

Critical Disability Theory and Public Law in Canada: The Case of *Longuepée v University of Waterloo*

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Abstract

Structural barriers in Canadian society severely impact people with disabilities, restricting their access to employment, public spaces, technology, and transportation. These obstacles, compounded during the COVID-19 crisis, lead to high levels of poverty, unemployment, and isolation for many. Neoliberal policies, which prioritize market stability and corporate profitability, exacerbate these challenges by reducing state support for vulnerable populations. Critical disability theory offers a framework to reimagine a society where people with disabilities can thrive. This chapter explores the development of this theory, particularly the social model of disablement, and incorporates insights from Cornelius Castoriadis' concept of social imaginary significations. By analyzing the *Longuepée v University of Waterloo* case, the chapter demonstrates how public law can better support people with disabilities and highlights the importance of reparative readings of legal texts to promote inclusion and equality.

* Thanks to the editors for inviting me to contribute this chapter and the peer reviewer for valuable insights. All errors remain my responsibility.

Résumé

Les obstacles structurels dans la société canadienne ont un impact profond sur les personnes en situation de handicap, limitant leur accès à l'emploi, aux espaces publics, à la technologie et aux transports. Ces obstacles, aggravés pendant la crise de la COVID-19, entraînent des niveaux élevés de pauvreté, de chômage et d'isolement pour de nombreuses personnes. Les politiques néolibérales, qui privilégient la stabilité des marchés et la rentabilité des entreprises, exacerbent ces défis en réduisant le soutien de l'État pour les populations vulnérables. La théorie critique du handicap offre un cadre pour réimaginer une société où les personnes en situation de handicap peuvent s'épanouir. Ce chapitre explore le développement de cette théorie, en particulier le modèle social du handicap, et intègre les idées de Cornelius Castoriadis sur les significations imaginaires sociales. À travers l'analyse de l'affaire *Longuepée c Université de Waterloo*, le chapitre démontre comment le droit public peut mieux soutenir les personnes en situation de handicap et souligne l'importance de lectures réparatrices des textes juridiques pour promouvoir l'inclusion et l'égalité.

Structural barriers for people with disabilities permeate Canadian society. From inaccessible architecture that blocks the dreams and aspirations of mobility-impaired people in work and play to information technology that produces data, web sites, and apps that are not readily usable by blind and visually impaired individuals to transportation systems that are not designed for people with all manner of disabilities, disabled people¹ face tremendous obstacles in their daily life. The consequences are dire: high rates of poverty and unemployment for people with disabilities, exclusion from public facilities and isolation from mainstream society. Many of these barriers have been compounded during the COVID-19 crisis. Indeed, few other identity groups are composed of members who are mostly outside the labour market, living in deep poverty, and experiencing daily barriers to access transportation and housing. The restructuring of the neoliberal state to focus on ensuring corporate profitability and stable market conditions for investors creates a particularly inhospitable environment, featuring a permanent state of austerity and cutbacks to

¹ I use the terms “disabled people” and “people with disabilities” interchangeably.

the welfare state, for inclusion and equality for disabled people.² As Bretton-Purdy, Kapczynski and Grewal observe, neoliberalism may be characterized as “a demand for deregulation, austerity, and an attempt to assimilate government to something more like a market—but it never was as simple as a demand for ‘free markets.’”³ Rather, they suggest that it was a demand to protect the market from democratic demands for redistribution.

Critical disability theory offers a way of reimagining a world that is inclusive of disabled people, enabling us to flourish in our daily lives. For public law scholars, that means reconsidering how existing case law, statutes and procedure have marginalized disabled people and how public law might do better to achieve equality for disabled people. In so doing, I articulate what Danish Sheikh has identified as a reparative reading of the jurisprudence. He argues that “read[ing] a text for the possibility of repair, is to read a text to see the resources it can offer us.”⁴ In this chapter, I illustrate the importance of critical disability theory and how it can empower disabled people as follows. To begin, I offer an overview of critical disability theory, tracing its origins in the work of theorists of the social model of disablement such as Michael Oliver and Colin Barnes. I also suggest how critical disability theory might be fruitfully supplemented by engagement with the radical French philosopher Cornelius Castoriadis and his concept of social imaginary significations.⁵ Social imaginary significations enable us to reimagine how we think about the world and identify the governing myths in a particular society. In the third section, I shift gears by providing an overview of a recent decision of the Ontario Court of Appeal, *Longuepée v University of Waterloo*,⁶ a

² See e.g. Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, “How Law Made Neoliberalism” *Boston Review* (22 February 2021) available online at <http://bostonreview.net/law-justice/jedediah-britton-purdy-amy-kapczynski-david-singh-grewal-how-law-made-neoliberalism>.

