However, as Aeyal Gross noted, unlike the American experience, until the 1990s the Supreme Court's rights jurisprudence was in general supportive of progressive causes and not constrained by classical liberal ideas of rights.[668]

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[665] Ze'ev Segal, A Constitution without a Constitution: The Israeli Experience and the American Impact, 21 CAPITAL UNIVERSITY LAW REVIEW 1 (1992). For cases concerning women's rights, *see* H.C. 953/87, *Poraz v. Municipality of Tel Aviv*, 42(2) P.D. 309 (1988); H.C. 153/87, *Shakdiel v. Minister of Religious Affairs*, 42(2) P.D. 221 (1988), translated in 8 Selected Judgments of the Supreme Court of Israel 186 (1969-1988). For a case concerning freedom of speech, *see* H.C. 14/86, *Laor et al. v. The Board for Film and Theater Censorship*, 41(1) P.D. 421 (1986) [Hebrew] (in which the Supreme Court accepted a petition filed by a playwright against censoring his play which criticized the army's actions in the Occupied Territories).

[666] *See* Leon Shelef, *The Green Line is the Border of Activism*, 177 IYUNEI MISHPAT 757 (1993) [Hebrew]; and Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 14 L. SOC. REV. 781 (1990). As to the Palestinian minority, *see* DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL (1990), and David Kretzmer, *Fifty Years of Jurisprudence on Human Rights* 5 MISHPAT U-MIMSHAL 297, 317 (1999); Lahav, *Rights and Democracy*, *supra* note 651, at 145-148.

[667] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

[668] Gross, *supra* note 651, at 87. Gross argues that the Critical Legal Studies critique of the American rights discourse does not apply to the Israel's history of rights where rights were triumphed by collective interests and not by other "private" rights or interests.

The event that symbolizes the peak of the process in which rights became a central concept in Israeli legal and public discourse was the enactment of two important Basic Laws in 1992. Israeli Basic Laws are individually enacted chapters of the Israeli constitution. Since agreement on a constitution could not be reached right upon the establishment of the state, the Knesset has been gradually enacting laws that would become a complete constitution in the future.[669] For four decades the enacted Basic Laws concerned mainly the operation framework for major state organs.[670] In 1992, however, for the first time, two bill of rights-type laws were enacted – Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.[671] That event was heralded as a "constitutional revolution" by Aharon Barak, today the Chief Justice of the Supreme Court, not only because those rights were granted a superior status in the legal system but more so because the laws were interpreted by Barak as providing courts with the tools and the authority to disqualify primary legislation as unconstitutional.[672]

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[669] On the debates regarding the constitution and the compromise that was eventually reached, *see* Ruth Gavison, *The Controversy over Israel's Bill of Rights*, 15 ISRAEL YEAR BOOK OF HUMAN RIGHTS, 113 (1985); Nathan Yanai, *Politics and Constitution-Making in Israel: Ben-Gurion's Position in the Constitutional Debate Following the Foundation of the State*, *in* CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 101 (Daniel J. Elazar ed., 1990).

[670] *E.g.* Basic Law: The Knesset, Basic Law: The Government, Basic Law: The Administration of Justice, Basic Law: The President, Basic Law: The Army, Basic Law: Israel's Land.

[671] Basic Law: Human Dignity and Liberty, S.H. 150 (1992); Basic Law: Freedom of Occupation, S.H. 90 (1994) (amended version that replaced original of 1992). English version of all Basic Laws including the most recent ones is available online in http://www.oefre.unibe.ch/law/icl/is__indx.html (last visited 8/15/2005).

[672] Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL 9 (1992) [Hebrew] (a speech given at the University of Haifa two months after the enactment of the two Basic Laws). For an English version, *see*: Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 83 (1993). See also Aharon Barak, *The Israeli Constitution: Past, Present and Future*, 43 HAPERAKLIT 5 (1996) [Hebrew]. For a detailed review of the enactment of the two Basic Laws and its implications, *see* Gross, supra note 651; and Ran Hirschl, *The "Constitutional Revolution" and the Emergence of a New Economic Order in Israel*, 2 ISRAEL STUDIES, 136 (1997). For comparative perspectives on that constitutional event, *see* Ran Hirschl *"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22

Following the enactment of the new Basic Laws, the concept of human dignity became central in the Israeli understanding of rights and consequently in the general legal discourse.[673] Thus, shortly after, a burgeoning rights-jurisprudence developed, which encompassed many aspects of Israeli law, including criminal, administrative, labor and family law. In the realm of equality law, the impact of the newly introduced term of human dignity was particularly strong, even though equality was not explicitly protected, and in fact was intentionally left outside the law. Elaborated equality jurisprudence was developed by the Supreme Court even before the 1992 Basic Laws, partially relying on Knesset's growing legislation in the field. Yet the 1992 Basic Laws have yielded some groundbreaking decisions concerning mainly women's rights, but gradually also gay rights, disability rights and later on in the field of the Palestinian minority's rights.[674] I shall return to the case that set a precedent for disability rights, the *Botzer* case, later.

HUM. RTS. QUART. 1060 (2000); and Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

Declaring the 1992 Basic Laws as a constitutional revolution was accepted with mixed responses. For criticism *see* Menachem Elon, *The Basic Laws: Legislation and Interpretation*, 12 MECHKAREY MISHPAT 253 (1995) [Hebrew]; and Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-Fulfilling Prophesy?*, 28 MISHPATIM 21 (1997) [Hebrew]. Asher Maoz, Constitutional Law: The Constitutional Revolution, in Y. B. ISR. L. 1996-1997 (Ariel Rozen-Zvi ed., 1996) [Hebrew]; David Kretzmer, The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law? 26 ISR. L. REV 238 (1992); Lahav, *Rights and Democracy*, *supra* note 651.

[673] *See* Gross, *supra* note 651, at 91-92 on human dignity as a catch-phrase in Israeli legal-political discourse and on the risk that it would become a "fetish."

[674] Highlight decisions on women's rights include: H.C. 4541/94, *Alice Miller vs. Minister of Defense* et al., 49(4) P.D. 94 (1994) [Hebrew] (a petition to open military pilots position to women. Granted); H.C. 453, 454/94, *Israel Women's Network vs. The Government of Israel* et al., 48(5) P.D. 501 (1994) [Hebrew] (a petition to enforce the law that mandates fair representation for women in boards of government owned corporations. Granted). Other petitions concerning equality for social groups include: H.C. 721/94, *El-Al Israel Airlines Ltd. v. Yonathan Danilowitz* et al., 48(5) P.D. 749 (1994) [Hebrew] (a petition to grant equal status for same-sex couples for purposes of work benefits. Granted); H.C. 7081/93, *Botzer et al v. Reut-Maccabim Municipality et al*, 50(1) P.D. 19 (1996) [Hebrew] (a petition to order a school to be fully accessible for a wheelchair using student. Granted), on the decision and its role in the history of disability rights, *see infra* Part C.b.i.; H.C. 6698/95, *Ka'adan v. Israel Land Administration et al*, 54(1) P.D. 258 (2000) [Hebrew] (a petition to allow an Arab-Palestinian family of Israeli citizens to build a house in a town designed for Jews only on public-owned land. Granted, yet with serious difficulties the major among them is that the decision only forbade the discrimination of the Palestinian minority, but did

While in the above fields human dignity was interpreted as allowing more activism, in others it has resulted in judicial restraint. Due to its wide scope and elusive content, the boundaries of human dignity were, and still are, under constant negotiation.[675] In his academic writings, which preceded actual judicial decisions on the matter, Justice Barak promoted a narrow understanding of human dignity that encompassed most civil rights, including some that were not enumerated in the Basic Law, but that excluded social rights. Consequently, the penetration of rights into the Israeli legal discourse, which was generally portrayed as a long awaited, positive event, was soon criticized as a turn in the legal discourse's character towards a more traditional liberal scheme that grants supremacy to civil rights and property rights. As Aeyal Gross, a constitutional law scholar, warned, the interpretation of the 1992 Basic Law represented a threat of "*Lochnerization*" to Israeli law.[676]

As the debate over the scope of human dignity illustrates, the entry of civil rights language into the legal arena was accompanied by a threat of weakening support for progressive social policy. Gross further demonstrates his argument by showing how the

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not positively mandate the actual allocation of land to the family, *see* Alexander Kedar, *A First Step in a Difficult and Sensitive Road: Preliminary Observations on Qaadan v. Katzir,* 16 ISR. ST. BUL. 3 (2000). *See* also Gross, *supra* note 651, at 100 on the 1992 Basic Laws as enhancing equality.

[675] Human dignity became an all-encompassing concept through which the acknowledgment of other principles that were not granted similar constitutional protection, such as equality and freedom of speech on the one hand and social rights on the other were debated. The position that seems to set the grounds for the debate was presented, again, by Justice Barak in Aharon Barak, *Human Dignity as a Constitutional Right*, 41 HAPERAKLIT 271 (1994) [Hebrew], and Aharon Barak INTERPRETATION IN LAW, VOL 3: CONSTITUTIONAL INTERPRETATION 419-423 (1994) [Hebrew]. For additional views on the scope of human dignity, *see* Judith Karp, *A Few Questions on Human Dignity According to Basic Law: Human Dignity and Liberty*, 25 MISHPATIM, 129 (1995) [Hebrew]; Hillel Somer, *The Non-Enumerated Rights: On the Scope of the Constitutional Revolution*, 26 MISHPATIM, 257 (1997) [Hebrew]; Barak-Erez, *supra* note 672, at 342-4.

[676] Gross, *supra* note 651. The term *Lochnerization* alludes to the infamous Lochner decision that was given by the United States Supreme Court *Lochner v. People of State of New York*, 198 U.S. 45 (1905); *See* also Ruth Ben-Israel, "*The Effect of the Basic Laws on Labor Law and the Labor Relations System*, 4 LABOR LAW YEARBOOK, 27 (1994) [Hebrew]; and Hirschl, *The "Constitutional Revolution"*, *supra* note 672.

entry of property rights and freedom of contracts has strengthened business interests and did not serve the rights of Palestinians in the Occupied Territories or of the Palestinian minority within Israel.[677] As Ran Hirschl shows, this phenomenon was not unique to Israel but was characteristic of Canada and New Zealand as well, as in all three countries the adoption of constitutional bill of rights documents did not result in the strengthening of progressive social causes, but rather their decline.[678]

The global influences, namely the utilization of law for achieving the goals of the civil rights movement in the United States and the intensifying international human rights culture, together with the local processes, have also triggered changes in rights activism and in the legal profession.[679] Those global trends also arrived through the unique channel of Jewish giving, when donors to Israel sought to promote social change activities.[680] During the 1970s, a new form of legal professionalism emerged as new public interest organizations started utilizing the law as a means for social change and were increasingly using a language of rights.[681] The practice of law in public interest

[677] Gross, *Id.*, at 101-106 (showing that the new property rhetoric did not serve a Palestinian family within Israel whose land was expropriated in 1968 (*Id.*, at 103).

[678] Hirschl, *Negative" Rights vs. "Positive" Entitlements*, *supra* note 672.

[679] On the role of those global influences in other places as well, *see*, Stephen Ellmann, *Cause Lawyering in the Third World*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349 (Austin Sarat & Stuart Scheingold eds., 1998).

[680] NETA ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING : A STUDY ON THE INTERDEPENDENCE OF JURISPRUDENCE AND THE LEGAL PROFESSION IN ISRAEL 92 (2001; A J.S.D. thesis submitted to the Stanford Law School). A primary actor in that field was the New Israel Fund (NIF) which was founded in 1979 by American Jews with the agenda of developing and fostering the public interest community in Israel. On the role of the NIF in fostering civil rights in Israel through its support in ACRI, see YASHUVI, *supra* note 652, at 28-29, 39-40.

[681] For a review on the rise of the public interest law practice in Israel, *see*, ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING *Id.*, particularly Chapter 3.

organizations was characterized by what the cause-lawyering literature describes as a shift from a client-oriented- to a cause-oriented lawyer.[682]

This was part of a broader change in the Israeli organizational landscape as a growing non-governmental sector emerged and developed an adversarial position towards the state and its institutions.[683] Before then, no human rights organizations operated in Israel. The former organizations were mainly engaged in providing actual services to certain groups of people in fields such as social welfare and healthcare.[684] Among the new organizations a growing number started mostly with a focus on public and educational activities but gradually strengthened their legal focus from policy advocacy to impact litigation and drafting legislation.[685] The shift towards strong legalism among public interest organizations occurred only later during the 1980s and became prominent in the beginning of the 1990s.

A telling example in this contest is the Association for Civil Rights in Israel (ACRI), the oldest and most prominent public interest law organization in Israel.[686]

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[682] For a variety of case studies that explore this trend, *see*, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat and Stuart Scheingold eds., 1998).

[683] *See* BENJAMIN GIDRON, MICHAL BAR, & HAGAI KATZ, THE ISRAELI THIRD SECTOR: BETWEEN WELFARE STATE AND CIVIL SOCIETY (2004); ILANA SILBER & ZEEV ROSENHEK, THE HISTORICAL DEVELOPMENT OF THE ISRAELI THIRD SECTOR 4-8 (2000). But *see* Ben-Eliezer who still warns against the state's "bear hug" which impedes the development of a true civil society in Israel, Ben-Eliezer, *supra* note 623. More on the changing landscape of non profit organizations in Israel with a focus on the field of disability activism, *see infra* part B.

[684] GIDRON ET AL, *Id*., at 89-101. *See* also Part B below, for my analysis of the changing forms of disability activism.

[685] See ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING, *supra* note 680, at 92-93.

[686] On ACRI, *see* ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING, *supra* note 680, at 94-97; Yoav Dotan, *Cause Lawyers Crossing the Lines: Patterns of Fragmentation and Cooperation between State and Civil Rights Lawyers in Israel*, 5 INT'L J. LEG. PROF. 193 (1998); YASHUVI, *supra* note 652. *The Essential Story* was published by ACRI for its 30th anniversary that chronicles the establishment of the organization and its path since then. Along the years ACRI became an influential actor in the public sphere, and was well-known for its protection of minority rights, including women, the Palestinian-Arab

Established in 1972, ACRI was the first of such organizations to employ an American-liberal agenda and to focus on individual and civil rights. It was formed by a group of activists, lawyers, and law professors, many of whom immigrated to Israel from the United States and were concerned with civil and minority rights in Israel after being inspired by the ACLU and its role in the development of rights jurisprudence in the U.S.[687] But even ACRI filed its first civil rights petition to the Supreme Court only in 1980, eight years after its foundation.[688] In the years that followed, a growing public interest movement emerged with additional organizations that contributed to the strengthening of rights. Many of them were founded by immigrants from the U.S. who wanted to bring to Israel what they saw as liberating and empowering experiences,[689] and many others were trained in the United States.[690] By the 1990s there was already a lively young community of public interest lawyers and organizations.[691]

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minority, and gays, and its involvement in protecting the rights of the Palestinians who lived in the occupied territories. Until today, ACRI is quite unique in its generalist agenda.

[687] YASHUVI, *id*., at 10-12.

[688] Before then ACRI's activities included public campaigns and letter sending to governmental authorities to protest against infringements of individual rights, such as free speech. YASHUVI, *supra* note 652, at 18-19.

[689] A fascinating example in that regard is brought by Noga-Morag Levine who analyzes the changes in the strategies employed by the Israel Union for Environmental Defense (IUED) who was patterned in large after the American Natural Resources Defense Council and that was established by an American immigrant who was an Israeli trained attorney. Morag-Levine discusses this case as an example for transplantation of rights practice from the United States and its adaptation to the Israeli environment. Noga Morag Levine, *The Politics for Imported Rights – Transplantation and Transformation in an Israeli Environmetal Course-Lawyering Organization*, *in*: CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stewart Scheingold eds., 2001).

[690] Mainly through a civil rights fellowship program established by the NIF to send young lawyers to study in the United States. On the role of that fellowship in fostering the public interest community in Israel, see ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING, *supra* note 680, at 93-94.

[691] The movement represented a growing local experience and at the same time continued to be highly influenced by the American experience in various dimensions. First, it was inspired by the public interest movement in the US. It was also heavily funded by US funds or private donors. In addition, American substantive law was a major resource for legal reform and professional connections were maintained with US organizations. Finally, many organizations were founded by lawyers who immigrated to Israel from the US, and/or were modeled after prominent US organizations. Thus, for example, in

Nevertheless, that vibrant and flourishing public interest movement and rights community did not include any disability rights organization and PWD's rights were still missing from the frontline of action. None of the organizations took the issue of PWD's rights under its auspice, unless it was related directly to their own agenda. ACRI, for instance, was primarily involved in the forced incarceration of people with psychiatric disabilities as a matter that implicates personal liberties,[692] but as I show below, it took time and outside involvement before ACRI could imagine other issues that PWD face as forms of discrimination or as human rights matters. It was only in 1992 that *Bizchut* (By Right) was established as an offspring of ACRI that specializes in disability rights.[693]

d. Neo-Liberalism and the Decline of Social Welfare

Among the shortcomings of the complex social processes that characterized the 1970s-1990s were the disappearance of commitment, even if merely rhetorical, to social democracy, solidarity and mutual aid, and erosion in the ethos of pride in social welfare.[694] Although, as I showed earlier, these promises were never fully fulfilled and in fact served primarily as a cover to actual lack of solidarity and of mutual aid, they did constitute an understanding of justice that carried a certain type of hopes and aspirations that the state felt, and was called to be, accountable for. Thus, the dominant political

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addition to ACRI and IUED, The Israeli Women's Network (1985) was established by a group of women, mostly immigrants for the United States; the Israel religious Action Center (IRAC) (1987), the public and legal advocacy arm of the Israel Movement for Progressive Judaism, was modeled after RAC which sits in Washington D.C.; B'tzelem (1988), an information center that reports on human rights violations in the Occupied Territories was modeled after Human Rights Watch; and most recently, Adalah (1996), The Legal Center for Arab Minority Rights in Israel was inspired by the model of the NAACP.

[692] YASHUVI, *supra* note 652, at 52, 76.

[693] See infra, Part B.c.

[694] ABRAHAM DORON, IN DEFENSE OF UNIVERSALITY – A CHALLENGE TO ISRAEL'S SOCIAL POLICIES (1995); JOHN GAL, SOCIAL SECURITY IN ISRAEL 31-38 (2004).

parties and the general public in the early decades perceived Israel as a progressive welfare state with strong social mechanisms that can serve, or that aspire to serve, as an example to other nations.[695] In those years massive state intervention in the market was acceptable for the mixed reasons of a socialist legacy and the practical goals of the nation building project.[696] The ideological shift towards neo-liberalism and conservative social policy, which was not unique to Israel alone,[697] was accompanied by an actual sense of economic crisis in the second half of the 1970s that was related locally to the aftermath of the 1973 War (Yom Kippur War) and globally to the energy crisis of the mid 70s.[698] In Uri Ben-Eliezer's words: "[e]ssentially, a kind of 'bourgeois revolution' took place, propagating a neo-liberal outlook that bore similarities to trends that gained popularity in Reaganist America and Thatcherist Britain."[699]

The link between those two directions was already noted by scholars who criticized the impact of the 1992 Basic Laws. Thus, Aeyal Gross, as I already mentioned, has warned against the *Lochnerization* of Israeli law and the emerging "myth of rights"

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[695] *See*, for example, Frances Raday, *Trends in Labour Law – Forty Years of Israeli Law*, 24 ISRAEL LAW REVIEW 674 (1988), on the early labor law legislation as relatively progressive in comparative perspective.

[696] On the complex ways through which intervention in the market was achieved, *see* Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict 1882 - 1914* (1989); Michael Shalev, *Labor and the Political Economy in Israel* (1992); Lev Grinberg, *The Histadrut Above All* (1993) [Hebrew]. On etatism in Israel's early years, see Chapter Two, Part D.a.

[697] The two most influential economists whose scholarly works is most identified with and representative of the turn to neo-liberalism, are Friedrich August von Hayek and Robert Nozick. Both of them have claimed for instance that social rights are inconsistent with personal liberties, *see* Friedrich A. Hayek, The Constitution of Liberty 87 (1960), and ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 30-34 (1974).

[698] HAIM BARKAI, THE EVOLUTION OF ISRAEL'S SOCIAL SECURITY SYSTEM – STRUCTURE, TIME PATTERN AND MACROECONOMIC IMPACT 57-85 (1998)t; ASSAF RAZIN AND EFRAIN SADKA, THE ECONOMY OF MODERN ISRAEL – MALAISE AND PROMISE 16-20 (1993); RIVLEIN, THE ISRAELI ECONOMY 10-12 (1993).

[699] Ben-Eliezer, *supra* note 623.

that it brought about.[700] Ruth Ben-Israel was in fact the first to identify the risks embedded in Barak's interpretation of human dignity, noting that his individualistic interpretation of that principle might yield a rejection of state intervention in labor relations, and predicting that it may even hinder future labor legislation as unconstitutional.[701] Similarly, Ran Hirschl argued that "the constitutional revolution reflects and promotes the neo-liberal, individualist, 'free enterprise' worldview upon which the new economic order now emerging in Israel is based."[702]

But it was not only the rise of capitalism that affected the declining place of social welfare in Israeli society; it was also the persistence and even strengthening presence of security as a central principle in Israeli public discourse. The ruling impression was that the continuing security threat does not allow pursuing progressive social causes.[703] After 1973, there was a growing sense that the state of war is not temporary but rather existential.[704]

Soon the legitimacy of progressive social welfare programs declined and the fragile achievements of the former era were under attack. Those trends were reflected in the changing place of National Insurance (social security) in public discourse and

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[700] Refers to Stuart Scheingold's discussion on the "myth of rights" in the United States. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

[701] Ben-Israel, *supra* note 676.

[702] Ran Hirschl, *The "Constitutional Revolution"*, *supra* note 672, at 136.

[703] EISENSTADT, *supra* note 612, at 411; KIMMERLING, *supra* note 612, at 208. Kimmerling also notes that one rhetorical way to solve that perceived tension was to link between the two and argue that social welfare promotes security. For an elaborated discussion on the subject, *see* IMRI TOV, THE PRICE OF POWER: ISSUES IN THE ECONOMICS OF SECURITY (1998) [Hebrew].

[704] Budgetary concerns were already mentioned in the enactment of the National Insurance Law (in relation to the cost of the 1948 war and the economic resources required for establishing the new state). And unsurprisingly they have sustained in light of the persistence of nationalism in the Israeli ethos. Yet as I argued before, budgetary concerns are not enough an explanation as to why welfare was on a low priority and why was the difficulty posited as a competition between welfare and security.

government activities. In fact, the response to the Black Panthers protests, which led to extensive social reforms, lasted for a short period of time in which the Sa'ad system was abolished and all social welfare programs were transferred to the auspice of the National Insurance Institute. That period ended with the enactment of the Assurance of Income Law, 1980.[705] As argued before, in that transition the promise to universality has failed and need and charity still prevailed.[706] National Insurance was consequently successful in providing a most minimal safety net but was unsuccessful in advancing a structural change based on redistribution and egalitarian principles.[707] Nevertheless, for a short period of time a more structural approach to poverty was adopted that characterized it as part of a broader social matrix.[708]

During the 1980s, with the decline of social welfare, the target changed again from a "war against poverty" to a "war against the poor," in Abraham Doron's words. In that shift, the poor were blamed for their personalities, and social welfare programs for corrupting their beneficiaries.[709] The emphasis on "fixing the poor" is reflected in the following testimonial by Yitzhak Moday, the Minister of Treasury (1990-1992), who was quoted speaking proudly about his achievements while in office, including the narrowing of the rights of the unemployed:

> The unemployed was obliged to work even if the job was in a vocation not identical to his own, even if the distance from his home was greater, even if it required work in shifts, and more. The unemployed was forced to visit

[705] Assurance of Income Law, 5741-1980, 35 L.S.I. 28 (1980-81).

[706] On the process with regard to the disability insurance program, *see* Chapter Two Part G. For critical analysis of old-age pensions and Assurance of Income Law, 1980, *see* DORON & KRAMER, *supra* note 612.

[707] DORON & KRAMER, *Id.,* at 155-157.

[708] DORON, IN DEFENSE OF UNIVERSALITY, *supra* note 694, at 123-124.

[709] DORON, *Id.*; BARKAI, *supra* note 87, at 23.

> the employment office (*lishkat ta'asuka*) more often and he was denied of his right to visit it again shortly after he rejected a job that he was offered and that he was required to accept according to the edibility rules.[710]

The assaults on the National Insurance Institute were related to the general neo-liberal trend and the correlated concerns regarding the National Insurance Institute's growing expenditures, which economists claimed were exceeding the system's economic limits.[711] In those years, the attacks on the welfare state included attempts to cut National Insurance allowances, to dismantle their universal nature and to re-introduce a means test as an eligibility criterion. They also included attempts to de-legitimize unemployment insurance, to harden the requirements for receiving payments, and to demand co-pays for healthcare services. Major cuts and changes were in the fields of child allowances and old-aged pensions.[712] These demands represented a return to the old techniques of deterrence and stigma that characterized the old Sa'ad system, and the Poor Laws on which it was based. Even the political parties who were historically part of labor Zionism did not advance a social-democratic line of action but supported a conservative economic approach that perceived social welfare as a problem.[713] Thus, during the 1980s and 90s they joined the effort to create more selective criteria for National Insurance benefits, making it less universal and more need-based.[714] In the 1990s the general neo-liberal trend continued yet there was more willingness to correct some of the results of the

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[710] Yitzhak Moday, *Statistical Data*, Ma'ariv 8/21/1992. Cited in DORON, IN DEFENSE OF UNIVERSALITY, *supra* note 694, at 130.

[711] BARKAI, *supra* note 87, at 57-85.

[712] DORON, IN DEFENSE OF UNIVERSALITY, *supra* note 694, at 128-131, and at 150-162. *E.g.* cutting child allowances to first and second child (*id.*, at 154).

[713] DORON & KRAMER, *supra* note 612, at 159.

[714] DORON, IN DEFENSE OF UNIVERSALITY, supra note 694, at 51

1980s' harsh welfare policies which amounts to risking the social and economic security of the citizenry and left some with no care for their minimal needs.[715]

As public and political discourse has changed, the state's explanations and justifications for its limited social policies have shifted, too. Thus, the old concerns have re-appeared only in a new dress that fitted the changing ideological climate. While in the early decades the reasoning's rhetoric has focused on priority-setting accompanied by promises of better social policies in the future, the new rhetoric was emphasizing utility and efficiency and was de-legitimizing welfare policy. An additional consequence of that transition was the changing meaning of productivity – while the traces of the Zionist project of productivization as a personal and a collective reform still shaped the dominant discourse, the new understanding of productivity was more capitalist-oriented, ascribing no value to manual labor and direct contact with the land, praising instead economic growth and efficiency.[716]

e. Social Activism in Late 1990s – The Rediscovery of Social Welfare

The success of the neo-liberal discourse and the new economic policies that accompanied it was remarkable. During the 1990s social welfare was strongly de-legitimized and the growing economic disparities reached unprecedented levels.[717] Nevertheless, the trend of growing social activism, resistance, and confrontation has yielded increasing struggles for low-income people seeking to improve their socio-

[715] GAL, *supra* note 694, at 35-37.

[716] For a critique of productivity and pace from a disability perspective, *see e.g.,* BARBARA HILLYER, FEMINISM AND DISABILITY, Chapter Four: Productivity and Pace (1993); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 37 (1996).

[717] The Center for the Study of the Social Policy in Israel, 1997, Index, p. 4 [Hebrew] (cited in: Yossi Yonah and Ishak Saporta, *The Politics of Lands and Housing in Israel: A Wayward Republican Discourse*, 8 SOCIAL IDENTITIES (2002)).

economic conditions, and growing awareness within the rights community of social rights. The rediscovery of social welfare by social activists was a direct result of the neglect of welfare by all public actors, right and left, state agents and civil rights advocates. Until the 1990s, the growing rights activism was mainly concerned with civil rights and antidiscrimination laws, while neglecting issues of social justice and poverty.[718] Through many of these issues that link between ethnic relations and poverty was revealed once again, as Mizrahi people were leading many of the struggles, and the issues of past injustices were brought up. Yet the criticism this time was not only towards the Ashkenazi establishment, but also against the Zionist-bourgeoisie agenda that underlay the Israeli rights discourse.

