Dangerous Bodies: Freak Shows, Expression, and Exploitation

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I. INTRODUCTION

Their names tell exotic and terrifying stories: the Living Skeleton, the Bearded Lady, General Tom Thumb, the Cannibal, the Legless Wonder, the Lobster Boy. During the late 1800s these and other so-called "freaks" were presented in shows that traveled across America.[1] People from all walks of life would bustle to see the "freak shows,"[2] which were extolled as educational and uplifting, starring "live" human exhibits.[3] Capitalizing on a new fascination with science and the inhabitants of foreign lands, freak show promoters would beckon to passersby, claiming the performers came from distant lands, manufacturing strange life stories for each of them, and asking only a nickel to see the rare scientific spectacles.[4]

Freak shows became a less popular form of entertainment after the first quarter of the twentieth century, as physical anomalies were increasingly viewed from a medical standpoint and, later, as the beginnings of "political correctness" took hold.[5] In the past fifteen years, however, there has been what some have called a new "renaissance" of the freak show.[6] Today, the traditions, images, and fictions of earlier freak shows are increasingly reborn in traveling shows, displayed on internet web sites, and morphed into television shows and performance art.[7]

Over the past twenty years, a number of non-legal scholars have investigated the history and meaning of freak shows in American culture.[8] Little or no attention, however, has been given to the laws and

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[1] Rosemarie Garland Thomson, *Introduction: From Wonder to Error – A Genealogy of Freak Discourse In Modernity*, *in* FREAKERY 1, 5-10 (Rosmarie Garland Thomson, ed.) (1996).

[2] I use the term "freak show" in this article to refer to the traveling shows of the late nineteenth and early twentieth centuries that included a stylized display of persons with unusual bodies as a form of entertainment. In using this term, I do not intend to imply that freak show performers are in fact "freaks" in the modern sense of the word.

[3] THOMSON, *supra* note 1, at 5.

[4] *Id.* at 5-10.

[5] ROBERT BOGDAN, FREAK SHOW 62-67 (1990).

[6] RACHEL ADAMS, SIDESHOW U.S.A. 1 (2001).

[7] *Id.* at 210-28; *see also infra* notes 42-47, 50-53, and 56-61 and accompanying text.

[8] Robert Bogdan provides the seminal work in this area, tracing the history of the freak show through the 1980s and explaining the social construction of freak shows. *See generally* Bogdan, *supra* note 2; Thomson *supra* note 1, at 13-14.

ordinances that regulate freak shows or the legal rights of freak show participants. Myriad towns and cities today have ordinances that prohibit or charge a fee for freak shows,[9] and a number of states have passed laws aimed at limiting or prohibiting the exhibition of those with unusual bodies.[10] In California and Florida, laws prohibiting freak shows have been held unconstitutional—not because the laws were thought to violate the First Amendment, but rather because persons with unusual bodies have a right to be employed and, surprisingly, the courts assume freak shows are the only possible job for such people.[11]

This Article seeks to introduce legal discourse into the discussion of freak shows and, in the process, to comment on legal approaches to preventing discrimination against persons who are physically different. Drawing upon the theories and analysis of non-legal scholars and laws concerning employment of persons with disabilities, this article examines statutes, ordinances, and case law that address freak shows. This investigation not only expands our understanding of the historical freak show, it also demonstrates the need for legislatures and jurists to recognize that social assumptions, not physical conditions, are the root of discrimination against persons with unusual bodies.

In Part Two, I briefly describe the development of the freak show tradition in America and the current revival of that tradition in various forms. In Part Three, I introduce research and theories of non-legal scholars and comment on aspects of those theories that will be particularly relevant to the discussion of freak shows in legal discourse. In Part Four, I identify and analyze specific laws, ordinances, and case law that address regulation and prohibition of freaks shows. I argue that these laws and cases seem to express some legitimate objectives, but that they are rendered ineffective because they fail to see beyond the fictions and drama of the freak show and instead adopt stigmatizing assumptions about persons with unusual bodies.

In Part Five, I address the constitutionality of laws that regulate or prohibit freak shows. I argue that contemporary freak shows include expressive elements that are subject to First Amendment protection, and that the objectives of laws restricting freak shows can be better achieved by prohibiting discrimination against those who are physically different.

What we learn from laws, ordinances, and case law addressing freaks shows, I argue in the final section, is that the law cannot very

[9] *See* notes 115 and 127, *infra.*

[10] *See* note 122, *infra.*

[11] *See* notes 140 and 160, *infra.*

well regulate that which it does not understand. So long as legal discourse relies upon erroneous social assumptions about those who are physically different, it will be ineffective in preventing discrimination or regulating this controversial form of expression.

II. DEVIANT BODIES AND THE RISE OF THE FREAK SHOW IN AMERICA

The rise of the freak show in America manifests an evolution in attitudes toward unusual bodies over the past two centuries. The extraordinary body moves from a sign of divine will to an object of scientific curiosity, to a medical flaw, to a political unit. Science usurps the body from God, medicine usurps it from science, and politics takes it from medicine. Throughout this evolution, the extraordinary body is constantly reinvented as both dangerous and impotent, both preternatural and comprehendible. It is at once a source of awe and shame, a privilege and social anathema.

Most of the laws and ordinances regulating freak shows were passed near the end of this evolution—at a time when freak shows were quickly losing social status and growing more degrading for the performers.[12] This form of the freak show, with its low social status and negative connotations regarding physical difference, is what most people today think of when they hear the term "freak show."[13] Contrary to this modern connotation, however, freak shows were not always considered disreputable.[14]

The current revival of freak shows borrows much from the freak shows of earlier times, though today's freak shows are much more diverse in content, media, and message than the traditional freak show.[15]

A. *Development of the traditional freak show*

People who have different bodies have long been a source of wonder and inspiration. As disruptions in the predictable course of nature, extraordinary bodies have been cause for both anxiety and worship.[16] Stone Age cave drawings record the birth of humans of unusual shape, and evidence from prehistoric gravesites suggests such bodies might have been the source for ritual sacrifice.[17] Aristotle, Cicero, Pliny, Augustine, Bacon, and Montaigne all make reference to the occurrence of

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[12] *See* note 122, *infra*.
[13] *Id.*
[14] *See* Bogdan, *supra* note 5, at 62-67.
[15] *See* Adams, *supra* note 6, at 210-28.
[16] THOMSON, *supra* note 1, at 1.
[17] *Id.*

unusual bodies in their interpretation of the natural order of things.[18] "For these fathers of Western thought, the differently formed body is most often evidence of God's design, divine wrath, or nature's abundance, but it is always an interpretive occasion."[19]

With the Enlightenment, science and reason became the preferred tools for understanding the unusual body.[20] The expanding marketplace of the mid-nineteenth century, in combination with a new fascination with science and travel, caused freak shows to flourish as never before.[21] People from all walks of life came to see the shows, from Henry James and the Prince of Wales to the humblest families.[22] Proper American households of the 1860s collected photographs of formally-posed family members, statesmen, generals, and often "freaks."[23] During this time, freak shows were promoted as being morally uplifting and educational.[24] Scientists, doctors, the clergy, and prestigious organizations recommended the exhibits and vouched for their legitimacy or uniqueness.[25] Once inside the shows, a lecturer, often referred to as the "Professor," guided the audience through the exhibits, fabricating in vivid detail the "life and true facts" of each human spectacle.[26] At the end, the audience could buy souvenirs, photographs, and booklets about the persons on display.[27]

During this period, those who worked in the industry distinguished three kinds of "freaks." "Born freaks" were those who had been born with a particular physical anomaly, like Siamese twins or armless people.[28] "Made freaks" were those who had done something to their body to make it unusual, such as covering it with tattoos.[29] "Novelty acts" were performers who did something unusual for the show, such as pounding nails into their heads or swallowing swords.[30] In addition to these three types, there were "gaffed freaks," or phonies, such as the

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 2.

[21] THOMSON, *supra* note 1, at 4.

[22] *Id.* at 5.

[23] BOGDAN, *supra* note 5, at 11.

[24] Robert Bogdan, *The Social Construction of Freaks*, *in* FREAKERY, *supra* note 1, at 23, 27.

[25] *Id.*

[26] *Id.* at 27, 29.

[27] *Id.* at 27.

[28] *Id.* at 24.

[29] *Id.*

[30] *Id.*

"Armless Wonder" whose arms were hidden under a tight-fitting shirt.[31] Of all these, the "born freak" was held in the highest esteem.[32]

After the turn of the century, the medical model began to gain force over the scientific approach, and people with unusual bodies were increasingly viewed as sick or having a medical disorder.[33] Greater knowledge about genetics lead to the eugenics movement, and people began to view deviant bodies as a threat to a "beautiful," genetically "pure" America.[34] A belief that health, beauty, and morality could all be determined by the form of the body conceived the unusual body as a dangerous error.[35]

With the rise of the medical model and the American eugenics movement in the first three decades of the twentieth century, humor and mockery became stronger elements of the freak show.[36] Early in the twentieth century, a number of states and municipalities began to view freak shows as a threat to the morals of society and passed laws prohibiting or regulating freak shows.[37] Fascination with the unusual body became more tainted with pity and disgust, causing the freak show to lose social status and popularity in the American psyche.[38] By the 1940s, the heyday of the freak show had passed.[39]

B. *The freak show revival*

Despite loss of social status and popularity in the twentieth century, freak shows continued to survive, though in dwindling numbers, well into the 1980s.[40] Today, freak shows are again rising in numbers and popularity as a form of entertainment.[41] Rachel Adams claims that we are now seeing the beginnings of a new renaissance of the freak show, as the forms and art of earlier freak shows are revived and paro-

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[31] *Id.*

[32] *Id.*

[33] *Id.* at 33.

[34] Martin S. Pernick, *Defining the Defective: Eugenics, Aesthetics, and Mass Culture in Early-Twentieth-Century America*, *in* THE BODY AND PHYSICAL DIFFERENCE 89, 90-91 (David T. Mitchell & Sharon L. Snyder eds.) (1997).

[35] *Id.*

[36] BOGDAN, *supra* note 24, at 33.

[37] *See* notes 122, *infra.*

[38] BOGDAN, *supra* note 5, at 2.

[39] *Id.*

[40] *Id.*

[41] Paradoxically, increased awareness of the historical freak show has caused some to claim that freak shows are in danger of extinction. One web site attributes the perceived demise of the freak show to an imaginary federal law prohibiting freak shows. Thus, the web site encourages visitors to "Write Congress! Make It Possible for Freaks to Work as Freaks!" American Civil Rights Review, The Virtual Freak Show, http://www.americancivilrightsreview.com/Freak%20Show/freak-beginning.html (last visited February 20, 2007).

died in various media and reenacted in traveling shows.[42] The unusual body remains a prominent element in the current freak show revival; however, modern freak shows are more diverse in their message and content than the traditional freak show.

Some modern freak shows attempt to recreate the style of the traditional freak show, while others use the forms of the freak show to provide social commentary. Thus, for example, today the "999 Eyes Ov Endless Dream" sideshow tours the country with a mission to emulate the freak shows of the past in an effort to GIVE THE "'HUMAN CURIOSITIES' OF THE MODERN AGE A VENUE TO BE TULY [SIC] APPRECIATED ONCE AGAIN . . . ."[43] In support of this mission statement, the show includes performances by "a modern day elephant man," a "half girl," a "lobster boy," "marvelous mutated siblings," a "dancing dwarf," and others with unique bodies.[44] Other revivals include the Brothers Grim Side Shows,[45] the freak show on Coney Island,[46] and several small, traveling shows.[47] In the United States,[48] modern-day freak shows tend to use the more politically-correct term "sideshow" and provide an array of novelty acts and "made freaks" in addition to natural "human oddities." It is still held among revivalists, however, that the "born freak" is the true freak show subject.[49]

The traditional freak show is reborn not only through live shows that emulate earlier freak shows, but also through the display of images from freak shows of the last two centuries. Today, there is a growing

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[42] ADAMS, *supra* note 6, at 1.