³ *Ibid.*

⁴ Danish Sheikh, “Staging Repair” (2021) 25 *Law Text Culture* 144 at 146. I thank an anonymous peer reviewer for suggesting I incorporate Sheikh’s analysis.

⁵ For leading works by Castoriadis, see Cornelius Castoriadis, *The Imaginary Institution of Society*, trans Kathleen Blamey (Cambridge: Polity Press, 1987) [Castoriadis, *Imaginary*]; Cornelius Castoriadis, *World in Fragments; Writings on Politics, Society, Psychoanalysis and the Imagination*, trans and ed David Ames Curtis (Stanford, California: Stanford University Press, 1997) [Castoriadis, *World*].

⁶ 2020 ONCA 830 (CanLII).

judicial review of a human rights tribunal decision in the context of post-secondary education. the fourth section, I offer an analysis of the case through the prism of critical disability theory. In the final section, I offer some brief concluding remarks.

An Overview of Critical Disability Theory

The principal animating concept that lies at the heart of critical disability theory is the social model of disablement. The social model of disablement stands for the proposition that it is structural barriers that impede the lives of disabled people. As Colin Barnes and Geof Mercer have noted, it seeks to challenge the social exclusion and oppression of disabled people in order to achieve dignity and independent living.⁷ The focus is consequently on eliminating barriers that handicap disabled people, rather than eliminating physiological impairments. These barriers may take the form of physical obstacles such as a staircase that does not allow entry or egress for a wheelchair user. Or they may take the form of pernicious attitudes which result in exclusion and marginalization of disabled people. The social model focuses on eliminating barriers, be they physical or attitudinal, rather than altering the disabled person's body through surgery or physiotherapy, sometimes known as the individual or medical model of disablement.⁸ One of the earliest formulations of the social model was made by the British organization of disability rights advocates, the Union of the Physically Impaired Against Segregation (UPIAS) in 1976. Popularized by Mike Oliver and Colin Barnes and building on work by Finkelstein and Hunt, it was a materialist conception of disablement that insightfully distinguished between impairment, the focus of medical and rehabilitation professionals, and disability, which may only be redressed through the transformation of society.⁹ The social model

⁷ Colin Barnes & Geof Mercer, "Understanding Impairment and Disability: toward an International Perspective" in Colin Barnes & Geof Mercer, eds, *The Social Model of Disability and the Majority World* (Leeds: The Disability Press, 2005), 1 at 1.

⁸ Mike Oliver, "The Individual and Social Model of Disability" (23 July 1990), available online: <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Oliver-in-soc-dis.pdf>

⁹ Due to space constraints, this is inevitably a stylized account and largely omits the development of poststructuralist theories of disablement more commonly taught in the

gradually gained acceptance by mainstream British disability organizations such as the British Council of Disabled People in the 1980s and spread internationally through Disabled Peoples' International to gain influence in Canada and the United States.¹⁰ While the social model has understandably been critiqued as not paying sufficient attention to concerns of intersectionality including the experiences of racialized disabled people, disabled women and girls, and LGBTQIA+ people who identify as disabled,¹¹ it remains a powerful prism that shines a light on challenging barriers while placing the empowerment of disabled people at the centre of its political priorities.

Too often, disabled people have been regarded as objects of pity or applauded as “supercrips” who overcame their otherwise tragic and pitiful impairments through bravery and personal courage.¹² Despite the growth of disability history and biographies of disabled people that seek to render the lives of disabled people in a more nuanced, complicated way and understand how ableism shaped the choices of disabled people, these demeaning and stereotypical tropes remain with us, damaging the well-being and dignity of disabled people.¹³ In that context, the social model had a dramatic impact in transforming the consciousness of many disabled people to become self-aware of

United States, particularly in the humanities. For a representative work, see Alison Kafer, *Feminist, Queer, Crip* (Bloomington, Indiana: Indiana University Press, 2013).