One fascinating example is the achievements in the field of women's rights, which were soon criticized and became the epitome of the tensions mentioned above. Most controversial was the *Alice Miller* case, a petition filed by the Israeli Women's Network to the Supreme Court to allow women to serve in the army as pilots.[719] The petition was heralded as a major victory yet faced criticism first for contributing to, rather than challenging, Israeli militarism,[720] and second for demonstrating how the achievements of Israeli feminists were related to Ashkenazi-middle class issues and irrelevant to low-income women. The latter issue was even more present in what came to be known as the *Female Directors* case, which mandated fair representation for women

[718] *See also* Yashuvi on the tendency in ACRI towards civil and political rights and the inner debate it had in the beginning of the 1990s on turning to civil rights as well. YASHUVI, *supra* note 652, at 74-76.

[719] *Supra* note 674.

[720] See, Hassan Jabarin, *Towards Critical Approaches of the Palestinian Minority: Citizenship, Nationalism, and Feminism in Israeli Law*, 9 PLILIM 53 (2000).

in director boards of government-owned corporations.[721] That criticism brought a change in the agenda of Israeli feminist legal activism, which together with other reasons led to the decline in the status of the Israeli Women's Network, a formerly powerful organization in the public interest arena, and the establishment of a new feminist organization, *Itach ("With You") – Women Lawyers for Social Justice*.[722] Itach was carefully designed as an organization with a clear social agenda that is concerned with poverty, emphasizes social rights, employs a bottom-up approach to empowerment, and delivers a message of solidarity across class lines.

Another issue that demonstrates that emerging trend concerned land and housing policy. At the end of the 1980s in an act of desperation a few groups of families who could not afford housing established "tent-camps" in public parks to protest their situation and to make the government involved. That protest exposed the deteriorating state of social welfare, yet it was spontaneous and not organized in any formal way. Later on, as the government embarked on some privatization initiatives in the field of land and housing, the resistance took a legal turn. Thus, in 1997 the property rights of long-term tenants in public housing projects were stirred. A broad coalition of grassroots leadership, academics, and rights advocates was eventually formed and gained substantial achievements in the Knesset with a law that allowed the tenants to buy their houses under certain circumstances and conditions (though their implementation was later circumvented by the government).[723] The campaign concerned the rights of poor people,

[721] *Supra* note 674.

[722] Unfortunately the organization has no official website. The information provided is based on personal acquaintance with the organization and its founders.

[723] For the Chronicles of the struggle, *see*, Moshe Kreif, *The Public Housing Law - This Justice is All Theirs*, Globes, 10/26/98 (available on: http://hakeshet.tripod.com/articles/housing2.htm). For the

mostly Mizrahi people who immigrated to Israel during the 1950s, who lived for many years in public housing with no feasible opportunity to gain ownership over their houses. The radical argument was that they have earned their right through the lengthy time that they inhabited the house. As the campaign progressed, the argument also addressed discrimination, asserting that Mizrahi immigrants were fulfilling pioneering goals that were not acknowledged as such but were rather treated as a burden on the Zionist project.[724] Interestingly, and tellingly, ACRI, which in the past had hardly been involved in social rights issues, was an active participant in that coalition.[725]

Consequently, social rights and poverty became majorly contested terrains in both the legal and political discourse.[726] It seems that the pressure of groups and identity politics on the one hand, together with the worsening of the social and material conditions for the lower classes on the other hand, have converged to allow more social activism.

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context and details of that struggle, *see*, Yonah & Saporta, *supra* note 717. *See* also Oren Yiftachel, *Social Control, Urban Planning and Ethno-class Relations: Mizrahi Jews in Israel's 'Development Towns'*, 24 INT'L J. URB. & REG. RES. 418 (2000).

[724] Yonah & Saporta, *Id*. A new stage in the campaign for public housing was launched in 2000 when the Mizrahi Democratic Rainbow filed a petition to the Supreme Court against the government's new land policy that allowed and even encouraged cooperative and agricultural settlements of the pioneering type to gain profits from turning their agricultural land to residential purposes, even though the land is officially owned by the state. The petition located that policy in the broader land/housing policy of Israel and therefore argued for lack of equality in the general scheme of Israeli land/housing policy (the petition is available on: http://hakeshet.tripod.com/articles2/court.htm.). H.C. 244/00, *The Mizrahi Democratic Rainbow et al v. Minister of National Infrastructure et al*.

[725] On ACRI's neglect of social rights, the criticism it faced and its growing involvement in the field since 1997, *see* ZIV, HUMAN RIGHTS LAW AND PUBLIC INTEREST LAWYERING, *supra* note 680, at 97-98.

[726] Neta Ziv marks the year 1997 as the turning point in that process and enumerates various organizations and activities that represent that era, *see* Ziv, *id*., at 98.

f. The Persistent Structure of Disability Cash Benefits

In those years the basic structure of disability cash benefits remained the same. No fundamental amendments to any of the programs were made either in the level of benefits or in terms of entitlements. The slight changes that did pass were on the margins of the programs and in general maintained the differentiated structure of the system as a whole as well as the different rationales that underlay each program.

Thus, in the general disability insurance program some of the flaws in the original law were amended, including, for instance, the distinction between "new handicapped" and "old handicapped."[727] In addition, struggles over mobility stipends and disabled child allowances during the turn of the 1970s have succeeded in improving other aspects of the program.[728] However, the level of benefits has gradually eroded together with additional vulnerable "low-prestige" National Insurance programs. During the 1980s and 90s, until the protests of 1999 and 2001, the issue of disability cash benefits did not receive much public or political attention.

As to benefits to disabled veterans, their basic cash allowance has not changed. Although they did face threats of budget cuts during the 1980s, they managed to prevent them through vocal protests organized by the ZDVO, which kept its organizational strength and political power.[729] Furthermore, at the same time, additional benefits were extended to some specified groups of disabled veterans. Thus, elderly disabled veterans

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[727] Arie L. Miller, *A New Look on Disability Insurance*, 22 SOCIAL INSURANCE 5, 6 (1981).

[728] *See infra* notes 753 and accompanying text.

[729] In a special album that chronicles the history of IDF disabled veterans and their struggles, both 1984, 1986, and 1987 are mentioned as years with protests against budget cuts that aimed to narrow the entitlements for PWD. GIBORE HAYIL (TRUE HEROES): ZAHAL DISABLED VETERANS ASSOCIATION 1948-1998, 104, 110, 113 (Yosef Lobenberg ed., 1998).

enjoyed special regulation.[730] Disabled veterans maintained their high social status and symbolic place, and the financial burden that their benefits require remained a matter of consensus in Israeli society as a moral debt the country owed its soldiers.

In economic terms, the work injury program has largely remained untouched; it was a relatively stable program that provided economic security to most of its beneficiaries and represented progressive social welfare principles. However, I argue that a few social processes have contributed to the decline in the status of the program. An interesting dynamic in that regard is the struggle of other groups, like the veterans of WWII and civilians injured by "hostile actions," which I described in detail in Chapter Two. In their attempts to link their benefits to those of disabled veterans, and to distance themselves from the work injury model, these civilians evoked national values and contributed to the understanding of work injury as less valuable not only in relation to a military injury, but also in more absolute ways, such as the appreciation of their contribution to society. Additionally, it seems that the decline in the value of labor, the erosion in support of social welfare policies, and the de-legitimization process that the National Insurance Institute underwent, have affected the status of the work injury program as well. Consequently, the relative prestige that the work injury program enjoyed in its early days, which was reflected in its structure, has declined, and the work injured were gradually associated with low-status welfare recipients and were not as distinguished from them anymore. Clearly, due to the relatively stable structure of the program, it maintained its superiority among National Insurance programs and its

[730] Invalids (Additional Allowance Due to Age) Regulations, 5744-1984. These regulations were replaced in 1999 by the Invalids (Additional Allowance Due to Age) Regulations, 5759-1999, K.T. 5979, at 895. See the background in GIBORE HAYIL, *Id.*, at 104.

legitimacy was never questioned. Yet I argue that the sociocultural positioning of the work injured was undermined.

A recent example of that deterioration in the status of the work injury program is a decision by the Israeli Supreme Court in 2004.[731] In that decision the Court maintained that the National Insurance programs (work injury and general disability insurance) and the national values-related programs should be distinguished and cannot be compared in terms of society's debt to its members (in that case the association of work injured challenged a law that decreased the level of benefits to work injured but did not touch the benefits to disabled veterans). For PWD the result was that while growing capitalism and individualisms paved the way to the rise of rights discourse, social welfare has lost its allure. And although in public discourse there was still pride in Israel's history of progressive social policy, in practice many of those achievements have eroded and their public support declined.

B. The Changing Forms of Disability Activism: From Cooperation to Confrontation

The changing conditions of Israeli society outlined above have enabled and supported the paradigm shift in disability activism and in challenging ableism's power structure. In this Part, I delve into the details of the changing patterns of disability activism and the turn from cooperative to confrontational relationships between disability organizations and the state. I start with characterizing the welfare activism of the first decades of statehood, when its role was mainly supporting the state in providing the

[731] HCJ 5304/02, The Association of Victims and Widows of Work Accidents in Israel v. The State of Israel – The Knesset of Israel et al., (unpublished).

services that PWD needed. While early welfare activism did pressure the state to provide services, its challenge to the general scheme of ableism was minor. I then examine the rise of rights activism and the complete and comprehensive alternative to ableism that it presented. I show that as the distance between the state and the organizations grew bigger, the confrontation between the two intensified, as well. And it is within this growing gap that the challenge to Israeli ableism has emerged and a counter-hegemonic practice of disability activism was able to develop, as it allowed critical examination of Israel's social and political conditions. I conclude with a third stage in the shifts of disability activism, in which social welfare became central once again, yet the tactics and positioning of the activities were clearly influenced by the turn to rights.

a. Welfare Activism in the First Decades: Between Resistance and Cooperation

In Israel's first decades, the promise of etatism and the enthusiasm about the establishment of the state inhibited and weakened radical attacks on the state, which represented the embodiment of the Jewish collective as a whole, and the realization of the Zionist project.[732] In those years, grassroots activism did exist but it generally exhibited alliance with the state and therefore attempted to promote a change "from within," working with the state and in the name of Zionist values. Thus, Noga Morag-Levine showed that the relationships between the Society for the Protection of Nature in Israel (SPNI), and the state in Israel's first decades were pretty close, characterized by a dominant corporatist scheme that in a gradual process transformed into an understanding

[732] JOSEPH NEIPRIS, SOCIAL WELFARE AND SOCIAL SERVICES IN ISRAEL: POLICIES, PROGRAMS AND ISSUES, 11 (1984); RALPH M. KRAMER, THE VOLUNTARY SERVICE AGENCY IN ISRAEL 3 (1976); SILBER & ROSENHEK, *supra* note 683, at 19.

that conflict with the state was not only appropriate but also necessary.[733] The changes in the forms of disability activism along the years follow this general pattern but also demonstrate the particular inferiority that that field has continuously suffered from. As I show below, the early flourishing of disability activism in Israel's first decades was related to the state's neglect of the field. At the same time the late blooming of disability rights is revealing as it shows that disability has continued to be a neglected subject even among the progressive circles of the rights community.

In research conducted in 1972-73, Ralph Kramer found that the vast majority of voluntary service providers in Israel during the 1960s were organizations for or of PWD.[734] Kramer's conclusion was that that phenomenon was a result of the neglect of PWD by the Israeli welfare system.[735] These voluntary organizations each typically focused on a well-bounded group of PWD with specific circumstances of injury or a particular impairment or illness, such as disabled veterans, road accident victims, children with developmental disabilities, or children with physical disabilities.[736] Each

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[733] Noga Morag-Levine, *Partners no More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations*, 37 L. & SOC. REV. 457 (2003).

[734] KRAMER, *supra* note 732, at 11. Kramer labeled these organizations as Voluntary Service Agencies (VSAs), and defined them as: Essentially bureaucratic structures which are governed by elected, volunteer board … and which employ professional and/or volunteer staff to provide a continuing social service to a clientele in the community." *Id.*, at 5. Disability organizations seemed to be leading a trend that intensified during the 1960s-1970s in which increasing number of voluntary organizations were founded (NEIPRIS, *supra* note 732, at 57). These organizations manifested first signs of a developing civil society activism (GIDRON ET AL, *supra* note 683)

[735] Kramer, *supra* note 683, at 11, and 19-20. Kramer notes that the weaknesses of the Sa'ad system and the negative attitudes toward it caused people to prefer services provided by other agencies.

[736] *See, e.g.* ZDVO, the IDF disabled veterans' organization that I discussed earlier, (Chapter Two, Part F.b.); *Anat*, the organization for rehabilitation of road accidents victims; *Akim*, the National Association for the Habilitation of the Mentally Handicapped in Israel, which was established in 1951 by a group of parents to children with developmental disabilities, [http://www.akim.org.il/english/Pages.asp?page_id=1]; or *Ilan*, Israel Foundation for Handicapped Children, which was founded in 1952 by a group of rehabilitation and public health professionals. For a comparative perspective, *see* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING

organization was conducting its own struggles in isolation, and no alliances were formed among them. The services that these organizations provided have covered all realms of welfare, including education and schooling, vocational training, counseling and work placement, psychological services, medical services and even direct financial aid.[737] In general, these organizations have hardly engaged with the law in their reform attempts. They did not turn to the courts in their struggles[738] and were not involved in legislative or public policy activities.[739] Most of their interactions with the state and its agencies were over direct financial benefits to the organization or to its clients, including tax exemption, special privileges, and other discounts.

The relationships that these organizations had with the state were complex. On the one hand, they criticized the state's neglect to provide necessary services to meet the needs of PWD, thus challenging the practice of constantly compromising PWD's needs in the name of economic constrains. On the other hand, they became very close to the state as they contracted with it and were funded by it.[740] In general, the state and the organizations perceived themselves as partners; the organizations' initiatives helped the state agencies in receiving more resources, and the organizations perceived themselves as

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FEDERAL DISABILITY POLICY 33-35 (1984) on the organizational landscape in the United States before the launching of the disability movement.

[737] For table detailing the services that each VSA supplied, *see* KRAMER, *supra* note 683, at 85.

[738] In general, organizations of or for PWD did not turn to the courts until the end of the 1980s (*See* Herr, *supra* note 770). Though it should be stressed that turning to courts as a social change strategy was relatively new in Israel in general (ACRI's first petition was filed in 1981).

[739] The following is based on KRAMER, *supra* note 683, at 59-69, unless otherwise stated.

[740] Usually, an organization identified a need and developed a service with the intention that in the future (after proved successful on a small scale basis, through a pilot trial) it would be either transferred or sold to the state (while the organization serves as a contractor).

working with the state to improve its services and policies.[741] Consequently, the voluntary-service-provider organization became part of the welfare system, operating as a substitute for its lack of action, and as a result providing legitimacy to the state. Nevertheless, it seems that for these activists, establishing services and creating solutions for PWD was the most pressing task to accomplish. And indeed, following the pressure of these organizations, PWD could enjoy more benefits and services. Still the problem was that as the organizations became financially dependent upon the state, that financial dependence held them back from participating in a radical criticism of the system's flaws.[742] Thus, the success of these organizations was also their weakness in terms of large-scale social change.

An intriguing example in this regard was AKIM, an organization of parents whose children had developmental disabilities. AKIM's activities at that time were exceptional.[743] Expressing the parents' deep dissatisfaction with the system, AKIM took a more assertive and adversarial tone towards the state and led successful legislative and reform campaigns, including its involvement in establishing the Department for the Retarded in the Sa'ad in 1962, developing the Supervision of Welfare Institutions law, 1965,[744] and lobbying for passing the Welfare (Treatment of Retarded Persons) Law,

[741] See also Morag-Levin, supra note 733. Other commentators noted that that was the general pattern of relationships between the state and voluntary associations during that era was of "mutual convenience and pragmatic cooperation" (SILBER & ROSENHEK, *supra* note 683, at 22).

[742] Kramer claims that the organizations still maintained high level of autonomy from the state, but the data that he exposes and later writing by disability activists show that the financial support by the state, together with additional factors, did result in a "silencing effect" on the organizations.

[743] Kramer shows that AKIM were actually the exception that proved the rule. *See infra* note 747 for materials on the organization's history.

[744] Supervision of Welfare Institutions law, 1965, 20 L.S.I. 48

1969.[745] However, since AKIM was also a major service supplier that was heavily funded by the state,[746] it eventually faced the tension between cooptation and resistance as well, in addition to a developing inner tension between advocacy and services.[747]

In sum, a major weakness in disability activism in the age of welfare was that, in the attempts to transform welfare, disability activists still largely operated "from within," essentially accepting many of the assumptions of the dominant discourse. The reforms they promoted were not structural or comprehensive but rather sporadic and limited in scope. Beneath their reform attempts, there was no comprehensive vision of change that would provide an alternative meaning to the notion of disability, that could transform the place of PWD in society, or that attempted to undermine the manifestations of ableism in Israeli society, and no tools to mobilize PWD for joint action were suggested. Moreover, this organizational landscape was contributing to the fragmented structure of the disability community, as it exposes an additional layer of divisions within the community. In addition to the major hierarchy that was based on the circumstances of the

[745] (Treatment of Retarded Persons) Law, 1969, 23 L.S.I. 144

[746] In 1972, 46% percent of AKIM's budget came from governmental and municipal resources (KRAMER, *supra* note 683, at 24).

[747] On the tensions that AKIM experienced in its work between advocacy and services, see Hanan Aharoni, *The Purpose and Problems of AKIM Association While Looking at the Last Five Years and Towards the Next Years*, BY RIGHT AND NOT BY CHARITY, 341-345 (Hanan Aharoni ed., 1988) (Originally written in 1987 for a discussion in AKIM Board). Holding on the one hand that it is the state responsibility to provide services for PWD, while experiencing the lack of services and of knowledge in the field on the other, brought the parents, some of them health care and social services professionals, to gradually create alternatives by themselves. While the original motivation was to show "the establishment" (*HaMimsad*), the public, and the donors how good work should be done, gradually the organization became invested in its own projects, had less resources to work on general advocacy, and maybe worst – was perceived by parents as part of "the establishment". As a result, AKIM was perceived as part of the problem for some of its clients who in their hardships directed all complaints to AKIM, which was an easy target, while ignoring the role and responsibilities of the state and local municipalities to provide those services. On AKIM first years, see *EXACTLY* LIKE EVERYBODY ELSE: FORTY YEARS OF STRUGGLE FOR OUR IMPAIRED CHILDREN, at 70-75 ((Hanan Aharoni ed., publication date unclear, est. 1988). The two collections cited above provide a fascinating history of Akim and a rare documentation of disability history.

injury or illness and to national values, the large group of non-privileged PWD was also divided among itself, focusing on sectarian benefits and competing over state resources.

Nevertheless, this cooperative-corporatist type of activism provided the actual services that PWD needed, it demonstrated the readiness on the grassroots level for a change to occur, and most importantly, it paved the road for subsequent and more aggressive activism. Working within the welfare paradigm, its role before the state was to help and maybe even force the state to provide what it promised – relief and care for PWD. As I show below later on, the very rhetoric of relief and care was problematized by the disability rights advocates who saw it as part of the old charity approach towards PWD that needed to be transformed.

b. Winds of Change: Preliminary Rights Activism

i. First Signs of Adversarial Activism

A major change in this pattern of activism started happening at the end of the 1970s as a growing discomfort with the poor situation of PWD emerged, and new avenues for action were examined. The change was both a result of the inner dynamics among disability activists and a consequence triggered and shaped by the larger social processes in Israeli society that were mentioned earlier, as well as additional global trends. Within the disability community there was a growing resistance to the exclusion and marginalization of PWD and to the inadequate services designed for PWD. In Israel at large, the myth of a unified Hebraic nation was undermined as increasing numbers of social groups developed counter-hegemonic positions against the state. The more that myth and its exclusionary effects were exposed, the more it was possible for additional

groups to develop their own critique and to voice their claims. Similarly, the growth of the public interest movement and its role in the rising rights language in Israeli public discourse shifted the process towards more confrontation and less cooperation with state.

Clearly, this local process was also in line with parallel global trends. Both in Europe and in the United States local initiatives of PWD became widespread, developing grassroots forms of resistance and various versions of original rights language.[748] The international arena as well witnessed growing activism and international documents concerning the rights of PWD were formulated.[749] That global influence penetrated the Israeli public discourse very slowly. It was spreading mainly by concrete personal encounters, as activists traveled abroad, or in visits of foreign scholars and professionals to Israel.[750]

Consequently, a search for a rights language that addressed the needs of PWD started pressing from the grassroots level. Yet unlike in the United States and Britain, where the use of rights language was developed by groups *of* PWD and not *for* PWD, in

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[748] On the growing international trend of disability movements, *see* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US – DISABILITY OPPRESSION AND EMPOWERMENT (2000). On the history of the movement in the United States, *see* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION (2003); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

[749] These documents, however, were still treating PWD as persons with medical problems requiring protection and did not develop address issues of access or accommodations. See Declaration on the Rights of Mentally Retarded Persons, Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971 (available on: http://www.unhchr.ch/html/menu3/b/m_mental.htm. last visited: 8/15/2005); Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December, 1975 (available on: http://www.unhchr.ch/html/menu3/b/72.htm . last visited: 8/15/2005). Later on, the World Programme of Action concerning Disabled Persons, A/RES/37/52, 3 December 1982 (available on: http://www.un.org/documents/ga/res/37/a37r052.htm . last visited: 8/15/2005).

[750] Thus, for example, Rivka Sneh, a disability activists and a parent to a son with Down syndrome tells about her trip to the United States as a turning point in her understanding of special education (interview). Gideon Drori, another parent and activist recalls Scandinavian influence on a specific social worker who studied there and was involved in disability reform and activism (interview). Another example would be the visit of Stanley Herr, an American law professor, which promoted the establishment of the first disability rights organization (*see infra* notes 774-777 and accompanying text).

Israel the introduction and formulation of disability rights was mainly a work of parents and advocates and less of PWD themselves.[751] Thus, although activities to promote the life conditions of PWD were initiated by various groups, eventually it was mainly parents of children with disabilities who started organizing across disability lines and working to change the meaning of disability in Israeli society. The earliest signs for a new type of activism were a few campaigns led by disability advocates at the end of the 1970s. It seems that the last legislative event that was characterized by the old framework of activism was the passage of the 1974 disability insurance program, in which no disability organizations participated and only very few appeared in the hearing that preceded its enactment.[752]

The following is a brief review of four struggles which represent the change in disability activism. The first indication of change was the struggle for mobility benefits. Two long struggles carried by people with mobility impairments have led to the signing of the Mobility Agreement in 1974 and its update in 1977.[753] The Mobility Agreement was signed between the National Insurance Institute and the government, providing mobility stipends, loans for purchasing suitable cars and the accessories needed, and other discounts for people with mobility impairments. Another successful struggle that

[751] On the beginning of the disability rights movement in the United States, *see* SCOTCH, *supra* note 736, at 35-40; JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993); ZAMES-FLEISCHER & ZAMES, *supra* note 748.

[752] KRAMER, *supra* note 683, at 61. Kramer also notes there that AKIM was the only involved organization in the legislation yet it failed to pass a provision that would grant benefits to parents of children with mental retardation.

[753] Agreement Concerning Mobility Allowances that was signed on June 1, 1977 (Mobility Agreement). Interview with Arie Zudkevich; Arie Rimmerman and Stanley S. Herr, *The Power of the Powerless – A Study on the Israeli Disability Strike of 1999*, 15 J. DISABILITY POL'Y STUD. 12, 15 (2004); KRAMER, *supra* note 732, at 60. The downside of the agreement was its form, a loose legal document that its authority was lower than secondary regulation and therefore can be changed easily. It fell short of a legal right and instead was an act of "good will." Nevertheless, this act of benevolence has improved the living conditions of many people with mobility impairments.

mobilized many parents' organizations and a large number of individuals was the campaign for the passing of the Allowance for Disabled Child Regulations in the years 1978-1981.[754] At the same time, the issue of accessibility became a growing concern for PWD, and in 1981, following a successful campaign led by ZDVO that involved additional PWD, the Planning and Building Law, 1965**,** was amended to include particular instructions on the accessibility of new public buildings.[755] The struggle that concluded this era was the enactment of the 1988 Special Education Law following an effective campaign led by a strong group of parents whose children had developmental disabilities. The campaign was led by the Jerusalem Special Education Parents' Board, which became a central actor in the introduction of disability rights later on.[756]

The organizational landscape also reflected the beginning of a change, as during those years, young organizations employed new approaches and tools. In their activities,

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[754] National Insurance (Livelihood Allowance, Study Assistance, and Arrangements for Disabled Child) Regulations, 5758-1998, K.T. 657 (1998) (a revised version of the 1981 regulations). As mentioned before, AKIM failed to include allowances for disabled children in the disability insurance program of 1974. Instead, a general provision authorized the government to issue regulations on the matter. As time passed and no regulations were introduced the parents started a protest and lobbied for the enactment of such regulations. For an in-depth account of the struggle for Allowance for Disabled Child Regulations, including tensions among the organizations self-interest agendas, *see* Michal Bar, *The Involvement of Voluntary Welfare Organizations in Social Welfare Policy Making Process – The Passage Process of Allowance for "Disabled Child" Regulations*, 21 SOCIETY AND WELFARE 129 (2000) [Hebrew].

[755] Building and Planning Law (Amendment 15), 5741-1981, S.H. 109. For a critique of that arrangement, *see* Zvia ADMON, THE RIGHTS OF PEOPLE WITH DISABILITIES IN ISRAELI LAW: CRITICAL PERSPECTIVES 181-183 (an LL.M. thesis, submitted to Tel Aviv Law Faculty, 2002). As reported in *Gibore Hayil (True Heroes)*, the jubilee album that celebrates 50 years to ZDVO, the 1977 campaign included protests against the lack of enforcement of the Planning and Building Regulations (Request for Permission, Conditions, and Fees), 5730-1970, K.T. 1841 (1970) (that included technical provisions and a classification of public buildings for that purpose) and against the absence of accessibility provisions in the primary legislation, i.e., the Building and Planning Law. According to the reports tens of paralyzed disabled veterans arrived to the opening of the Tel Aviv Marine demanding accessibility to all sports centers; the ZDVO also organized a rare coalition that included all wheelchair users in Israel. In their press conference the spokespersons reported on the gala screening of the movie Entebbe Operation to which the only injured of that battle (Surin Hershko) cannot enter. After a threat of a protest outside the cinema special arrangement were made for that screening. GIBORE HAYIL (TRUE HEROES): ZAHAL DISABLED VETERANS ASSOCIATION 1948-1998, 88 (Yosef Lobenberg ed., 1998).

[756] Special Education Law, 5748-1988, S.H. 114 (1998). *See* more on the Parents' Board, *infra* notes 758-770 and accompanying text.

they advanced less paternalistic arrangements and promoted issues that concerned the place of PWD in society. One such prominent organization was the Roof Association for the Organized and Unorganized Handicapped (hereinafter: The Roof Association), which was established in 1980. The Roof Association was in essence a large coalition that included many of the old organizations, such as AKIM, ILAN, and more, but it did not include ZDVO and other organizations of other privileged groups. The Roof Association's agenda was generalist and it did not provide direct services, except information. Along the years it became more and more involved in advocacy before state and municipal authorities yet its general line of action was still cooperative with the state, as it avoided direct and full confrontation, and stopped short of legal action.[757]

ii. The Parents' Board: A Preliminary Rights Language

A most interesting site in which a preliminary rights language started to evolve was the activism of parents of children with diverse disabilities, particularly the Jerusalem Parents' Board for Special Education (hereinafter: the Parents' Board).[758] The Parents' Board was established in 1977 and essentially represented a collection of parents' organizations and individual parents of children with all types of disabilities, while the main activists were parents of children with developmental disabilities. The parents responded to the proliferating mechanisms of isolation and exclusion they

[757] *See* the website of the Roof Association for the Organized and Unorganized Handicapped, on: http://www.center4all.com/BuildaGate4/general2/data_card.php?U=no.

[758] Active parents' boards exist for years in all levels of Israeli education system, including school boards, district boards and a national board. Yet these parents found that their needs and problems are not sufficiently addressed and therefore in 1977 established their own board which aims to struggle for the improvement of the life conditions of their children who live with various disabilities, especially through the special education system in Jerusalem. *See* Noga Yafe, *The Jerusalem Parents' Board and Yated – Independent Parents Organizations*, *in*: BY RIGHT AND NOT BY CHARITY, *supra* note 747, at 349.

encountered that disregarded their children's special needs, that were based on disbelief in their potential, and that disqualified them from becoming equal members of society.[759]

Their different spirit is demonstrated in a piece published by Noga Yafe in 1982, one of the Parents' Board leaders, where she stressed that the new organizations are

> involved in public activities aimed at improving the image of the abnormal (*charig*) in society and *enhancing his rights as a citizen who enjoys equal rights*; [and] fight to open all community services to the special child, *believing that the abnormal should be integrated into the community and society, and to enable him a lifestyle similar as possible to that of the ordinary child and adult*.[760]

Yafe further stressed that they created

> a new model for action … [with] two elements. … [A] lobby working to maximize the civil rights of a weak and impaired population who were thus far forced to the margins. [And] mobilizing a great number of parents for their own children and for others. … [Carrying] an important message to the parent that it is possible to make a change and that making it happen depends on him first and foremost.[761]

She also stressed that the new organizations "are totally independent from the establishment, and since they do not maintain services and do not contract for services with the government, no Gordian knot between them and the establishment is created; thus, they are free to vocally protest against any injustice."[762]

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[759] Their critical perspective was also assisted by exposure to the American and Scandinavian experience. Interviews with Rivka Sneh and Gideon Drori; testimonies published in The Parent's Board bulletin *Like Everybody Else*. *See e.g.*, *On Rights and On Charities: On the Differences in Treating the Special(charig) Child in the United States and Israel*, LIKE EVERYBODY ELSE No.1, at 11-12.