[43] The 999 Eyes Ov Endless Dream Carnival Museum & Sideshow, *Main Page*, http://www.999eyes.com/main-page-frame.htm (last visited February 17, 2007) [hereinafter *999 Eyes*].

[44] *999 Eyes*, *Human Oddities*, http://www.999eyes.com/eye-live-oddities/eye-live-oddities.htm (last visited February 17, 2007).

[45] *See* Brothers Grim Side Shows, http://www.brothersgrimsideshow.com/ (last visited February 17, 2007) (describing performers, including a "half boy," a "bearded lady," a "fat lady," and others).

[46] *See* Coney Island Sideshow, http://www.coneyisland.com/sideshow.shtml (last visited February 17, 2007); ADAMS, *supra* note 6, at 212-17 (describing dwarf and bearded lady acts).

[47] Such shows can be traced through the Sideshow World web site. *See* Sideshow World, *Events by State*, http://www.sideshowworld.com/ms-sebs.html (last visited February 17, 2007).

[48] Freak shows continue in various forms outside the United States. For example, in 1998, *The Guardian* reported on freak shows in the Philippines: "Children born with too many limbs are billed as 'human spiders,' those with a single deformed leg as 'mermaids,' amputees are exhibited as 'lame ducks,' and people with skin afflictions as 'half-human, half-reptile' or 'the child whose mother slept with a frog'. . . . In a cage a young girl - the 'Cannibal Princess'—is kept naked and handcuffed as she gnaws on a chicken." Claire Wallerstein, *Philippines Freak Shows Put in Dock*, THE GUARDIAN, December 18, 1998, at 17.

[49] *See* Adams, *supra* note 6, at 216.

number of virtual freak shows that compile images from earlier freak shows and repeat—with varied accuracy—the tales of the performers' lives and origins.[50] One web site, Sideshow World, includes a wide range of photos, stories, and performer biographies.[51] A less historical approach is taken by most web sites, which publish (often with a cavalier attitude toward copyright law) photographs of persons who were once exhibited as "freaks."[52] There are also a number of coffee-table books that print pictures of persons with unusual bodies and describe their history of being "discovered" by promoters and displayed in freak shows.[53] While these books and web sites are not "live" exhibitions, they have some of the same effects as the traditional live freak show. The photographs they display are usually reprints of the touched-up pitch cards that were sold at earlier freak shows,[54] and the stories they tell repeat the rhetoric of the freak show barker.[55]

Some modern freak shows do not attempt to revive the traditional freak show, but rather use its forms to communicate social commentary[56] or to express a radical approach to entertainment.[57] Thus, Jennifer Miller, a woman with a beard, appears in performances that challenge gender and aesthetic norms.[58] The forms and subjects of traditional freak shows are also investigated in contemporary visual art[59] and recalled in television programs.[60] The cable television channel Comedy Central, for example, runs an animated series called

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[50] *See* notes 51-52, *infra*.

[51] Sideshow World, http://www.sideshowworld.com (last visited February 17, 2007).

[52] *E.g.*, Monstrous, http://freaks.monstrous.com/freak_show.htm (last visited February 17, 2007); Phreeque, http://www.phreeque.com (last visited February 17, 2007); Quasi-Modo, http://www.quasi-modo.net/ (last visited February 17, 2007); Show History, http://www.showhistory.com (last visited February 17, 2007); Sideshow-Art, http://www.sideshow-art.com/posters1.htm (last visited February 17, 2007); note 37, *supra*.

[53] For a good listing of freak show coffee table books, as well as a number of books with more scholarly approaches, see Sideshow-Art, *Master Handsome's Sideshow Library*, http://www.sideshow-art.com/library.htm (last visited February 17, 2007).

[54] *See* Bogdan, *supra* note 5, at 13-16 (describing touched-up photographs).

[55] *See id.* at 19-20 (discussing performer biographies used in traditional freak show).

[56] ADAMS, *supra* note 6, at 212, 217-27.

[57] *See, e.g.*, The Jim Rose Circus, http://www.jimrosecircus.com/ (last visited February 17, 2007).

[58] ADAMS, *supra* note 6, at 19-26.

[59] For a list of artists and links to their art, see Sideshow World, *Sideshow Art Gallery*, http://www.sideshowworld.com/SSAG.html (last visited February 17, 2007). *See also* James J. Mudgie, *Prodigies: Drawings of Anomalous Humans*, http://www.missioncreep.com/mundie/images/index.htm (last visited February 17, 2007); The Czar of Bizarre, http://www.czarofbizarre.com/art/ (last visited February 17, 2007).

[60] *See* Comedy Central, *Freak Show*, http://www.comedycentral.com/shows/freak_show/index.jhtml (last visited February 17, 2007); Eric Deggans, *He Speaks Fluent Carny*, ST. PETERSBURG TIMES, September 13, 2003, *available at* http://www.sptimes.com/2003/09/13/Floridian/He_speaks_fluent_carny.shtml (describing HBO program "Carnivale").

"Freak Show" in which characters with various physical anomalies fumble to live up to superhero conventions.[61]

These recent derivative works and the growing number of direct freak show revivals manifest a continued fascination with the unusual body, as well as continued unrest about the role of persons with extraordinary bodies in contemporary culture. While the diversity of modern freak shows makes broad generalizations about the shows problematic, an investigation of the roots and forms of the traditional freak show assists in explaining the meaning of freak shows in American culture and evaluating their treatment in legal discourse.

III. INTERPRETING THE CONTEXT OF FREAK SHOWS

Non-legal scholars who have studied the history of freak shows have made significant headway in describing the development and meaning of freak shows as a form of entertainment in America. In summarizing and critiquing their work, I focus on three issues that will be particularly relevant to the discussion of freak shows in legal discourse: 1) how persons with unusual bodies come to be viewed as "freaks," 2) whether freak show performers can be assumed to have voluntarily consented to participate in freak shows and, if so, the degree to which that apparent consent is relevant to the morality of freak shows, and 3) the kind of social assumptions that lead to discrimination against persons with unusual bodies. An analysis of these issues is necessary in order to cut through the drama and prejudices that travel with the freak show, and to understand the rights and realities at stake in the display of humans for profit.

A. *Show biz: "Freaks" as socially constructed*

In 2002, the French senate voted to release to South Africa the remains of a Sarah Baartman, a woman from the San tribe of South Africa who had been exhibited as the "Hottentot Venus" in freak shows across England and France.[62] Like many San women, Baartman had steatopygia,[63] which appeared strange and primitive to European audiences.[64] During her lifetime, Baartman had been paraded around

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[61] COMEDY CENTRAL, *supra* note 60.

[62] Chris McGreal, *Coming Home*, THE GUARDIAN, February 21, 2002, *available at* http://education.guardian.co.uk/higher/worldwide/story/0,,653760,00.html.

[63] Steatopygia is "an accumulation of a large amount of fat on the buttocks that occurs especially among women of some peoples of African descent." MERRIAM-WEBSTER'S MEDICAL DICTIONARY (2002) *available at* http://dictionary.reference.com/browse/steatopygia.

[64] Bernth Lindfors, *Ethnological Show Business: Footlighting the Dark Continent*, *in* FREAKERY, *supra* note 1, at 207, 208 (1996).

in beads, feathers, and in tight clothes matching her skin color while a barker exclaimed that Baartman was "wild as a beast" and invited viewers to stare at and poke her unusually large buttocks.[65] After Baartman died in 1815, her body continued to be a subject of scientific curiosity, and her remains were displayed in the Musé de L'Homme in France until the 1970s.[66] Indeed, as late as 2001, the museum still resisted relinquishing the remains because, according to the museum's assistant curator, "we never know what science will be able to tell us in the future. If she is buried, this chance will be lost . . . ."[67]

Although Sarah Baartman was not a part of the American freak show, we can see from her story that what makes a person a "freak" is not so much the person's body as it is the way in which the person is displayed and the notions of normalcy that dominate the society where the exhibition is performed. To people in her homeland, Baartman's physical features were not unusual and her body was no more a scientific curiosity than anyone else's body. Once transported to Europe, however, dressed in a costume, described as a beast, and treated as a defect of nature, Baartman came to be viewed as something strange, grotesque, and barely human.

Robert Bogdan describes a similar transformation in the freak shows of nineteenth and twentieth-century America.[68] Bogdan argues that a "freak" is not a person with a certain physical state.[69] Rather, "'[f]reak' is a state of mind, a set of practices, a way of thinking about and presenting people. It is not a person but the enactment of a tradition, the performance of a stylized presentation."[70] Every freak show exhibition is more theater than reality—a stylized misrepresentation of the background, condition, and personal attributes of the person presented.[71]

Bogdan identifies two general modes of presentation used in freak shows. In the "exotic mode" the person was promoted in ways that appealed to the audience's interest in foreign cultures and the bestial ancestry of man.[72] In order to capitalize on American exploration and

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[65] *Id.* at 208-09 (quoting A Constant Reader, *The Female Hottentot*, EXAMINER, October 28, 1810, at 653); Sadiah Qureshi, *Displaying Sara Baartman, the "Hottentot Venus,"* 42 HISTORY OF SCIENCE 233, 236 (June 2004).

[66] QURESHI, *supra* note 60, at 242, 245.

[67] *Id.* at 246 (quoting Paul Webster, *France Keeps A Hold On Black Venus*, GUARDIAN, April 1, 2000.)

[68] BOGDAN, *supra* note 24, at 28-31.

[69] *Id.* at 35.

[70] *Id.*

[71] *Id.* at 25.

[72] *Id.* at 28-29.

pre- and post-Darwinian ideas about the relation of humans to animals, persons were dressed in skins or loincloths and said to come from far away lands.[73] In the second mode, the "aggrandized mode," the person was presented in ways that emphasized how different and, typically, how inferior the person being exhibited was.[74] The smallness of one's stature might be emphasized by an ironic title of large consequence, like "Captain," or "General."[75] Those exhibited were said to speak multiple languages and to come from Europe or England.[76] The aggrandized mode emphasized the strangeness of the "freak" by focusing on how normal the other aspects of the performer's life were.[77] The Bearded Lady would brag about having a "normal" husband; the Legless Wonder would show how he walked on his hands.[78]

The fact that freak shows are primarily theater has been no great secret among promoters. Freak show promoters brag about their ability to draw crowds with dramatic—and usually fictitious—stories and various props.[79] Performers are regularly reinvented as new and different human oddities.[80] Snake charmers are reborn as medical anomalies, magicians are transformed into human blockheads.[81]

Bogdan's recognition that "freak" is a social construction in some ways corresponds with the way in which "disability" is defined by the Americans with Disabilities Act. Under the ADA, a person may fall within the definition of disabled in three alternate ways: they may have a physical impairment, they may have a record of such an impairment,

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[73] *Id.*

[74] *Id.* at 29-31.

[75] *Id.* at 29.

[76] *Id.* at 30.

[77] *Id.*

[78] *Id.* at 30-31. This tendency to aggrandize difference while simultaneously emphasizing inferiority can be seen in many modern forms outside the traditional freak show. Thus, movies cast dwarfs as cute sidekicks to the powerful and invent other unusual bodies as strange villains. *See, e.g.,* David A. Gerber, *The "Careers" of People Exhibited in Freak Shows: The Problem of Volition and Valorization*, *in* FREAKERY, *supra* note 1, at 50. Telethons exalt the courage of their subjects while evoking pity. *See, e.g.,* Paul Longmore, *Conspicuous Contribution and American Cultural Dilemmas: Telethon Rituals of Cleansing and Renewal*, in THE BODY AND PHYSICAL DIFFERENCE, *supra* note 34, at 134, 134. And talk shows and reality TV programs enforce dominant norms by displaying the unrefined and unusual beside famous hosts and experts. Andrea Stulman Dennett, *The Dime Museum Freak Show Reconfigured as Talk Show, in* FREAKERY, *supra* note 1, at 315, 320-21.