¹⁰ Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (New York: Palgrave Macmillan, 2007) at 57–58. While the American and British versions of the social model are not identical, the social model of disablement might be regarded globally as an example of policy diffusion. For a remarkable study of this in the context of disability supports for independent living, see generally Georgia van Toorn, *The New Political Economy of Disability: Transnational Networks and Individualised Funding in the Age of Neoliberalism* (London, U.K.: Routledge, 2021) (examining policy diffusion of disability supports in England, Scotland and Australia).

¹¹ See e.g. Alexis Buettgen et al, *Understanding the Intersectional Forms of Discrimination Impacting Persons with Disabilities* (Winnipeg: Canadian Centre on Disability Studies, 2018), available online at <http://www.disabilitystudies.ca/assets/ccds-int-dis-151110-final-report-en-full.pdf>

¹² Kim E Nielsen, “The Perils and Promises of Disability Biography” in Michael Rembick, Catherine Kudlick & Kim E Nielsen, eds, *The Oxford Handbook of Disability History* (Oxford: Oxford University Press, 2018) 21 at 21–22.

¹³ *Ibid.* For a recent biography of a disabled political activist, see Ravi Malhotra & Benjamin Isitt, *Able to Lead: Disablement, Radicalism and the Political Life of E.T. Kingsley* (Vancouver: University of British Columbia Press, 2021).

how disability was a political problem that required a political solution invoking the language of liberation, rights, and equality.

One illustration of how the social model may be operationalized to illustrate the marginalization of disabled people is testimonial injustice. Scully defines testimonial injustice as “what happens when prejudice against a group results in its members being given less credibility than they would otherwise have.”¹⁴ An example might be ignorant perceptions by university or college instructors that requests for academic accommodations are unwarranted attempts to game the system or beliefs that recipients of disability benefit programs, such as the Ontario Disability Support Program, are simply fraudsters who are faking their disabilities to avoid work. A second category that Scully identifies is hermeneutical injustice. This refers to situations where the specialized knowledge that disabled people develop about their own experiences is not recognized by society due to structural prejudice.¹⁵ While this can apply to many identity groups, an example in the disability community is the very specialized knowledge that wheelchair users acquire about how wheelchairs are funded, what the best models are, and even how one can adapt one’s attire to dress fashionably while using a wheelchair. Students with disabilities are often the most knowledgeable with respect to which assistive educational technology products work best for their situation. Most people, including those committed to social justice, have no knowledge of these questions as the expertise is not regarded as valuable. In the fourth section, the salience of these concepts will be elaborated.

In the legal context, disability rights have been instantiated by the prohibition of disability discrimination in provincial and federal human rights legislation and a duty to accommodate disabled people up to the point of undue hardship, although interestingly only after disability rights advocates protested their exclusion in the 1980s.¹⁶ Similarly, section 15 of the *Charter of Rights and Freedoms* prohibits

¹⁴ Jackie Leach Scully, “Epistemic Exclusion, Injustice, and Disability” in Adam Cureton & David T Wasserman, eds, *The Oxford Handbook of Philosophy and Disability* (Oxford: University Press, 2020) 297 at 300. Scully relies on the work of Fricker to develop her theory.

¹⁵ *Ibid* at 302.

¹⁶ See e.g. *Ontario Human Rights Code*, RSO 1990 c H 19.

discrimination on the basis of disability.¹⁷ More recently, several provinces including Ontario, British Columbia, Manitoba, and Nova Scotia have adopted accessibility legislation that sets out specific standards for covered organizations to meet.¹⁸ The tools of critical disability theory allow lawyers and advocates to consider how statutes can be crafted and interpreted in a manner that empowers disabled people.

It is also important for public law students and scholars to bear in mind that law is simply one possible way of achieving some of the goals of the social model. The literature on the limitations of law as a tool for social transformation is voluminous.¹⁹ For our purposes, it is critical to remember that victories through litigation are necessarily partial, fragile, and imperfect. They are always susceptible to subsequent reversal by the legislature, reluctant enforcement by overburdened and underfunded administrative tribunals or even simply being ignored by relevant policy actors.

Melding aspects of classical Marxism with psychoanalysis, work by the renowned Greek-French philosopher Cornelius Castoriadis points to the necessity of constructing social imaginary significations that can challenge the ideological myths of a given society.²⁰ Social imaginary significations are Castoriadis' attempt to construct a social theory that transcends functionalism and structuralism. Kavoulakos observes that Castoriadis regards functionalism as reducing the existence and functions of institutions to the functions they perform in society. Similarly, structuralism according to Castoriadis fails to comprehend the symbolic

¹⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, s 15.