[760] Noga Yafe, *Jerusalem Parent's Board and Yated – Independent Parents' Organizatins*, *in* BY RIGHT AND NOT BY CHARITY, *supra* note 747, at at 349 (emphasis mine).

[761] *Id*., at 353.

[762] *Id*.

Something about the debate and the reaction within AKIM to the new initiatives can be learned from Hanan Aharoni's response to Yafe's piece. Aharoni was an activist within AKIM for many years (since 1960)[763] that wrestled with the tension between services and advocacy.[764] And yet, in his reply Aharoni defended AKIM, restating AKIM's historical achievements and the positive influence it had on disability policy and the availability of services, and suggesting that the new organizations are taking for granted what AKIM fought for. Aharoni further claimed that in the absence of law which obliges the Israeli government to develop services of sound quality for the disabled, it is impossible to employ a radical approach against any governmental funding.[765]

The parents' use of "rights" is interesting as it seems to be primarily part of a language of empowerment and assertiveness and a way to define themselves against the state and in opposition to existing organizations. Having no knowledge and education in the field of rights, and not even one lawyer among the activists, it was an intuitive approach that emerged from the bottom, a layperson understanding of rights, in an era where rights had just started taking hold in Israeli public discourse.

The parents' motto, "by rights and not by charity," represented a rejection of mercy, pity, and "favors" with regard to PWD and a call for dignity and state responsibility.[766] It was a communicative slogan to convey the new message that the

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[763] Hanan Aharoni, *How I Became Involved with AKIM*, *in* EXACTLY LIKE EVERYBODY, *supra* note 747, at 62-63.

[764] Aharoni claims that these dilemmas were always part of AKIM's life, and suggests that if AKIM was aware to them earlier it might have dealt better with the challenges it faced at the end of the 80s. EXACTLY LIKE EVERYBODY, *supra* note 747, at 265.

[765] Hanan Aharoni, *Comments in reply to Noga Yafe*, *in* BY RIGHT AND NOT BY CHARITY, *supra* note 747, at 353-354.

[766] Since its second issue the Parents' Board bulletin adopted the motto "by right and not by charity" as the title of the opening editorial column. The Board's enthusiasm with the slogan is manifested

Parents' Board wanted to introduce, and to mobilize other parents to join them. In the Parents' Board Bulletin's second issue, the commitment to rights was further developed:

> The key to our activities for the children who need special education is our assertion that the treatment of those children is '*by right and not by charity*.' Many times there is a feeling that all the institutes that are in charge of special education do it as a favor for the children and their parents, as if they grant charity. We claim that this is their *duty*. The children receive the help and assistance [that they need] as a right and not as a charity. Fate has been cruel to them, damaged them. It is the duty of a just society to assist them. It is on this right that we intend to insist, to serve as a mouth to the children in special education that cannot do it by their own. This is the spirit of our actions.
>
> … As the representatives of the children of special education, we cannot and will not give up on this principle. We are going to [ensure] that special education will be given by right – and not by charity.[767]

Rights for these parents had a symbolic power, as they signified a new social status for their children. However, from a legal perspective this was still a preliminary and narrow language. While not surrendering to the rules of the welfare discourse, these rights were more like a call for action, rather than an employment of constitutional law-like claims or naming particular wrongs as infringements of the rights to X, namely, a

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in its repeating use: five times in the second's issue editorial board's column and three more time throughout the issue.

However, the term justice was never mentioned, as far as I could find.

[767] Editorial Board's Column, Like Everybody – The Parents' Board Bulletin, No. 2 (1982 (estimated, no date mentioned)), at 2-3 (emphasis in origin).

In the issues that followed the bulletin reflected an ongoing and evolving effort to promote rights by working for the enactment of the Special Education Law, and by empowering the parents through personal stories, psychological support, and providing information. Thus, in a telling essay that illustrates these elements a parent wrote a personal account of his own way of coping with the difficulties he encountered, and encouraged the parents to accept the situation by allow themselves and their child to experiment and to mistake/err, to go out with no shame, and to search for support. In his words, "Normal is to allow your child to experiment with selfhood and independence… Normal is to openly speak about your problems, to break the conspiracy of silence and secrecy, at home and outside. It is not easy to go out to the street with a [special] child … but nevertheless, going out is desirable and possible, because only this way the child learns to establish relationships with his surrounding and only this way people learn not to be puzzled by the different person" (From Parents to Parents: One Question – Many Answers, in: Like Everybody – The Parents' Board Bulletin, No. 2 (1983) at 8-11).

right to housing or to education. Instead, the parents claimed that education and housing are "a matter of rights." This might sound semantic but I suggest that it represents a difference between the symbolic power of rights and a legalistic understanding of rights.

The Parents' Board's main achievement was the campaign that eventually led to the enactment of the Special Education Law in 1988. Before then, there was no law that addressed the duty of the state to provide special education services to children with special needs.[768] Although special education services were provided, they were developed unsystematically and with no guiding framework of educational and social principles like those other countries already had by that time.[769] The parents' own experience led them to look for an alternative. As they traveled the world, they met other possibilities that excited them and which they decided to import. The principles of mainstreaming, least restrictive environment, and individually tailored educational programs were adopted by the parents and were formulated into the Special Education Bill. For parents it was a matter of rights: the right of their children to develop and fulfill their potential. They effectively lobbied the Knesset and eventually created a legislative document that transformed the field of special education. Clearly, that was not the end of the road and additional battles over the implementation and the scope of the law were needed. But the

[768] Compulsory Education Law, 5709-1949, 3 L.S.I. 125 (1949) was the general law that mandated compulsory and free education for all. Yet it included no provision concerning special education. Consequently, the neglected field was developing mainly through private initiatives which often did not meet minimum standards of physical conditions and provided low quality of education.

[769] In the United States for example, in 1975, an Education for All Handicapped Children was passed. 20 U.S.C.A. §§1400-1485. The law is currently named the "Individuals with Disabilities Education Act (IDEA).

Special Education Law of 1988 has definitely become a milestone in the history of disability activism.[770]

The new stage of developing a legal language of rights has entered the scene of disability activism only in the 1990s, as disability rights were formalized and finalized by *Bizchut*, the first human rights organization for PWD, the influence of which was tremendous.

c. Formulating Disability Rights: Confrontation and Structural Change

Bizchut (by right) was the first organization for PWD's human rights and developed the current formula of Israeli disability rights. It was established by the Association for Civil Rights in Israel (ACRI) in 1991-1992[771] by an interesting alliance between ACRI and major activists from the Jerusalem Parents' Board for Special Education. While for ACRI, disability rights were a sudden revelation, for parents, forming a disability rights organization was a natural stage in their continuing efforts to develop a new language and new tools to address the needs of PWD. Thus, Rivka Sneh, one of the most prominent activists among the parents, remembers that the Parents' Board tried to approach ACRI just a few years before to get ACRI more involved in matters of disability rights, and that ACRI ignored their requests. Disappointed by ACRI, the parents sought to establish their own *Association for the Rights of the Disabled Citizen*.[772] The new connection between the groups was made by the New Israel Fund

[770] For a review and critique of the Special Education Law, 1988, *see* Stanley S. Herr, *Human Rights and Mental Disability: Perspectives on Israel*, 26 ISRAEL L. REV. 142, 153-160 (1992).

[771] It started in 1991 as a project within ACRI and soon became an independent organization.

[772] Interview with Rivka Sneh. According to Sneh following ACRI's rejections a few parents decided to establish the *Association for the Disabled Citizen's Rights*, for which they received a grant from NIF. When NIF suggested that they work together with ACRI which by that time submitted a grant

(NIF), which received grant proposals from the two groups and linked them together. The interesting question, therefore, is what happened in ACRI so that within a year or two it had changed its understanding of disability and became receptive to the parents' plight?

Although ACRI was already involved with civil rights of other social groups, such as women, gays and lesbians, and Palestinians, that agenda was not extended to PWD. However, around that time, its members started pressing for more involvement in social rights issues, such as education, health, housing, and the poor.[773] While disability was not among the original concerns that the members raised, other circumstances led to its eventual triumph. Interestingly, the decision in ACRI to enter the field of disability rights was mainly inspired by the visit of Professor Stanley Herr, a scholar of disability rights who was then the director of the Disability Clinical Law Office at the Maryland School of Law. Herr was motivated by the recent changes in the U.S., particularly the enactment of the ADA, and came on a Fulbright scholarship to study Israel.[774] Herr discovered great differences between the U.S. and Israel, and was particularly struck by the outdated laws governing disability issues, and the lack of disability rights and disability activism:

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proposal for similar purpose, the parents decided, despite their suspicions towards ACRI, to withdraw their own plan and to join forces with ACRI. In Hebrew the name was intentionally alluding to that of ACRI (*HaAgyda LeZchuyot HaEzrach HaMugbal*), which can be translated as the *Association for Civil Rights of the Disabled.*

[773] Interview with Neta Ziv. Thus, in 1991 ACRI decided to establish some kind of project in the area of "welfare rights," although no specific topic was selected yet. Bizchut's first newsletter (April 1993).

[774] Herr's motivation was rooted in recent developments in the US. His visit to Israel was just after the great victory of the disability movement in the US with the enactment of the Americans with Disabilities Act (ADA) in 1990 (Pub. L. No. 101-336, 104 Stat. 327-33 (codified at 42 U.S.C §§ 12101-13 (1990)), and at the peak of two decades of local and national struggles in the US. On the traveling and influence of the ADA on other countries, *see* Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOC. INQUIRY 723 (2002); Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J. L. REFORM 305 (2002) (examining the effect of the ADA on disability reform in Israel, the United Kingdom, and Sweden).

> No broad pubic interest movement exists to employ a legal-rights strategy to advocate the status of disabled and other underrepresented interests. Organizations of disabled persons have not formed a self-conscious civil rights lobby or used the courts on a systematic basis.[775]

Herr urged rights activists from ACRI and other legal organizations to establish a disability rights project that would grow to become an independent organization.[776] Herr's impact on ACRI was enormous and the transformative effect of his efforts was remarkable. Using a language of civil rights and legal activism, Herr was able to change the way ACRI viewed disability-related issues. He introduced to ACRI a new possibility, opening ACRI's eyes to a new horizon of, and a challenge to, rights. I view it as a unique event of *legal imagination expansion*, which suddenly allowed a space for the inclusion of another social group.

Neta Ziv's testimony about this process is illuminating. Ziv was an ACRI lawyer and a central figure in the foundation of Bizchut. She credits Herr for inspiring her and others to become involved in disability rights. She recalls that following her meetings with Herr she became curious and occupied with the ideas he introduced, which gradually started taking shape in her mind. Around that time, ACRI received two hotline calls concerning the long list of people with mental retardation who were waiting for institutions. Thus, Ziv says that she became more sensitive to those issues and that she was suddenly able to comprehend them as rights issues, while two years earlier she might

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[775] Herr, *supra* note 770, at 180. For additional criticism on the poor activity of the legal profession, see *id*, at 183.

[776] Interview with Neta Ziv; Neta Ziv, *Disability Law in Israel and the United States – A Comparative Perspective*, 1999 ISRAEL YEARBOOK ON HUMAN RIGHTS, 171, 172 (1999). Herr also introduced his ideas to the National Council for the Child who was involved in the establishment of Bizchut as well.

have rejected them as beyond ACRI's mandate.[777] After going through this cognitive change, Bizchut's founders were amazed to realize how small of a place PWD had within the rights community, and how small of a place disability rights had within the rights discourse. PWD and their needs were considered part of the welfare world, but not of civil rights.[778]

The absence of PWD from the rights discourse and the rights community was completely transparent. And it was Herr who was able to penetrate the cognitive block that the dominant understanding of disability created, and that affected even the leaders of the rights community. Those leaders who perceived themselves as progressive and inclusive in their agenda could not visualize the "handicapped's" plight as a rights issue. However, once the door was opened, a flood of calls and cases arrived that showed ACRI what parents knew all along – that there is a readiness and even eagerness on the grassroots level for a fundamental change in the social, legal and political conditions of PWD.[779] At that point, the "newly recruited" disability rights advocates from ACRI were ready and able to start the double process of translating those claims into a legal rights language and at the same time to transform the rights language so that it would be able to accommodate disability-related claims. Bizchut was then the first organization that provided a rights-type advocacy to PWD. Its adversarial position in relation to the state

[777] Interview with Neta Ziv. These hotline calls were the basis for one of Bizchut's earliest petitions regarding the long wait-list for institutional housing. H.C.J __/91, *Asraf et al v. The Principal of the Department for services to the Retarded* (the petition was concluded with an agreement among the parties; on file with author).

[778] It was not only that PWD had no rights in practice, that problem was common to other disadvantaged groups as well, but that their rights were not a matter of public and legal debate at all, except with regard to entitlements according to welfare laws.

[779] Materials presented in a press conference announcing the establishment of Bizchut, 12/5/93 (on file with author). Interviews with Ariela Auphir, Bizchut's first attorney and former Executive Director of the organization.

was manifested by its very legal tactics and its absolute independence from any state apparatus. In a press conference that announced the establishment of Bizchut it was declared:

> For the first time in Israel an organization was established to promote the interests and rights of people with disabilities in the spirit of the values of the Association for Civil Rights in Israel, and to bring the principles of integration within the community and of anti-discrimination into practice … "Bizchut" wishes to eradicate the prejudices and paternalism towards populations with special needs, in order for them to be an integral part of Israeli society, *Bizchut ve-lo be-chesed* (by right and not by charity).[780]

Although Bizchut started as a project within ACRI for people with developmental disabilities, it was soon growing into an independent organization with a general agenda to develop an inclusive rights language that concerns all PWD. It was also quite soon that Bizchut decided to develop a comprehensive legislation that would end the discrimination and exclusion of PWD in all life aspects.[781] Through this legislation and in the process of its articulation and promotion, additional disability organizations and individuals with disabilities joined Bizchut and created a larger base for its activities.[782] The result of these efforts was indeed an ambitious and inspiring model of disability rights, in the form of the Equal Rights for People with Disabilities Bill in 1995 (ERPWD Bill). The Bill provided an intriguing alternative to the prevailing notions, assumptions, and practices concerning disability by including provisions relating to fields such as employment, accessibility, housing, education, and more. By that, I argue, it became the

[780] The opening and concluding paragraphs of the Announcement on establishing Bizchut in the above press conference, 12/5/93.

[781] For an elaborated analysis of the Equal Rights for People with Disabilities Bill, *see infra* Part C.

[782] For the processes of mobilization and group formation that were entangled with the rise of the rights discourse, *see infra* Part C.b.v.

fundamental document of the disability rights project.[783] In 1998 a first part of the Bill was enacted into law. The Equal Rights for People with Disabilities Law, 1998, (ERPWDL) included provisions regarding basic principles of equality and dignity for PWD, provisions related to employment and accessible public transportation, and a final part that establishes an Equal Rights Commission for PWD.

Following the changes in Israeli society, the firm alternative that Bizchut introduced, and particularly as a result of the mobilization efforts surrounding the enactment of the ERPWDL older organizations adopted the language of disability rights. These organizations were involved in various levels in the drafting process and some of them took later independent legal actions which have further contributed to their growing legal consciousness.[784]

In this study, however, I also argue that that seemingly inclusive and transformative project also had its limits. The next Part of this Chapter discusses in greater detail the content and character of the concrete rights language that has evolved in Israel, the role of Bizchut in that process, and its impact on disability activism in general. I provide an analysis and critique of the local disability rights formula that has evolved, claiming that the only realm that the new rights formula neglected to address was that of disability insurance. Yet before then I should turn to the last type of disability activism that emerged at the end of the 1990s in two vocal campaigns of PWD in 1999 and 2001. Both campaigns concerned social welfare benefits for PWD and gained extensive public

[783] On the ERPWD Bill as a fundamental document of disability rights, *see* Chapter 8, Part A.

[784] *See* Chapter 8, Part B.e.

support, and for a short but critical moment, made the issue of disability benefits a national concern.

d. Voices from the Bottom: Disability Insurance Now

The late 1990s' rise of social activism and social welfare consciousness did not skip the disability community. In fact, the 1999 and 2001 strikes of PWD, which I opened this thesis with, and the impact they made on public opinion, were important steps in the growing power of street protests and other forms of resistance. As poor people started speaking for themselves based on their own experience, the insufficiency of existing welfare benefits and its consequences were exposed. That discovery had two layers: one, that the Israeli welfare system was never fully progressive with regard to sectors whose desert of social benefits was questioned or even overtly denied; and two, that the neo-liberal turn has worsened the situation of the programs that were already minimal.

The 1999 strike lasted 35 days.[785] It started with a spontaneous initiative of a group of persons with mobility impairments. The background was the disappointment from the ERPWDL, which had not yet brought anticipated changes, and in particular, the increasing economic hardship, which was linked to the inadequacy of disability insurance allowances.[786] While the strike started with a broad agenda including issues of accessibility, housing, and the implementation of the ERPWDL, these issues have

[785] On the strike and its achievements, *see*, *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001 (a bulleting published by the Campaign for the Handicapped, an organization that was formed during the 1999 strike and that led the second strike a well).

[786] Disability insurance allowances were not only insufficient in the first place, but were also not updated with rising living standards for more than two years, therefore suffered continuing deterioration. On the background to the strike, *see* Einat Fishbein, *The disabled are opening a struggle on their rights: we have nothing to live from*, Ha'aretz, 9/29/1999. On the disappointment from the ERPWDL I heard in an interview with Simha Benita.

quickly disappeared. Eventually the strike was essentially about disability benefits, i.e. disability insurance stipends, mobility allowances, and personal attendance allowances, and their low rates, narrow scope, and outdated structure. It was also about the requirement of choosing between mobility and personal attendance allowances even though each was related to a different set of needs.[787] The strike ended with great achievements for the activists as the Prime Minister and the Ministry of Finance surrendered to their demands. It was the first time that a street protest over social welfare issues succeeded. It yielded significant changes in mobility and attendance allowances and a rise in disability insurance for people who are "severely disabled."[788] During the strike, a new organization was established, the Campaign for Handicapped Persons in Israel (hereinafter: Campaign for the Handicapped), which perceived the strike's achievements as only a first step in a broader effort to improve the living conditions of PWD. And indeed, the continuing effort of the Campaign for the Handicapped produced a second strike.

The 2001 strike lasted 77 days.[789] On the agenda was a general reform in disability insurance that would benefit the majority of PWD who live on disability insurance and not just the few who are "severely" disabled. This time the goals were few and clear, though still expensive: to bring disability insurance on par with minimums wage rates (including an allowance for people who earn under minimum wage), to allow PWD who reach pension age (60 or 65) to receive both disability insurance and old-age

[787] Fishbein, *Id.*

[788] *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001, at 8-11.

[789] On the strike and its achievements, see *In Struggle – The Bulletin of the Disabled Union*, Vol. 3, March 2002.

pensions and other disability related benefits,[790] to equalize healthcare benefits and services among all PWD (bringing them on par with disabled veterans and work injured), and to continue updating the mobility agreement. After a longer and tougher struggle, again the strike ended with great achievements for the disabled. The agreement that was signed included a general raise in disability allowances, disability allowances for people who earn less than minimum wage, a guarantee that an aging disabled person's benefits would remain the same as they were before pension age, and a commitment to appoint a public committee to study and offer operative suggestions with regard to disability-related social welfare policy.[791]

The achievements of the strikes were remarkable. The strikes were understood as a spectacle of solidarity among PWD and between PWD and the public at large; as a historical triumph of a powerless group in society over the powerful bureaucracy; as a unique moment in which social welfare became an issue in every home, and PWD became visible, assertive, and relevant in national politics.[792] Thus, Yoav Kraim, the spokesperson of the Campaign for the Handicapped wrote in their bulletin:

> After long years of walking in the desert with no pastor, we finally reach the gates of the Promised Land. We can now state that the disabled populace has left behind any last remains of paternalism and it represents itself with dignity and with no mediators. …
>
> … Our two most important achievements: one – the power of working together …, and second – the public's understanding of the needs of all

[790] Before then, a disabled person would switch from disability insurance to old-age pension which was many times lower than disability allowance, and was denied of other benefits (e.g. mobility and attendance allowances).

[791] *In Struggle – The Bulletin of the Disabled Union*, Vol. 3, March 2002, at 12-14.

[792] Neta Ziv, *People with Disabilities – Between Social Rights and Existential Needs*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ISRAEL 813, (Yoram Rabin and Yuval Shany eds., 2004); Rimmerman and Herr, *supra* note 753 (naming their article *The Power of the Powerless*).

> disabled: the mentally disabled, sensory disabled, physically disabled, and cognitive disabled.
>
> The public knows today that a disabled too is a human being bearing rights.
>
> We too share the image of God. … Furthermore, the disabled populace is leaving its "closet" behind today and starting to lift its head. The shame that society granted us disappears, and we now march to the light of human dignity. This light will guide the state of Israel ... to become a society that manages its economic affairs as well in light of values and fundamental needs. By that we provided the entire public with a renewed dignity.[793]

Organized by PWD and performed in the streets, the strikes represented a grassroots struggle in which PWD have forced society to see them, confront their hardships, and consequently to engage with its own responsibility for those injustices.

One of the strengths of the struggle was its emotionality, and its acute relevance to the participants' daily lives and economic survival. Yet for the same reason, the strikes were also criticized for using a politics of mercy and pity. And indeed, disability was presented as misfortune and suffering by Arie Zudkevich, the leader of the strikes, when he addressed the candidates in the race for a Prime Minister office in 1999:

> We are talking about the disabled who were hit by misfortune twice, once for being disabled, and second for being forced to live on the shameful and shaming budgets of all Israeli governments ever. …
>
> These people cannot fight for improving their living conditions; therefore we found our organization … and promised to serve as their mouth and to fight with our very last powers for us all.
>
> … You that met our people and know their suffering, you that saw the pain in our eyes, should acknowledge the terrible injustice we suffered.
>
> We hope to bring new hope… so that we would not watch again the shaming spectacles of disabled rolling (*mitgoleleim*) in the freezing streets of Jerusalem.[794]

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[793] *In Struggle – The Bulletin of the Disabled Union*, Vol. 3, March 2002, at 15 (emphasis omitted).

[794] *In Struggle – The Bulletin of the Disabled Union*, Vol. 1 and , March 2001. the differences between the texts of Kraim and Zudkevich deserve a more concrete analysis as they represent two generations within the movement (Zudkevich the older and Kraim the younger) and two phases in the

It was a "victory of tears," a journalist known for her progressive agenda observed after the first strike,[795] it was a "performance of misery" a participant in an online forum of PWD noted after the second strike,[796] a "one-dimensional representation [of PWD] as miserable ... as a minority that lives on the margins, a social burden," in the words of Kimmerling, an acclaimed sociology professor who is a wheelchair user.[797] "This attitude," Kimmerling warned, "brings us closer to societies that [promoted] physical extinction of unworthy non-contributing elements in society." In this view, the image of PWD in those strikes was not of equal citizens fighting for their rights, but of a marginal group begging for compassion.[798] "It was a victory of misery" a history professor explained, because "you are forced to undress yourself, to expose your impairments, to recruit some journalists that would bring them to light, and only this way you can win. Is this the society we wanted? This is a return to the [exilic – S.M.] town, to charity funds (*kupat tzdaka*) …"[799] From this perspective, the exposure of the participants' impairments in public was communicated as a call for mercy and not an act of dignity.

The strikes, then, have manifested a dual movement of continuity on the one hand and departure on the other in relation to disability rights activism; a continuity because

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struggle (Zudkevich at the end of the 1999 strike, Kraim at the end of the 2001 strike. Still, I believe, they demonstrate the tensions inside that struggle and in the messages that it communicated outside.

[795] Einat Fishbein, *The Victory of Tears*, Ha'aretz, 11/10/1999. The tears refer to the turning point in the first strike when a mother to a disabled child started crying and carried other Knesset members and reporters to cry with her. To that Ehud Barak replied

[796] Rita, Ynet communities, 6/13/2002.

[797] Baruch Kimmerling, *The Disabled of the Media*, Ha'aretz, 8/11/1999.

[798] A survey by Rimmerman and Herr of media representation of the 1999 strike concluded that "it is not surprising that the participants of the strike were more often described in the Israeli press as objects of pity rather than activists struggling for their rights." Rimmerman and Herr, *supra* note 753, at 15. *See* also Ziv, *Social Rights and Existential Needs*, *supra* note 792, at 843-844.

[799] Daniel Gutwein, cited in Fishbein, *The Victory of Tears*, *supra* note 795.

they manifested a growing visibility and assertiveness of PWD, and a departure because they seemed to many people to be a step backward towards charity and pity. Only Yuval Elbashan, then the legal counsel to *Yedid*, a social justice organization, found the tears to be subversive and rebellious and therefore consistent with the struggle as a whole. According to Elbashan "there is nothing more legitimate … [than] taking the game to where you have the advantage." While normally the game is ruled by inaccessible economics, he explained, this time PWD themselves have set the rules of the game – the rule of tears.[800]

In the next Chapter (Chapter Eight) I shall further elaborate on the complexities, implications, and broader meanings of the tensions between rights activism and the strikes and to the differences in their agendas. I will review the strengths of the disability rights discourse that has evolved in Israel and will analyze its limits. Although the rise of disability rights and disability activism has fundamentally altered the landscape within which disability was constituted I show that in the realm of disability allowances, which was the number one issue on the strikes' agenda, not even a slight change occurred.

[800] Yuval Elbashan, cited in Fishbein, *The Victory of Tears*, *Id*.

CHAPTER EIGHT:
The Failures of Disability Rights:
A Critique of Essentialism, Heroism, and of Rights, After All

This Chapter explores the promises and the limits of the disability rights discourse that has evolved in Israel. It is not intended, however, to provide an all-embracing critique of rights in general or of disability rights in particular. It rather seeks to expose and interrogate central elements that shed light on my specific subject of interest in this dissertation, which is the link between the differentiated system of disability benefits and the structure of Israeli ableism. The first part of my analysis is more descriptive as it reviews the content and tenets of the disability rights discourse that was developed in Israel and lays the grounds for the second part which is a critique of that discourse. It examines the promises and aspirations of disability rights and their contribution to the project of dismantling of ableism. The second part of the analysis represents the culmination of this entire project as it exposes the limits of the local disability rights formula to address some of the fundamental roots and manifestations of Israeli ableism, as they were exposed in the preceding chapters. What this critique reveals is that the introduction of disability rights became a third missed opportunity to create a mechanism of dignified social welfare benefits for PWD.

A. The Equal Rights for People with Disabilities Bill as a Site of Counter-Hegemonic Resistance

For my analysis of the local disability rights discourse that evolved in Israel I examine the a set of concrete elements that contributed to the process of its emergence,

and the particular outcomes that this process produced, in relation to the socio-cultural environment in which it operated. In previous Chapters I focused on sites of state action. Here I shall explore counter-hegemonic sites of resistance. More particularly, I focus on disability rights as they were articulated by disability advocates, originally by Bizchut and later through the work of the public committee that was nominated to investigate the issue and to provide concrete suggestions to the government on the matter.[801]

At the center of my inquiry on Israeli disability rights stands the Equal Rights for People with Disabilities Bill (the ERPWD Bill or the Bill)[802] which to me represents the ethos and the essence of Israeli disability rights discourse during the 1990s.[803] The first version of the Bill was submitted to the Knesset in 1996. This document was formulated by disability advocates in the offices of Bizchut following extensive comparative research and an active effort to collect output from many local and some international disability organizations and a few academics, particularly from the field of social work. During the articulation process of the Bill the understanding of disability that was promoted by Bizchut and that was legislated into the Bill was spreading to additional organizations, professionals, and academics that took part in the process. The ERPWD Bill was also presented to the Knesset in a seminar on disability rights and was eventually signed and officially submitted by eleven Knesset members.