[79] *See* Bogdan, *supra* note 24, at 27; *see also* Walt Hudson, *I Was a Human Blockhead*, 2 SHOCKED AND AMAZED! (February 1996) *available at* http://www.sideshowworld.com/tgod blockhead1.html.

[80] ADAMS, *supra* note 6, at 211.

[81] For a description of the transformation of Serpintina, the snake charmer, into Miss Tessie, the human anomaly, and other theatrical identity shifts, see Hudson, *supra* note 79.

or they may be perceived as having such an impairment.[82] By defining disability to include not just a physical state but also "being regarded as" having a disability, the ADA takes into account the fact that discrimination can derive from the social construction of physical difference. The drafters of the 1974 amendment to the Rehabilitation Act, from which the ADA takes its definition of disability, recognized that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[83] Thus, the ADA was intended to acknowledge that "[w]hat people with disabilities needed . . . was not government benefits, but freedom from the discrimination that turned their physical or mental attributes into disabilities."[84]

Bogdan's analysis and the approach of the ADA help to debunk the notion that stigmatization is an inevitable characteristic of the unusual body, as opposed to a correctable social construction of physical difference. Persons with unusual bodies are not destined to be seen as "freaks" simply because of their unique bodies. Instead, it is the assumptions of the society where the person lives and the way in which the person is portrayed that shape how such persons are perceived and treated. Laws that account for this social construction of difference are more likely to be effective than those that cannot separate the freak show drama from the reality of the performers.

B. *The nature of choice: Self determination and social consequences*

In 1979 the Supreme Court of New York overturned a statute that required circuses to obtain a permit before using child performers.[85] After holding the statute exceeds the state's police power, the court goes on to comment on one particular child performer:

> It is of note that while most child performers in the circus are children of circus personnel, one of the performers for whom a permit was refused is a child who was taken out of the ghetto and found a

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[82] 42 U.S.C.S. § 12102(2)(A)-(C) (2006) (defining "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such a person; a record of such an impairment; or being regarded as having such an impairment").

[83] School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987); *see also* 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. LAW 91, 157-60 (2000).

[84] Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. LAW 53, 59 (2000). The ADA's expansive definition of disability has been called "transformative" because it seeks to displace social norms regarding what it means to be disabled. Linda Hamilton Krieger, ADA Symposium, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. LAW 476, 479-80 (2000).

[85] Farias v . New York City, 421 N.Y.S.2d 753, 757 (1979).

> life and a family in the circus. . . . . It would be a far crueler thing to deprive this boy of the life in which he has found fulfillment than to permit him to perform.[86]

The court seems to think the child could not have supported himself without joining the circus. This narrative of downtrodden persons being "saved" by the circus can also be found in freak show traditions.[87] In the freak show narrative, however, it is not "the ghetto" that makes the person in need of liberation, but the equally-stigmatizing state of the person's physical body. It is assumed that persons with exceptional bodies are destined for disgrace and unemployment due to their unusual physical characteristics. The freak show "discovers" and saves these people by giving them what is assumed to be the only possible kind of productive employment and identity.[88] Freak show performers are thus portrayed as proud to be gawked at and known as freaks, having escaped the anonymity and poverty their bodies are assumed to demand.[89]

Believing that freak show performers have happily chosen the life of the freak show makes it easier for the audience to feel there is nothing wrong with supporting freak shows. If we believe that those with unusual bodies have the same rights and mental capacities as others, the argument goes, we cannot fault freak show performers for striking a bargain between dignity and financial reward.[90] Thus, some have argued that the morality of activities such as "dwarf tossing" can be resolved by recognizing that the participants are consenting adults.[91]

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[86] *Id.* at 757-58.

[87] *See, e.g.*, Ward Hall, *Schlitzie the Pinhead* (Nov. 19, 2003) *available at* http://www.sideshowworld.com/tgodschlitzie.html (describing how Schlitzie, a male microcephalic later billed as Schlitzie the Monkey Girl, was "hidden away" by his prominent and wealthy parents until he was "given" to a freak show promoter); Phreeque, *Ronnie and Donnie Galyon – America's Oldest Living Conjoined Twins*, http://phreeque.tripod.com/galyon_brothers.html (last visited February 19, 2007) (stating that the mother of conjoined twins "rejected them when they were born, leaving them to be raised by their father").

[88] *See, e.g., 999 Eyes*, *supra* note 43 (describing the discovery of various freak show performers).

[89] *See, e.g.*, BOGDAN, *supra* note 5, at 166-67, 170.

[90] Bogdan argues that, to the freak show participants of the nineteenth century—before pity and disgust began to dominate the shows—the term "freak" was not offensive to participants, who saw themselves as merely playing a distinct role in order to make money. They looked down upon the audience, not because they were upset about being gawked at, but because they saw the audience as "rubes"—suckers to be taken for money. While Bogdan admits that those who chose the life of the freak show in the nineteenth century did not always enjoy fame and support from the promoters, he emphasizes that the performers chose the life because it best suited their economic interests. BOGDAN, *supra* note 24, at 35.

[91] *See generally* Robert W. McGee, *If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?*, 38 AM. J. JURIS. 335 (1993).

Even if we could accept the premise of this argument, however, the issue of consent is far more complex than simply identifying whether a person made a conscious decision. As David Gerber has pointed out, there are certain preconditions to effective choice and consent.[92] First, there must be options: "One makes a free choice not only when one is uncoerced, but also when one has a significant range of meaningful choices."[93] Second, there must be a social environment that gives one opportunities to play a number of different roles.[94] Third, one must have occasions for choice and the physical and mental capacity to make those choices.[95] Fourth, one must have information about the alternatives to a choice.[96] And finally, one must have sufficient security to be able to take the time to evaluate options.[97]

Gerber looks to the lives of freak show performers of the last two centuries, many who have spoken positively about their careers, to see the extent to which the freak show was an actual "choice." He reveals that due to discrimination and architectural barriers, many of the performers had no other means to earn a living. Dwarfs, for example, Barnum & Bailey's first successful human exhibits, could typically find no other work despite being mentally and physically capable. Often, freak show performers were developmentally disabled, such as the microcephalic persons billed as "pinheads," or they were recruited into the business while they were still children. Charles Sherwood Stratton, who became world famous as "Tom Thumb" was recruited into his life's career when he was just five years old.[98]

More recent discussions with freak show performers suggest that persons with physical anomalies decide to join freak shows in order to join a community that accepts them as they are.[99] After being treated as strange and grotesque by the majority, persons with unusual bodies join freak shows in order to find a community in which their differences

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[92] GERBER, *supra* note 78, at 42. This same issue arises in considering a woman's consent to prostitution or pornography. One cannot assume voluntary consent without considering the social conditions that lead to the behavior and the other options, if any, available to the person. *See* Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 118 (2006).

[93] GERBER, *supra* note 78, at 42.

[94] *Id*

[95] *Id.*

[96] *Id*

[97] *Id.*

[98] *Id.* at 47-51.

[99] ADAMS, *supra* note 6, at 217-27; Interview by John Robinson with Lobster Boy / Black Scorpion (Jan. 11, 2007) *available at* http://www.sideshowworld.com/interviewBlack_LB.html (last visited February 15, 2007).

are accepted and appreciated. J. Dee Hill explains, "Freak implies both a larger community in which the individual is shunned, or at least treated with vague suspicions, for his or her peculiarities, and a smaller community in which those peculiarities are embraced. It is about relationships, not just physical anomalies."[100] While freak show forms often encourage majoritarian views of unusual bodies, the traditional freak show culture is critical of its audience.[101]

The draw of an accepting counter-culture helps to explain the choices of persons left out of Gerber's analysis. Gerber does not take into account self-made freaks, that is, persons who have chosen to modify their bodies through tattoos, implants, or other techniques in order to qualify as unusual.[102] Nor does he consider persons with unusual physical characteristics who could normalize those characteristics but choose not to, such as women with facial hair who are exhibited as bearded women. These persons might voluntarily take on the label and costumes of the freak show in order to challenge social conventions or because they enjoy the counter-culture of the circus.[103] Having chosen to have an unusual body, these persons have more choice in deciding whether to be viewed as "freaks" than those who have unusual bodies from the outset.

Even if we could easily conclude that freak show performers have happily chosen their occupation, this would not answer whether freak shows are acceptable as a form of entertainment. This is true for two reasons:

First, even if some persons with unusual bodies voluntarily consent to being treated as "freaks," their consent might not justify the stigmatizing effects of their compromise on others who also have unusual bodies and seek to be respected in more mainstream institutions. Persons who have no interest in being treated as exhibitions are assumed freaks by somatic association. A person born with achondroplasia, for example, may be blocked from mainstream jobs if dwarfs are associated with the social status and grotesque exhibitionism of the freak show.[104] The

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[100] J. DEE HILL, FREAKS AND FIRE xi (2004).

[101] *See* note 90, *supra.*

[102] Self-made freaks are increasingly popular in modern freak shows. *See* notes 43-47, *supra.*

[103] Promoters and performers have traditionally looked down upon the "rubes" that pay to see the shows. *See* Bogdan, *supra* note 24, at 35.

[104] This was the experience of Paul Stephen Miller, now Professor of Law at the University of Washington School of Law, when he graduated from Harvard Law School in 1986. One law firm recruiter admitted that the firm's sudden loss of interest in hiring Miller was because the firm feared that "clients might think the firm was running a circus freak show." Jake Ellison, *Professor Fighting Discrimination Step by Step*, SEATTLE POST INTELLIGENCER, Nov. 24, 2004, *available at* http://seattlepi.nwsource.com/local/200937_lawprof24.html.

free choice of one to be seen as a "freak" can impose that unwanted identity upon others, especially when popular culture assumes the perspective of the freak show observer.

Second, one must consider whether the forms and values of the freak show are harmful to society and should be discouraged regardless of the will of the participants. Just as the social consequences of pornography cannot be decided based solely on the willingness of its subjects, so too the freak show must be measured by its effects generally and specifically. The traditional freak show disturbs and offends not simply because it may be exploitative. Also disconcerting is the attitudes toward difference that are embraced and encouraged by the traditional freak show. Treating physical difference as strange and disturbing encourages discrimination against those who have bodies that are different than most.

What all of this means is that the mere appearance of consent does little to tell whether freak shows are exploitative or otherwise harmful to society. Part of remedying the potential negative effects of freak shows requires preventing discrimination against persons with unusual bodies so they have sufficient options to make voluntary choices.

C. *Ugly bodies: Freak shows and group oppression*

Writing for *Scientific American*, George Johnson recalls visiting a freak show at the Minnesota State Fair. After buying a ticket, he looked through the window of a trailer that housed Ronnie and Donnie Galyon,[105] twin brothers joined at the stomach, sitting watching television:

> Twenty-five years later I am still struck by this dizzying conjunction of the grotesque and the mundane. Trying to project myself into their situation—a man with two heads, two men with one body—I felt only sickness, horror and a certainty that I would rather be dead. Yet there they were, traveling from town to town, leading some kind of life.[106]

This reaction of fear and disgust, encouraged by the forms of the traditional freak show,[107] reflects attitudes leading to discriminatory

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[105] In the late 1960s, Ronnie and Donnie Galyon's father was arrested for exhibiting his children in violation California's law prohibiting freak shows. That law and Galyon's challenge to it are discussed in Part III.B, *infra*.