¹⁸ See e.g. *Accessibility for Ontarians with Disabilities Act, SO 2005 (AODA)*. While many provinces have such legislation, they typically have little to no enforcement mechanisms. For a critique of the AODA in the education context, see Michelle Flaherty & Alain Roussy, "A Failed Game Changer: Post-Secondary Education and the *Accessibility for Ontarians with Disabilities Act*" (2014) 24:1 *Education LJ* 1 at 1–23.

¹⁹ See e.g. Byron Sheldrick, *Perils and Possibilities: Social Activism and the Law* (Halifax: Fernwood, 2004); Orly Lobel, "The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics" (2007) 120 *Harv L Rev* 937.

²⁰ Castoriadis, *Imaginary*, *supra* note 5. For a scholarly overview of Castoriadis' framework see generally Suzi Adams, *Castoriadis' Ontology: Being and Creation* (New York: Fordham University Press, 2011). Castoriadis, a genuine polymath who was a professional economist, philosopher and psychoanalyst, is perhaps best noted as one of the leading members of the legendary *Socialisme ou Barbarie* group in France that anticipated many of the upheavals that rocked French public life after the May 1968 General Strike.

elements of society by reducing the world on the basis of a binary logic of oppositions.²¹ This opens the door to recognizing the creative nature of symbolic systems. Social imaginary significations help to regulate social relations in a given polity and pose big philosophical questions, such as what is the main underlying purpose of a society?²²

Perhaps one of the most common and pernicious social imaginary significations in Western capitalist societies is the market, the notion that people ought to be valued by their contribution to producing surplus value in capitalist society. Disabled people are inevitably seen as disposable burdens in such a framework and this trend has only accelerated as neoliberalism dominates contemporary policy debates and is a configuration in the very makeup of institutional structures including post-secondary institutions. I suggest Castoriadis' work can also be used to construct new social imaginary significations about disabled life which value individuals for their inherent talents and contributions, rather than their value in market terms.²³ Similarly, higher education, a theme of this chapter, is increasingly constructed as a tool to produce skilled employees with defined and marketable credentials, rather than producing knowledge for its own sake. A Castoriadan vision can and does work in tandem with carefully crafted litigation strategies. Advocates for social justice do not have to choose between law or politics. We can do both. I illustrate the importance of such an approach in the fourth section of this chapter but first provide an account of the case, an illustration of discrimination in higher education, under discussion in the third section.

Longuepée v University of Waterloo

Roch Longuepée applied for admission to the Faculty of Arts program at the University of Waterloo in July 2013. He had obtained his

²¹ Konstantinos Kavoulakos, "Cornelius Castoriadis on Social Imaginary and Truth" (2006) 12 *Ariadne* 201 at 202–203.

²² *Ibid* at 203.

²³ See Castoriadis, *Imaginary*, *supra* note 5 at 139–46. I develop these ideas at greater length in Ravi Malhotra, "The Legal Politics of Marta Russell: A Castoriadan Reading" in Ravi Malhotra, ed, *Disability Politics in a Global Economy: Essays in Honour of Marta Russell* (London, U.K.: Routledge, 2016) 3 at 3–23.

GED assessment, a high school equivalency, in 1999 and later that year enrolled as a student at Dalhousie University but dropped out after a year due to poor grades. Longueépée was a survivor of institutional child abuse and had experienced physical, psychological, and sexual trauma. He had a moderate traumatic brain injury and experienced post-traumatic stress disorder (PTSD). However, he was unaware that he had these conditions during his time at Dalhousie and received no accommodations during his studies.²⁴ He chose to apply to Waterloo because of its proximity to family and social and medical support networks. At the time of his application, he informed the Registrar's office of his traumatic brain injury and how his impairment had impacted his grades during his previous studies. He also submitted records of his volunteer work and references. Longueépée was told that the class was full. However, the Registrar's office nevertheless collected his grades and medical documentation to determine his eligibility.²⁵ After reviewing his application, the Admissions Committee determined that his grades were too poor, falling well below Waterloo's 65 percent cutoff, and consequently recommended that he apply elsewhere.²⁶