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[801] The focus on counter-hegemonic sites is particularly typical to a decentered approach to law which I mentioned in the Introduction to this Chapter.

[802] Equal Rights for People with Disabilities Bill, 5756-1996, H.H. 628 (hereinafter: the original Bill). All citations from the Bill are based on the translation that was issued by Bizchut.

[803] The following description of the drafting process is based on an independent research of Bizchut's files; Neta Ziv, Disability Law in Israel and the United States – A Comparative Perspective, 1999 Israel Yearbook on Human rights, 171, 172-4 (1999); Ariela Auphir and Dan Orenstein, *Equal Rights for People with Disabilities Law, 1998: Emancipation at the End of the 20th Century*, *in* MENACHEM GOLDBERG BOOK 42, 52-54 (Aharon Barak et al eds., 2002); Zvia ADMON, THE RIGHTS OF PEOPLE WITH DISABILITIES IN ISRAELI LAW: CRITICAL PERSPECTIVES 203-206 (an LL.M. thesis, submitted to Tel Aviv Law Faculty, 2002).

Following the submission of the Bill, the Minister of Justice and the Minister of Labor and Welfare nominated a Public Committee for a Comprehensive Review of the Legislation Regarding People with Disabilities, which was to conduct a thorough investigation regarding the legal and social conditions of PWD in Israel. Professor Israel Katz, a prominent figure in the field of social welfare, served as the head of the committee. The Public Committee's Report was presented to the government and to the public in July 1997.[804] Its findings were based on various resources, including comparative research and calls for the public to participate by appearing before or writing to the committee. The final result was an impressive and important official report that for the first time gathered information concerning all types of disabilities in almost all aspects of life. The main part of the Report was a modified ERPWD Bill (based on the original Bill that was drafted by Bizchut) that became the bedrock for the legislative proceedings in the Knesset that followed.[805]

In 1998, part of the Equal Rights of People with Disabilities Law (the ERPWDL) was enacted.[806] It included the sections that the Knesset committee was able to complete before the next elections arrived. Despite its partiality, the enactment of the ERPWDL was celebrated by rights advocates as a revolutionary moment in the history of PWD in

[804] The Report of the Public Committee for a Comprehensive Review of the Legislation Regarding People with Disabilities (1997) (hereinafter: the Public Committee Report or the Report). The Report is also popularly called the Katz Report, after the name of Israel Katz who was the head of the committee. In the following I shall refer to he report in two ways I shall refer to the analysis, data, and recommendations in the report as the Public Committee Report, and I shall address specific provisions as the ERPWD Bill.

[805] For a more detailed discussion on the content of the Bill, *see infra* Parts C.b and C.c. in this Chapter.

[806] Equal Rights of People with Disabilities Law, 5758-1998, S.H. 152. The decision to bring only part of the law to vote in the Knesset was a result of political considerations to enjoy the agreements that were achieved in the relatively supportive atmosphere in the Knesset Committee on Law, Constitution, and Legislation before the Chair of the Committee resigned. *See* Auphir and Orenstein, *supra* note 803*,* at 53.

Israel.[807] The ERPWDL included four main sections: general principles, employment, public transportation, and the establishment of the Commission for Equal Rights of PWD (hereinafter: Equal Rights Commission). Another section of the ERPWDL was enacted into law in March 2005 and includes extremely detailed arrangements regarding all aspects of accessibility.[808]

The ERPWD Bill is a detailed document that provides a comprehensive list of matters and rights for PWD that constitutes an alternative to the popular view of disability. In contrast, the ERPWDL is partial, first of all, and second, cannot be regarded as representing Israeli society's understanding of disability or the current practices employed by its government. Hence, despite the importance of the ERPWD Law, I regard the ERPWD Bill, and mostly the modified Bill, as the document that represents the vision of disability advocates in its most completed form (and will refer to the original version and the ERPWDL when necessary). My focus on the ERPWD Bill and not on the ERPWD Law stems therefore from my interest in characterizing and critiquing the challenge that disability rights poses to the hegemonic understanding of disability, and the broader process of legal and social change, and not merely in what was, at a certain point in time, permitted to become formal law. To conclude, I view the ERPWD Bill as a counter-hegemonic document that demonstrates the spirit and the elements of the local disability rights formula that was created during the 1990s.

[807] Auphir and Orenstein, *Id*., at 46.

[808] Equal Rights For People With Disabilities (Amnedment No. 2) Law, 5765-2005, S.H. 288 (2005).

B. The Promise of Disability Rights – Dismantling Ableism

> *The law is a creature living in its environment. It influences society and is influenced by it. The same is for PWD, a minority groups that was and still is suffering from discrimination, injustice (kipu'ach), segregation and socio-economic inferiority. Modern society moves belatedly from attitudes of exclusion (niduy) and segregation towards PWD, to attitudes of cooperation and integration in various life aspects, and that change is accompanied in a variety of countries around the world by a legal renewal.*
>
> *The Public Committee Report*[809]

The notion of disability rights carries a great promise to transform the social conditions and the power structure to which PWD are subjected.[810] This promise is based on the very content of disability rights, the tools that rights provide, the history of the American and global trends of civil and human rights movements, and finally, the site in which the disability rights formula was produced and the grassroots forces that participated in its formation. And indeed, the local disability rights discourse that developed in Israel during the 1990s has challenged many arenas in which the inferiority that PWD experienced was constructed, constituted, and institutionalized.[811]

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[809] The Public Committee Report, *supra* note 804, at 19.

[810] There is vast literature that celebrates the turn to disability rights as a revolution and a transformative event. *See, e.g.*, the following accounts of the disability rights movement in the United States: RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2nd ed., 2001); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993); DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION (2003).

[811] For a comprehensive legal analysis of the manifestations of Israeli ableism, its sources and the ways that the emergence of disability rights challenged and aspired to alter that power system, *see* ADMON, *supra* note 803.

a. Setting a Supreme Court Precedent

The first major achievement of the rights advocates that manifested a change in the social and legal understanding of disability was the *Botzer* case,[812] a Supreme Court decision in the matter of a school that was not fully accessible to PWD. The petition was prepared by Bizchut in the name of a disabled child who uses a wheelchair and his family, who were very active and assertive in advocating his rights. In a groundbreaking decision, and after a long process of deliberation, the Supreme Court held that having only one floor that is accessible to students who use wheelchairs is insufficient and is incompatible with the commitment to equality to which the Building and Planning Law is subjected. Interestingly, the law's plain language formally required that only one floor would be accessible, but in this case the accessible restrooms were in another level, which the student could not reach independently. In an inspirational legal text, the Supreme Court read into the Building and Planning Law a commitment to equality of PWD:

> The purpose of the legislation is to enable the integration of the disabled in society. … It was aimed to fulfill the fundamental vale of equality … It was intended to provide the disabled equality of opportunity … to allow independence … to protect the dignity and the liberty of the disabled by guaranteeing equality and participation in all aspects of life. Indeed, in the past the prevailing view was that the disabled is different, and therefore should be treated while he is isolated from society ("separate but equal"). Today the prevailing view is that the disabled should be integrated into society, and should be guaranteed equality of opportunity ("integrated and equal"). Indeed, the modern approach is that separation intensifies inequality, and perpetuates discrimination. The disabled is a human being with equal rights. He is not located outside or in the margins of society. He is rather a regular member of the society in which he lives. The purpose of the [legal] arrangements is not to benefit him while he is isolated, but

[812] H.C. 7081/93, *Botzer et al v. Reut-Maccabim Municipality et al*, 50(1) P.D. 19 (1996) [Hebrew]. For an analysis of the *Botzer* decision, *see* Auphir and Orenstein, *supra* note 803, at 48-50.

> to integrate him – sometimes while using affirmative action – in the regular matrix of social life.[813]

The court also acknowledged that equality has its costs and that society is obliged to pay those costs within reasonable boundaries:

> Guaranteeing equality of opportunities for the disabled costs money. A society that is committed to [amuna] human dignity, liberty, and equality is ready to pay the required price. At the same time, it is aware to its limited abilities. A balance should be struck between the needs and the possibilities.[814]

The novelty of the *Botzer* decision lies in the pioneering manifesto of equality for PWD that it provides. Before *Botzer* there was no available legal document that acknowledged and protected the rights of PWD. Previous petitions that were filed to the Supreme Court, mostly by Bizchut since 1992, although successful, did not yield a detailed reasoning. They usually resulted in outside court arrangements that were achieved under the pressure of the court and received its approval.[815] The *Botzer* case was indeed a landmark moment in the legal history of PWD in Israel, and as Auphir and Orentstein noted, while it could not replace the urgent need for comprehensive legislation in the field, it did pave the road for it.[816] As in similarly renowned cases of impact litigation, *Botzer*'s consequences on government policy and on the living conditions of PWD were not and could have not been more than limited.[817] In Bizchut's experience,

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[813] *Botzer*, *Id.*, at 26.

[814] *Id.*, at 27.

[815] *See* for example H.C.J __/91, *Asraf et al v. The Principal of the Department for services to the Retarded* (on file with author), mentioned in Chapter 7, note 166; and H.C.J 3173/93 *Shoker et al v. The Minister of Labor and Welfare* (unpublished) (on file with author), discussed *infra* note 945 and accompanying text.

[816] Auphir and Orenstein, *supra* note 803, at 50.

[817] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991).

therefore, litigation was quite an effective tool for individual cases, but an insufficient instrument for social change.

b. The ERPWD Bill's Provisions: Principles, Guidelines, and Concrete Rights

From a relatively early stage Bizchut was developing a comprehensive legislation in the field, which eventually became a major site of legal and public activism. The legislation followed the American example (the ADA), combined with Bizchut's own local experience.[818] In the following section, I review the law's basic elements and the approaches that guided its formulation.

The opening part of the ERPWD Bill includes general provisions that continue the work that *Botzer* began. They serve both as a legal and ethical framework for the fulfillment and implementation of PWD's rights and as a tool to guide and educate courts, state agencies, private entities and the public at large about PWD as rights holders, and about their personhood and dignity.[819] Thus, Article 1 to the ERPWDL provides that "The rights pf people with disabilities and the commitment of Israeli society to such rights are based on the recognition of the principle of equality and the value of being created in the Divine image." Article 2 provides that "The purpose of this law is to protect the dignity and freedom of a person with a disability, to enshrine her/his right to equal and active participation in society in all the major spheres of life, and, furthermore, to provide an appropriate response to the special needs of a person with a disability, in

[818] Ziv, *supra* note 803; Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 (2002) (examining the effect of the ADA on disability reform in Israel, the United Kingdom and Sweden).

[819] Auphir and Orenstein, *supra* note 803, at 55; The Public Committee Repot, *supra* note 804. *See* Auphir and Orenstein for a general analysis of the Basic Principles part of the law, *Id.*, at 54-59.

such a way as to enable her/him to live with maximum independence, in privacy and in dignity, realizing her/his potential to the full."

The three principles that the law is based on, are therefore dignity, which became a central legal in Israel following the enactment of the 1992 Basic Laws, which were regarded as a "constitutional revolution" in Israel;[820] equality, which had not yet received constitutional protection, but is a long developed doctrine by the Supreme Court; and a related Jewish principle, according to which every man was created in the image of God or the Divine. This combination is important to the understanding of the Israeli discourse of equality in general, to which I shall return below.[821]

The general approach advocated by the drafters of the Bill, and adopted by the Public Committee Report as well, emphasized the need for a systematic and comprehensive approach addressing all needs of all PWD.[822] In its opening, the Report identified that

> The root and source of aberrations in the neglect of hundreds of thousands of persons with disabilities in Israel and their families, is in the lack of a body that would centralize, focus, coordinate, and initiate the activities of care for, and treatment of, the disabled person.[823]

Yet the Bill did not offer any consolidation of the numerous bodies that provided services to PWD. It rather established the Equal Rights Commission, "a central body in which PWD are represented fairly, that would work next to the executive branch on proceeding

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[820] See Chapter 7, notes 58-61 and accompanying text.

[821] *See* infra Part A.c.

[822] The Public Committee Report, *supra* note 804, at 2, 24; Auphir and Orenstein, *supra* note 803, at 60.

[823] The Public Committee Report, *Id.,* at 4. The Report also stated that this broad base approach responds to the continuing reality of numerous laws, which are scattered, partial, insufficient, not enforced, and outdated in their guiding rationales. *Id.*.

the legislative effort, and that would follow the implementation of the legislation."[824] It was a sort of monitoring body with extensive authority to prepare and advance reform proposals through legislation, regulation, and policy initiatives; to conduct research and establish a database for that purpose; to promote the proposed ERPWDL and its implementation; to advance the integration and participation of PWD in society; to consult PWD on those matters; to propose methods for cooperation and coordination among the agencies who work in the field; to investigate infringements of PWD's rights; to provide alternative dispute settlement mechanisms; to assist PWD in preparing claims according to the law and to submit such claims, and more.[825] The law that was eventually enacted did not include many of the above roles, but it did provide that the Commission would (1) promote the ERPWDL and its implementation, (2) advance the integration and participation of PWD in society, and (3) be assigned the concrete roles of filing lawsuits in the field of employment and consulting the government in regulation processes.[826]

Another principle advanced by the Bill, and adopted by the ERPWDL, is self-determination of PWD as individuals and as a group.[827] In response to the historical exclusion of PWD from decision-making processes, the ERPWDL established an advisory committee next to the Equal Rights Commission that the majority of its members would be PWD and mandated consultation with disability organizations in regulatory processes.[828] In addition, a section concerning the right to make decisions was

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[824] *Id*., at 80.

[825] The ERPWD Bill § 41. For detailed explanations on the Equal Rights Commission's proposed roles, *see* the Public Committee Report, *supra* note 804, at 80-85.

[826] ERPWDL §. 20-26.

[827] ADMON, *supra* note 803, at 225-227. On self-determination for PWD, *see* James I. Charlton, Nothing About Us Without Us: Disability Oppression and Empowerment 127-128 (1998).

[828] The Public Committee Report, *supra* note 804, at 20 and 85

included, providing that "a person with a disability has the right to make decisions that pertain to her/his life according to her/his wishes and preferences; this right shall be exercised in conformity with the law."[829] The latter guarantees the autonomy of PWD and responds to the overprotection and paternalism in the preceding laws.[830]

The rights model that the drafters designed was based on what they identified and defined as two dominant approaches to progressive disability legislation: non-discrimination and adequate services.[831] The first component referred to the Anglo-American approach that emphasized non-discrimination tools and relied, especially in the United States, on the legacy of the civil rights movements. The second component was a lesson of the Scandinavian approach, which focused on the state duty to provide adequate services and the complementary entitlements that individuals have in their relationships with the state to receive those services.[832] The drafters saw this combined model as a more complex understanding of the nature of disability and of equality for two main reasons. First, it recognizes that achieving equality and rights are possible only when

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[829] ERPWDL § 4. *See* the Public Committee Report, *supra* note 804, at 26, on the disagreement within the committee whether the right to make decision should be explicitly limited in the law. The majority in the committee thought that it is necessary, but Bizchut has placed a dissenting opinion arguing that this provision should be viewed as guidance in the operation of other existing laws.

[830] Auphir and Orenstein, *supra* note 803, at 58. PWD, particularly people with mental or cognitive disabilities face great skepticism and underestimation with regard to their rationality and ability to make choices about their own life. Thus, social welfare laws, concerning the treatment of PWD who live in institutions, special education, and more, employ paternalistic attitudes, which do not put at their center the unique wishes and needs of each individual. *See* Admon's thorough analysis of the history of paternalism and overprotection towards PWD in Israeli law, ADMON, *supra* note 803, at Chapter 3: Denial of and Restriction on People with Disabilities' Rights; and *see* also Stanley S. Herr, *Human Rights and Mental Disability: Perspectives on Israel*, 26 ISRAEL L. REV. 142 (1992).

[831] Ziv, *supra* note 803, particularly at 176-177. Ziv emphasizes the innovativeness that in such a combined approach and argues that it can serve as a model for disability rights laws. *Id*., at 201-202. *See* also The Public Committee Report, *supra* note 804, at 19; Auphir and Orenstein, *Id*., at 56; Herr, *supra* note 818. The ERPWD Bill included a specific chapter dedicated to Special Needs (§35-38). A more strict translation of the original concept of adequate services would be something like "*appropriate-response to special needs"* (see the ERPWDL §1, cited *supra* next to note 19).

[832] On the Swedish model of disability, *see* Ziv, *Id*., at 194-197; Herr, *Id*.

individuals have the means and conditions to fulfill and enjoy these rights.[833] And second, it acknowledges the unique relationships between autonomy and dependency in PWD's (and in all persons') lives.[834]

The result was a unique mixture of rights and entitlements, of negative and affirmative provisions, of concrete yet broad claims that PWD can make while using the law without being too constrained by either the ambiguous generality that civil right laws tend to suffer from, or by the meticulousness that narrow rules might exhibit. Following the ADA, the rights component included general principles of equality, rights, and dignity in particular fields, accompanied by affirmative duties of state agencies and private entities to provide accommodations.[835] Yet, unlike the ADA, the list of rights that the Bill enumerated was long and detailed and the state affirmative duties were more extensive. The entitlement to adequate services component complemented the former by specifying particular duties of the state in realms that used to belong only to the domain of social welfare, as the following examples demonstrate.

A typical provision in the ERPWD Bill started with declaring an abstract right, followed by a few concrete instructions about the operation of that right, and concluded with detailing the concrete roles and duties of the state in providing certain services to ensure the rights' fulfillment. Take for example the structure of the Employment

[833] The Public Committee Report, *supra* note 804, at 3.

[834] Neta Ziv, *supra* note 803, at 201.

[835] *See*, *e.g.*, Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996).

Chapter.[836] The first element prohibits discrimination against PWD in employment. The second determines that complying with the discrimination clause includes the duty to provide reasonable accommodations. The third is an affirmative action element that mandates a mechanism of appropriate representation for PWD in the public as well as in the private labor market. And the fourth element requires the Minister of Labor to "initiate, develop, and prepare" employment and rehabilitation programs to encourage the integration of PWD into the general labor market.

Another example of a less familiar civil rights matter would be the provisions concerning the right to housing in the community (or community living).[837] Here as well, the Bill first set the general principle of a person's right to live in the community. The second element concerns the person's entitlement to assistance from the state to fulfill this right through loans, grants, and public housing. Then, the third component adds an entitlement to personal assistance, or an attendance allowance, a sum which allows hiring another person to assist with daily activities.

This model of rights is evidently characterized by extensive state responsibility and it seems that various factors have shaped that notion. In part it was related to the nature of disability rights and the "special needs" approach that the drafters embraced. In part it could be linked to a dominant presence of parents to children with disabilities in the drafting process, their vast experience with the welfare regime, and their

[836] The Employment Chapter was fully included in the 1998 law, *see* the ERPWDL § 8-18. On the ERPWD Bill, *see* the Public Committee Report, *supra* note 804, at 30-41 (ERPWD Bill §10-13B). For a review and analysis of that section, *see* Auphir and Orenstein, *supra* note 803, at 63-72.

[837] The ERPWD Bill §59-69. Community living is the equivalent notion to independent living in the United States and England. The differences in terminology are revealing as they expose some cultural differences between the places (independence v. community). Another important law in the field of community living was the Rehabilitation of People with Mental Disabilities in the Community 5760-2000, S.H. 231 (2000).

understanding of how significant it is in the daily lives of PWD. But it was also a consequence of the political culture in Israel, which historically expects the state to be involved and active in social and economic life.[838] Despite the decline in collectivism and the rise of individualism and capitalism, that expectation of the state has remained dominant in the political culture, though the question of what issues deserve state intervention is in debate.

The ERPWD Bill provided specific instructions regarding almost every aspect of PWD's lives, including accessibility, employment, education, culture and leisure, health, housing, and more, which together solidified the vision of equality and dignity that it promoted. It was especially innovative in the model of rights that it created and particularly the place of social rights within that model.[839] Yet I will show that missing from the Bill's content was a reformulation of disability insurance or of disability allowances more generally. I shall argue below that the meaning of that missing part was profound, as it overlooked an important arena where disability was constituted.[840]

c. A New Meaning for Disability, a New Model of Justice: From Charity to Dignity and Difference

In this section I try to locate and define what meaning of disability was employed and constructed by the new discourse and what models of justice were developed for that purpose. I start with examining the slogan "by right and not by charity," and I continue to the model of justice that guided the drafters. I conclude by elaborating on the role of

[838] See *supra* Part A.a., and Chapter 4, notes 15-16 and accompanying text.

[839] For a detailed review of the status of PWD's social rights, *see* Neta Ziv, *People with Disabilities – Between Social Rights and Existential Needs*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ISRAEL 813, (Yoram Rabin and Yuval Shany eds., 2004).

[840] *See* Chapter 8, Part B.c.

difference in that particular scheme. Later on in this Chapter, I shall critique this view of difference, suggesting that it was limited and not as radical as it might first appear.

The motto "by right and not by charity" represented much of the vision of the new disability discourse and became its constitutive slogan. The phrase is a common Israeli expression ("bizchut ve-lo be-chesed") which means earning what one deserves based on principles of justice and not on mercy or goodwill. As I have already shown, this had already been a motivational slogan for the Jerusalem Parents' Board and later became the source behind Bizchut's name ("by right"). Yet in fact, it was used even earlier in the context of disability benefits to praise the turn from Sa'ad to National Insurance and to celebrate the then-newly enacted 1974 disability insurance program. "By right" meant a turn to a legally based entitlement and a monthly allowance that is determined by clear eligibility criteria and not by the whims of a welfare officer.

The disability rights slogan "by rights and not by charity" was a short, catchy phrase that embodied the new prism through which to read social reality. The new meaning of the phrase was presented in a press conference that announced the establishment of Bizchut.[841] At that press conference, the prevailing social attitudes towards PWD were criticized as expressing "mercy, charity, and philanthropy," therefore leading to exclusion, isolation, neglect, and political powerlessness. The proposed alternative was a civil rights approach that was based on "the centrality of the human being and the principle of equality among human beings." Charity, then, meant more than private giving; it became a code word for all social and legal arrangements that reinforced

[841] Materials presented in a press conference announcing the establishment of Bizchut, 12/5/93 (on file with author).

the marginality, exclusion, and isolation of PWD. Instead, the new message was about justice, universal principles of humanity and individuality, and citizenship.

In that press conference, Bizchut also presented its innovative understanding of equality as one that is based on difference – on acknowledging differences among human beings and accommodating reality in order to provide equal opportunities for all:

> Equality does not mean that we are all identical. … Real equality is achieved by acknowledging the differences among human beings and by accommodating the complex reality of our life to provide an equal opportunity for the fulfillment of the happiness, uniqueness, ability, and objectives of every person whoever he is.
>
> Such equality means providing special education to the child whose educational needs requires it; a true equality is to accommodate the workplace so that a disabled person can be part of it; equality means building accessible paths for the disabled in every public facility; equality is recognizing the right of a person with developmental disability to receive healthcare treatment for cancer; …. It means to acknowledge – in theory and in practice – that society in which we live is a heterogeneous society … and that every person has the right to equality, liberty, and dignity.[842]

The term "difference" is of course linked to global developments around the same time, as it became a central concept in the writings on the rights and inclusion of other disadvantaged groups in general, and of PWD in particular. Thus, both Iris Young and Martha Minow published in 1990 influential books on the meaning and implications of a politics of difference that explored the relationships between difference and oppression.[843] Similarly, within the disability movement, there was growing attention to the concept of difference. Difference was a concern both in the context of disabled-non-disabled relations (i.e., challenging the concept of disability as otherness) and with regard to the intersection of disability with other social categories such as gender, class, race,

[842] *Id.*

[843] IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

and so forth.[844] It also became an inner-group concern when it was realized that accommodations would not be enough for PWD who needed personal assistance and various systems of support in daily activities (such as people with severe physical impairments, people with developmental disabilities, and some people with mental disabilities).[845] That realization resulted in a call for "a third wave movement."[846]

And indeed it seems that *difference* became a fundamental element in the understanding of disability and justice as promoted by disability rights advocates. "By right and not by charity," then, means that disability is a difference that should not be understood as a reason to exclude persons from the realm of rights to the realm of charity, from participation to isolation, or from dignity to neglect.[847] Accordingly, justice was understood as dignity to all persons and respect for differences. In this view, society is committed to provide equal opportunities to all people in a way that acknowledges their differences, and in a way that is willing when necessary to invest more resources to enable that equality.

Yet difference also had local roots. Although difference was not part of Israeli legal or even civil rights discourse beforehand, its appearance can be linked to some

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[844] See, e.g., SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 57-84 (1996).

[845] Sara D. Watson, *Discrimination on the Basis of Disability: The Need for a Third Wave Movement – The Evolution of a Social Movement*, 3 CORNELL J. L. & PUB. POL'Y 254 (1994); Ziv, *supra* note 803. In disability writing the concept of difference and its critique were extensively discussed, *see e.g.*, SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996), at Chapter 3: Disability as Difference. For three different views about the implication of difference for social policy, *see* ANITA SILVERS, DAVID WASSERMAN, AND MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE BIOETHICS AND PUBLIC POLICY (1998)

[846] In 1994 the Cornell Journal of Law and Public Policy published a collection of essays titled together: Discrimination on the Basis of Disability: The Need for a Third Wave Movement. For a review of those essays that situates them within a context, *see* Watson, *Id*.

[847] At first Bizchut was mostly utilizing the language of civil rights. The element of dignity was added later on, probably following the influence of Basic Law: Human Dignity and Liberty, 1992.

earlier concepts. Thus, for example, the Supreme Court's equality jurisprudence of the 1970s and 1980s created a distinction between formal equality and substantive equality, which contended that individuals who are not similarly situated should nevertheless be able to enjoy equal rights.[848] The clear contrast between formal and substantive equality is questionable, of course, but it still represents an acknowledgement of structural inequalities and an expectation from the state to respond by redressing them.

A jurisprudence of difference can also rely on the growing dominance of the notion of dignity in Israeli legal discourse since the enactment of the 1992 Basic Laws. As argued by Orit Kamir, a prominent feminist scholar, dignity, more easily than equality, can be a medium through which we accept and accommodate human diversity as it acknowledges the unique value of every person.[849] A dignity-centered analysis would seem to be more open to differences and more inclusive towards human varieties – it would lack the comparison element on which an equality analysis rests, and it would not require the justification of any "special treatment" "special rights" or "special care" in relation to a given standard, which is usually dictated by power relations.

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[848] The term "formal" or "technical" equality refers to the classic Aristotelian formula of "like men will be treated alike and dislike men will be treated dislike, " While substantive equality departs from that formula towards a more context sensitive understanding of equality. For a critique of the Aristotelian formula, see Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

The jurisprudence of substantive equality defines it as equality of "equity and justice" (H.C.J. 1703/92 *K.A.L. Airlines LTD v. Prime Minister et al* (1998)). Justice Or in the *Avitan* case explained it as follows: The principle of equality is intended to serve the goal of achieving a just outcome. Not the 'technical' or 'formal' equality deserves protection, but the substantive equality, that is equality among the dissimilar. Human beings, or groups of human beings, are different from each other in their conditions, attributes, and their needs, and sometimes there is a need to discriminate among the unequal to protect the weak or the needy, to support and advance him. Equality among the unequal is sometimes nothing but "mocking the impoverished" (*la'ag la-rash*). Therefore the question is … whether the discrimination is unjustified … Distinction itself does not constitute discrimination." H.C.J. 528/88 *Avitan v. Israel Land Administration et al*, 43 P.D. 297, 299 (1988).

[849] In her study of Israeli sexual harassment law, Kamir shows that unlike its American counterpart that is based on equality, the Israeli law is based on dignity, thus providing better foundation for the law. Being less constrained by the liberal discourse it is better able to address issues of power differences. Orit Kamir, *Sexual Harassment: Sex Discrimination, or an Injury to Human Dignity?*, 29 MISHPATIM 98 (1998).

Another legacy of difference might be found in the Jewish tradition, which posits that every person was created in the image of God or the Divine, a phrase that was even inserted to the ERPWDL and that bears a potential similar to that of the concept of dignity.[850] As the Supreme Court noted, "all human beings, since they were created in the image of God, are equal in their value and in their merit."[851] If God, or any abstract ideal, is the standard, then no human being can ever fit the standard; it is an a-human ideal that situates all human beings in a similar position of incompleteness in relation to it.[852]

The difficulty with difference-sensitive principles, however, is that they can be easily used to maintain differences that are "justified." Therefore, a critical reading of differences should consider the role of power in constituting and assigning meanings to differences.[853] As I show below, the understanding of difference as employed by the local disability rights discourse has largely lacked a critical view regarding the formation of differences, their roots, and the powers that participated in their construction. Instead it tended to accept differences as a given, as unquestionable social facts while the origins of those differences remained untouched.

d. Actual and Potential Impact on Rights, and Welfare

> *A person is someone who can be a citizen, that is a fully cooperating member of society over a complete life … For our purposes … I leave aside permanent physical disabilities … so severe as to prevent persons from being normal and fully cooperating members of society in the usual sense.*

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[850] Article §1, *supra* next to note 819.