[106] George Johnson, *Favored by the Gods*, SCIENTIFIC AMERICAN (June 2006) *available at* http://www.sciam.com/article.cfm?articleID=00053BBA-AC55-146C-A56D83414B7F0000. Johnson goes on to write that the horror and despair he projected onto the Galyon twins is inconsistent with reports from other conjoined twins that being joined does not prevent them from having happy and complete lives. *Id.*

[107] Freak shows draw audiences much like horror movies. Before entering the web site for 999 EYES OV ENDLESS DREAM CARNIVAL MUSEUM AND SIDESHOW, for example, one must pass through dark pages warning, "Be careful what you wish for . . . your nightmares

treatment of persons with different bodies. One who is perceived as being better off dead and whose appearance awakens horror is unlikely to be treated as having the same value as others.[108]

Iris Marion Young has argued that all forms of group oppression, including racism, sexism, ageism, ableism, and homophobia, reflect notions of "ugly, fearful, or loathsome bodies."[109] According to Young, these values are expressed by the dominant culture in such a way that some groups are associated with normalcy and reason, while other groups are associated with deviance and the body.[110]

Young argues that modern science and philosophy present reason as a universal standpoint—a "knower"—outside of and opposed to the objects of knowledge.[111] Those who do not share the experience of the dominant culture, those who do not fit the vision portrayed as normal, are marked as "Other" and defined by bodily traits. Thus, "Dominant discourse defines them in terms of bodily characteristics, and constructs those bodies as ugly, dirty, defiled, impure, contaminated, or sick."[112]

The elements of Young's theory are readily apparent in the forms of the traditional freak show. The audience acts as the infallible "knower" whose norms are reinforced as the viewer looks at the bodies of the performers. The audience observes from the perspective of reason and science, guided by the "Professor" and the scientific context in which the shows have been billed, to view the performer as an Other, explicitly defined by bodily characteristics.[113]

Legal discourse, like the infallible "knower," traditionally stands at a distance from its subject in order to appear objective.[114] This approach becomes problematic when it adopts a perspective that encour-

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might come true . . ." *999* EYES, SUPRA note 43, http://www.999eyes.com (last visited February 15, 2007).

[108] The history of discrimination against those with unusual bodies is well documented. Not long ago, historians chronicled the history of state-sponsored discrimination against the disabled in employment rights, voting rights, marriage and parental rights, and the right to travel, be free from institutionalization, and have access to the courts. *See* Brief of Morton Horwitz et al. as Amici Curiae Supporting Respondents, University of Alabama v. Garrett, 531 U.S. 356 (2001) (No. 99-1240) *available at* http://www.bazelon.org/scholarsbrief.html.

[109] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 124 (1990).

[110] *Id.* at 124.

[111] *Id.*

[112] *Id.* at 123.

[113] THOMSON, *supra* note 1, at 10.

[114] Bernard J. Hibbitts argues that the tendency to use metaphors of vision in legal discourse derives from the historical domination of the American legal community by certain "visualist groups," that is, groups that value "abstraction, disengagement, and objectivity." Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse*, 16 CARDOZO LAW REVIEW 229, 294 (1994) *available at* http://www.law.pitt.edu/hibbitts/meta_p2.htm, at 2:62-63.

ages discrimination. We should be wary of laws that cannot see beyond the physical form of the freak show performers or that assume those bodies to be strange and inferior.

IV. FREAK SHOWS IN LEGAL DISCOURSE

There are legitimate policy reasons for lawmakers to be concerned about freak shows. Such shows might exploit persons with unusual bodies, offend the public, stigmatize freak show performers and others with unusual bodies, and teach intolerance of physical difference. On the other hand, freak shows provide employment to persons with unusual bodies and, as an expression of free speech, might encourage productive discussion about physical difference.

Many of these potential positive and negative effects are raised, in varying degrees, in legal discourse regarding freak shows. Despite apparent good intentions, however, legal discourse on this subject adopts, rather than challenges, the values of the traditional freak show, assuming that social stigma is an inherent quality of the unusual body, that persons with such bodies are incapable of work outside of freak shows, and, in some places, that such persons cannot make decisions for themselves. Indeed, while legislatures often reach a different conclusion than jurists about whether freak shows must be prohibited, both make their determinations based upon similar stigmatizing assumptions about persons with unusual bodies and the role of freak shows.

In this section, I catalogue laws, ordinances, and cases that expressly concern the display of humans with unusual bodies. I identify and critique the assumptions underlying these statutes and cases, reserving for Part Four an analysis of the constitutional questions raised by laws prohibiting freak shows.

A. *Illegal bodies: Taxation and prohibition*

The past popularity of freak shows is evidenced by the number of local ordinances and state statutes still in force today addressing freak shows. Local ordinances are usually aimed at requiring a permit for freak show performances, whereas state statutes more often attempt to prohibit freak shows all together. The state statutes appear to derive from concerns about freak shows corrupting morals and exploiting the vulnerable, but these statutes end up suggesting that persons with unusual bodies cannot think for themselves and should not be allowed to participate in any public display whatsoever.

Today, numerous towns and cities have ordinances that require freak show promoters to obtain a permit and pay a fee, varying from

$1.50 to $414 per day, for presenting a freak show.[115] These ordinances refer to the display of persons with unusual bodies in the most vernacu-

[115] *See, e.g.*, CITY OF HAYWARD, CAL., MUNICIPAL CODE § 10-1.3500 (requiring permit for "carnival," defined as including "a tent, freak, or side show"); SAN DIEGO, CAL., COUNTY CODE OF REGULATORY ORDINANCES §§ 21.1051, 21.1056 (Am. Legal Pub. 2007) (permit required for "freak shows, exhibits, or any other like entertainment"); WALNUT CREEK, CAL., MUNICIPAL CODE § 8-6.31 (Am. Legal Pub. 2005) (tax on "freaks, dancing shows, minstrels, exhibitions"); KISSIMMEE, FLA., CODE OF ORDINANCES § 5-1 (Am. Legal Pub. 2006) (charging $20 for "Exhibits of freaks or other curiosities, per week"); ORMAND BEACH, FLA., CODE OF ORDINANCES § 12-36 (Municipal Code Corp. 2006) ("Freak or other curiosity (per week only) . . . 157.50"); STUART, FLA., CODE § 74-75 (Municipal Code Corp. 2006) ("freak or curiosity, for profit, per day . . . 100.00"); WACHULA, FLA., CODE § 18-65 (Municipal Code Corp.) ($1.50 per day for an "Exhibit or [sic] freak or other curiosities for profit"); ALEDO, ILL., CITY CODE § 3-5-1 (Sterling 2006) (license required to "exhibit any natural or artificial curiosities"); BATTLE CREEK, MICH., CODE OF ORDINANCES § 812.01 (Am. Legal Pub. 2006) (permit required for a "freak show where any artificial or natural curiosity is exhibited"); VILLAGE OF BLISSFIELD, MICH., COMPILATION OF ORDINANCES § 22.001 (Municipal Code Corp. 2006) (licensing "freak shows"); City of Niagara Falls, N.Y., By-Law No. 2001-31, Schedule 14 (2003) (license fee for "exhibition of natural or artificial curiosities, freaks of nature or handcraft"); TOWN OF MANCHESTER, N.Y., CODE §§ 325-4, 325-64 (Gen. Code Pub. 2006) (permitting "freak shows" in zone); VILLAGE OF ALBION, N.Y., CODE §§ 143-1, -2 (Gen. Code Pub. 2006) (permit required for "freak shows"); VILLAGE OF ELLENVILLE, N.Y., CODE § 94-1 (Gen. Code Pub. 2007) (requiring license for "the exhibition of natural or artificial curiosities, freaks or attractions"); VILLAGE OF FAYETTEVILLE, N.Y., CODE § 48-15 (Gen. Code Pub. 2006) ("exhibition of natural or artificial curiosities, freaks or attractions, $5 per day"); CINCINNATI, OHIO, MUNICIPAL CODE §825-7 (Municipal Code Corp. 2007) ("For each . . . exhibition of monsters or freaks of nature, $414 for each day's operation"); CITY OF FAIRLAWN, OHIO, CODE OF ORDINANCES §§ 852.01, 852.02 (Am. Legal Pub. 2005) (license for "exhibition of monsters or freaks of nature"); CODIFIED ORDINANCES OF TRENTON, OHIO § 816.01 (Am. Legal Pub. 2005) (same); DUBLIN, OHIO, CODE OF ORDINANCES §112.02 (Am. Legal Pub. 2006) (same); ELYRIA, OHIO, CODE OF ORDINANCES §§ 713.01, 713.02 (Am. Legal Pub. 2005) (same); EVENDALE, OHIO, CODE OF ORDINANCES § 820.01 (Am. Legal Pub. 2004) (same); FAIRBORN, OHIO, CODE §§ 711.01, 711.03 (Walter Drane 2006) (same); GREENWICH, OHIO, CODE OF ORDINANCES § 812.01 (Am. Legal Pub. 2006) (same); MASON, OHIO, CODE OF ORDINANCES § 711.02 (Am. Legal Pub. 2005) (same); MEDINA, OHIO, CODE §§ 701.01, 701.02 (Walter Drane 2006) (same); MILAN, OHIO, CODE §§ 731.01, 731.03 (Walter Drane 2006) (same); MILFORD, OHIO, BUSINESS & REG. CODE § 709.02 (Walter Drane 2006) (same); NEW BREMEN, OHIO, CODE OF ORDINANCES § 113.02 (Am. Legal Pub. 2006) (same); NEW LEBANON, OHIO, CODE OF ORDINANCES § 111.02 (Am. Legal Pub. 2005) (same); NORTH RIDGEVILLE, OHIO, CODE OF ORDINANCES § 816.02 (Am. Legal Pub. 2005) (same); NORTHWOOD, OHIO, CODE OF ORDINANCES § 826.01 (Am. Legal Pub. 2005) (same); SPRINGBORO, OHIO, CODE §§ 832.01, 832.03 (Walter Drane 2005) (same); ST. MARYS, OHIO, CODE § 715.02 (Walter Drane 2006) (same); STREETSBORO, OHIO, CODE § 701.03 (Walter Drane 2006) (same); WAUSEON, OHIO, CODE §§ 705.01, 705.02 (Walter Drane 2006) (same); MASSILLON, OHIO, BUS. REG. CODE § 717.02 (Walter Drane 2006) (permit for "natural or artificial, [sic] curiosity"); SANDUSKY, OHIO, PLANNING & ZONING CODE § 1137.04 (Walter Drane 2006) (permitting "[f]reak shows"); SPRINGDALE, OHIO, CODE OF ORDINANCES § 11302 (Am. Legal Pub. 2005) (fee for "exhibition of monsters, or freaks' [sic] of nature"); WICKLIFFE, OHIO, CODE § 1327.01 (Walter Drane 2007) (permit for "sideshows and artificial curiosity exhibits"); STOW, OHIO, CODE § 1185.02 (Walter Drane 2007) (same); TOWNSHIP OF MONTGOMERY, PA., CODE ch. 69, § M (Gen. Code Pub. 2006) (permit for "freak shows"); LA FERIA, TEX., CODE § 12.11 (Franklin L. Pub. 2007) (license for "the exhibition of any natural or

lar of terms, not referring to the display of "persons," but to the exhibition of "freaks," "freaks of nature," "monsters," and "artificial and natural curiosities."[116] While most municipalities do not maintain complete legislative history showing when the ordinances were put in place, it is apparent that many have survived amendments and codifications without removing references to "monsters" and "freaks of nature."[117] The ordinances reflect some ambivalence about the morality of freak shows: on the one hand, they implicitly condone freak shows by establishing a scheme whereby exhibitors can legally produce the shows and the locality can benefit financially.[118] On the other hand, they imply that freak shows should be regulated. Exhibitors must register with the locale and thus come under the regulation of the municipality. Under some ordinances, a town official must find that "the nature of the performance or exhibition is morally proper" before issuing a permit for a show.[119]

Concern about the social consequences of public theater and amusements has led some states and localities to prohibit the exhibition of persons with unusual bodies. As early as the 1800s, some states had enacted complete bans on circuses and theatrical productions.[120] With

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artificial curiosities"); MONROE, WIS., CITY CODE § 3-1-1 (Sterling 2004) (fee required to "exhibit any natural or artificial curiosity").