In the fall of 2013, Longueépée filed a human rights complaint with the Human Rights Tribunal of Ontario (HRT) alleging that Waterloo discriminated against him on the basis of disability in violation of the *Human Rights Code*. He argued that the Admissions Committee's 65 percent standard for admission was discriminatory as it did not take into account the fact that his previous academic performance reflected work he completed with no academic accommodations. Furthermore, he argued that Waterloo had failed to consult the university's Accessibility Services and failed to consider his potential to study part-time.²⁷ The HRT completely rejected Longueépée's arguments. It noted that the duty to accommodate persons with disabilities contained both procedural and substantive components. It held that Waterloo accommodated him by considering his application outside the regular process because of his extenuating circumstances. The

²⁴ *Longueépée v University of Waterloo*, 2019 ONSC 5465 at paras 7–8 (CanLII)

²⁵ *Ibid* at paras 8–10.

²⁶ *Longueépée v University of Waterloo*, 2017 HRT 575 at para 49. Athabasca, Ryerson Continuing Education and Guelph Open Learning were suggested as appropriate choices.

²⁷ *Ibid* at para 40.

HRTO held that Waterloo could not be expected to deem Longueépée a successful candidate simply because another university had failed to accommodate his disabilities 13 years earlier.²⁸ It further held that there was no evidence that the involvement of Accessibility Services in the admission process would have changed the committee's decision. In the end, the HRTO concluded that Waterloo was entitled to rely on Longueépée's past academic performance.²⁹ As the learned Vice Chair Jennifer Scott expressed it, "[t]he difficulty is that in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success."³⁰

On reconsideration, Vice Chair Scott upheld her earlier decision. She held that it was simply not possible for one university to assess the accommodations provided by another university by consulting accessibility services in the context of an admissions application.³¹ The decision is a striking example of a social imaginary signification, academic standards, having such weight in the mind of the adjudicator that adaptation is simply inconceivable. To fully challenge this thinking requires, as Castoriadis would argue, for a social imaginary signification that reimagines the purpose of universities as an institution for more than credentialing students for the workplace. It would entail rethinking why we require educated citizens and why that is important for a democratic polity. It requires rethinking the very purpose of post-secondary institutions as a prerequisite for fostering democratic citizenship to assist members of society to engage in self-improvement and acquiring knowledge to make a better world.

The Divisional Court quashed the HRTO's decision and reconsideration decisions. Justice Mew for the Court held that the question of admission must be remitted back to the Admissions Committee to freshly evaluate the case.³² The Divisional Court set out the Supreme Court of Canada's three-part test from *Grismer* to demonstrate that a *bona fide* occupational requirement, such as Waterloo's admissions cutoff standard, complied with human rights jurisprudence. First, the responding party must demonstrate that it adopted the standard for a purpose or goal that is rationally connected to the function being

²⁸ *Ibid* at para 42, 49.

²⁹ *Ibid* at paras 44–49.

³⁰ *Ibid* at para 51.

³¹ *Longueépée v University of Waterloo*, 2017 HRTO 1698.

³² *Longueépée*, *supra* note 24 at para 63.

performed. Second, it must demonstrate that it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose of the goal. Third, the standard is reasonably necessary to accomplish its purpose or goal, as the respondent cannot accommodate individuals with the characteristics of the applicant without incurring undue hardship.³³ The Court found that while the first two factors were met, Waterloo failed to meet the third branch of the test. The Court found that Waterloo acknowledged that the earlier marks earned by Longueépée at Dalhousie were tainted by discrimination and yet it provided no mechanism to assess his competency apart from these poor grades. It also did not claim that to accommodate the applicant would constitute undue hardship and presented no evidence on this defence.³⁴ Consequently, the Court quashed the decision of the HRTO. In applying the *Grismer* test in such a robust manner, the Court was open to new ways of thinking about what matters in educational achievement. It embodied an openness to applying the creativity that Castoriadis argued was so important in crafting and proposing new social imaginary significations to develop new legal principles.

On appeal to the Court of Appeal, the majority of the Court of Appeal, in a decision by Justice van Rensburg, substantially upheld the decision of the Divisional Court and dismissed Waterloo's appeal. Justice van Rensburg concluded that the Vice Chair had failed to properly analyze the third branch of the *Grismer* test. The majority concluded that Waterloo could not simultaneously disregard other criteria of assessment beyond grading while accepting the applicant's Dalhousie grades which it knew were obtained without appropriate accommodations for his disability.³⁵ As well, the majority concluded that the Vice Chair implicitly decided that Waterloo would experience undue hardship if it had to modify its admission policy to accommodate individuals with brain injuries who had a record of unaccommodated grades. This was not appropriate because Waterloo failed to make an undue hardship argument before the Tribunal and did not marshal any evidence as to the impact of altering its admission

³³ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC) at para 20 [*Grismer*].