[851] C.A. (permission to civil appeal) 5587/97 *Attorney General v. Plony [John Doe] (Minor)*, 51 P.D. 830, 857.

[852] Compare to Lennard Davis's discussion on the genealogy of "normalcy" where he shows that before the ideal body became a normalized body, based on human statistics, the standard was a divine body that "is not attainable by a human." LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 24-25 (1995).

[853] MINOW, *supra* note 843.

John Rawls, Justice as Fairness, 1985.[854]

The ERPWD Bill, then, represented the entry of PWD into the domain of rights: Its structure and content provided a more concrete image of what an alternative to the existing reality might look like, as well as a means to achieve those goals. This process occasioned a mutual introduction between PWD and the rights discourse, and, as a result, both realms have undergone a change. For PWD the change incurred a process of naming and translation in which claims that, beforehand, were perceived as matters of personal preference or mere private choices, became claims with political and legal power.[855] These experiences – being unable to climb the stairs to work, or having only the option of living in an institution when living at home becomes too difficult for the person and her family – were unnamed in Israeli law until the ERPWD Bill.[856] In this process PWD became rights holders in their own eyes and in the eyes of others; they became legal subjects.[857] In addition, as I will soon show, PWD have also undergone a process of

[854] John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 233 (1985). Cited in: Anita Silvers, *Formal Justice*, *in* ANITA SILVERS, DAVID WASSERMAN, AND MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE BIOETHICS AND PUBLIC POLICY 13 (1998).

[855] The process of naming is the first step in a long way from experiencing an injury to making a claim against the offender and demanding restoration or compensation. *See* William Felstiner, Richard Abel, Austin Sarat, *The Emergence and Transformation of Disputes: Naming Blaming Claiming…*, 15 LAW & SOCIETY REV. 631 (1980-1). For actual examples from feminist legal theory, *see* Elizabeth Schneider, *The Dialectics of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U .L. REV. 589 (1986); and CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 233-235 (1979).

[856] Note that to my purposes it is unimportant whether the right was enacted into law, what matters is that it was named and that it serves as a terrain for struggle. On rights as a terrain for struggle rather than formal rules, *see* MICHAEL W. MCCANN, RIGHTS AT WORK – PAY EQUITY REFORM AND THE POLITICS OF POLITICAL MOBILIZATION (1994).

[857] DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003). For a similar claim with regard to other social groups, *see* JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996).

group formation as a collective identity of minority group started to emerge – a process that had the potential to change the divided structure of the disability community.[858]

At the same time, the general rights discourse has changed following the efforts of disability advocates to adapt it to their needs. The disability rights project exposes the power hierarchy which sets the non-disabled person as the unstated norm, the standard to which rights were historically tailored.[859] Making rights inclusive meant accommodating and transforming them from within, by challenging the traditional structure of the rights discourse (e.g., negative versus positive rights) and expanding it to new and renewed categories.[860] It also involved contesting deeply rooted cultural assumptions that underlay rights, such as "difference," "normalcy," "rationality," "dependency," and "autonomy," each of which served as pre-conditions to enjoying those rights.[861] The challenge here was double. First, the discourse needed to undermine the view that PWD (particularly, but not solely, persons with mental or developmental disabilities) are "too different," "too abnormal," and "too dependent" to be considered rational and autonomous enough to become rights holders. The second challenge is to resist and defy the very construction of

[858] *See infra* Part C.b.v.

[859] MINOW, *supra* note 843, at 56-60. *See* also MACKINNON, *supra* note 848, at 36-37; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV 1003 (1986).

[860] Lynn Mather; Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 L. & SOC. REV. 775 (1980-1981) (showing how participants in disputes "transform a dispute by imposing established categories for classifying events and relationships (narrowing), or by developing a framework which challenges established categories (expansion). Disputes may be expanded by adding new issues, by enlarging the arena of discussion, or by increasing the number and type of active participant").

[861] MINOW, *supra* note 843, at 125-128, 156. For a disability studies work that interrogate and deconstruct the dominant understanding of these concepts as well as views among some professionals and advocates, *see* BARBARA HILLYER, FEMINISM AND DISABILITY (1993).

notions such as (in)dependence, autonomy, and rationality in a way that favored social atomism over social relations.[862]

But the ERPWD Bill impacted not only the domain of rights but also the field of welfare. Disability critique of welfare shows how welfare policies and institutions were and still are major sites in which disability was constituted as a state of inferiority and worthlessness.[863] A detailed critique of the state of Israeli welfare policy just prior to the introduction of disability rights was conducted by Stanley Herr, the American professor who urged ACRI to establish Bizchut.[864] In the article that he published in 1992, following his visit to Israel, he analyzed the lack of rights orientation in disability-related social services, arguing that the existing laws manifested outdated and contested approaches, such as "institutionalized models of treatment and care"[865] and a lack of legal safeguards on powers held by social services officers.[866] One primary example that he explored was the Welfare (Treatment of Retarded Persons) Law, 1969.[867] Herr showed how that law had almost no reference to the rights of its beneficiaries, claiming that it "provides no framework for community-based services," "reflects intense paternalism [towards PWD and] skepticism that their caretakers will bring them to treatment, does not promote parental participation in decision-making "nor guarantees the delivery of least restrictive alternatives, and finally, that it "vests enormous power in a single

[862] MINOW, *Id.*; Jennifer Nedelsky, *Reconceiving Rights as Relationships*, *in* EXPLORATIONS IN DIFFERENCE 71 (Hart & Bauman eds., 1996).

[863] MICHAEL J. OLIVER, UNDERSTANDING DISABILITY – FROM THEORY TO PRACTICE 19-29 (1996).

[864] *See* Chapter 7, notes 163-164 and accompanying text

[865] Herr, *supra* note 830, at 160.

[866] See, for example the discussion on forced sterilization, Herr, *Id.*, at 177.

[867] Welfare (Treatment of the Mentally Retarded) Law, 5729-1969, 23 L.S.I. 144.

uncredentialed 'welfare officer.'"[868] Herr provides a similar analysis of the laws concerning people with mental disabilities, primarily discussing forced mental hospitalization (while noting the lack of community-based services and residential facilities), and touching upon the issue of forced sterilization.[869]

Herr's analyses, as well as my own work in previous chapters, expose how the particularities of the social services arena, including its language, assumptions, and practices, convey a message and an image of PWD as helpless, incapable of living an independent life, unable to make decision for themselves, and destined to live on the margins of society. Consequently, the legal and social arrangements concerning PWD's needs and the attitudes employed by welfare officers were disrespectful, patronizing, condescending, and at times dehumanizing. Through the ERPWD Bill, disability rights advocates aspired to change that environment and to insert the values of equality and human dignity for PWD into that scheme of welfare. The established link between abstract individual rights (i.e., antidiscrimination and accommodations), concrete entitlements, and specific state duties to provide welfare programs and adequate services has resulted in a unique model of social rights that transcended the contested hierarchy between civil and social right. Thus, the structure of the Bill's provisions involved the reformulation of what was previously perceived of as a welfare issue into a rights framework.[870]

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[868] Herr, *supra* note 830, at 161-162.

[869] Herr, *Id.*, at 168-179.

[870] For an analysis of the structure of the ERPWD Bill's provisions, *see* Part B.b in this Chapter. For a more detailed analysis of the various welfare provisions and their linkage to rights, *see* Part C.c. in this Chapter.

Moreover, by bringing welfare and rights closer, the new disability rights formula created a potential to transform the power relations between service providers and service beneficiaries or users. That power relation was a fundamental and acute aspect of PWD's interactions with the welfare system.[871] One way to bring about that transformation was through the self-determination provisions, which created a duty to consult disability organizations and the Equal Rights Commission in decision-making processes, and which concerned the right to make life decisions. Another way was through formulating guiding principles for the provision of services to PWD. Thus, section 6 to the ERPDL (adopted from the ERPWD Bill) provided that in implementing the rights according to the law, and in providing services to PWD, "strict attention shall be paid to the dignity and freedom of the person;" services shall be provided not in isolation and segregation but "within the framework of services provided in society and aimed at the general public," with adjustments as required in particular circumstances; and that the provision of services by a public body "shall be to an appropriate standard, within a reasonable time and within a reasonable distance." Section 7 to the ERPWDL provided that inquiries for purposes of determining a person's entitlement shall be conducted with "maximum consideration to the person's regular lifestyle."

Nevertheless, the naming and translation processes that took place during the formulation of disability rights have also had their limits. I will argue that although transformative in many respects, by stopping short of including disability insurance, the new disability rights framework failed to translate and identify a central experience in

[871] Micahel Oliver for instance argues that "assessment of need is an exercise in power." OLIVER, *supra* note 863, at 70. *See* also LINTON, *supra* note 878, at 82

PWD's lives; failed to challenge a basic element in the traditional rights discourse; and failed to provide a complete new vision for social welfare.[872]

e. The Impact on the Disability Community – Identity Formation and Coalition Building

This section introduces the promises that accompanied the rise of the rights discourse in terms of group formation and coalition-building possibilities. The emergence of disability rights as a language to address the hardships and subordination of PWD was closely connected to the formation of PWD as one inclusive social group. A social group is re-formed as the social relations within which the group is situated are changing due to the work of internal and external forces.[873] Thus, it changes as the understanding of what binds the group together alters, as the boundaries of the group are re-shaped, or as the relations between a dominant and a disadvantaged group are re-defined. The new understanding of disability triggered both the rise of disability rights and the emergence of a collective identity of PWD. A growing group consciousness emerged that involved the understanding that all PWD share similar forms of oppression and even more radically that disability is as well a from of resistance and a way of expression.[874] That transformation has enabled PWD to imagine themselves as a minority group and as a new

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[872] *See infra* Part C.c.

[873] For a great discussion on the formation of social groups from a relational perspective, *see* YOUNG, *supra* note 843, at 42-48. *See* also MINOW, *supra* note 843, at 110-111, on relational understanding of groups' differences as based on power rather then on fixed attributes.

[874] On solidarity among PWD that is based on the shared mechanisms of oppression and their daily experiences in resisting them, *see* SCOTCH, *supra* note 810, at 6. *See* also WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS 6 (Michelle Fine and Adrienne Asch eds., 1988) (raising a similar claim in the context of women with disabilities). See also Chapter 1 on disability pride and disability culture as forms of resistance (notes 35-39 and accompanying text).

civil rights movement.[875] With the political turn to civil rights activism, the utilization of law (e.g., through courts and legislation) as a means for social change became widespread.[876]

One way to understand the new basis for alliances and cooperation is through the new terminology that was used by disability rights advocates and that was inserted into the Bill. In addition to naming rights and wrongs, the new discourse also furnished a new terminology to be used when discussing PWD.[877] Thus, the very term *persons with disabilities* embodies many of the changes in the understanding of PWDs as a group and as individuals. Imported from the global arena and the United States in particular, this term was celebrated by disability activists as a turning point in the social positioning of PWD. While the previous prevailing terms were denigrating (e.g., "cripple," "retard," or "mentally ill"), the term PWD emphasized each individual's personhood and contended that a person's identity cannot be reduced to her disability, since disability is only one aspect of a person's individuality.[878] Furthermore, as a term for the entire group, it suggests an inclusive definition of the group's boundaries that unites people with all types of disabilities – physical, mental, sensual, learning, developmental, and so forth –

[875] Charlton, *supra* note 827, at 115-121 (on empowered consciousness and the disability movement in an international perspective)

[876] *See* SCOTCH, *supra* note 874, at 24-31and 37-40, on the influence of the civil rights movement and the civil rights act on the disability movement and on the early legislation and litigation during the end of the 1960s to mid 1970s.

[877] The politics of naming social groups is familiar from other contexts as well. The examples of blacks in the US or gays show that a change of name marks a new era with regard to the social positioning of a group in the cultural meaning that is assigned to the group, especially if the previous term was denigrating. *See e.g.* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002) on the debate surrounding the appropriate term to use with regard to blacks/African Americans, by themselves and by others.

[878] See Linton's discussion on the history and politics of "Naming the Group", SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 9-13 (1998) (Linton concludes, however, with saying that "beginning in the early 90s *disabled people* has been increasingly used. … Rather than maintaining disability as a secondary characteristic, *disabled* has become a marker of the identity that the individual and group wish to highlight and call attention to" (emphasis in original). *Id.*, at 13.

under one umbrella. At the same time, this term still acknowledges, rather than ignores, the variations of impairments among PWD, and avoids their homogenization.[879]

Still, not all PWD identify with the new terminology. Although it was quickly adopted by many organizations, professionals and academics, some continue to use the old terminology. Thus, in an interview with Ha'aretz newspaper, Paul Steven Miller, the head of the United States' Equal Employment Opportunities Commission (EEOC) and a small-statured person, said he prefers to be called a "dwarf." He explained that this is a term that he is most comfortable with and that correctly describes him, and emphasized that what is most important for him is that his right to self-determination will be respected.[880] Elsewhere, John Hockenberry, in his book *Moving Violations,* uses the term *crip* very freely, saying casually, for example, "my crip friends and I…"[881] Similarly, among new grassroots organizations of PWD in Israel many use the plain old term "handicapped" or "disabled" both in their title and in their activities.[882] In an interview with the organizers of the 1999 and 2001 strikes, they insisted that they do not find the term handicapped denigrating at all and that they relate to this term better than "people with disabilities," which feels somehow imposed on them and unrelated to their experience.[883] Even among Disability Studies scholars, there is a recent trend of referring

[879] Although as any other social category the term PWD bears the risks of reification, essentialism, and the homogenizing of the members of the group, it nonetheless has the potential to avoid those hazards at least partially since it emphasizes that the group is of people with a shared experience of having a disability, and at the same time accommodates personal identifications, such as a person with physical disability, or a woman with Down syndrome, without threatening the basis for the group's solidarity.

[880] Uriah Shavit, *Pride and Prejudice*, Ha'aretz, 2/23/2002. However, in the part of the interview where he addressed issues of discrimination and the role of the EEOC he used the term PWD.

[881] JOHN HOCKENBERRY, MOVING VIOLATIONS: WAR ZONES, WHEELCHAIRS, AND DECLARATIONS OF INDEPENDENCE 216 (1995). *See also* Chapter 7, where he discusses naming and labels, *Id.*, at 87-102.

[882] A partial list includes: Disabled Now (Nechim Achav), Campaign for Handicapped Persons in Israel (the word "persons" does not appear in the Hebrew name); Mazor – Disabled for Disabled.

[883] Interview with Arie Zudkevich and Yoav Kraim.

to *Crip Studies*, which like Queer Studies, embraces and reclaims the pejorative term as a way to ridicule and protest against the confining nature of social categories.[884] Nevertheless, the term PWD carries an important political statement, particularly as a way to undermine prevailing views about disability within dominant society.

Obviously, the actual change was more profound than titles and terminology. The disability rights language furnished new tools for the group and its members to re-imagine their place in society and their relations with other social groups and other individuals. In a unique work, Engel and Munger have explored the passage of the ADA as a case through which to examine the constitutive relationships between law and society, and in particular, the relationships between law and identity. Engel and Munger suggest that "rights and rights consciousness hinge on a sense of identity that is reflected in ever-changing life story narratives of individuals with disabilities," and that this effect of rights is revealed in a variety of ways, which extend beyond raising formal claims under the ADA.[885]

In Israel too the emergence of the rights discourse and the rise of disability activism were closely related. Yet a distinctive feature of the evolution of disability rights in Israel is that no substantial social movement preceded it.[886] As I showed before, the local disability rights language was formulated by Bizchut, a legal organization that was an initiative of non-disabled lawyers and parents of children with disabilities, and not a

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[884] If Queer theory refers to all gender/sexuality related variations and culturally defined abnormalities, Crip theory interrogates all bodily variations and their construction as abnormal, "freaky," or "ugly." "*Cripple*, *gimp*, and *freak*, as used by the disability community," Linton notes, "have transgressive potential." LINTON, *supra* note 878 (emphasis in origin), at 17. *See* also SHAPIRO, *supra* note 810, at 34.

[885] ENGEL & MUNGER, supra note 857, at 10-11.

[886] Herr, *supra* note 830, at 180. *See also supra* Part B. On the role of legal experts who were leading the rights initiative, *see* Ziv, *Social Rights and Existential Needs*, *supra* note 839, at 852.

grassroots project of PWD themselves. Before then, even though the organizational landscape of disability activism was vibrant, the majority of activists were not involved in social change activities and in general no identifiable social movement of PWD existed. Only since the end of the 1980s, and particularly following the introduction of disability rights in the 1990s, was there a fundamental shift in PWD's form of associations, which focused less on providing services and more on advocacy and the fulfillment of rights.

The contribution of disability rights to coalition building among PWD was evident already during the work on the ERPWD Bill and particularly towards the passage of the ERPWDL. Many of the old disability organizations were first exposed to disability rights when Bizchut approached them during the work on the first version of the ERPWD Bill. Later on they provided their input to the Public Committee Report and participated in the legislative proceedings in the Knesset. That was a transformative stage in terms of radicalizing their understanding of disability, but the more critical moment in that process was their mobilization during the successful campaign to pass the law in the Knesset.[887]

After the passage of the law, the coalition was formalized and it continued to work on promoting additional parts of the law, exchanging ideas, and initiating joint activities. It included a variety of PWD and parents organizations and attracted unorganized individuals who found disability rights empowering.[888] Usually, those who adopted disability rights have also immediately embraced the term PWD as a notion that represents a shift between two eras and that offers a new way to understand disability and

[887] Although very partial the law faced a strong opposition led by the Ministry of Finance. To lobby for the legislation Bizchut established a coalition of organizations that resulted in a successful campaign that ended with passing the law with no votes against it.

[888] Interviews with Simha Benita, Achiya Kamara, and Yoav Kraim. A personal conversation with Leah Lior.

a new place for PWD in society. Yet still, the most immediate and profound impact of disability rights on the makeup of the disability community was only on non-privileged groups, or the *common* PWD (as opposed to the privileged). The previously scattered community became more connected and started forming links of solidarity while still maintaining individual identity to work on particular issues. The law in this case became a platform for coalition-building as groups with different types of disabilities have used the same language to support their claims and to support each other in their struggles.

Thus, for example, Achiya Kamara from *Bekol* (By Voice), an organization of people with hearing impairments (established in 1977),[889] tells how from the beginning it was clear to the founders of Bekol that they wanted to be different from the existing organizations at that time. They consciously avoided presenting themselves as miserable because of their disability (and therefore did not participate in the annual March of Dimes for the deaf), and they were thinking in terms of participation and integration (e.g., enabling people with hearing impairments to function better at home and at work), but equality was still a very marginal issue on the agenda. Only through their involvement with the ERPWD Bill did their language change, placing equal rights as the primary goal and field of action. Soon Bekol applied the rights language to its own agenda and struggles, such as the lobby for fully captioned broadcasting on Israeli TV.[890] Their

[889] Based on interview with Achiya Kamara. Bekol - Organization of Hard of Hearing and Deafened People in Israel. Bekol's website is available on: http://www.web4u.co.il/code/main.asp?pID=298. See also their goals, achievements and current projects: http://www.web4u.co.il/code/main.asp?cat_id=2123&pID=298.

[890] A law mandating closed captioned in a small amount of TV broadcasts has passed already in 1992 (Assistance to the Deaf Law, 5752-1992, S.H.116) but its required only 25% of non-live productions to be captioned and only once a week captions for news programs. But even that law is only partially enforced, an enforcement which started only following a petition that was filed in 1994 by Bizchut and The Association for the Deaf in Israel (H.C.J. 564/94 *Chibotero et al v. Israel Broadcasting Authority et al* (not published).

effective efforts succeeded and on July 26, 2005 the Television Broadcasting (Close Captions and Sign Language) Law, 2005 was passed. It mandated that gradually all TV programs would become accessible to people with hearing impairments.[891] Bekol was also involved in filing the first employment discrimination suit on the basis of disability.[892] According to Achiya Kamara, the involvement in those legal struggles, and the continuing engagement in the coalition for the promotion of the ERPWDL, where people with diverse disabilities have shared their experiences, have further contributed to the changing disability consciousness of the organization.

The campaign for housing by people with mental disabilities was another exceptionally successful struggle in terms of legal mobilization. The lobbying effort yielded a relatively progressive law: the Rehabilitation of Mentally Handicapped in the Community Law, 2000.[893] The law opens with a general statement regarding the aspiration to allow people with mental disability to reach maximum independence and quality of life while preserving their human dignity, and it defines rehabilitation broadly.[894] It was initiated and lobbied by *Ozma* (Strength) – *A National Forum of Families to Mentally Injured*. Another example of the spread of disability rights, though not necessarily through legal action, is Access Israel, an organization that was established in 1999 by a group of persons who use wheelchairs with already great achievements. The organization's agenda was to promote accessibility by surveying the field, providing

[891] Television Broadcasting (Close Captions and Sign Language) Law, 5765-2005, (no official publication available yet).

[892] L.C. (Haifa) 1103/01, Sharam v. Carmiel (not published) (a case involving a social worker with hearing impairment that was transferred to a lower position at work due to her disability. The parties reached an agreement outside the court that included the returning of the worker to her former position and the city's obligation to accommodate the workplace for the worker's needs).

[893] Rehabilitation of Mentally Disabled in the Community Law, 5750-2000, S.H. 231.

[894] §1 and §2 to the Rehabilitation of Mentally Disabled in the Community Law, 2000.

information to PWD, and applying public pressure to places and services to become accessible.[895] Other locally based organizations started organizing community activities with a rights-related agenda. Thus, Disabled Now, which is located in Jerusalem, was established in 1999 by a group of wheelchair users who seek to empower PWD to be their own advocates. Their agenda includes the promotion of human dignity, equality, and fighting against the stigma that is attached to PWD.[896] In addition, they established an independent living center in Jerusalem and are involved in accessibility initiatives in the city.[897] Additional indications that the disability community has been strengthening at the grassroots level included the increasing sports and leisure activities among PWD who are not disabled veterans,[898] lively Internet forums,[899] in which not only rights and benefits are discussed but also leisure activities and dating issues.[900]

Outside that growing solidarity, powerful groups of PWD did not join the coalition. Looking at those groups complicates the assessment of the impact of disability

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[895] Access Israel has a vibrant and updated website which provide information on the Organizations and its activities: http://www.aisrael.org/ . Interestingly, this organization was formed by disabled veterans who were not affiliated with the ZDVO, and who had no background on disability rights either. Interview with Yuval Wagner, one of the founders of Access Israel.

[896] The organization's profile was published in *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001, at 22. Disabled Now has also initiated a petition against a TV commercial, which depicted the life of a car accident injured as life in jail and as being a "living dead."

[897] On the independent living center, see: http://makom-m.cet.ac.il/pages/item.asp?item=1135.

[898] In the field of sports an association called *Etgarim (Challenges) – Israel Outdoor Sports and Recreation Association for the disabled*, was founded in 1995 and started organizing diverse sports activities for PWD, including skiing, diving, bike-riding, surfing, climbing and more. From the website: "Our main goals are to facilitate the physical, emotional and social rehabilitation of the disabled, through outdoor sports and recreation activities, to enhance their wellbeing, and advance their integration into mainstream society. Etgarim was founded in 1995 by a group of disabled veterans of the Israel Defense Forces, disabled civilians, and senior rehabilitation professionals" (*see* http://www.etgarim.org/english/about.asp).

[899] There is currently a diverse selection of online forums on disability: The Disabled Forum by www.ynet.co.il (under: communities); Rights and Disabilities (handicapped) forum by www.tapuz.co.il (under forums); a forum on the website of the the Headquarters' Struggle http://www.nechim4u.com/; a forum on Bekol website: http://www.web4u.co.il/code/main.asp?pID=298.

[900] The following is a closed forum dedicated to dating for PWD: http://www.tapuz.co.il/Communa/userCommunaMsges.asp?Communaid=1731&smsMsg.

rights on the disability community. IDF disabled veterans, the injured by hostile actions (terror attacks), the work injured, and even those injured in road accidents (in short all those who enjoy a relatively generous financial arrangement where the state took at least some sort of responsibility for their injuries or illnesses) have refrained from forming solidarity with the rest of the disability community and from joining the struggle for disability rights. Thus, disabled veterans or work injured were hardly present in the struggle for the enactment of the ERPWDL, and their representative organizations were totally absent. The question of why these groups did not join the struggle is a fundamental one. I shall return to develop it later, as it pertains not only to the structure of the disability community, but also to the persistent foundations of Israeli ableism.[901]

Another group of PWD remained in some way outside the disability rights project. Unlike disabled veterans and other privileged PWD who excluded themselves from the struggle, poor and indigent PWD felt somewhat excluded and expressed dissatisfaction with the absence of disability allowances issues in the emerging disability rights discourse.[902] The 1999 and 2001 strikes manifested this emerging tension within the disability community and became a central locus of counter-activism to rights activism, as I show later in this Chapter. Yet in this context I would like to emphasize how the strikes' agenda was indebted to the crucial role that disability rights activism had in triggering and generating this welfare rights type of resistance.[903]

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[901] See infra Part C.c.ii.

[902] *See infra* Part C.c.iii. As it become clearer later on, despite the effort to go beyond disability benefits disability benefits have continued to haunt disability rights advocates, mirroring the limits of their inclusiveness and questioning the relevance of the project to a large group of PWD.

[903] In welfare rights activism I refer to the view that welfare benefits deserve constitutional protection like other civil right, as the welfare rights movement in the United States tried to develop. On the welfare rights movement, *see* Chapter 9, notes 24-26, and accompanying text.

Although the strikes' agenda was different than, and at times even at odds with, the rights agenda, their very occurrence represented the aspiration of the rights advocates – a mass grassroots movement that would mobilize PWD to act upon the marginalization and exclusion that they suffer from. The strikes were therefore perceived by all activists and commentators as a milestone in the history of disability activism.[904] Furthermore, the strikes demonstrate the empowering effect of disability rights and its contribution to enhancing grassroots activism in all forms. The disability rights discourse has promoted a view of PWD as a minority group, enhanced the growing tendency to develop adversarial relations with the state, and empowered PWD to regard their perceived personal issues as a political matter of social justice. Consequently, the organizers of the strikes have used inclusive language and claimed to represent all PWD even though the vast majority among them were people with physical disabilities (primarily mobility impairments).[905] Together, the crystallization of rights as a language of social change and a form of activism, and the rise of a subsequent welfare-oriented activism, became part of a movement-building process.

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[904] Arie Rimmerman and Stanley S. Herr, *The Power of the Powerless – A Study on the Israeli Disability Strike of 1999*, 15 J. DISABILITY POL'Y STUD. 12 (2004); Ziv, *Social Rights and Existential Needs*, *supra* note 839, at 844; Ariela Auphir, the Comissioner of the Equal Rights Commission at the time of the 1999 strike and formerly the executive director of Bizchut (in an interview to *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001, at 24); my interviews with: Achiya Kamara (*Bekol* organization), Rivka Sneh (*Yated* organization, among the founders of *Bizchut*), Gideon Drori (among the founders of *Bizchut*),.

[905] Note that I do not argue here that the strikes represented the true or authentic voice of the disability community or that they indeed represented all PWD. In fact, behind the scenes, the extent to which the organizers, who did not represent a wide range of disabilities, and who did not belong to old established organizations can truly speak in the name of all, was questioned (*see* the Roof Association letter to Prime Minister Ariel Sharon after the 2001 strike, asking him to meet and participate in post-strike negotiations along with the Campaign for the Handicapped, available on: http://www.disabled.org.il/letter.gif). My interest in the strike is more in the challenge that it posed to the local disability rights discourse, and the way it exposed limits of the local disability rights discourse.

This brief review has shown a few central aspects of the links between changes in the structure of the disability community and the introduction of disability rights. It has shown that coalition building on the ground has indeed increased and that among major groups of PWD a growing sense of collective identity and solidarity emerged. However, in other major aspects the disability community still remains a divided community.

C. The Shape of Rights – Three Critical Comments on the Limits of the New Disability Discourse: Another Missed Opportunity?

Previously, I addressed the potentially transformative dimensions of the disability rights discourse that has evolved in Israel. And indeed, as a product of a deliberate and sophisticated effort to change the social conditions of PWD, that discourse included many innovative and original mechanisms that were promising in comparison to the former discourses of welfare and rights in Israel, as well as in relation to other models of disability rights outside Israel.