[116] *Id.*

[117] CITY OF NIAGARA FALLS, N.Y., BY-LAW No. 2001-31, Schedule 14 (adopted as amended in 1990; licensing exhibition of "freaks of nature"); VILLAGE OF ELLENVILLE, N.Y., CODE § 94-1 (adopted and amended 1987; referring to "freaks"); NEW BREMEN, OHIO, CODE OF ORDINANCES § 113.02 (passed 1983; licensing "exhibition of monsters or freaks of nature"); SPRINGBORO, OHIO, CODE §§ 832.01 (passed 1993; licensing "exhibition of monsters or freaks of nature"); STREETSBORO, OHIO, CODE § 701.03 (passed 2005; licensing "exhibition of monsters or freaks of nature"); *see also* Patrick O'Donnell, *The Show Can Go On: Streetsboro Clears Way for Concert at School,* PLAIN DEALER, March 9, 1999, at 1B (Streetsboro ordinance modified, but "freak show" provision maintained).

[118] In Delaware and Ohio, statutes ensure that the state benefits from freak show performances. Delaware requires "every person engaged in the business of exhibiting freaks" to pay a $300 licensing fee. DEL. CODE ANN. tit. 30, § 2301 (2006). In Ohio, promoters must pay a fee to the county ranging from $20 to $60 per day to "exhibit a natural or artificial curiosity." OHIO REV. CODE ANN. § 3765.01 (LexisNexis 2006). In New Hampshire and Texas, state laws specifically authorize municipalities to regulate freak shows. N.H. REV. STAT. ANN. § 47: 17 (LexisNexis 2006) (giving cities power "[t]o regulate or prohibit the exhibitions [sic] of natural or artificial curiosities"); TEXAS LOC. GOV'T CODE ANN. § 215.032 (Vernon 2006) ("The governing body of the municipality may license, tax, suppress, prevent, or otherwise regulate . . . exhibitions of natural or artificial curiosities . . . .").

[119] *See, e.g.,* CITY OF FAIRLAWN, OHIO, CODE OF ORDINANCES § 852.01; MEDINA, OHIO, CODE § 701.01.

[120] Early in American history, theater was often condemned as an immoral amusement. Most anti-amusement laws were rescinded by the time the multi-act circus was introduced to America in the late 1700s; however, some states, like Connecticut, continued to prohibit circuses and other amusements until the middle of the nineteenth century. Stuart Thayer, *The Anti-Circus Laws in Connecticut 1773-1840,* 20 BANDWAGON, (Jan. 1976) at 18-20; *see*

the rise of the freak show in the late nineteenth and early twentieth centuries, a number of states passed laws directed at prohibiting the exhibition of persons for profit.[121] While some of these laws were repealed in the 1960s and '70s, the majority are still in force in some form.[122]

From the text of these laws, we can surmise distinct concerns about the social consequences of freak shows, and of public display of unusual bodies in general. The earlier statutes manifest a concern that freak shows will in some way deceive the public. Massachusetts, for example, forbids not just exhibiting a "person who is deformed," but also prohibits displaying "a person who has an appearance of deformity produced by artificial means."[123] The statutes show that the authorities were to some degree aware that exhibits are often more show business than reality. The fake exhibits were likely associated with other unscrupulous activities that surrounded carnivals—the pickpockets, rigged games, bootlegged liquor, and prostitutes[124]—and this concern over the secondary effects of the shows may have partly motivated a ban.

The statues also reveal a concern that the exhibitions are dangerous to the morals of society. Wyoming's statute refers to "endangering of a child's health, welfare, or morals."[125] Before it was repealed, Illinois' statute prohibited, all in the same breath, exhibition of "persons

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also FREAK SHOW, *supra* note 5, at 78-79 (Connecticut and Vermont banned circuses until 1860 and 1865, respectively). In 1826, the *Connecticut Observer* listed some of the evils it believed warranted the ban on circuses: "The waste of time - the corruption of taste - the temptations held out to the young, to obtain, improperly, the means of attendance . . . - the allurements which induce some to be present, whose families must lack the necessaries of life . . . ." Thayer, *supra* this note, at 18-20 (quoting CONNECTICUT OBSERVER, February 23, 1826).

[121] *See* note 122, *infra*.

[122] Today, freak shows are generally prohibited in Michigan, Pennsylvania, and Hackensack, New Jersey. MICH. COMP. LAWS SERV. § 750.347 (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 5904 (LexisNexis 2006); CITY OF HACKENSACK, N.J., CODE § 0454-175d Schedule of District Regs. Part 3 (General Code Pub. 2006) (prohibiting "Freak shows or wax museums"). Louisiana, Massachusetts, New York, New Jersey, Rhode Island, and Wyoming prohibit the exhibition of minors with unusual bodies and other groups deemed vulnerable. LA. REV. STAT. ANN. § 23:251 (2006) (enacted 1912); MASS. ANN. LAWS ch. 272, §33 (LexisNexis 2006) (enacted 1884); N.Y. ARTS & CULT. AFF. LAW § 35.07 (Consol. 2006); N.J. STAT. ANN. § 34:2-21.57 (LexisNexis 2006); R.I. GEN. LAWS § 11-9-1 (2006); WYO. STAT. ANN. § 6-4-403 (2006). Oregon, California, Florida and Illinois have repealed their prohibition of freak shows. OR. LAWS § 167.10 (1970) (repealed 1971); CAL. PENAL CODE § 400 (1963) (enacted 1874; repealed 1964); FLA. STAT. § 867.01 (1971) (enacted 1921; repealed 1972); ILL. REV. STAT. ch. 38, § 486 (1961) (approved 1899; repealed 1962). Iowa prohibits the exhibition of "any person" without that person's permission. IOWA CODE ANN. § 727.10 (LexisNexis 2005).

[123] MASS. ANN. LAWS ch. 272, §33; *see also* CAL. PENAL CODE § 400 (1963).

[124] BOGDAN, *supra* note 5, at 84-89.

[125] WYO. STAT. ANN. § 6-4-403 (2006).

who have gained notoriety through some criminal act" and "persons whose deformity is such as to attract public curiosity."[126] Several towns in Michigan supplement that state's statute prohibiting exhibition of persons with unusual bodies by declaring that freak shows are among the class of activities that have been determined to be "a nuisance, safety hazard or otherwise not conforming to public welfare or morals."[127] Many statutes group human exhibitions along with other perceived nuisances, such as begging, prostitution, and gambling.[128] Most of the statutes only prohibit exhibitions that are "for profit," thus permitting public displays that are promoted as scientific or educational.[129]

While these statutes appear concerned about the social consequences of freak shows, they do not focus on those social consequences or recognize the social construction of the freak. Instead, the statutes zero in on the bodies of the persons being exhibited. Like the freak show observer, these statutes focus on deviant bodily traits in defining what is prohibited, as though the physical features of the exhibited person were the primary reason for prohibiting the exhibition. Michigan prohibits exhibition of "any deformed human being or human monstrosity."[130] Louisiana and New York prohibit exhibiting a child "when presenting the appearance of any deformity or unnatural physical formation or development."[131]

Referring to persons as "monstrosities" or "unnatural" phenomenon is itself stigmatizing. But even when the language of the statutes is modified, they still miss the mark by focusing on the bodies exhibited rather than the context of the shows. Rhode Island's statute, which broadly prohibits "the exhibition of any child with a disability"[132] could arguably prevent children with disabilities (whether physical, mental, or intellectual) from participating in various activities, such as plays, pageants, and spelling-bees, with their able-bodied peers. Presumably,

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[126] ILL. REV. STAT. ch. 38, § 486 (1961).

[127] CITY OF ROYAL OAK, MICH., CODE § 188-48 (Gen. Code Pub. 2006); DAVISON, MICH., CODE OF ORDINANCES § 864.04 (Am. Legal Pub. 2006); FARMINGTON HILLS, MICH., CODE OF ORDINANCES § 5-103 (Municipal Code Corp. 2006); GARDEN CITY, MICH., CHARTER AND CODE OF ORDINANCES §W 116.053 (Am. Legal Pub. 2006); OAK PARK, MICH., CODE OF ORDINANCES § 10-252 (Municipal Code Corp. 2006); SAGINAW, MICH., CODE OF ORDINANCES § 112.02 (Am. Legal Pub. 2006).

[128] *See* N.Y. ARTS & CULT. AFF. LAW § 35.07; R.I. GEN. LAWS § 11-9-1; WYO. STAT. ANN. § 6-4-403.

[129] MASS. ANN. LAWS ch. 272, §33; MICH. COMP. LAWS SERV. § 750.347; N.J. STAT. ANN. § 34:2-21.57; 18 PA. CONS. STAT. ANN. § 5904.

[130] MICH. COMP. LAWS SERV. § 750.347.

[131] LA. REV. STAT. ANN. § 23:251; N.Y. ARTS & CULT. AFF. LAW § 35.07.

[132] R.I. GEN. LAWS § 11-9-1.

Rhode Island does not seek to outlaw children with disabilities from enjoying these benign activities, but the statute fixates on the "disabled" body of the exhibited person and thereby prohibits children with such bodies from being the subject of any spectacle whatsoever.

Iowa's cleaned-up statute is also ineffective. In 1995, the Iowa legislature modified its statute so that, rather than prohibiting exhibition of "any deformed, maimed, idiotic or abnormal person or human monstrosity" without consent, the statute simply prohibits exhibition of "any person" without that person's consent.[133] While the deletion of the stigmatizing adjectives in Iowa's statute is praiseworthy, the resulting statute duplicates laws prohibiting slavery and kidnapping.[134] This unnecessary statute can do little to prevent freak shows, since it simply looks for the appearance of consent in any kind of display.

Implicit in many of these statutes is a concern that vulnerable persons may be exploited in freak shows for the profit of others. As discussed above,[135] this is a valid concern to the extent persons with unusual bodies are not allowed legitimate opportunities for employment and respect. In the statutes, however, this reality is overlooked and replaced with a more simple presumption—that persons with unusual bodies are incapable of making appropriate decisions. Persons with unusual bodies are grouped with minors and persons with mental illness and developmental disabilities. Thus, New Jersey prohibits exhibition of, as though one and the same, "any physically deformed or mentally deficient minor";[136] Pennsylvania prohibits exhibition of "any insane, idiotic or deformed person, or imbecile";[137] and Louisiana and New York prohibit exhibiting a minor who is "insane or idiotic, or when presenting the appearance of any deformity."[138] Gone is the fiction that sad physical deviants are "saved" by joining a freak show; this is replaced, however, with the assumption that such persons cannot think for themselves.

The problem with these statutes is that they have absorbed the very perspective they seem to be aiming to correct. By focusing on the

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[133] IOWA CODE ANN. § 727.10; An Act Relating to the Exhibition of Humans (May 4, 1995), S.F. 366, 1995 Iowa Acts, ch. 168, §1.

[134] Arguably perhaps, if Iowa's law applies not just to live exhibitions and thereby prohibits exhibition of photographs of persons, it might place limits on internet freak shows. For a discussion of enforcing the right to publicity to prevent entertainment derived from the misfortune of others, see, e.g., William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43 (2005).