³⁴ Longueépée, *supra* note 24 at paras 56–58.

³⁵ Longueépée v University of Waterloo, 2020 ONCA 830 at para 84.

process.³⁶ Consequently, the decision of the Divisional Court was upheld. However, the Court of Appeal held that the decision should be remitted to the HRTO rather than Waterloo's Admissions Committee because in light of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,³⁷ it was better to allow the HRTO to craft an appropriate remedy.³⁸ In a short concurrence, Justice Lauwers agreed with the reasons of Justice van Rensburg in the case at bar but interestingly chose to write separately in order to state his concern that university autonomy and academic freedom was a strong normative value that warranted protection.³⁹

Critical Disability Theory in Action

What would a critical disability theory analysis of the *Longueépée* matter look like? At first glance, the decision seems like a resounding victory for inclusion and equality for disabled people. The decision incrementally expands the opportunities for applicants with disabilities seeking enrolment in post-secondary institutions to challenge rigid and inflexible admission policies. This is likely welcome news for many students with learning disabilities and brain injuries, particularly mature students who may have in years past completed some post-secondary education without appropriate or indeed any accommodations in place. Indeed, it likely will be relevant for students with a variety of impairments, including blind and deaf students who completed their studies when appropriate assistive technology was less widely available or accepted and when some disabled students may have attended segregated institutions. As post-secondary institutions are frequently large impersonal bureaucracies, the decision is a promising first step, although at this time of writing, the HRTO has yet to release a decision in light of the Ontario Court of Appeal's reasons.

³⁶ *Ibid* at paras 85–86.

³⁷ 2019 SCC 65. In the interests of space, I have omitted commentary of the Court of Appeal's analysis of questions of the appropriate standard of review. However, nothing significant turns on that analysis.

³⁸ *Longueépée*, *supra* note 35 at paras 89–94.

³⁹ *Ibid* at paras 97–106.

However, it seems likely that the specific facts and the institutional processes at play in the case drove the outcome. Waterloo undertook a rather unusual litigation strategy and did not call any evidence with respect to undue hardship. Had it done so, it is not clear that the Court of Appeal would have reached the same decision. Indeed, all decision-makers were clear that they intend to accord significant deference to internal university decisions in a typical case in the future and expect they will by and large be insulated from judicial review. This is particularly apparent in the concurrence by Justice Lauwers. That suggests that Scully's notion of testimonial and hermeneutical injustice is likely relevant.⁴⁰ Many faculty perceive disability accommodations in academia as infringements on academic integrity, a canonical example of testimonial injustice and an illustration of how public law jurisprudence is clarified through critical disability theory.⁴¹ Furthermore, people with brain injuries are the experts regarding the best strategies for them to learn and retain information. Their insights for appropriate accommodations are invaluable in order to develop learning strategies that are effective and appropriate. This font of knowledge is unfortunately too often devalued and dismissed as the voices of pedagogical experts are privileged. Much of university education retains a cookie-cutter approach in which disabled students are expected to fit rather than universal design principles that are inclusive of the learning needs of all students.

Ultimately, critical disability theory requires that one go beyond an individualized approach of providing accommodations as an exception to a rule. While the Court of Appeal in *Longuepée* is open to a more robust admission process, it is still one contingent on the provision of extensive documentation approval by medical authorities to bypass an admission system predicated on compulsory able-bodiedness.⁴² This places an enormous onus on the disabled student

⁴⁰ See *supra* notes 14–15 and accompanying text.

⁴¹ See e.g. Teri Hibbs & Dianne Pothier, "Post-secondary Education and Disabled Students: Mining a Level Playing Field or Playing in a Mine Field" in Dianne Pothier & Richard F Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver University of British Columbia Press, 2006) 195 at 200.