In this section, however, I discuss three difficulties that I identify in the disability rights discourse as it has evolved. I start with the understanding of difference that underlay the disability rights discourse. I then explore the absence of reference by the rights advocates to the hierarchy among PWD. And I conclude with a thorough examination of the place of disability insurance in the new scheme of disability rights. These difficulties are interrelated and I argue that their accumulation has generated a failure to address a major arena in which the meaning of disability in Israel was constituted.

a. A Limited Language of Power – A Critique of Essentialism after All?

My first point concerns the missing element of social construction from the Israeli disability rights discourse. This point is related to the understanding of differences and their formation and its impact on the meaning of disability. By comparing the meaning of disability and difference, as they were developed in the Israeli rights discourse and as they were employed at least by activists from the United States and England, I argue that the Israeli version was less radical as it was less attentive to the role of power in structuring differences.

The local discourse, I argue, has challenged the state to account for all people despite their differences (i.e., the state should not neglect some people because they are disabled), yet it neglected to address the more radical dimension of power in disabled-nondisabled relations, which is the role of the state and society in constructing those differences in the first place (i.e., questioning the notion of disability, its contested history and meanings, and ultimately the very neutrality of the dichotomy between the disabled and the non-disabled). The focus, so it seems, was more on the *consequences* of disability (particularly on the social and political levels) and less on the *generators* of disability (especially the historical and cultural dimension and their role in the production of disability).[906]

Viewed this way, it is not surprising that representation of disability as a misfortune and suffering continues to exist among Israeli disability activists. As I

[906] In a study of the disability movement in Japan a somehow similar distinction was made between the United States emphasis on equality of opportunities that focus on the removal of barriers and the Japanese emphasis on "different needs" and that was therefore characterized as "equality of results." See Katharina C. Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 ASIAN-PAC. L. & POL'Y J. 7, 20 (2000).

previously showed, the 1999 and 2001 strikes evoked a mixed response, exhibiting on the one hand empowerment and pride, but still communicating a message of misery and pity. Recently, Yehuda Doron, a disability activist, was quoted talking about the link between disability, misery, and poverty, saying that accident or illness "can happen to each and every one among us, god forbid (*chas vechalila*). Within one second you enter destitution. We must save these people that not only became miserable because of their disability, they are miserable because of the economic dependency and poverty that caught them.[907]

In my view, the model of difference which maintains that PWD are different but should still be accommodated allows these seeming contradicting notions to coexist. While disability rights advocates clearly do not share that position the Israeli public was not exposed yet to the radical and liberating message that disability is not located in the person but rather in social interactions and dynamics that socially burden PWD. In short, the rights advocates' message did not communicate enough of a challenge to that dominant understanding of disability even within the disability community.

What is different from the British and the American discourse, I argue, is the lack of a *social construction* model or understanding of disability; the sense that society *disables* persons in diverse and complex ways. The activists in England and the United States are actively engaged in questions regarding the meaning of the differences between disabled and nondisabled persons. Not perceiving those differences as a given but rather a result of sociocultural and political processes reveals the role of society and the state in

[907] Miri Chason. The Disabled Struggle: within one day the house is destroyed," Ynet online newspaper, 9/19/2005.

the construction of those differences and therefore their responsibility towards PWD and for the social implications of disability as a system of power.

Interestingly, the social construction model of disability was first developed by disability activists from England, in response to their own experience of hardship and oppression. In 1976 the *Union of the Physically Impaired Against Segregation* published a Fundamental Principles document in which it introduced the then-revolutionary concept of the social construction of disability:

> In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairment by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.[908]

As argued by Michael Oliver, who brought the manifesto to print, even though the model is an analytical attempt to deconstruct the meaning of disability, its history shows that it was a product of grassroots activism.[909] The social model was later warmly adopted by United States disability activists, in the global disability movement and in the academic field of disability studies.[910] This model is not unified, as it has encountered various internal critiques and is employed in variations among disability scholars and activists. But, it seems that at its core it manifests the deepest challenge that disability critique poses to mainstream society – disability is a social, historical, and cultural phenomenon and not an inherent static condition.

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[908] Cited in: Oliver, *supra* note 863, at 21-28. Oliver brings the document for "archival" reasons fearing that it might be lost and as a debut to its role in his own scholarship. Oliver was among the first to introduce a comprehensive critique of the individual vs. the social model of disability. *See* MICHAEL J. OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990)

[909] Oliver, *supra* note 863, at 30-31.

[910] Anita Silvers, supra note 854, at 75 (noting that the ADA "is thoroughly grounded in the belief that disability is socially constructed").

The difficulty with the Israeli discourse, then, is that it neglected to challenge some of the deepest roots of ableism which justify the limitations on and infringements of PWD's rights. The message is something like: PWD *are different* and society should *accommodate those differences* by protecting their rights and providing them with the necessary resources they need. Put another way, while in the American discourse, for example, in a perfectly accessible society a person who uses a wheelchair is not disabled (though still impaired), in the Israeli discourse she is a disabled person whose disability is mitigated through mechanisms of accommodations.

On the other hand, the Israeli model also benefits from its relative simplicity. Its simplicity allows focusing directly on the responsibility of the state for every citizen's special needs and on how differences are treated, rather than constructed. Therefore, also, the treatment of differences and their consequences is not apologetic, but rather straightforward, liberated from any complexities connected to the tension between the social and biological dimensions of disability/impairment.[911]

The resulting dilemma here is an old dilemma the legal field faces, as the advantage of the Israeli disability rights discourse is also its weakness – the same pride for a rights language that attends to PWD's special needs and creating state duties to respond to them leads to the view that these special needs are an inherent merit of PWD; that these differences are rooted in PWD's condition and not in a historical process which

[911] While it was relatively easy for disability scholars to resist disability as a socially imposed category and a system of power, it soon became a challenge to theorize and validate the experience of impairment and pain. The deconstruction of disability carries the risk of denying pain, dependency, frustration and other impairment related issues that PWD face. *See* LINTON, *supra* note 878, at 38 (calling to engage with those issues). In addition, severe mental, developmental, and physical disabilities undermine the claim for autonomy and self-reliance that disability activists promote. *See e.g.*, HILLYER, *supra* note 861. See also the critique of the disability/impairment dyad in Chapter One, notes 21 and accompanying text.

resulted in their neglect, exclusion, and marginalization. In some sense this is one version of what Martha Minow has concisely put as the "dilemma of difference," according to which taking difference into account in order to address issues of power might lead to the reinforcement of those differences and stereotypes.[912] Minow's analysis is part of a more general critique of law and its rigid use of categories as given and taken for granted,[913] which she seeks to replace with a relational analysis of categories, an analysis that is more complex and more sensitive to the role of power in these social dynamics. Similarly, Young argues that in group politics "one is more likely to avoid the dilemma of difference … if the meaning of difference itself becomes a terrain of political struggle."[914] This is exactly what I argue is missing from the Israeli discourse.

The difference difficulty is part of a typical critique of essentialism, which the rights language has already encountered in various similar contexts. Thus, the jurisprudence of anti-discrimination was widely critiqued for being based on assumptions of fixed categories that can be discerned by their essence, their essential elements. That is the case, for example, with the American doctrine of discrete and insular minorities, which assumes "immutable" characteristics of social groups.[915] The anti-essentialism critique exposes the dynamic and contested nature of categories and their historical constructions and rejects their perceived stability and immutability.[916] In her article on

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[912] MINOW, *supra* note 843, at 20.

[913] *See* also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 583 (1990).

[914] YOUNG, *supra* note 843, at 169.

[915] The famous Footnote Four in *United States v. Carolene Products*, 304 U.S. 144 (1938). For two central critiques of the immutability requirement implied in *Carolene Products*, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152-53 (1980).

[916] *See e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Harris, *supra* note 913.

The Politics of the Closet Janet Halley performs exactly that kind of critique. In her discussion of *Carolene products*' logic of fixed identity categories, she points at the effect it had on legal activists' tendency to develop a politics of identity that assumes and fosters notions of sexual orientation as an immutable trait. [917]

Following Gayatri Spivak's notion of strategic essentialism, one might ask whether this is not the case with disability rights – whether the category of disability is used only as a strategic resource, assuming that differences are real only to be able to resist them.[918] The question of strategic essentialism is important as it allows a space for activism in an environment where categories are suspect and therefore unavailable. Yet neither Israeli disability rights discourse's use of differences, nor disability activism in general, seem to grapple with the complexities of identity and subjectivity at all and therefore cannot be described as strategic.

The differences between the discourses in Israeli and in the United States and England might be rooted in the very history of the disability movement in those places. While in England and the United States the development of a rights language was a later stage in a larger process of movement building, in Israel it was an influential beginning stage. While in the United States and England people with physical disabilities initiated the movement and provided the early framing of the discourse, in Israel it was nondisabled people who were particularly occupied with people with developmental

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[917] Janet E. Halley**,** *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L.REV. 915 (1989). See also her later article that focuses on the tension between essentialist and constructivist approaches to gay identity, Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

[918] THE SPIVAK READER 214 (Donna Landry and Gerald MacLean eds., 1996) (defined as "a strategic use of positivist essentialism in a scrupulously visible political interest"). See Linton's acknowledgement of strategic essentialism in the context of disability, for instance, LINTON, *supra* note 878, at 124.

disabilities and that only later expanded their scope of interest. Moreover, while in the United States and England a lively academic arena and cultural sphere of interrogations of disability exist next to the legal terrain, in Israel these are still in their very beginning stages.

To be clear, I do not argue here that the disability rights discourse in Israel is a total anachronism from a disability critique perspective, but I argue that the additional radical edge is missing. In fact, I suggest that the Israeli discourse is in line with the civil rights/minority group model of disability, which in the United States is generally understood as one that "transforms [the social model] into a political call for action."[919] Yet it lacks the theoretical dimension and experiential background that the social model provides, and on which the rights/minority group model rests in the United States. Typically, this critical dimension was not developed by lawyers in other places either, but rather by other types of activism, which were largely absent from Israel at the time that disability rights were formulated. The dominance of lawyers in this process suggests that the tendency of hegemonic law to use and assume rigid categories contributed as well to the understanding of difference that has evolved and to the evolution of a model that is more politically and practically oriented but less theorized and less radical in its underlying assumptions.

In the context of this project, the primary concern with employing a discourse that does not fully problematize the concept of difference is not only that a fundamental foundation of ableism remains untouched, but also, and perhaps more critically, that

[919] Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 659 (1999). For a good account of the model, *see* David Wasserman, *Distributive Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 147, 174-182 (1998). *See also* references cited in Chapter 1, note 61.

related hierarchies within the disability community may also remain unaddressed. In the next section I show that the Israeli disability discourse has not addressed in any way the materialist, symbolic, and political hierarchy that exists between different types of PWD in Israel, particularly the privileged status of disabled veterans. Had the new discourse employed a more radical version of disability critique, it might have been more effective in undermining the widely accepted distinctions between disabled veterans, work injured, and the rest of PWD, since this hierarchy is based on the role of the state in disabling *only some* people, namely those who became disabled in circumstances related to national causes. Challenging the understanding of how disability is constructed and questioning the role of the state in this process might have therefore been more helpful in getting to the roots of Israeli ableism and in transforming them.

It seems, then, that the absence of a social construction critique had benefits and detriments. On the one hand, it liberated the activists to employ a model of disability rights that can easily accommodate claims for specific duties of the state towards PWD. This, in turn, helped develop mechanisms of assistance that fit the needs of people with developmental and mental disabilities or with severe physical impairments, creating no need to contemplate whether they contradict the new message of PWD as equals.[920] On the other hand, this discourse employs an essentialist view of disability; it conveys a message that there are true differences between disabled and nondisabled persons and among various groups of PWD.

[920] Within the social model framework, it is suggested that without the oppressive conditions that are imposed on PWD they would be free and independent.

b. Heroism Untouched – A Critique of Collectivism after all?

> *My feeling is that IDF veterans prefer to maintain forever the current situation. It is better to be a unique hero than a merely simple disabled person. It undermines the ideological ground under their wheelchair. Maybe this is why they do not cooperate with us. … They sit in silence in their golden ghetto. [They have comfortable lives] so why would they struggle for equality? … It makes me angry, exactly because I know that disability is a political condition. Our struggle will succeed only when IDF disabled veterans would be part of it. But this is a kind of secret that nobody talks about, and I am angry.*
>
> *Leah Lior, disability rights activist, 1998.*[921]

A second issue that points to the limits and difficulties of Israel's disability rights discourse is that it did not challenge the social hierarchy among PWD (between disabled veterans, the work injured, and the rest of PWD) in any direct way. As I argued throughout this dissertation, the structure of Israeli ableism is comprised of two hierarchies of power that mutually inform and reinforce each other: one is between disabled and nondisabled persons and the second is among PWD. I showed that the second hierarchy is reflected in and constituted by the differentiated regime of disability benefits and that its implications extend beyond the immediate material dimension. However, a close examination of the disability rights discourse reveals that it was focused more on the first component of ableism, i.e., the disabled-nondisabled distinction, and hardly on the second component, i.e., the inner divisions.

The disability rights activists' major message concerned the equal place of PWD in society, the full realization of which would mean that all PWD would enjoy similar rights without distinctions. That vision was also accompanied by hopes of an empowered community of PWD that would yield a strong disability movement. As I showed before, the idea of disability rights also entailed a vision of solidarity among PWD and

[921] Lili Galili, *Life Outside the Golden Ghetto*, Ha'aretz, 7/31/1998 (a profile piece on Leah Lior).

establishing a sense of a minority group. And indeed, in their texts, public appearances, and other efforts, disability rights activists have focused on the exclusion of PWD from public life and the forms of discrimination that they suffer. Yet they avoided addressing the hierarchy among PWD, its material, social, political, and cultural implications, and neglected to examine the relevance of those implications for the disability rights project, even though these disparities were well-known.

It should be noted at this point that by the time that disability rights appeared, the primary relevant hierarchy within the disability community was between disabled veterans (and the groups whose benefits are attached to them) and the rest of PWD. The erosion in the social status of the work injured resulted both from the inner dynamics among the various groups of PWD, and the decline in the place of social welfare in general. That process has reached a point at which the work injury program has lost its allure as the flagship program of the celebrated National Insurance Institute. Instead it became another low-rated social welfare program, situated better than disability insurance but far behind disabled veterans.[922]

Among PWD the feelings of unfairness with regard to the elevated and privileged status of disabled veterans are prevalent though rarely voiced publicly. Already in 1979, Miller, Procaccia and Kretzmer, having concluded their field research on the differentiated structure of disability benefits in Israel, reported that "out of the many talks we had with various disabled we realized beyond any doubt that the differential question

[922] Since work injury benefits were relatively generous and progressive, the work injured did enjoy economic security. Because it was insurance-based its economic legitimacy remained intact. As I argued earlier, the work injury program could have become a sound civil model for disability benefits but that possibility was missed largely because of the dominance of the Invalids Law that gravitated additional groups to attach themselves to the law and distance themselves from National Insurance.

occupies them on a daily basis. Their awareness to the question is accompanied by deep feelings of injustice among the disabled with inferior legal status."[923] Not surprisingly, then, one of the main demands of the organizers of the 1999 and 2001 strikes was to equalize health benefits among all PWD. In an address to the candidates for the 1999 elections Arie Zudkevich, the head of the Campaign for the Handicapped argued:

> The State of Israel treats [the disabled] unevenly. Apparently there are "privileged" ["meyuchasim"] disabled and "non-privileged" disabled who are pushed to the margins of society.
>
> For example … a "privileged" disabled who suffers from pressure sores will be entitled to a special sitting cushion that would prevent his wounds from bleeding, while a "non-privileged" would not be able to enjoy such a cushion and his wound would continue to bleed to the shame of the State of Israel.
>
> Similarly, a "privileged" disabled who needs a wheelchair will be able to receive it immediately and unconditionally. Compare this with the "non-privileged" disabled who needs to go through exams by various and different committees that extend for over a year sometimes, and even then he needs to pay his share in purchasing the chair in sums that he cannot afford.[924]

Although voicing a criticism against the disparities among PWD, even the Campaign for the Handicapped did not go all the way with its plight, as no further claims regarding the differences between other types of benefits among PWD, including the levels of allowances, were made. While healthcare is indeed a pressing issue, if addressed in isolation it maintains the medical framing of disability.

But the strikes evoked such strong responses that the broader aspects of the disparities were apparently felt by some disabled veterans as well. In a rare expression of self-reflection on his privileged position, Avihai Beker, a journalist in Ha'aretz, wrote:

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[923] ARIE L. MILLER, URIEL PROCACCIA, & DAVID KRETZMER, THE RIGHTS OF THE DISABLED IN ISRAEL: PROPOSALS FOR REFORM 9 (1979) (Hebrew).

[924] *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001, at 12-13.

"Lucky Me, I am an IDF Veteran."[925] Beker explained that when he saw the strikes he realized, more than ever, that

> while I am a member of a prestigious club that is an exemplary model (*mofet*) of rehabilitation, enjoying the services provided by the Ministry of Defense, which cares, pampers, and floods me with benefits (in some sense my injury has given me an economic jumpstart), [the common disabled] are knocking on doors, longing for charities. We are praised and they are perceived as a nuisance. … We are rightfully considered [the state's] dearest sons. At the same time the gap between us and other disabled is enormous … We talk about money here, but more than that on dignity."

A remarkable full fledged criticism of the relationships between disabled veterans and other PWD was expressed by Leah Lior, a woman who uses a wheelchair and an activist in Bizchut, in the interview with Ha'aretz newspaper, cited above.[926] Lior portrayed IDF disabled veterans as living in a "Golden Ghetto." Her observations surprised the journalist who described Lior's response to a question involving IDF disabled veterans as "unexpected." Lior said that she would expect people who enjoy generous support from the state to join the struggle and say: "Even we cannot get into the cinema ... even we cannot take our children to parents' day at school because there are steps there." Behind this disappointment stands the realization that all the financial support that disabled veterans receive from the state, including their allowances, accessible houses, and accommodated cars, are enough to make their personal lives easier and more convenient but not to allow them equal participation in the public and social spheres. Acknowledging the multifaceted implications of the divide between disabled veterans and other PWD, and particularly the privilege that the status of "hero" and not simply "disabled" confers upon them, Lior has made the additional more strategic point

[925] Avihai Beker, *I am among the Aristocrats*, Ha'aretz, 11/5/1999.

[926] Galili, *supra* note 921.

that as long as disabled veterans enjoy their heroism and are perceived as a totally distinct group from other PWD, a fundamental change in Israeli society is unlikely to occur. She concluded by stating that the disability rights struggle will succeed only when disabled veterans would join it.

Yet it seems that the working assumption of the disability advocates was against confrontation.[927] They probably thought that in a world of disability rights, as they envisioned it, which would benefit all PWD, the relevance of these issues would be diminished dramatically since the social conditions and relations that support the marginalization and exclusion of all PWD would be transformed. It is also possible that the rights advocates acknowledged the power of disabled veterans and therefore avoided confrontation, wishing tactically not to create antagonism towards disability rights among the public at large, who supported disabled veterans. Another possibility is that the rights advocates did not want to alienate disabled veterans from the struggle, hoping to mobilize them as well once they realize the advantages it carries for them. It is also not improbable that the rights advocates themselves have shared the view that disabled veterans are differently situated in relation to other PWD and consequently were not interested in challenging that assumption.

In any event, the result was that the disability rights formula was working within the collectivist imagery, which maintained a spatial separation between disabled veterans, the work injured, and the majority of PWD. By not challenging this hierarchy, which was informed by national values and collectivist ideology, a radical potential of the struggle was denied.

[927] Unfortunately, when I conducted my interviews I did not ask this question. My speculations here are based on the overall research that I made including the interviews and other materials.

Several problematic consequences are related to neglecting the hierarchy among PWD. First, notwithstanding tactical reasons and other justifications, I argue that by not confronting the tensions between disabled veterans and other PWD, this approach missed a fundamental element in the structure of ableism in Israeli society. It exhibits a narrow understanding of the hierarchies among PWD, which treats them as solely material and therefore not a matter of disability rights. Yet these disparities have also symbolic and political dimensions, and excluding them from becoming a matter of disability rights might contribute to the continuation of these patterns of power. In the next section, I explore the absence of disability allowances from the disability rights formula and go deeper into its understanding and treatment of economic gaps and direct cash benefits (the material aspect). In this section I shall focus on the symbolic and political dimensions of the separation between the privileged IDF disabled veterans and the "commons."

In challenging the hierarchy among PWD, the question should not be why disabled veterans receive so much,[928] but rather why do others receive so little? This question is not related only to cash benefits but also to the rationales that underlie the social services for each group.[929] While IDF disabled veterans enjoy an arrangement that manifests principles of integration and dignity, other groups of PWD are still subject to exclusion and isolation. In fact, community living, mobility assistance, aid in housing, vocational training programs, full access to healthcare and rehabilitation services, priority in employment in a form of affirmative action, and more are all benefits that disabled

[928] This is the question that is usually asked, *see* Chapter 5, notes 209-210 and accompanying text.

[929] This paragraph is based on the discussions in Chapter 5 regarding the allocative principles that underlie social welfare programs. *See* notes 169-171, 197-208 and accompanying text.

veterans have enjoyed since 1949 while the rest of PWD only recently started to struggle for, and most do not yet enjoy. It also concerns the differences in rationales for disability allowances for each group. While disabled veterans receive a respectable allowance no matter whether they work or not, the common disabled are denied their allowance as soon as they earn minimal income.

The common answer to the question regarding the hierarchies among PWD is that it is a moral obligation of the state to its soldiers because the state itself put them in risk and therefore should pay for it. In other words: the state has made those persons disabled and it is therefore responsible. I suggest that this very answer opens an opportunity to raise two complementary replies that challenge the common understanding of disability. The first could use the theoretical foundations of the turn to disability rights (i.e., the social construction of disability) to argue that the state disables *all* PWD through its inaccessible and unaccommodating social institutions and practices. The second could bring up arguments regarding the role of modern society in disabling people through its interest in technology and innovation and the related impossibility of drawing clear links of causality that distinguish between disabilities and illnesses for which society may or may not be responsible.[930] Such a discussion would complicate the understanding of society's responsibility toward PWD and would expose the assumptions that underlie it.

A second consequence is that the disability rights project is communicated and interpreted as an effort for the common PWD and not for the privileged. The separation

[930] The first part of the argument is illustrated though the examples of defective products and road accidents, two fields in which the state took responsibility due to its interest in innovation and technology. The second part is demonstrated through the extensive litigation over work injured benefits which dedicates much energy to deciding whether an injury or illness (e.g. heart attack) are work related or not. See Chapter 6, Part A, notes 266-267 and accompanying text.

in the Israeli pubic imagery between disabled veterans and other PWD is so strong and the belief that the state already responds well to the needs of disabled veterans is so prevalent that it conceals the fact that disabled veterans too suffer from ableism; that they as well could enjoy the structural change that disability rights propose.

Most obviously disabled veterans would benefit from the changes in the field of accessibility. As Leah Lior noted, even the most generous benefit program would not suffice if the public sphere is just inaccessible.[931] But disabled veterans would also enjoy the changes in the sociocultural meaning of disability since despite their glory their disability is eventually understood as inferiority, and their benefits and the compensation rationale that underlie them do not manifest acceptance of disability, but rather its rejection and denial.

This separation is demonstrated, for instance, in an article written by John Gal and Michal Bar, titled *The Needed and the Needy*.[932] This article provides a most comprehensive critique of the differences in status and benefits among disabled veterans (the needed) and the majority of PWD (the needy), yet its authors neglect to locate this dichotomy within the general context of the ableist power structure between disabled and nondisabled persons. At the end of their article they mention the possible impact of the ERPWDL, yet they discuss the law as a hope for the general population of PWD only, as if it does not concern disabled veterans. The general message is that disabled veterans have the Invalids Law that supplies all their needs and rights and the general population of PWD will have the ERPWDL.

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[931] Lior, in: Galili, *supra* note 921.

[932] John Gal & Michal Bar, *The Needed and the Needy: The Policy Legacies of Benefits for Disabled War Veterans in Israel*, 29 INT. SOC. POL. 577 (2000).

In addition, the ERPWD Bill itself maintains the separation between the common and the privileged PWD. Neither the introduction to the Committee's Report nor its substantive analyses of each field mentions disabled veterans as enjoying different benefits or as prospective beneficiaries of the law. Moreover, when the Committee's Report discusses the "lack of a body that would centralize, focus, coordinate, and initiate the activities of caring for, and treatment of, the disabled person,"[933] it seems to discuss the variety of bodies that the majority of PWD are in contact with, but not the existence of duplicate systems for disabled veterans and for other PWD. Presently, this duality represents the unequal spheres of disability benefits, but in the future, if disability rights would become a reality, these two systems will perform almost similar tasks that respond to similar needs of two similar populations that are separated only by the circumstances of their impairments.

Another example in that context concerns the proposed tasks of the Equal Rights Commission. The missions that were envisioned for the ERC included initiating reform proposals, supervising and consulting state agencies, promoting the ERPWDL principles, and so forth.[934] Yet it is doubtful whether the ERC was perceived as an address for disabled veterans' problems, or whether it was intended to supervise and consult the agencies that provide services to disabled veterans. Interestingly, one of the early origins of the idea to establish a central body that would coordinate and supervise the diverse agencies whose work is related to disability seems to be a letter sent to Bizchut by AKIM during the drafting process. In that letter AKIM argued that "in order *to guarantee operational activities towards equalizing rights* [among all groups of PWD], it is

[933] The Public Committee Report, *supra* note 804, at 4

[934] *See supra* Part B.b. notes 824-825 and accompanying text.

recommended that the law will require the establishment of a national authority that would coordinate among all these agencies."[935] In fact, already in 1974, Uriel Procaccia and Arie Miller promoted a one central agency that would rule and monitor the field, as it would inevitably face and handle the economic gaps.[936] Despite this background of inequality among PWD, this was not mentioned as one of the goals or reasons for the establishment of the Equal Rights Commission.

Notwithstanding the above critique, the separation also has its benefits, as it opens the possibility of challenging the hierarchy among PWD from below. Furnishing tools for common PWD to fight ableism generates a civil agenda that is free of militarism. Viewed this way, the joining of disabled veterans to the struggle might be all about what society owes its soldiers and the common PWD, along with the potential for a civil agenda, would be pushed to the margins once again.

The third and final comment on this matter opens a new issue that becomes more central as my argument progresses. That is the absence of a vision for disability allowances and particularly for disability insurance, which are also related to an implicit aspiration to separate disability and poverty. The comprehensive scheme of benefits which the ERPWD Bill seeks to provide will result in a welfare system, which although divided between disabled veterans and other PWD, would be hopefully "separate but (almost) equal" in terms of the human dignity and economic security that it provides to all PWD. Under this view, the advantage that disabled veterans have in terms of their monthly cash allowances would become irrelevant or insignificant. However, as I show

[935] Letter from AKIM to Bizchut, dated December 28, 1994 (on file with author) (emphasis added).

[936] URIEL PROCACCIA & ARIE L. MILLER, THE RIGHTS OF THE DISABLED IN ISRAEL: BASIC ISSUES 12 (1974) (Hebrew) (that was their book's main conclusion).

below, the relationships between disability and poverty are more complex and persistent than is admitted or acknowledged in the disability rights discourse. In the next section I shall claim that disability insurance was perceived by the rights advocates as part of the anachronism of the world of charity that renders PWD impoverished and powerless. It seems therefore that the disparities between disabled veterans and other PWD in terms of monthly allowances were also perceived as part of that same archaic charity world. For disability advocates, the way to address the economic gaps was not through direct distributive mechanisms that redress those gaps, but rather through altering the deeper social structure.

The attempt to bypass the link between the elevated status of disabled veterans and the levels of disability insurance allowances has yielded a "black hole" in the disability rights discourse with two major implications: first, the further legitimizing of the elevated status of disabled veterans; and second, the continuing dynamic in which the elevation of the privileged depends on the maintaining of a strict separation between the two and results in the downgrading of the non-privileged.

c. No Vision for Disability Insurance – A Rights Critique after all?

> *We are given poor and miserable allowances so that we live and be silent. They say: "nobody can tell us that we are an immoral society, because you are alive." But what kind of life are we talking about here? I am struggling so that a disabled could be part of society, and it starts with money and food. I want the disabled to live in dignity, to be able to go to work and contribute to society.*
>
> *Yoav Kraim, Campaign for Handicapped Persons in Israel, 2002.*[937]

The third difficulty with the Israeli disability rights discourse which I discuss here is also the most central to this project. I argue that the local disability rights formula

[937] Hagar Yanai, *Things I learned while Sitting*, Ha'aretz, 11/1/2002. A profile piece in Ha'aretz Magazine.

avoided the very issue of social insurance as a measure of economic security as well as a source of human dignity for PWD. In fact, as I show below, this is the only subject with legal implications that was totally abandoned in the process of formulating disability rights.