[135] See Part II.B, *supra*.

[136] N.J. STAT. ANN. § 34:2-21.57.

[137] 18 PA. CONS. STAT. ANN. § 5904.

[138] LA. REV. STAT. ANN. § 23:251; N.Y. ARTS & CULT. AFF. LAW § 35.07.

bodies of the performers, constructing those bodies as "deformed" and "monstrous," as though those words describe static, universally understood characteristics, and implying that persons with such bodies are incapable of making decisions, the statutes perpetuate the assumption that persons with unusual bodies are incapable, inferior, and destined to be considered "freaks." Rather than identifying or prohibiting the unwanted effects of freak shows, the laws simply prohibit the spectacle of the unusual body, as though such bodies are dangerous in and of themselves.

This oversight leaves these laws ineffective. Despite their focus on the performers' bodies, these laws fail to define what makes a body sufficiently unique to be considered "deformed" or even "disabled." These loaded terms are bound to be interpreted differently depending on culture and personal experience, thus making compliance with the statutes subjective and enforcement of them arbitrary.

B. *Public morality: Challenges to prohibition*

Although some of the laws prohibiting freak shows have been on the books for over one hundred years, there is very little case law interpreting the reach of the statutes. The few reported cases that analyze the statutes are cases in which freak show promoters have challenged the prohibition by claiming the law is an unconstitutional restraint beyond the state's police power.[139]

As discussed in Part Four, these cases ultimately reach the right decision, holding the California and Florida statutes banning freak shows unconstitutional. They reach this result, however, through an array of erroneous assumptions about persons with unusual bodies and the context of freak shows. The courts assume that freak shows are simply educational displays that do not shape social views, that persons with unusual bodies are destined to be treated as "freaks" because of their physical differences, and that such persons have no interest or capacity to be anything but a freak show performers. While the courts rightly recognize that society has grown more accepting of physical diversity since the laws prohibiting freak shows were passed, they fail to recognize that freak shows might express negative themes that promote discrimination against those who are physically different.

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[139] Using its police power, a state may pass laws to promote the order, safety, health, morals and general welfare of society. *See* discussion in Part IV, *infra.*

1. Galyon v. San Bernardino

Decided in 1964, *Galyon v. San Bernardino*[140] was the first case to address a challenge to the constitutionality of a ban on freak shows. The father of nine-year-old conjoined-twin boys was exhibiting his sons at a show in San Bernardino when he was arrested for violating California Penal Code section 400, which prohibited display of deformed persons for profit.[141] The twins, who were joined at the chest, were housed by their father in a mobile trailer with a large glass window in the side.[142] The father charged admission to see the twins and during the exhibit would give out pamphlets and tell stories about the birth, personalities, and living habits of the boys.[143] The father's sole income came from exhibiting the boys.[144] At trial, the father claimed that California Penal Code section 400 was unconstitutional by virtue of the California Constitution and the Fourteenth Amendment of the U.S. Constitution.[145]

In order to measure the strength of the state's police power in this area, the court attempts to imagine the ways in which such a show might be considered a danger to the health or morals of California citizens.[146] The court offers two possible negative effects of freak shows: harm to those who are exhibited and harm to the general public who view the shows. In its analysis, however, the court only seriously considers the second threat. The court finds the prohibition of freak shows unconstitutional, not because it believes freak shows treat performers fairly, but because society no longer finds such shows offensive.

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[140] 229 Cal. App. 2d 667 (1964).

[141] *Id.* at 668; *see* Cal. Penal Code § 400 (enacted 1874; repealed 1964) ("Every person exhibiting the deformities of another, or his own deformities, for hire, is guilty of a misdemeanor; and every person who shall, by any artificial means, give to any person the appearance of a deformity, and shall exhibit such person for hire, shall be guilty of a misdemeanor.")

[142] *Galyon*, 229 Cal. App. 2d at 668.

[143] *Id.* Endemic of the continuing fascination with unusual bodies, the "pitch cards" distributed by freak show promoters during the last century can still be found today on internet auction sites. I obtained a copy of a pitch card Galyon apparently distributed after the California ban was lifted. The outside of the card has a picture of the twins, along with language promoting the children: "No. 1 Phenomenal Sensation of the Show World," "TWO HEADS – FOUR ARMS – FOUR LEGS – ONE BODY – RONNIE – DONNIE – ALIVE." WESLEY LEON GALYON, GALYON SIAMESE TWINS (undated) (on file with author). The inside describes the birth of the children, their medical history, and how they are able to walk, sleep and eat. *Id.* The card states, "These boys are on exhibition with the permission of the probate court for the benefit of their own future security. They are perfectly happy, healthy, and mentally alert children." *Id.*

[144] *Galyon*, 229 Cal. App. 2d at 668.

[145] *Id.* at 668-69.

[146] *Id.* at 670-71.

The court states that it is unable to recover the legislative history of the statute, and therefore it must attempt to reconstruct the purpose of the statute from historical resources.[147] At first, the court seems moved by the danger that persons being exhibited might be exploited through freak shows. It describes the rise of the freak show:

> Probably the greatest of all exhibitors who preyed upon and became enriched by these unfortunates was P.T. Barnum. He sought and obtained persons who would draw the members of the general public to the display. The individual was compensated but the greatest financial gain was to the exhibitor.[148]

The court stops here, however, never fully evaluating whether freak shows might in fact exploit the performers.[149] This is a considerable oversight, especially since the freak show at issue is one in which those exhibited likely have no say in deciding whether to be displayed; the nine-year-old boys are most certainly being displayed at the behest of their father. Perhaps the court optimistically assumes that no father would exhibit his children if it were not in the best interests of the children. But the court gives no reason for making this assumption after noting the history of freak shows that exploited their subjects.

When the court discusses the danger of exploitation, it is the general public that it finds in danger of being exploited by the spectacle of unusual bodies. The court imagines that the statute was originally put in place to protect observers from being lured into looking at deviant bodies:

> As timid as the general public may have been and as revolted as they may have been to this type of exhibit, human curiosity overcame these emotions and money was paid to see the oddity. Possibly by reason of the code of morals extant in 1873, section 400 was enacted.[150]

The court assumes that "revulsion" was the viewer's natural and inevitable response to exhibition of "freaks, deformities and weird, unusual and misshapen human beings."[151] The court decides that the danger of the displays was that "human curiosity" would push the public beyond healthy "timidity" and "revulsion" at the unusual body.[152] The language the court uses to describe the threat of the freak show—

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[147] *Id.* at 670.

[148] *Id.* (citation omitted).

[149] *Id.*

[150] *Id.* at 670.

[151] *Id.*

[152] *Id.*

"human curiosity"[153]—happens to be the very term used in the industry to identify a freak show performer.[154]

After noting that the statute prohibits exhibitions "for hire" but not ones for free, the court concludes that society's sensibilities have changed since the statute was enacted and that people now find no moral offense in paying to see "deformities."[155] While the court makes a special point of noting that the exhibition of the Galyon twins was in no way erotic,[156] it suggests that freak shows are an accepted part of modern culture:

> The very essence and plot of many cartoons, motion pictures, television shows are deformities which are paid for in one manner or another, are daily distributed to, and viewed by the general public. The general public has accepted them and indeed encouraged them as part of their lives.[157]

The court's examples maintain the notion that persons with unusual bodies are a source of entertainment: they are the subjects of cartoons, movies and TV shows. Whereas the statute was originally passed "to stop the exploitation of deformities for financial gain,"[158] the same exploitation is apparently now acceptable in the entertainment industry. The court appears to believe that persons with unusual bodies will inevitably be seen as "freaks" and offered for entertainment, and that this is perfectly acceptable today. The court therefore concludes that the prohibition of freak shows goes beyond the state's police power and holds the statute unconstitutional.[159]

Notably absent from the *Galyon* opinion is any recognition that the Galyon twins might not want to be considered "freaks," that the statutory language prohibiting displays of "deformities" is unclear, or that freak shows might have consequences outside of their entertainment value. The *Galyon* court does not challenge any of the negative social assumptions about persons with unusual bodies; instead, it decides that the "revulsion" of physical difference is now an accepted part of society.

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[153] *Id.*

[154] BOGDAN, *supra* note 5, at 3.

[155] *Galyon*, 229 Cal. App. 2d at 671.

[156] *Id.* at 668 ("When viewed by the public the twins were fully clothed at all times.").

[157] *Id.* at 671.

[158] *Id.* at 670.

[159] *Id.* at 672.

2. World Fair Freaks and Attractions v. Hodges

Eight years after *Galyon*, the Florida Supreme Court addressed the constitutionality of Florida's ban on freak shows.[160] A local sheriff in North Bay Village appears to have interrupted a freak show before it began. He warned the carnival company setting up shop there that if they proceeded with a side show exhibition the company and its participants would be prosecuted under Florida Code section 867.01, which prohibited "exhibition for pay or compensation of any crippled or physically-distorted, malformed or disfigured person."[161] The carnival company joined with two of its freak show performers in claiming that the statute was unconstitutionally discriminatory and void for vagueness.[162]

Even more so than the *Galyon* court, the *Hodges* court appears utterly incapable of seeing the freak show performers as anything but "freaks." The court expressly rejects the idea that freak shows might promote negative views of persons with unusual bodies and bases its ruling on the assumption that freak show performers are incapable of any kind of gainful employment outside of freak shows.

The court sees its task as weighing the interests of "society in general" against those of "the individual in particular."[163] It must balance the "equal right of all to earn a living" with the "public health, morals and safety."[164] In defending the statute, the State had argued that the prohibition was justified because of the negative consequences freak shows have on other people with unusual bodies.[165] The court includes in the published opinion the following quote from the State's brief:

> Such exhibitions tend to generate the public concept of physically handicapped and deformed persons as freaks. Such a concept is morally intolerable in light of its impact upon those handicapped and deformed persons who do not care to be looked upon as carnival acts. In addition, such a public concept would logically tend to make it more difficult for physically handicapped and deformed persons to obtain normal employment that they are otherwise capable of engaging in. The result is that the support of such persons ultimately falls upon the State. The State therefore has a legitimate economic interest in fostering enlightened public understanding and attitudes toward the true nature and problems of the physically handicapped and deformed.[166]

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[160] World Fair Freaks and Attractions v. Hodges, 267 So. 2d 817 (Fla. 1972).

[161] *Id.* at 817.

[162] *Id.* at 818.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

This argument reflects a unique understanding of the social construction of oppression and, as such, anticipates laws such as the ADA that define disability socially as well as physically.[167] It recognizes that people with unusual bodies suffer discrimination not because they have inadequate or inferior bodies, but because society constructs these people as inferior. Further, the argument recognizes that while freak shows offer employment to those with unique bodies, the shows simultaneously limit the employment options open to such persons by identifying them as "freaks" rather than normal people.

The court, however, quickly rejects this forward-looking perspective, stating simply, "We seriously doubt such a result as is suggested . . . ."[168] Instead, the court employs its own conception of what the social harms of freak shows may be, focusing on the reactions of the observers. The court assumes the harm that comes from freak shows has nothing to do with the exploitative attitudes that freak shows encourage; rather, the potential harm is the inevitable disgust of the audience at seeing deviant bodies.[169] Like the *Galyon* court, the Florida court assumes that the laws prohibiting freak shows was passed because unusual bodies were recognized as being dangerously erotic and repulsive:

> It may be that certain malformations, perhaps those relating to private areas of the body or some which may be repulsive or vulgar in nature, would so affect the morals and general welfare as to lend themselves to a prohibition by a proper law which sets appropriate standards.[170]

Thus, the court zeroes in on the bodies of the performers since it cannot conceive of freak shows presenting any other harm. This potential harm is balanced, the court decides, by the educational value of the exhibitions:

The exhibition could actually be informative and educational of facts and occurrences that the public should see and know regarding certain deformities which result to human beings; to know of the horrors that beset mankind. Apropos is the recently publicized deformities in babies from the use of thalidomide by pregnant women.[171]

The court cannot conceive that the "horrors" of physical difference are created by social conditions and attitudes. Rather, these "horrors"

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[167] *See supra* notes 83-84 and accompanying text.