⁴² *Ibid* at 195–222. See also Leyton Schnellert et al, "Enacting Equity in Higher Education Through Critical Disability Studies: A Critical Community Self-Study" (2019) 39:2 *Disability Stud Q*, available online at <https://dsq-sds.org/article/>

to acquire documentation from approved gatekeepers, assemble materials, and eloquently articulate their accommodation needs as exceptions to a standard rule. The institutional process in play reinscribes a social imaginary signification that values conformity to traditional and arbitrary admission standards. This approach is inconsistent with the principles of the duty to accommodate as set out by the Supreme Court of Canada in *Meiorin*⁴³ which is rooted in the idea that standards that are discriminatory are to be modified. Post-secondary education should not be crafted as a human rights-free zone of exception.

Beyond that, Castoriadis assists us in thinking about the larger purposes of post-secondary education and indeed the larger purposes of our society itself. Castoriadis asks us to think about the representations that capture our popular imagination, the social imaginary significations about who we are as a people and what are our dreams and aspirations for a better life.⁴⁴ The commodification of education is now so widespread that it often does not elicit questions or even notice from the general public. While there are without a doubt important accommodation battles to be fought for inclusion of disabled students in professional schools such as, *inter alia*, law schools, and medical schools,⁴⁵ it is imperative that one bear in mind that the case at bar concerned admission to an undergraduate program. Castoriadis helps us to understand that the Greek concept of *paideia* or education concerns public education to improve the citizenry as was a feature of life in Ancient Greece.⁴⁶ In other words, a

[view/6150](#); Cynthia Bruce & M Lynn Aylward, "Accommodating Disability at University" (2021) 41:2 Disability Stud Q, available online at <https://dsq-sds.org/article/view/6973/5942>.

⁴³ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CarswellBC 1907 [*Meiorin*].

⁴⁴ Castoriadis, *Imaginary*, *supra* note 5 at 139–46.

⁴⁵ The literature on disability accommodation in law schools goes as far back as M David Lepofsky, "Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School" (1991) 36(2) McGill LJ 636. For disability accommodation for medical students in the American context, see Michael McKee et al, "Medical Schools' Willingness to Accommodate Medical Students with Sensory and Physical Disabilities: Ethical Foundations of a Functional Challenge to 'Organic' Technical Standards" (2016) 18(10) AMA J Ethics 993 at 993–1002.

⁴⁶ Cornelius Castoriadis, "The Greek and the Modern Political Imaginary" in Castoriadis, *World*, *supra* note 5, 84 at 95.

new social imaginary signification of education entails an understanding that education is about self-improvement of a citizen to assist in making a better world. The marketization of post-secondary education has occluded this original goal of post-secondary education with constantly increasing tuition, research funding geared toward serving the needs of the market including through the prioritization of public-private partnerships, and greatly diminished public funding.⁴⁷

When one takes this broader perspective, accommodation issues seem to be of less salience because the very purpose of education shifts from scores on a set rubric to genuine learning for self-understanding and reshaping the world. Given such a wide-ranging ontological vision, why would an applicant's high school grades be salient for her potential contribution to society as a citizen to pursue wisdom as its own end? Do minimum grade cutoffs for any student serve any valid purpose beyond neoliberal branding for a particular institution? Castoriadis' legacy enables a richer understanding of critical disability theory and a richer vision of a public education that works for all students. And that is only a first step toward building what Castoriadis styles an autonomous world where people are free to follow their aspirations, unbound by the pressures of a market society that requires most to work long hours at modest pay, conditions that inevitably exclude disabled people from the labour market and a decent life.

Conclusion

Public law scholars and students alike need critical disability theory to help build a world of accessibility and inclusion. Recent scholarship has marked a shift from a focus on disability accommodation to placing disability justice at the centre. This paradigm shift reflects the embodiment of the values of universal design and transforming standards so that structures and rules are inclusive of disabled people. The Ontario Court of Appeal decision in *Longuepée v University of Waterloo* marks a small step forward in university admission standards.

⁴⁷ Bob Rigas & Renée Kuchapski, "'Strengthening' Ontario Universities: A Neoliberal Reconstruction of Higher Education" (2016) 180 Can J Ed Adm & Pol'y 47.

Moving forward there is no need to choose between a legal approach and a political approach. We must do both: crafting effective legal strategies while remaining cognizant of the big picture goals. To that end, the creative and challenging work of Cornelius Castoriadis enriches both the day-to-day work of public law advocates and our understanding of the social model of disablement. It is incumbent on public law scholars committed to equality for disabled people to ensure that we continue to build a world of accessibility and inclusion for all.