As previously shown, the ERPWD Bill did not neglect social welfare all together, but rather reconceptualized many welfare issues as disability rights-related matters. The drafters of the ERPWD Bill were very creative and at the same time detailed and concrete in redefining the relationships of specific social welfare issues and rights. Thus, the Bill included provisions regarding access to healthcare, arrangements supporting housing in the community with personal assistance allowances, education that fit each child's special needs, rehabilitation and vocational training programs as part of the right to employment as well as additional services that support participation in the labor market, and a separate section on special needs (which deserves further elaboration as I shall soon do). And yet no place was found for disability insurance or living allowances for PWD. I argue that the result was that the included issues were legitimized while the excluded ones were not or even de-legitimized.

In the following section, I focus on cash benefits, which stand at the core of my critique. I argue that while in general the Bill seems to espouse in-kind benefits (i.e., providing actual services), it distinguishes between two main types of cash benefits (i.e., direct payments). One type concerned money transfers that cover specific needs and the second concerns general living allowances.

i. Cash Benefits for Specific Disability Related Needs

The first type in my typology of cash benefits concerns direct payments that are designed to cover *specific needs that are directly related to one's disability*, where a link between one's disability and her need for the benefit is clear. This category includes a variety of provisions. Some of them, like personal assistance (for people who need help with everyday activities) and mobility stipends, are re-configurations of existing National Insurance benefits, and some are novel. This group of provisions is unique in that they seek to guarantee state assistance in fields where PWD require additional resources to enjoy rights that others enjoy freely. These resources are granted via direct money transfers, grants, and loans. Disability rights advocates justify those cash benefits on the basis of their function as a means to fulfill rights that were otherwise useless for PWD and therefore abstract. An archetypal example would be the formulation of personal assistance. Still defined as attendance allowance under the disability insurance section in the National Insurance Law, the newly designed entitlement to personal assistance was located under the right to housing in the community and guarantees PWD independence and dignified living at home and outside.[938] Similarly, financial assistance with housing is located under the same Housing in the Community Chapter, aimed at providing possibilities other than institutional care for people who cannot otherwise afford it.[939]

Three additional cash benefits for specific needs were gathered under the general Special Needs Chapter in the ERPWD Bill.[940] The first provides that a disabled person is entitled to benefits and discounts in acquisition of special equipment that the impairment necessitates. The second stipulates that a disabled person who needs assistance in making

[938] The Public Committee Report, *supra* note 804, at 59-65.

[939] ERPWDL §25(b); The Public Committee Report, *Id.*, at 59-65 and 69 (finding that institutional care is the norm under current state practice).

[940] ERPWDL §35-§39; The Public Committee Report, *Id.*, at 75-79.

life decisions is entitled to professional aid and consultation for that purpose (the provision aims to diminish the practice of guardianship). The third and final section concerns the legalization of the entitlement to mobility allowance, which allows people with mobility impairments to be part of the public sphere and to extend their personal relationships outside their home. This benefit is currently grounded in the Mobility Agreement and has no formal legal status of primary or secondary legislation.[941] The justification for these eclectic entitlements was not in their link to any specific right. It should rather be read in light of their location under the Special Needs Chapter, which (as a whole) is linked to the adequate services principle, which is in turn understood as allowing and maximizing the utilization of rights.[942]

The Bill also addresses a related disturbing practice of "offsetting allowances," in which a person is required to choose between allowances in cases where s/he is eligible for both. The National Insurance Institute did not allow some cash benefits to accumulate and required the beneficiaries to choose among them – an irrational requirement since the various allowances were aimed at covering different needs. I shall return to this issue later, but in this context the unreasonable requirement was to choose between attendance allowance, which relates to personal help at home, and mobility allowance, which relates to financial assistance with mobility costs (or accompaniment allowance for blind persons (*dmei livuy*)).[943] In addition, the Bill provides that the possibility of receiving both a mobility allowance and personal assistance would not depend on whether the

[941] On the history of the Mobility Agreement, *see* Chapter 7, note 142 and accompanying text.

[942] Clearly each one of these provisions can be easily linked to a specific right: special equipment to healthcare and fostering autonomy, mobility to freedom of movement, and decision-making to liberty, human dignity, and privacy, or even to the particular right to make decisions that the Bill created and that were already adopted into the ERPWDL.

[943] ERPWD Bill §9(1). The Public Committee Report, *supra* note 804, at 28-29.

person earns regular wage-based income or not, whereas before, a non-working disabled received reduced mobility benefits. Another related irrational requirement forced recipients to choose between a disabled child allowance, which covers general costs related to rearing a child with disability, and a child mobility allowance, which is related to extra costs due to mobility issues.[944] The Report notes the harsh criticism that this arrangement faced along the years, including a list of Bills that were recently submitted to the Knesset on the matter. Yet the relevant provisions were not among the ones that entered the ERPWDL.

The offsetting allowances issue was the closest that the disability rights discourse came to addressing the issues regarding the *level* of financial support for PWD. Interestingly, one of Bizchut's early petitions to the Supreme Court sought to ban the mechanism that requires choosing between the attendance allowance and mobility stipend.[945] The petition did not result in a court's judgment, although the criteria have changed a little. Instead, the petitioners were referred by the court to the legislature. This petition, which was filed in 1993, was an exception to the general type of case that Bizchut litigated. In fact, it was the only petition concerning cash benefits in the history of the organization. In it the petitioners argued that they are eligible for both benefits. The petition seems to be an important event in the crystallization of the adequate services principle, yet in the overall struggle the issue received little attention.[946]

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[944] *Id.*

[945] H.C.J 3173/93 *Shoker et al v. The Minister of Labor and Welfare* (unpublished) (on file with author). For a more detailed analysis of that petition, *see* Ziv, *Social Rights and Existential Needs*, *supra* note 839, at 842.

[946] While Neta Ziv (*Id.*, at 843) seems to find this petition interesting because it shows that struggles with complicated budgetary aspects are typically doomed to fail in courts and more likely to

Eventually this issue was among the major achievements of the 1999 strike.[947] Without getting into the details of the agreement that was signed with the government, the accumulation of mobility and attendance allowances was permitted; benefits for non-earning persons who were eligible to mobility benefits were improved; the attendance allowance for homemakers was equalized to that of other PWD (a formerly clear case of sex discrimination); and other mobility-related issues were addressed. In addition, the accumulation of the disabled child allowance and the mobility allowance was permitted for every child with a disability – even for families with more than one disabled child.

ii. Cash Benefits for General Living Expenses

The second type of cash benefits in my typology concerns basic disability allowances for general living expenses, as provided by all disability benefits laws (e.g., the Invalids Law and the National Insurance Law). These allowances are typically the base that all eligible persons receive depending on their level of disability, but not on any particular need.[948] The structure, definitions, and levels of allowances are different for each program. In all programs disability allowances are silent about what expenses they are meant to cover, namely whether disability-related or not. It is clear, however, that they are meant to cover everyday expenses, some of which might be related to disability, but the distinction between the two types of cash benefits clarifies what society is willing to acknowledge and cover as disability-related costs (together with in-kind benefits) and what society views as the responsibility of each person for herself or himself. The

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succeed in street protests, I argue that not including them in the agenda at all is a telling choice not in tactical terms, but in terms of the boundaries of the discourse.

[947] On the strike and its achievements, *see*, *In Struggle – The Bulletin of the Disabled Union*, Vol. 1, March 2001, at 8-11. *See* also Chapter 7, Part B.d. notes174-177 and accompanying text.

[948] For a table that outlines the basis for the three major allowances and comparing among them, see Chapter 6, Part C, note 268 and accompanying text.

question that becomes more central to the discussion is therefore *what disability costs*, namely what are the extra expenses for PWD in society, and whose responsibility is it to pay those extra costs.

That kind of general disability allowances was totally absent from the original Bill that was submitted to the Knesset, and in the revised ERPWD Bill it was just remotely hinted at. The ERPWD Bill mentioned disability allowances only indirectly in the amendments to the National Insurance Law that concerned "offsetting allowances." Moreover, these three amendments were not provided with a rights rationale or rights-reference, nor were they linked to the special needs principle.[949]

Previously I discussed the problematic rules that required choosing between an attendance allowance and a mobility allowance, and between a disabled child allowance and a child mobility allowance. The third amendment in that set was also the most complex issue – the relationships between old-age pension and disability insurance. It provided that the old-age pension for a person who was disabled beforehand would not be lower than the disability insurance allowance.[950]

While the existing law required recipients to choose between the two, assuming that these are two types of unemployment or retirement benefits, PWD claimed that, because they are disabled, their costs are different and even higher – they are both

[949] The original Bill did formulate this issue in more general terms under the General Principles Chapter. According to §9: "[e]ntitlements of a person with disability to adequate services for a special need shall not be abridged because of the existence of other entitlements based on other needs." Yet the explanatory notes mention only the tension between mobility and attendance allowance and neglects to mention the general allowances, which I think is not accidental (*Supra* note 802, at 630). Bizchut opposed changing the general rule to specific amendments, claiming that the general principle should remain as a guiding principle facing future events (The Public Committee Report, *supra* note 804, at 29).

[950] ERPWD Bill §9(1). The Public Committee Report, *supra* note 804, at 28-29.

disabled and old and therefore should be eligible for both allowances.[951] Note that what the requirement to choose between disability allowance and old-age pension reveals is that disability allowances were not intended to cover disability related needs. It was a "deserving poor" allowance.

In short, disability allowances were excluded from the ERPWD Bill. Moreover, neither version says anything about a right to economic security, to social insurance, or to a minimum standard of living, to name a few possible options. Such an option was presented before the drafters of the ERPWD Bill in a letter sent by the organization Community Advocacy (*Singur Kehilaty*). The letter commented on the first memorandum towards the new legislation prepared by Bizchut and distributed among disability-related and other organizations. The letter stated: "… we believe that granting basic rights to PWD does not depend on the implementation of non-discrimination legislation. We believe that *the right to adequate living conditions* as an independent fundamental right should be guaranteed."[952] Another option was available in the International Covenant on Economic, Social and Cultural Rights. The Covenant's Article 9 provides: "The States Parties to the present Covenant recognize *the right of everyone to social security, including social insurance*."[953]

It is clear that cash benefits were not rejected altogether – only those that were not linked to a specific disability-related need were rejected. Cash benefits were not meant,

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[951] See Chapter Two, note 298 and accompanying text on the history of that provision. This issue is complicated and beyond the scope of this project because old people tend to become disabled with time and their allowances as well are utterly insufficient to cover all their related expenses

[952] Letter from Community Advocacy to Bizchut, dated January 12, 1995 (on file with author) (emphasis added).

[953] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (emphasis added).

so it seems, to cover needs which are not disability-related, such as food, clothing, furniture, or cleaning supplies – the kind of universal needs that all people share and that advocates for poor people demand. That conclusion begins to expose the role that the relationships between disability and poverty play in this issue. The implicit aspiration to draw a line between disability-related and poverty-related needs, I argue, did not allow a formulation of disability allowances that acknowledges the complex relations between the two. One extreme possibility is that the Bill was effectively seeking to abolish disability insurance; another less provocative option is that the Bill was establishing a rigid separation between social security and disability rights as two distinct spheres.[954]

An illuminating provision in this context is §13(a)(6), which establishes a mechanism to supplement PWD's income when it is lower than minimum wage. This is a hybrid provision in which a working disabled person receives general cash benefits that cover no particular need, but nevertheless are considered part of a rights-based employment arrangement. The Employment Chapter in the ERPWDL eventually did not include that provision, but in 2002 regulations were issued under the Minimum Wage Law, 1987,[955] which enables an employer "to pay people with disabilities a lower wage if their level of output is significantly lower than that of employees in a similar position, while at the same time protecting people with disabilities from exploitation."[956] This provision, I suggest, represents the vision of disability rights advocates in which all PWD

[954] Absence of attention to social welfare was present in additional sections of the Bill. Thus, the provision concerning accommodations of legal proceedings did not address proceedings before administrative tribunals, and the accessibility part (§14-§24) paid no special attention to access to social welfare services (although it did specify a right regarding access to healthcare).

[955] Minimum Wage Law, 5747-1987, S.H. 68.

[956] Minimum Wage (Accommodated Wage for a Worker with Disability with Reduced Working Ability) Regulations, 5762-2002, K.T. 460. Quotation taken from Bizchut's Ten Year Bulletin ?? → CITE , at 30. Available online: http://www.bizchut.org.il/eng/upload/publications/Tenyearenglishfinal.pdf

work, and in extreme cases their wages are accommodated. By that it acknowledges, or maybe even embraces, the persistence of the capitalist order and its occupation with productivity in terms of efficiency, which are extended to the person who works yet cannot earn sufficient income.

I argue that the main problem with neglecting social insurance is, again, that a central foundation of Israeli ableism has remained intact, unaffected by the rights revolution. As I showed in this study, the structure of disability benefits had a fundamental role in the constitution of disability in Israel, and in the shaping of the disability community. The neglect to address this issue, I argue, amounts to another link in a long series of missed opportunities for a progressive scheme of disability insurance in the history of social insurance in Israel.

Again, public attention to the issue and some major achievements with regard to levels of benefits only arose following the 2001 strike.[957] In the agreement that followed this strike, all recipients of disability insurance received a raise to their allowances and additional mobility issues were addressed (on top of the achievements of the 1999 strike). In addition, old-age pensions for elderly PWD were raised to the level of disability benefits, (although the original demand was to enable the accumulation of both). The agreement also addressed the incentive to work system by providing that people with severe disabilities who live on disability insurance for a substantial period of time would be able to keep receiving their allowance if they start working yet earn below minimum wage. Finally, a committee was to be established to discuss mechanisms to encourage the integration of PWD into the labor market

[957] On the strike and its achievements, *see*, *In Struggle – The Bulletin of the Disabled Union*, Vol. 3, Spring 2002, at 12-14. *See* also Chapter 7, Part B.d., notes 178-180 and accompanying text.

The primary explanation of that neglect, as evoked by some disability advocates, was that this is not a struggle to handle with ordinary legal methods of litigation and legislation; that this kind of a struggle should come from the bottom, that the appropriate arena in which to conduct this struggle is the streets.[958] This argument sounds merely tactical and therefore in my opinion avoids the true challenge posed in the question. If disability insurance was agreed to be part of disability rights and the question was only strategic, then the difficulty would have been the lower priority of living allowances in the disability rights agenda, not its total absence. I would therefore like to offer a more critical account.

It seems that the simplest answer to the question of why disability allowances were left outside the rights formula is that they were considered part of the old world of charity that should be abolished, the epitome of anachronistic social welfare policy. Understood as merely acts of goodwill, they carried a message that disability is a static condition; that PWD are destined to live in the margins of society and not to be equal participants in its social, cultural, and political life; that they are non-productive and cannot become productive; and consequently, that they deserve hand-outs that would keep them alive but do not deserve to flourish and to become dignified citizens and human beings.[959]

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[958] This was the kind of reasoning which the lawyers who founded Bizchut were evoking (interviews with Neta Ziv and Ariela Auphir). In an article that Ziv published recently, she makes that argument more specifically, even though she also acknowledges that "the issue of allowances is a direct reflection of the idea of 'adequate services.'" Ziv, *Social Rights and Existential Needs*, *supra* note 839, at 844-845.

[959] This view of disability allowances was voiced most clearly in the Fundamental Principles document of the *Union of the Physically Impaired Against Segregation* (1976), cited in OLIVER, supra note 863, at 21-28. *See* also Silvers, supra note 854.

Moreover, social insurance, so it seems, was rejected because, like private charity, it was perceived as mere "cosmetics," a superficial social remedy that does not impact the social structure, but rather legitimizes it, and consequently hinders the revolution that rights were about to bring.[960] Within the disability rights formula that evolved, disability insurance, particularly in the form of living allowances, was perceived as a wrong that could be tolerated only as a transitory measure, until the transformation would be complete. According to this view, within time disability insurance would become irrelevant and unnecessary.

Yet the most fundamental explanation that I argue lies beneath the avoidance of disability insurance was the attempt to separate poverty and disability. Under this view, the particular need-tailored benefits, which were also clearly disability-related, were linked to costs and services that PWD require regardless of their actual economic situation. The problem with disability insurance, particularly in its current form as a living allowance, is that it establishes a link between disability and poverty. This link was not welcomed by rights advocates because it had no place in the world that they envisioned for PWD. In that world, PWD would not be poor because they are disabled, but due to other reasons. From this perspective the separation of poverty and disability was not strategic but rather rooted in the very assumptions of the discourse, according to which *poverty in itself is not a disability rights issue*. This leads to the questions that I discuss in the next chapter – the rationale for disability insurance and its underlying relationships between disability and poverty.

[960] The Fundamental Principles document, *Id*.

A related conclusion might be that the absence of social insurance and economic security from the ERPWD Bill re-exposes the role that neo-liberal ideas and productivity among them still plays in disability policy even among progressive circles: While all services that the Bill enumerates and promotes are designed to support disabled persons in their independent lives and enhance the conditions that allow their productivity, primarily through full employment, disability insurance was perceived (even if indirectly) as giving up productivity. This might mean that the disability rights framework did not entail a challenge to the dominant meaning of productivity but rather adopted it.

The last two points raise the question whether despite the sophisticated and socially oriented disability rights discourse that was developed in Israel eventually, the discourse still faces a classic critique of rights as a liberal-bourgeoisie concept that serves the powerful, particularly the interests of property owners and capital holders..[961] Another way to approach this critique is through Nancy Fraser's critique of the politics of recognition as overshadowing the politics of redistribution that preceded it. It is typical of recognition-focused movements to ignore the redistributive aspects of their plight, thus eventually cooperating with the neo-liberal turn of the 1970s.[962]

The question regarding the boundaries of the disability rights discourse becomes more clear and acute in light of the 1999 and 2001 strikes in which grassroots voices of

[961] Morton J. Horwitz, *Rights*, 23 HARV. C.R-C.L L. REV. 393 (1988). Note that despite my critique I do not advocate the abandoning of rights. Neither I endorse them as the ultimate device to promote social change and to dismantle power structures. I examine rights as the particular paradigm and a concrete resource that was developed in a certain era and ask what it entailed and what it missed or neglected. Rights in my view are a process and not an outcome, as I shall explain later, and the critique of rights is an important, yet not exclusive, aspect of my understanding of how they work. On the constitutive approach to rights in sociolegal studies, *see* Chapter 9, Part C.

[962] THE RADICAL IMAGINATION: BETWEEN REDISTRIBUTION AND RECOGNITION (2003); NANCY FRASER AND AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003).

disability activists have presented disability insurance as the most pressing matter in their lives. The strikes have highlighted the low socioeconomic status of PWD and triggered some actual changes. Yet the disability rights advocates were confused and conflicted about the struggle over stipends, as they saw it as anachronistic. Thus, while they did provide legal counseling services to the protesters behind the scenes, they did not join the strike with their full forces – they did not sit in the tent, did not lobby for the strike's demands before the Knesset and government officials, and they did not take any active action. The protocols of Bizchut from around that time indeed reveal inner conflicts, and interviews with activists show that heated debates took place with regard to whether Bizchut and the Coalition to Promote the ERPWDL should be more actively involved.[963] Like other journalists and commentators, rights activists saw the strikes with mixed responses, as a spectacle of solidarity and misery at the same time; as manifesting growing visibility and assertiveness of PWD on the one hand and a step backward towards charity and pity on the other.[964] But more fundamentally, having excluded disability allowances from the rights agenda, a struggle over disability allowances was perceived not only as a step backward from the disability rights project, but maybe even a direct challenge to its basic assumptions.

For the organizers of the strikes, civil rights were something for later stages in the overall struggle; they were not entirely outside the struggle although their priority was low. In the 1999 strike, for instance, disability rights were included in the initial agenda but were soon deserted. But first priority was granted to the struggle over disability

[963] The Protocols are on file with author. Based on interviews with Rivka Sneh, Gideon Drori, Simcha Benita, Achiya Kamara, Ariela Auphir, Sylvia Tessler Lozovick, and Neta Ziv.

[964] See Chapter 7, Part C.d.

allowances as a struggle over the fundamentals of their being – their economic security and physical survival. Thus, Momo Nekave, one of the organizers of the strikes, was cited as saying: "Our people are desperate. Our struggle is on *the right to life*, because in the current situation many hardly live."[965] In encounters with rights advocates they claimed that rights are a utopian ideal and that current pressing issues cannot be ignored in the name of a future revolution, even an attractive one.[966] As Yoav Kraim said: "Our approach to rights is evolutionary not revolutionary."[967] His critique of Bizchut is that "Bizchut is guided by ideology. We have no problems with that but there is a great distance between theory and reality and life requires compromises so that people and their happiness would not be sacrificed for that ideology … Our vision about allowances is the same … but in the meantime nobody should starve." He concluded that topic by saying "Bizchut are not ready to talk about needs, on the 'here and now.'"[968]

For these local activists disability allowances indeed concern the "here and now;" the immediate and basic issue that is shaping their life conditions, but their grand vision was nonetheless of rights, dignity, and participation and integration in the labor market. Gradually the Campaign for the Handicapped developed its own rights formulation for its demands. After the 2001 strike, its activists increasingly talked about allowances as rights, as a mechanism that aims at bridging the gap between the costs of living of a disabled person to that of a nondisabled person. The level of the gap depends on the level of services provided by the state. Moreover, they advocated "disability allowances [as] an

[965] Cited in: Ruti Sinai, How Do You live from a 1,740 NIS a Month?, Ha'aretz, 2/20/2002 (emphasis added).

[966] Interview with Yoav Kreim; Yoav Kraim, talk in a panel on the disability protests at Tel Aviv University (script of panel on file with author).

[967] Interview with Yoav Kreim.

[968] Interview with Yoav Kreim.

investment that allows the disabled to secure his unique needs, to integrate in the country's life and contribute to it. We need a new balance between disability and wage-earning so that the disabled and the state would pursuit the integration of the disabled as an active and productive worker on the one hand, and that the quality of life of the disabled would not decline."[969]

In the agreement with the government at the end of the 2001 strike, the organizers insisted on a provision that guaranteed the establishment of a public committee that, among other things, would discuss ways to encourage and provide incentives that would allow PWD to work and earn their income while still enjoying mechanisms that guarantee easy transition in terms of financial support (e.g., eligibility for an allowance if income is below minimum wage). The Campaign for the Handicapped indeed insisted on the establishment of such a committee and participated in its proceedings. The Public Committee to Review Matters Concerning Disabled People and to Advance their Inclusion in the Community (also named the Laron Report, after Judge Laron, the head of the committee) published its report in March 2005.[970]

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[969] A memorandum submitted to the government by the Campaign of the Handicapped People in Israel regarding the establishment of a public committee as part of the agreement that at the end of the 2001/2002 strike. Dated May 9, 2002 (on file with author).

[970] See the full report on: http://users.tapuz.co.il/forums/laron-x.pdf. A comprehensive analysis of its recommendations is beyond the scope of this project at this point. The government website reported that: "The Committee decided to concentrate on recommendations that would lead toward improving the quality of life of people with disabilities and to their inclusion in society and employment. In this context, the Committee focused on encouraging employment, which constitutes a basis for improvements in all areas. The members of the Committee believe that the disabled must be afforded a wider degree of participation as a solution to their problems and indicate the need for policies based on consideration and the promotion of autonomy." As this text already reveals, from a disability critique perspective, a basic fault of the report is that understanding of employment as a problem of the disabled person, and not a social disablement. Thus, the report develops advanced mechanisms to support the entrance of PWD to the labor market, but ignores the societal aspects of employment discrimination and other structural problems. A second issue, which stands at the center of other PWD's criticism of the report (who already organized an anti-Laron Report campaign) is that the levels of disability allowances were basically remained the same, i.e. on poverty lines. While according to the report people who go to work will not lose their benefits at

Ironically, the Campaign for the Handicapped encountered much criticism regarding the report, arguing that they deserted the goals and the people they represented by sitting on the committee.[971] The heated debate surrounding the Laron Report just reinforces my argument regarding the central place the disability allowance plays in disability politics in Israel. The following are illuminating statements regarding the major demands of the opponents to the Laron Report:

> The Report continues and perpetuates the historical injustice: the link between allowances and wage income. We argue: it is the right of a disabled to work and earn wage dignifiedly without losing his allowance, as it is now among other sectors of disabled. Once and for all this link should be discontinued, or, alternatively, all disability allowances and eligibility criteria should be put on equal grounds.[972]

More specifically:

> There is a need for a General Disabled Law that is similar to the Invalids Law and the work injure program. Clearly, there is a need to create an equal and unified legal framework that would apply to all of the disabled. We demand to consider the nature of the disability and not its circumstances, and to equalize the conditions of the disabled in Israel.[973]

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once, the reform does not improve the economic situation of people who live on disability insurance. The opponents of the Report admit its importance in some aspects but argue that underlay it an aspiration to keep the expenditure on disability allowance low and to create incentives to work that might bring people to lose their benefits (e.g. the requirement to participate in rehabilitation program as a condition for receiving benefits). For a full fledges critique of the report, see the following document that was written by Kobi Cohen, a leader of the struggle against the Report and the spokesperson of Keren organization (*Keren – K'tu'ei Raglayim Nilchamim* (*Legs Amputees Fight Back*), titled: The Laron Report – Why it is Important to Stop its Implementation (available on: http://mate.ios.st/IOS/Users/mate.ios.st/Files/3546613314.pdf).

[971] For the content of the opponents' critique, *see Id*. This debate among PWD concerning the report began in the online forum on Tapuz.co.il, and gradually gained momentum and lead to a new gathering of PWD who oppose the Report who now have their own website and who even initiated a new strike of PWD on October 2005. *See e.g.* a letter sent by the Roof Association for the Organized and Unorganized Handicapped to the Prime Minister Ariel Sharon explaining their objections to the report and complaining for not being represented or involved in the Committee's proceedings, dated 7/31/2005 (Available on: http://www.center4all.com/BuildaGate4/portals/disable/imagesP/sub23/237628558.jpg).

[972] The Laron Report – Why it is Important to Stop its Implementation, *supra* note 970, at 9.

[973] *Id*., at 42.

This latest development in disability activism not only offers a more radical view of disability allowances, but also for the first time brings the disparities among PWD to the center of the discussion and makes the arrangements for the privileged PWD the basis for their demands and proposals.

I argue that the conflict over the role of social insurance benefits represents not only a disagreement about the goals of the disability movement but also a limit on the potential of the rights effort and its inclusiveness. Since the issue of social insurance was ignored, disability insurance recipients felt alienated and misrepresented. And thus, although as I showed before, the rise of rights has contributed to processes of identity construction, group formation, and movement-building among PWD, it was perceived as insufficient by some of its major prospective beneficiaries. The higher symbolic status and the political power that disability rights promised were incomplete as the efforts of naming and translation stopped short of PWD's basic needs – a dignified standard of living and economic security.

For poor PWD the distinction between disability and poverty was nonexistent because their daily personal experiences have proved the many links between the two, and the role of productivity in shaping the relationships between them. In sum, while for all other social welfare benefits, whether in-kind or cash benefits, the ERPWD Bill has provided a framework to think about in terms other than charity, and even furnished guidelines for maximizing their utilization, social insurance has remained untouched. The centrality of disability insurance in many PWD's lives and the role of living allowances as a means of survival for them were not acknowledged. They were put aside not because of a need to *prioritize* the struggle's goals; but rather because they *contradicted* its goals.

The disability rights formula that could tolerate dependencies and special needs of various kinds could not tolerate the living allowances of disability insurance and could not envision a different form of disability insurance.

Moreover, as I show in Chapter Nine, including a right to adequate living allowances could have contributed to a more egalitarian regime of benefits among all PWD; it would have completed the spectrum of services and benefits that the Bill guarantees, and contributed to closing the gaps among PWD and to establishing a more egalitarian notion of state responsibility towards all PWD. Formulating a right to living allowances could have been one possible way to address the hierarchies of benefits directly and the fundamental issues of economic security and a decent standard of living for PWD. The main challenge would be to articulate and structure these allowances not as compensation for being disabled but rather as a way for society to pay for its part in disabling PWD.