[168] *Hodges*, 267 So. 2d at 818.

[169] *Id.*

[170] *Id.*

[171] *Id.*

are assumed an inevitable and inherent attribute of the deviant body from birth.

Unlike the *Galyon* court, which does not consider the position of freak show performers, the court here is intensely aware of the spectacle of the performers who are acting as plaintiffs. We are told their names are Terhune, who "was born a dwarf," and Berent, who "was born with deformed extremities and is generally known as 'Sealo the Seal Boy.'"[172] Although it has only been "alleged" that these two plaintiffs have no means of employment except through freak shows, the court accepts this proposition as established fact and adds to it the assumption that all persons in freaks shows have no other means of employment.[173] The court thus frames the primary issue of the case as the right of persons with unusual bodies to be employed: "[O]ne who is handicapped or in an unfortunate position because of physical handicaps or deformities, in no wise of his own choosing, must be allowed a reasonable chance within his capacities to earn a livelihood."[174]

The court becomes so focused on the two plaintiffs that it fails to recognize the underlying interests of the corporate plaintiff who profited from the shows. The two "unfortunate" plaintiffs, suffering the "horrors" of physical difference, are assumed so incapable as to be happy to find any kind of useful activity, diligently accepting their natural place as "freaks."[175] The plaintiffs seem to act as representatives of all people with extraordinary bodies, even to the extent that the court is unable to imagine that others with unusual bodies might have views contrary to the plaintiffs. The court "seriously doubt[s]" that there are such people who "do not care to be looked upon as carnival acts" and who suffer employment discrimination because of attitudes that such persons are "freaks."[176]

Ultimately, the court concludes that the statute violates the constitutional right of the performers "to pursue a lawful occupation." The court notes that the statute prohibits freak shows that charge a fee, but not ones that charge no fee, and decides this distinction is unfair and arbitrary. Prohibiting only human exhibitions for a charge, the court holds, unfairly disadvantages persons who earn their living by being ex-

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[172] *Id.* at 817. During the freak show performance, Terhune, who was billed as the "iron tongued pygmy," lifted weights with his tongue, Deggans, *supra* note 60, while Bernet would show off his ability to shave himself with a straight razor, smoke a cigar, and saw up a fruit crate, James G. Mundie, *Sideshow Ephemera Gallery: Sealo—The Seal Boy*, http://missioncreep.com/mundie/gallery/gallery16.htm (last visited February 17, 2007).

[173] *Hodges*, 267 So. 2d at 817.

[174] *Id.* at 818.

[175] *Id.*

[176] *Id.*

hibited.[177] Determining that the distinction between freak shows for profit and those for free is wholly arbitrary, the court states that the statute must be rejected for "failure to set forth reasonable standards to be followed in its application."[178]

The primary problem with *Hodges* and *Galyon* is how the courts perceive the persons exhibited in freak shows. Freak show promoters and performers readily acknowledge that freak shows are a form of theatrical entertainment—that is, dramas made through costumes, language, and fiction. Yet neither the laws regulating freak shows nor the cases overturning those laws take into account the social construction of the "freak." The *Galyon* and *Hodges* courts cannot conceive of the freak show performers as being capable of or interested in doing anything other than being exhibited as freaks. Nor can they imagine that discrimination is a social construction rather than an inevitable consequence of physical uniqueness. The courts thus misjudge the interests of the performers and the reasons for prohibition, and instead repeat the same negative social assumptions about those with unusual bodies as are promoted by the traditional freak show.

V. THE POWER OF THE STATE TO REGULATE FREAK SHOWS

While the *Galyon* and *Hodges* courts fail to understand the context of their subject, they ultimately reach the correct result in finding the California and Florida statutes unconstitutional. The statutes considered by the *Galyon* and *Hodges* courts are unconstitutional not because persons with unusual bodies desperately want jobs as freak show performers or because society can no longer be offended by freak shows. Rather, those statutes are void for vagueness and place impermissible limits on free speech.

So too, the current prohibition of freak shows in many states are unconstitutional because their terms are overly vague and they prohibit more free speech than necessary to achieve the objectives of the statutes.

A. *Police power analysis*

In order to determine whether a state law reaches beyond the state's power to pass laws for the "public health, safety, morals, or general welfare," courts look to whether the law serves a legitimate government interest and weigh that governmental purpose against the

[177] *Hodges*, 267 So. 2d at 819.
[178] *Id.*

individual rights that are limited by the law.[179] If the law does not infringe upon a fundamental right, it will be upheld if it is rationally related to a legitimate government interest.[180] The *Galyon* and *Hodges* courts rely on questionable grounds for holding that the California and Florida statutes exceed the state's police power analysis, when in fact those statutes should have simply been found void for vagueness.

The *Galyon* court seems primarily concerned with whether prohibiting freak shows remains a legitimate government interest. In deciding that the government no longer has a legitimate basis for banning commercial exhibitions of persons with unusual bodies, the court confuses society's growing acceptance of physical difference with a general consensus that freak shows are accepted entertainment. While it is true that persons with unusual bodies have become more widely accepted, this does not mean that society has accepted, or should accept, freak shows as common entertainment. To the contrary, the modern use of the term "freak show" is generally applied to things considered disturbing, improper, and in poor taste.[181] Thus, the court's analysis of whether a law prohibiting freak shows is legitimate is skewed by the court's assumption that persons with unusual bodies will always be seen as "freaks" and that society has properly accepted this reality.

In *Hodges*, the court gives two reasons for finding that the Florida law prohibiting freak shows goes beyond the police power. First, the court suggests that prohibiting such shows interferes with the right of freak show performers to earn a living.[182] The court reaches this conclusion, however, based on the assumption that the performers are capable of no other work. The court fails to recognize that permitting freak shows can actually diminish job opportunities for those who are physically different by encouraging the view that persons with unusual bodies are "freaks."[183]

The *Hodges* court also bases its ruling on what it perceives as an arbitrary distinction in the law—the prohibition of freak shows for profit but not ones for free. Because the statute prohibits human exhi-

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[179] *See* Berman v. Parker, 348 U.S. 26, 32 (1954); Kevin Outterson, *Health Care, Technology and Federalism*, 103 W. VA L. REV. 503, 505-07 (2001) (describing police power in health care regulation).

[180] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56 (1905).

[181] *See, e.g.*, WEBSTER'S NEW MILLENNIUM DICTIONARY OF ENGLISH, PREVIEW EDITION (v 0.9.6), (2003) (defining "freak show" as "any show or event that is in bad taste"); Random House, Inc., Dictionary.com Unabridged (v 1.1), http://dictionary.reference.com/browse/freak show (last visited March 14, 2007) (defining same as "any ludicrous, bizarre, or dehumanizing occasion, function, performance, etc.").

[182] *Hodges*, 267 So. 2d at 818-19.

[183] *Id.* at 818.

bitions for a charge but permits such exhibitions when there is no charge, the court holds, the statute creates a distinction for which there can be no rational reason.[184] It is interesting that the court envisions freak shows as potentially educational,[185] yet it cannot fathom why the State would want to allow free exhibitions and prohibit exhibitions for profit. Arguably at least, an exhibition of humans for profit is more likely to exploit those exhibited and deceive the audience for the simple reason that promoters of such shows have a financial incentive to put persons with unusual bodies on display and to make the show more shocking. The increased likelihood of exploitation in for-profit shows is at least rationally related to the government interest in protecting its citizens. This distinction is not arbitrary; though, as discussed below, it results in a greater burden on free speech than necessary.

That is not to say that there is not an arbitrary aspect of the Florida law. In fact, the problem of vagueness infects all of the statutes currently in place prohibiting freak shows. The terms used by the statutes to define what kinds of persons may not be exhibited cannot be pinned down. The statutes prohibit the display of persons who are "deformed,"[186] or "monstrosities,"[187] or who have "unnatural"[188] features. These statutes could cover everything from a person with a mole to a person with nine eyes, depending on how broadly one defines these terms. The use of subjective, value-based terms in all of these statutes gives authorities unbridled discretion in deciding what conduct is prohibited.[189] The vague terms used in laws prohibiting freak shows is by itself grounds to hold the statutes unconstitutional.

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[184] *Id.* at 819.

[185] *Hodges*, 267 So. 2d at 818.

[186] *See* MASS. ANN. LAWS ch. 272, §33; MICH. COMP. LAWS SERV. § 750.347; LA. REV. STAT. ANN. § 23:251; N.J. STAT. ANN. § 34:2-21.57; N.Y. ARTS & CULT. AFF. LAW § 35.07; 18 PA. CONS. STAT. ANN. § 5904; WYO. STAT. ANN. § 6-4-403.

[187] *See* MICH. COMP. LAWS SERV. § 750.347.

[188] *See* LA. REV. STAT. ANN. § 23:251; N.J. STAT. ANN. § 34:2-21.57; N.Y. ARTS & CULT. AFF. LAW § 35.07.

[189] In fact, in a later case, the Florida Court of Appeal found a statute to be unconstitutionally vague where the statute used the exact same language as the statute invalidated in *Hodges*, only it prohibited the exhibition of "crippled or physically distorted, malformed, or disfigured" animals rather than humans. Gardner v. Johnson, 429 So. 2d 1341 (Fla. Ct. App. 1983) *r'vd* 451 So. 2d 477 (Fla. 1984). After noting the testimony of various law enforcement officers who, when shown pictures of animals of various shapes and sizes, were unable to agree on which animals were "crippled or physically distorted, malformed, or disfigured" and which ones were not, the Court of Appeal concluded that "the statute is unconstitutionally vague and thus void." *Id.* at 1342 n.1, 1343-44. This decision, however, was later overturned by the Florida Supreme Court on other grounds with little discussion of the meaning of the statutory terms. Gardner v. Johnson, 451 So. 2d 477, at 477-78 (Fla. 1984).

B. *First Amendment analysis*

Neither *Hodges* nor *Galyon* attempts to analyze the First Amendment rights of freak show performers or promoters. Apparently, the issue was not raised on appeal. As we have seen, however, freak shows certainly have an expressive element. Freak shows are not mere exhibitions of unusual persons; they are stylized displays designed to emphasize the strangeness of certain physical characteristics.[190] Freak show performers are given outlandish names, dressed in costumes, and presented with fictitious narratives about their background and abilities.[191]

The expressive elements of freak shows have become more pronounced in recent years as the shows have grown more diverse in content, message, and medium. Some attempt to revive freak shows of the past, while others use the forms of the traditional freak show to criticize social assumptions about physical difference.[192]

The Supreme Court has held that "content-based" restrictions on expressive conduct are subject to strict scrutiny; whereas laws that are "content-neutral" need only pass intermediate scrutiny.[193] A law is content-neutral if it is "justified without reference to the content of the regulated speech,"[194] that is, if the reason the expression is being restricted is not related to the viewpoint being expressed.[195]

In *O'Brien*,[196] the Court held that a law restricting expressive behavior is constitutional under First Amendment analysis if 1) "it is within the constitutional power of the Government," 2) the law "furthers an important or substantial governmental interest," 3) "the governmental interest is unrelated to the suppression of free expression," and 4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to that interest."[197] A law that is directed at the specific content of speech, on the other hand, will be held unconstitutional unless it serves a compelling government interest,

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[190] *See supra* notes 68-81 and accompanying text.