CHAPTER NINE:
Between Evil and Hope: A Preliminary Framework For Re-constructing Disability Allowances

Thus far I have pointed at three missed opportunities to interpret and construct disability allowances in a way that grants PWD economic security and a dignified standard of living. In this part, I provide a preliminary framework for thinking critically on disability allowances. Yet a few caveats are necessary before I proceed. First, my goal is not to provide a detailed reform proposal but to expand the social imagination to alternative conceptualizations of disability allowances, to continue the discussion about their role and meaning. In addition, budgetary concerns are beyond the scope of this discussion. Though I do not ignore their significance in later stages of implementation, the main goal of this project is to develop additional forms of resistance to ableism. Finally, the concept of disability allowances that I envision here is not based on the assumption that allowances are an end in and of themselves, or that having disability allowances would provide the ultimate solution to the problems of marginalization and exclusion of PWD. Nor do I think that conceptualizing disability allowances as a right – and I discuss later what rights mean – will make them firm and secure.[974] But I do think that acknowledging the necessity of disability allowances is crucial for the project of dismantling ableism. It is a recognition that disability allowances are essential and it goes hand in hand with the aspiration that there will come a day that they will not be necessary anymore, at least not in the lives of so many PWD.

[974] I also do not suggest that rights are the best solution to PWD's social hardships and suffering, or the most effective form of resistance. I take rights as the current comprehensive legal language with which to address the marginalization and exclusion of PWD.

The primary tension that underlies this Part's discussion is, therefore, between disability allowances as *evil* – a pronouncement and perpetuation of the ableist structure of society, and as a *hope* – a response to a pressing necessity, an expression of social responsibility, and a means to redress the continuing wrongs of ableism and to provide economic security and human dignity for PWD. My purpose is to work within this tension and not necessarily to resolve it. Acknowledging the tension between evil and hope is the first step in thinking critically about disability allowances; it means to acknowledge their unavoidable yet undesirable character. That means recognizing the necessity of disability allowances while at the same time striving to make them unnecessary, unneeded, and even useless. This tension is familiar in other realms of antidiscrimination law as well. Affirmative action policies, for example, experience this same tension as they interfere with what society is doing wrong but simultaneously face the risk of reinforcing that wrong, and therefore at their core are understood as a temporary measure.[975] Later I shall indeed suggest that one way to view disability allowances is as a form of affirmative action that redresses PWD for the extra costs of their disability in a society that is inaccessible and is not yet willing to become fully accommodated.

Acknowledging the necessity of disability allowances relies on three related sources: the first concerns the life experiences of PWD; the second regards the continuing and complex relations between disability and poverty; and the third involves the view of rights as process.

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[975] MARTHA MINOW, MAKING ALL THE DIFFERENCE 47, 385-387 (1990). For a review of United States history of affirmative action policies and the debates that surrounded them, *see* CHARLES R. LAWRENCE III AND MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

A. Listening To Voices of PWD

One central reason to acknowledge the necessity of disability allowances is rooted in the life experiences of PWD. Currently, there are a disproportionately large number of PWD who live under poverty, making economic survival the most pressing issue in their lives. As the 1999 and 2001 strikes as well as the anti-Laron Report campaign have so powerfully shown, for PWD in Israel, disability allowances are about the here-and-now, while disability rights that attempt to restructure society are perceived as a long-term goal, if not a utopian ideal. The context and content of these claims were already discussed in previous chapters. Here I will focus on the need to listen to these voices.

Listening to PWD's voices is important as a corrective methodology that deviates from the history of PWD, in which they were paternalistically told what was good for them and were excluded from decision-making processes that concerned their lives. This argument is usually directed at state agencies and representatives, but in this case I aim it at disability rights advocates. If the issue of disability allowances occupies the most vocal arena of disability activism in Israel today, then this is an issue to address and consider in critical terms. It cannot be dismissed as irrelevant to the struggle of disability rights or as a matter of almost "false consciousness." As Iris Young so powerfully phrased it: "Rational reflection on justice begins in a hearing, in heeding a call, rather than in asserting and mastering a state of affairs, however ideal."[976] Young cites Lyotard, who argues that in "the game of the just," unlike other language games, "ones speaks only inasmuch as one listens, that is, one speaks as a listener, and not as an author."[977] Among

[976] IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 5 (1990).

[977] JEAN-FRANCOIS LYOTARD AND JEAN-LOUP THEBAUD, JUST GAMING 71-72 (1985) (cited *Id*., at 4).

disability studies scholars, this has been a specific concern that is situated in the history of disability.[978] At the same time, the issue of disability allowances cannot be embraced unequivocally only because PWD demand it. Critical listening means that "voices from the bottom" are taken into account but examined and judged in light of other principles and in light of their own historical, political, and socioeconomic context.

For starters, the demands for dignified disability allowances should not be viewed as a naïve and misguided belief in their power. In a reply to the critique of rights, as raised by critical legal studies, critical race theorists have developed the notion of double consciousness. Double consciousness means that disadvantaged groups' demand of rights is more complex than mere fascination with rights and an inability to comprehend their limited and sometimes oppressive power. Mari Matsuda, for instance, argued that oppressed groups demand rights not because they are captives of the myth of rights, but rather because rights provide a means for hope, while still acknowledging that in current reality rights might mean very little in the life of an African- or Asian-American person.[979] The same can be said about a disabled person who demands that disability allowances are granted as a matter of rights – she does not necessarily think that disability allowances are the quick and easy repair for PWD destitution since her everyday experiences tell her how long the road will be before equality is achieved. Nevertheless, formulating disability allowances as a matter of rights is an act of hope that primarily represents a call for a struggle.

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[978] SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 134-142 (1998).

[979] *See* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIVIL-RTS, CIVIL-LIBERTIES L. REV. 329 (1987).

B. Challenging Relationships: Disability and Poverty

In the case of disability allowances, the move towards the historical, political, and socioeconomic context first requires a closer look at the relationships between disability and poverty. PWD's plight is a result not only of their overrepresentation among the poor, but is an outcome of the consequences of being poor. In my view, beyond personal experience, the necessity of disability allowances is more fundamentally an acknowledgement of the complex relations between disability and poverty as tightly connected and co-constitutive of each other, as is shown by the history of the modern welfare state as well as recent accounts of disability rights struggles.[980] The boundaries between disability and poverty were historically a matter of constant negotiation as persistent attempts to associate and disassociate between the two categories, to draw them together and to set them apart, were constitutive of capitalism's definition of the labor force and of welfare's definitions of desert and need. As Deborah Stone has most clearly shown, the origins of many modern welfare states are rooted in striking the line between the disabled and the nondisabled as a means to distinguish between those who are exempted from work, and those who are required to earn their own income.[981]

The English Poor Laws, for instance, were a well-known historical attempt to distinguish the deserving from the undeserving "idle" poor, between those who deserve charity and protection of the state and those who are expected to work.[982] Similarly, the debates in the Unites States over social security programs involved questions about the

[980] Jennifer Pokemoner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L. J. 425 (2001).

[981] DEBORAH A. STONE, THE DISABLED STATE, (1984).

[982] STONE, *Id.*, at Chapter 2.

fluid boundaries between the two categories and the role of medical versus socioeconomic components of the definition in broadening or narrowing the scope of the population covered by the program.[983] In Israel, too, the Sa'ad program, and later on, disability insurance, were engaged in drawing the boundaries between disability and poverty. The definition of disability in the disability insurance program employs a combined test that includes medical and socioeconomic components which mandate inquiries of the person's ability to reach a minimum income level, or the reduction in her income capacity (50% or more).[984] In fact, the presence of a need rationale is a good indication of a site where the lines between disability and poverty necessitate interrogation.

Yet the case of disability hierarchies in Israel teaches (for other contexts as well, although with variations) that even the privileged PWD could not avoid the impact of the disability/poverty dyad. As categories that are products of social welfare policy, they were explicitly motivated by the concern of poverty. That motivation was informed by the view that these PWD do not deserve to live in poverty nor on the edge of the poverty line. In other words, they deserve to live with economic dignity. Implicit in that scheme of benefits is the notion that other PWD were not deserving of economic security. Their designation was to live, but their survival was craftily maintained below poverty lines. Consequently, for the privileged groups of PWD, becoming poor was in fact the ultimate

[983] At the end there were three major types of programs: a work injury program that was enacted in 1935, a disabled workers program from 1956 that covered all contributing workers who paid their social insurance fees (SSD), and a general public assistance program that covered PWD who could not enjoy social insurance programs. STONE, *Id.*; Williams H. Simon, *Rights and Redistribution in the Welfare System* 38 STAN. L. REV. 1431 (1986); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, (1993);

[984] See Chapter 6, Part C.

mark of becoming "truly" disabled. Compensation and insurance are therefore attempts to break the link between disability and poverty.

Furthermore, it was not just the welfare imagery that was occupied with disability and poverty; disability rights as well envisioned a new place for PWD in society that would be liberated from poverty and even from welfare. In one provocative article, Samuel Bagenstos even argued that the ADA was marketed as welfare reform.[985] Laws against employment discrimination of PWD and rules concerning accommodations in the workplace were the primary mechanism through which that occurred. Concerns about disability and poverty were also present among Israeli disability rights advocates. Their detailed rights model shows that they understood that fulfilling PWD's rights requires additional specific measures in the forms of social rights and in kind and cash benefits, which would help reduce the socioeconomic gap and would break the poverty cycle. However, as I previously argued, the line that was drawn between disability-related needs and needs related to the (assumed to be) separate problem of poverty, reveals an underlying aspiration to separate between poverty and disability.

The predicament of poverty and disability is therefore as follows: linking disability and poverty might perpetuate the stigmatizing views of disability as inferiority, lack of productivity, worthlessness, and passivity, while separating disability and poverty ignores the complex relations within which poverty and disability are constitutive of each other. Yet the choice between the two involves additional consequences that shed more light on the deeper meaning of the predicament. These consequences are related to the

[985] Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 930-52 (2003) (Bagenstos shows how the ADA was warmly accepted by policymakers because it was understood as a welfare reform that would take PWD off welfare rolls and put them on payrolls, a view that is problematic because accommodations are not enough of a measure to overcome the long history of exclusion of PWD from the labor force).

realm of activism, coalition building, and strategic alliances. Separating disability from poverty generates a politics oriented to the inner group, which encourages PWD to find what unites them as a group and what distinguishes them from others. It allows PWD to distance themselves from pity, misery, and indigence, and instead dedicate their efforts to fostering activism in the realms of disability pride, identity, and culture. Yet such a direction contributes to more rigid boundaries between PWD and other social groups, who in such a "politics of recognition" climate would also focus on inward group-based politics.[986] Conversely, linking disability and poverty blurs the boundaries between disadvantaged social groups and allows more space for alliances among them.[987] This is so not only because, as the Marxist-Socialist argument goes, the most fundamental power structure in society is that between capital owners and the capital-less proletariat. Nor it is because all disadvantaged groups are disproportionately poor. It is because other social categories, such as gender, race, sexuality, and ethnicity, are inexorably constitutive of and constituted by poverty.[988]

The question of coalition-building with other groups in the realm of disability allowances is particularly challenging because it requires exploring the differences between the forms of poverty that PWD experience in relation to other groups, and whether the meaning of the struggle for dignified disability allowances is that only PWD deserve to live above poverty lines while other poor people should stay below them. It is possible that thinking through those issues would require a broader reform that attends to

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[986] THE RADICAL IMAGINATION: BETWEEN REDISTRIBUTION AND RECOGNITION (2003); NANCY FRASER AND AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003).

[987] Malhotra Ravi, *The Politics of the Disability Rights Movement*, 7(3) NEW POLITICS 65 (2001).

[988] Pokemoner & Roberts, *supra* note 980 (claiming that disability and illness are distributed in ways that reflect gender, racial, and economic inequalities).

the needs of PWD as well as to other indigent people. I shall return to these questions later.

C. Rights and the Persistence of Poverty – A Process Approach

The plight of PWD, together with the complex relationship between disability and poverty, challenges the current disability rights discourse in two main ways. The first challenge, which is also more vocally advocated by disability activists, concerns disabled people who do not yet participate in the labor force because of various economic, social, and political reasons. This challenge focuses on their status in the period until disability rights become a reality, if that ever occurs. The second challenge lies in the group of PWD who will never be able to work, a definition (and assumption) that is very problematic in light of the history of disability, but that touches upon the deepest assumptions that underlie disability rights.

I suggest that the first challenge calls to focus *on the interim period between the present*, when suffering is rampant, *and the imagined future*, where there is no suffering, as it opens new ways to think of disability allowances and raises different sets of questions. Consequently, both the shortsighted view of this transitory time as the destiny of PWD and the farsighted view of it as a marginal time that cannot be part of the grand vision of disability rights are revealed as insufficient. Moreover, structuring the issue as a conflict between the shortsighted, who focus on the present, versus the farsighted, who seek a better future, would be rejected as a limited approach. Instead, the focus is shifted to the meaning that is assigned to that time period, and to the measures that should be taken while working towards a new regime. Thus, an important question to consider is who should pay the price for society's ableist power structure and its consequences until

ableism became dismantled. Clearly, avoiding disability insurance would mean that society is not required to pay the full price for its historical wrongs and for its continuing ableist norms and practices. That means that until society would be fully transformed PWD would remain poor. And indeed, what underlay the strikes was the unwillingness of PWD to keep paying that price.

Furthermore, focusing on the interim period involves a greater challenge to rights as it calls for the realization that society might never be fully transformed and that PWD will need disability allowances to survive for a much longer time than disability rights advocates would want to believe and are willing to admit. The argument that disability rights are indeed a utopian ideal that will never reach full realization is not so radical in light of the history of rights struggles.[989] That history shows that even heralded rights victories such as *Brown v. Board of Education*[990] or *Roe v. Wade*[991] are part of long processes that had ample failures and defeats, and that rights do not make poverty go away. Still, the fundamental problem for disability rights advocates with poverty is that their goal is to eradicate poverty from PWD's lives. Hence, any measure that acknowledges the persistence of poverty is in essence a threat as *it symbolizes the futility of rights*, and more broadly, the impossibility of creating a world with no barriers to PWD.

Working out the tension between disability allowances as evil and hope, a necessity that is at the same time unavoidable yet undesirable, requires *a different view of rights* (and similarly of *law*) – *as a process rather then an outcome, as a resource rather*

[989] And as the history of social welfare teaches us as well.

[990] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[991] *Roe v. Wade,* 410 U.S. 113 (1973).

than a "thing," as a terrain of ongoing struggle rather than a promise for stability. Rights in this view belong to the contradictory and conflicted dynamics of legal and social relations rather than to abstract theoretical inquiries. And finally, rights in this view are constantly produced and reproduced rather than given.[992] Interestingly, disability rights advocates were willing to acknowledge some aspects of the difficulty with disability allowances, particularly its status as a temporary measure, as characteristic of the entire equality legislation of PWD. Thus, Auphir and Orenstein, two of the most influential figures in the legislation process of the ERPWDL, concluded their article with the following sentence:

> Indeed a paradox. On the one hand, by enacting the ERPWDL a new age has started in the annals of the struggle for equality and social justice in Israel. On the other hand, Israeli society's greatest achievement will be the day that it would be found obsolete.[993]

Another set of issues arises from a second challenge to the effort of rights, and that concerns the group of PWD who will never be able to work. This question is extremely complex because the very project of disability rights is to challenge and narrow the boundaries of that group by claiming that many PWD who are currently assumed to be unproductive can in fact become part of the labor market. Still, one should admit that there is a group of people, particularly those with severe developmental disabilities, who cannot perform any work (of wage labor type). Although this is a

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[992] SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 145 (1990) (based on her field work on rights, Merry found that "rights come to be opportunities for action, not guarantees of protection"). For similar approaches to rights. *See also* MICHAEL W. MCCANN, RIGHTS AT WORK – PAY EQUITY REFORM AND THE POLITICS OF POLITICAL MOBILIZATION (1994); JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS (1996); HELENA SILVERSTEIN, UNLEASHING RIGHTS – LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996).

[993] Ariela Auphir and Dan Orenstein, *Equal Rights for People with Disabilities Law, 1998: Emancipation at the End of the 20th Century*, *in* MENACHEM GOLDBERG BOOK 42, 87 (Aharon Barak et al eds., 2002).

marginal group, focusing on it assists in pressing the question: what about those who need public support for food, clothes, and furniture, without mentioning yet leisure activities, such as a vacation or a movie. Having no general disability allowance must therefore assume something else – that there are dignified living allowances of other types that PWD can enjoy. Are they ignored because they are perceived as unproductive? This is the point where strategic alliances with other disadvantaged groups rise again and where "mere poverty" becomes a major concern for disability advocates as well. The inevitable conclusion is therefore that the scheme of disability rights must depend on a strong social insurance mechanism that is either particular to PWD or universal to all people in poverty. And that is the topic of the next and last section of this project.

D. Possible Directions for Reconsidering Disability Allowances

In order to reconceptualize disability allowances as a matter of rights, it is necessary to consider what they intend to cover. The traditional way to understand disability allowances is as a sub-type of the old form of social welfare living allowances that intends to cover basic needs such as food, shelter, and clothes. Yet another more critical way to understand disability allowances that I present here is as a new form of benefit that covers unspecified disability-related costs that stem from society's continuing ableist institutions and practices. A third option is to integrate the above two by arguing that disability allowances should be at a level that covers both basic needs and additional extra costs.

The option of disability allowances as mere living allowances carries the risk of perpetuating the marginality of PWD and legitimizing the ableist power structure. Just like the current model of disability insurance, it is almost destined to have "need" as its

guiding allocative principle and thus to maintain PWD's poverty and inferiority.[994] Even in a more generous format, this is the structure most likely to reproduce the power relations to which PWD are subjected, which is manifested in a view that the problem of poverty is rooted in the individual and does not acknowledge the role of society in generating indigence and disablement. The Invalids Law is a good example in this context. Although generous and although it acknowledges the role of society in disabling soldiers, its underlying compensation principle reveals that it manifests a rejection of disability. Under the Invalids Law, society takes responsibility over the disabling event but not over the continuing social disablement that PWD face. This model is therefore also highly unlikely to change the hierarchy of benefits among PWD.

Another way is to understand disability allowances as a payment of society for its role in disabling PWD and for the time that it takes until social barriers that PWD face disappear. This view considers the extra costs of disability as a matter of social responsibility and not an individual burden. This rationale was developed by the Campaign for the Handicapped who, as I showed earlier, promoted a view of allowances as rights that aim at bridging the gap between the cost of living for a disabled person and that of a nondisabled person. This view also stressed that the level of the gap (and therefore of the allowance) is dynamic, as it depends on the level of services provided by the state. Recall the group's memorandum, which argued that "*disability allowances are an investment that allows the disabled to secure his unique needs*, to integrate in the

[994] Anita Silvers, Formal Justice *in* ANITA SILVERS, DAVID WASSERMAN, AND MARY B. MAHOWALD, DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE BIOETHICS AND PUBLIC POLICY 13 (1998).

country's life and contribute to it."[995] In accordance with my earlier critique of the disability rights discourse, I should add here as well that in my view the gap between the cost of living of a disabled person and that of a nondisabled requires further problematization. While the Campaign for the Handicapped views the state as responsible for providing appropriate care and treatment for every person, it does not mention the role of the state in creating social, cultural, and political barriers, and it neglects to mention forms of discrimination and exclusion that contribute to this gap.

A revised model would therefore include the following elements: first, acknowledgement (and in fact exposure) of the social, dynamic, and interactive nature of disability; and second, shifting the costs of disability to society, which is found accountable for denying services and for not ameliorating all forms of discrimination and exclusion of PWD. An even more radical version of such an allowance would demand that any disabled person, whether working or not, rich or poor, will receive it because it is not intended to be a replacement of wages but rather to cover extra costs imposed upon PWD, in comparison to other non-disabled people, working as well as non-working. Moreover, once the rationale of ableism that underlies disability benefits programs is exposed, no program can escape it. If at all, according to this logic, disabled veterans should receive lower levels of disability allowances than other disabled persons because the services they enjoy are more comprehensive, progressive, and generous. Such a formulation creates a form of compensation not for the inferiority that is associated with disability, but because society has a role in social, cultural, and political disablements that

[995] A memorandum submitted to the government by the Campaign of the Handicapped People in Israel regarding the establishment of a public committee as part of the agreement that at the end of the 2001/2002 strike. Dated May 9, 2002 (emphasis added) (on file with author).

transform PWD into inferior citizens. This is therefore a universal model for disability benefits that is based on a social construction model of disability, that is engaged with the consequences of ableism, and that connects all PWD and all disability benefits programs under one umbrella.

The third and final type of model would cover both basic needs and nonspecific disability-related costs. This makes it more comprehensive than the second model because it provides an answer to PWD who cannot work at all. As narrow as this group would become, even in a world of complete, adequate, and dignified services, and of no discrimination, marginalization, isolation, or any other form of oppression, such people will have no money to cover their everyday expenses. Yet at this point an additional and last set of questions enters the discussion. These questions concern the relationships between disability allowances and general living allowances for people who live in poverty. If disability and poverty are interrelated, then it is impossible to construct isolated social welfare mechanisms to address their implications. The assumption in this project is that every person deserves a life of human dignity and economic security, not only PWD.

Through my exploration of the complex ways in which disability was constituted as inferiority, I also exposed the relationships between the inferiority of need-based welfare programs and the inferiority of their beneficiaries. A comprehensive view of social welfare dynamics mandates a link between all people who benefit from basic living allowances for their physical survival. Disability advocates, therefore, have three options with regard to the basic needs component in disability allowances: first, to neglect the issue of living allowances as not related to disability; second, to promote

dignified disability allowances only for PWD, which carries a risk of conveying a message that the group of PWD is more deserving of those allowances; and third, to join, or better form, an alliance of all people who live in poverty, which would promote dignified living allowances for all. The actual details and calculations for such disability and general living allowances are clearly beyond the scope of this project.

The specific formulation of disability allowances as a concrete right can vary. One possibility could result in it being structured as a right to social security. As I earlier mentioned, Article 9 to the International Covenant on Economic, Social and Cultural Rights provides that "The States Parties to the present Covenant recognize *the right of everyone to social security, including social insurance*."[996] Another possibility could be based on the attempt in the United States to formulate welfare benefits as rights, a view that was promoted by the welfare rights movement during the 1960s. Already in 1955 A. Dalefield Smith developed an approach to welfare benefits as stemming from the fundamental "right to life" according to the Fourteenth Amendment to the American Constitution.[997] That argument has failed and the welfare advocates turned to due process rights as a way to ensure benefits for indigent people (using Charles Reich's theory of the "New Property").[998] The welfare rights movement enjoyed a success in courts during the

[996] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (emphasis added).

[997] A. DELAFIELD SMITH , THE RIGHT TO LIFE (1955).

[998] For a chronicle of the struggle, *see* Edward v. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 82 (Norman Dorsen ed., 1971). For a chronicle of the movement, see MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995). For Reich's renown article, *see* Charles A. Reich, *The New Property*, 73 YALE L. J. 768 (1964).

1960s and then declined without leaving much impact on the rights discourse.[999] It seems, however, that a welfare right is of a lower status than a right to social security because of the related hierarchy between social security and welfare. The vision of social insurance for all entails higher principles of social responsibility, economic security, and dignified standards of living. These are not the only two options available, of course, but just examples. Thus, a right to dignified living and/or to socio-economic security could achieve the same goals while applying even higher standards. In any event, my goal here is to show that the tools for articulating such a right already exist.

One last word before conclusion: as this study comes to an end it might be mistakenly view as arguing that disability allowances are the single most important issue for PWD in the fight against ableism. Yet I would like to remind the reader that although important disability allowances cannot be examined in isolation. Indeed, my view is that disability allowances should be a part of the disability rights discourse; they cannot be the only issue on the agenda of PWD, but ignoring them altogether is also impossible. In fact, I argue that disability allowances receive the place that they deserve only when they are positioned within a comprehensive view of dismantling ableism. Without such comprehensive plan the "hope" component is lost and only "evil" remains.

[999] Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 82 (Norman Dorsen ed., 1971); MARTHA DAVIS, BRUTAL NEEDS: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995).

CONCLUSION

The hierarchies of disability benefits stand at the center of this study. As I come to conclude this study I would like to go beyond the necessity of dismantling those hierarchies. Instead, I would like to point at the fresh perspective that disability critique provides to the understanding of those hierarchies and the contribution of that critique to the study of rights and welfare and other related topics and the relationships between those realms.

Thus, one major contribution of the disability critique that this study offers is to transcend the details and technicalities of the differentiated structure of disability benefits and to see the grand picture of the meta-power relations within which that hierarchy is situated. Disability critique mandates a shift from who gets what to what larger scheme the distribution of who gets what serves; what this power structure supports and what is supported by it. While at first site it looks like those hierarchies only serve to elevate the privileged, particularly disabled veterans, a closer examination reveals that they also serve to downgrade the "commons," the PWD who do not belong to any advantaged group, and that in fact the elevation of the privileged to a large extent depends on the downgrading of the commons. Yet an even closer interrogation, that owes its rigorous to disability critique, exposes that even disabled veterans are not served by this hierarchy, and that essentially it serves no one. At the same time, such analysis does not neglect the details but rather use them to inform its analysis, to provide it with the thickness and depth it requires.

The critiques of the domains of rights and welfare in this study exhibit different responses to the hierarchies of dis/ability. As Part III shows, within welfare the hierarchies among PWD enjoyed the primacy of attention and have dominated the field, serving to mask the meta-power-structure of ableism. Within rights, however, as exposed in Part IV, the focus has shifted to the larger scheme of power between disabled and non-disabled, yet the inner hierarchies among PWD were overlooked or even neglected. According to my argument these two hierarchies are interrelated and interdependent, and therefore cannot be fully understood in isolation. The disability rights project to liberate disability from welfare and charity, where it was formerly sited and to relocate it to the realm of rights was also fundamentally a project of uniting the disability community and providing an inclusive language and all-encompassing goals of accessibility and accommodations in every aspect of life. Pointing at disparities, tensions, and power differences within the disability community seem to contradict these goals, yet as I show, a disability critiqe acknowledges, and disabled people know, that these disparities are so fundamental that only by addressing them their power would be lessened.

A second contribution of disability critique that I offer is a thorough examination of the relationships between the material, the symbolic, and the political dimensions of disability relations. The relationships between the three become important as this study progresses and moves from the domain of welfare to the realm of rights. Thus, the welfare paradigm was occupied with the material dimensions of disability, and particularly with combating poverty. The minimal concept of social welfare offered a narrow form of safety-net through either public assistance programs or social

security mechanism, which despite the differences in the principle that guide these two, in Israeli reality they were not that remote. The broader and more progressive notion of social welfare sought to offer economic security and thus typically employed an insurance rationale which was potentially more generous. Yet my analysis shows not only the material implications of the minimal programs that were eventually developed for most PWD (while only few enjoyed the more generous insurance scheme), but also that despite the lack of attention to the political and symbolic dimension of disability policy, it had nevertheless far reaching implications in those regards, as it anchored, perpetuated and re-constituted the very national values and collective imageries on which it was based.

As rights entered the public discourse the political and symbolic aspects of disability moved to the forefront of the efforts to improve the living conditions of PWD. Disability was no longer an objective and personal impediment on the person's ability to work and support herself, but rather a political and contested category that is concerned with social disablement and with the ways images and language inform social practices of exclusion and marginalization. However, my critique of disability rights shows that although the local formula of disability rights in Israel did extend into the material realm through allowances that are tailored to specific disability related needs, it eventually left the most fundamental material problem of PWD untouched; that is general disability allowances. Beneath the rejection of disability allowances seems to lay an aspiration to separate disability and poverty and a new attempt to establish PWD as the "deserving poor." Yet as I argue in the last chapter, this aspiration encounters two serious difficulties: one is the realization that rights

are essentially an ongoing and even incomplete effort, and the second is that some PWD will need allowances for the their economic survival even in a perfect world of the kind that disability advocates envision.

A third contribution of disability critique is its engagement with other modes of critique and commitment to all forms of oppression while maintaining its focus on the contested nature of disability. Every stage of this study is informed by those concerns. The disability critique of Zionist ideology is very much related to queer theory's exposure of Zionism's occupation with the exilic Jew's sick and disabled body; the investigation of welfare practices concerning the majority of PWD during Israel's first decades reveals the close relationships between ableism and orientalism; the critique of rights benefits from on the feminist scholarship that uncovered the unstated norms that underlay the traditional rights discourse; the predicament of disability and poverty manifests both a concern about the construction of poverty and a commitment to all people living in poverty; and finally, the conception of rights as a process and an incomplete project is in line with critical race theory's dissatisfaction with the reality of rights yet disapproval of their complete abandonment.

A disability critique examines all those matters not in isolation but in their relations to each other. Most importantly, it does not define those matters as involving the *problems of PWD*, but rather as enhancing the disussion on the *problems of society* which PWD are among its members while using disability as a category that exposes society's underlying asumptions and taken for granted practices.

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