[191] *See supra* notes 72-81 and accompanying text.

[192] *See* Part I.B, *supra.*

[193] The proper test to use in First Amendment analysis is the subject of much discussion and little agreement. *See generally* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2006). I do not attempt to enter that debate here. Instead, I rely upon general principals of established jurisprudence.

[194] Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

[195] *See* Volokh, *supra* note 193, at 1286-1304.

[196] United States v. O'Brien, 391 U.S. 367 (1968).

[197] *Id.* at 381-82.

is narrowly tailored to achieve that end, and is the least restrictive means of accomplishing it.[198]

First Amendment analysis thus requires consideration of the purpose of laws that prohibit freak shows. As we have seen, the three main justifications given for laws prohibiting freak shows are 1) to prevent exploitation of those with unusual bodies, 2) to avoid offending public sensibilities, and 3) to stop practices that tend to stigmatize those with unusual bodies and that teach intolerance of physical difference. I discuss each of these objectives separately with reference to current state statutes prohibiting freak shows.[199]

1. Prohibiting freak shows in order to prevent exploitation

If the first objective—preventing exploitation—is the purpose of laws regulating freak shows, then the laws are content-neutral. It is not the message of the shows but their treatment of the performers that inspires this objective. With this objective, we can clear the first elements of the *O'Brien* test by noting that the government has the power to protect its citizens, that it has a legitimate interest in ensuring that persons are not unfairly exploited, and that this interest in protecting the citizenry from exploitation is not related to what freak shows do or do not say.

The fourth element of the *O'Brien* test, however, weighs against constitutionality. Current state statutes prohibit freak shows that exploit performers along with shows that do not exploit, and thus these statutes restrict greater speech than necessary to achieve this goal. As we have seen, some statutes prohibit any display of persons with unusual bodies,[200] while others prohibit such displays that are for profit,[201] and others prevent such displays when the subject is a minor with an

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[198] *See, e.g.,* Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

[199] Ordinances addressing freak shows are also subject to First Amendment analysis. As discussed above, the ordinances addressing freak shows vary widely in how they tax, prohibit, or demand a permit for freak shows. *See supra* notes 115 and 127 and accompanying text. As a general matter, however, the ordinances do not define "freak show," and some leave it to local authorities to determine whether a particular show is "morally proper." *See supra* note 127. Thus, many of these ordinances would likely be found to be unlawful prior restraints on expression because they give local officials unbridled discretion in deciding what constitutes a "freak show" and which of those are "morally proper." *See* Trey Hatch, *Keep on Rockin' in the Free World: A First Amendment Analysis of Entertainment Permit Schemes*, 26 COLUM. J.L. & ARTS 313, 329-30 (2003) (prior restraint analysis of live entertainment permits).

[200] *See* IOWA CODE ANN. § 727.10; MICH. COMP. LAWS SERV. § 750.347.

[201] *See* MASS. ANN. LAWS ch. 272, §33; 18 PA. CONS. STAT. ANN. § 5904.

unusual body.[202] While it is true that shows for profit are more likely to exploit than ones for free, and that minors are more vulnerable to exploitation than adults, we cannot say that all shows for profit are exploitative or that all displays of children with unusual bodies take unfair advantage. The Massachusetts and Pennsylvania statutes, for example, prohibit all commercial displays of persons with unusual bodies, regardless of whether the persons being displayed are being sufficiently rewarded for participating or not.[203] Several states prohibit any display of a child with an unusual body, whether it is in a freak show or some more innocent spectacle like a play, spelling bee, or dance competition.[204] These laws throw the unusually-formed baby out with the bath water, banning all displays of children with unique bodies, thus limiting more speech than essential to prevent exploitation.[205]

2. Prohibiting freak shows for the sake of propriety

Laws restricting freak shows may also be intended to shield the public from the spectacle of the unusual body. The *Galyon* and *Hodges* courts assumed that this was the primary purpose of the statutes they overturned.[206] Arguably, this objective is also content-neutral. Like generally applicable laws prohibiting public nudity, laws might prohibit the display of the unusual body because the spectacle offends public morality and tastes.[207] On the other hand, such laws may be considered content-based because they seek to suppress public involvement and expression by one particular group—persons with unusual bodies. Moreover, laws that prohibit only displays "for profit" control how commentary on unusual bodies may be expressed: treating the unusual body as educational is okay, but treating it as entertainment is not.

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[202] *See* LA. REV. STAT. ANN. § 23:251; N.J. STAT. ANN. § 34:2-21.57; N.Y. ARTS & CULT. AFF. LAW § 35.07; R.I. GEN. LAWS § 11-9-1; WYO. STAT. ANN. § 6-4-403.

[203] *See* MASS. ANN. LAWS ch. 272, §33; 18 PA. CONS. STAT. ANN. § 5904.

[204] *See* LA. REV. STAT. ANN. § 23:251; N.J. STAT. ANN. § 34:2-21.57; N.Y. ARTS & CULT. AFF. LAW § 35.07; R.I. GEN. LAWS § 11-9-1; WYO. STAT. ANN. § 6-4-403.

[205] It is questionable whether banning freak shows truly prevents exploitation. As we have seen, the potential for exploitation does not arise from the existence of freak shows but from a lack of reasonable alternatives. *See* Part II.A, *supra*. This means the law should focus on ensuring that persons with unusual bodies have opportunities for gainful employment outside of freak shows.

[206] *Galyon*, 229 Cal. App. 2d at 670; *Hodges*, 267 So. 2d at 818.

[207] *Compare* Barnes v. Glen Theater, Inc., 501 U.S. 560, 570-71 (holding public nudity statute content neutral) *with* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-135 (U.S. 1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *see also* Aaron Brogdon, *Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws: City of Erie v. Pap's A.M. Perpetuates the Confusion Created by Barnes v. Glen Theatre, Inc.*, 17 BYU J. PUB. L. 89, 92-98 (2002) (arguing *Barnes* wrongly decided).

Even if we assume that this objective allows for treating freak show laws as content-neutral, the laws still fail the *O'Brien* test when relying on this objective. Shielding the public from those who look different is hardly an "important or substantial government interest." Indeed, this objective is reminiscent of the "ugly laws" passed early in the twentieth century prohibiting "unsightly" persons from "exposing" themselves to public view.[208] The government cannot have a substantial interest in preventing some of its citizenry from joining the rest of the community simply because people do not want to see people who look different.[209] This type of targeted restraint on the expression of one group is contrary to First Amendment values.

3. Prohibiting freak shows in order to prevent discrimination

The most appealing objective for laws prohibiting freak shows is also the most likely to run afoul of the First Amendment. Laws prohibiting freak shows may be intended to prevent displays that tend to portray persons with unusual bodies as strange and inferior, as the traditional freak show has often done. The concern here is that freak shows stigmatize freak show performers, as well as others with unusual bodies, and encourage intolerance and confusion. Unfortunately, this objective is undoubtedly content-based. The purpose—to prevent negative perceptions and consequent discrimination—is based entirely upon the negative message expressed by certain freak shows about persons who are physically different.

If this is the objective of laws prohibiting freak shows, those laws cannot withstand strict scrutiny. While preventing discrimination may be a compelling government interest, the laws addressing freak shows are not narrowly-tailored to this end or the least restrictive means of achieving it. As we have seen, the statutes prohibit all kinds of displays of the unusual body, without regard for how the shows treat their subject. Freak shows with stigmatizing themes are prohibited along with those that may not promote discrimination.

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[208] Chicago, for example, prohibited persons who were "diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object" from "exposing" themselves to public view. CHICAGO, ILL., MUNICIPAL CODE § 36-34 (1966) (repealed 1974); *see* Marcia Pearce Burgdorf and Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 863-65 (1975) (identifying certain ugly laws as well as private rules); SUSAN SCHWEIK, THE AMERICAN UGLY LAWS (2007) (forthcoming).

[209] *See* Jordana Schreiber, *Begging Underground? The Constitutionality of Regulations Banning Panhandling in the New York City Subway System*, 27 CARDOZO L. REV. 1517, 1525-48 (2006) (arguing that anti-panhandling ordinance violates First Amendment; identifying supporting cases).

Moreover, the primary goal of preventing discrimination can be achieved by laws that directly address discrimination on the basis of physical difference. The ADA does this to the extent it prohibits discrimination based on the appearance of a disability,[210] though the reach of the "regarded as" prong of the ADA has been overly limited.[211] In addition, some states and municipalities have passed laws that prohibit discrimination based on appearance.[212] The District of Columbia, for example, prohibits discrimination based upon "actual or perceived" differences in background and attributes, including "physical appearance."[213] While an analysis of each of these laws is beyond the scope of the current inquiry, we can recognize that such laws attempt to look beyond social assumptions regarding physical difference and create opportunities for those with unusual bodies. Such laws are more narrowly-tailored to the objective of prohibiting discrimination than statutes that prohibit freak shows entirely.

4. Recognizing a higher objective

To be certain, recognizing freak shows as expressive theater makes it more difficult to regulate or prohibit shows that, many would agree, have historically negatively affected people who have unusual bodies. This does not, however, justify ignoring the context and meaning of freak shows. By pretending freak shows are simply public displays of persons with unusual bodies, legal discourse is unable to recognize that discrimination based on physical difference does not derive from any inherent quality of the unusual body, but rather from the views expressed about persons who are different.

Treating freak shows as creative commercial expression, on the other hand, allows lawyers and jurists to emphasize that, like other forms of expression, freak shows are subjective and artificial. This ap-

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[210] Stacey S. Baron, Note, *(Un)Lawfully Beautiful: The Legal (De)Construction of Female Beauty*, 46 B.C. L. Rev. 359, 375-78 (2005).

[211] *See generally* Parmet, *supra* note 84.

[212] *See* D.C. CODE § 2-1402.11 (2001) (prohibiting discrimination based upon "actual or perceived[ ] race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation"); MICH. COMP. LAWS § 37.2202 (2007) (prohibiting discrimination based upon "religion, race, color, national origin, age, sex, height, weight, or marital status"); SANTA CRUZ, CAL., MUNICIPAL CODE §§ 9.83.010-9.83.120 (ProCode 2006) (prohibiting discrimination based upon, among other things, "height, weight or physical characteristic" and defining "physical characteristic" as "a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person including individual physical mannerisms").

[213] D.C. CODE § 2-1402.11.

proach recognizes that "freak" is a social construct, rather than an inherent characteristic of the unusual body, and thereby encourages public discussion and criticism of freak shows. Rather than silencing discussion by prohibiting all freak shows, or encouraging discrimination by adopting the perspective of the traditional freak show observer, the law is better applied prohibiting discriminatory acts.

VI. Conclusion

Today, our society's fascination with the unusual takes many forms, from daytime talk shows to reality TV, to tabloids, telethons, talent searches, books like *The Guinness Book of World Records*, and, as we have seen, the freak show revival.[214] Whether modern freak shows are presented as a form of alternative theater or a nostalgic recreation, they express views about how we understand physical difference.

In order for legal discourse to effectively prevent discrimination, it must be able to see past the social norms that cause discrimination. The law can do little to stop persons who are different from being unwillingly treated as "freaks" if lawmakers and jurists fail to see such people as more than human curiosities. Legal discourse should recognize that social assumptions, not physical conditions, are the root of discrimination against persons with unusual bodies. Rather than attempting to prevent any display of the unusual, or trying to control public discussion about physical difference, the law should focus its efforts on prohibiting discrimination through laws that take into account the social construction of physicai difference.

[214] For discussion of some of these modern phenomenon in relation to freak shows, see Gerber, *supra* note 78, Longmore, *supra* note 78, and Dennett, *supra* note 78.