

STATES OF EXCEPTIONALITY: PROVISIONAL DISABILITY, ITS MITIGATION AND CITIZENSHIP

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In recent years, a number of common law jurisdictions in North America and Australia have delivered judgements, which, among other things, have challenged traditional formulations of impairment and legal renderings of disablement as existing independent of various technologies. In tandem with these legal re-writes, some neo-conservative legal writers have advocated for the reformulation of impairment along the lines of mitigated disability in contradistinction from voluntary or elective disability – which denotes the bodily and/or mental states of those who ‘choose’ to remain disabled. Developments in surgical techniques and pharmacology have meant that it is possible to eradicate, neutralise or morph impairment to the extent that ontologically, the disabled person is transmogrified from an ‘impaired status’ to newly fabricated able-bodiedness. Disability constructed under these circumstances can be figured as ‘tentative’ and provisional. This paper discusses these developments in intolerance, a trend which implies that impairment as impairment is intrinsically negative and explores what the notion of tentative disability means to the understanding of citizenship, the productive body and the valuing of difference within neo-liberal societies.

I. Projecting Disability?

The focal concerns of this paper are part of a larger research charter which seeks to examine the ways that processes of ableism can be better understood and subsequently how ableism in turn produces understandings of disablement.¹ This charter has two sites of interest that are addressed in this

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¹ See Fiona Kumari Campbell, *Inciting Legal Fictions: 'Disability's Date with Ontology and the Ableist Body of the Law'*, 10(1) GRIFFITH L. REV. 42 (2001) [hereinafter Campbell, *Legal Fiction*]; *The Case of Clint Hallam's Wayward Hand: Print Media Representations of the 'Uncooperative' Disabled Patient*, CONTINUUM: J. MEDIA & CULTURAL STUD., 443 (2004); *Legislating Disability: Negative Ontologies and the Government of Legal Identities* in FOUCAULT AND THE GOVERNMENT OF DISABILITY, (Shelley Tremain ed., 2005) [hereinafter Campbell, 2005a]; *Selling the Cochlear Implant*, 25(3) DISABILITY STUD. Q., (2005); *Litigation Neurosis: Pathological responses or rational subversion?* 25(4) DISABILITY STUD. Q. (2006) [hereinafter Campbell, *Litigation neurosis*]; *Exploring Internalised Ableism Using Critical Race Theory*, DISABILITY & SOCIETY (2005); and Bernadette Baker & Fiona Campbell, *Transgressing Noncrossable Borders: Disability, Law, Schooling and Nations* in VITAL QUESTIONS FACING DISABILITY STUDIES IN EDUCATION 319 (Scot Danforth & Susan Gabel eds., 2006).

paper, namely the site of technology and the site of law. More specifically, I am interested in how law mediates medico-technological formulations of impairment that become transmogrified and codified in law.

Many years ago it was hard to imagine a scenario where disabled people would be coerced into obtaining surgical, prosthetic or pharmacological interventions in order to avail themselves of the limit pointed identity of the ‘disabled person’, which *inter alia*, enabled them to access social services and legislative protections.² In contrast, what is also difficult to imagine is a situation where the juridical authorities endorsed a reading of legal disability which in effect penalized disabled people who had taken steps, rightly or not, to mitigate their impairments – only to find out that such acts of mitigation rule them outside the purview of disability as defined under law. Such imaginings are the source of this paper, which as the title suggests, probes the question of citizenship and impairment in its ‘untreatable’ state.

This paper is divided into four parts. **Part I** contends that law operates as narrative and provides an outline of legal baggage and backdrops. In this section I argue that an effective method of deconstructing hegemonic legal narratives on disability is to deconstruct the spatial assumptions embedded within those narratives. The legal story-teller makes certain unconscious and implicit *choices* regarding the spaces and places within which the narrative or story unfolds. And, those choices, rather than being neutral, reinforce a performative passion for sameness occluded by a deeply embedded notion that disability is *inherently* negative. **Part II** is concerned with the encounter of law with people with disabilities. Here I argue that legal texts plays a complicitious role in authorizing particular representations of impairment and the permissible ways in which the disabled litigant has standing with the law. **Part III** is a focused discussion on the matter of mitigation. It first operates at the philosophical level—in particular what the deployment of this concept says about the status of disability and the disabled person in civil society. Secondly, for illustrative purposes I survey legal reasoning around the mitigation in a series of US Federal Court cases. Finally, in **Part IV**, the substance of the paper is drawn together in a consideration of the implications of the recent trend in case law and legal theory about mitigating impairment and the ways in which disability formulations have the capacity to redefine disability as *provisional* or *tentative*.

² Individuals may have been coerced for other reasons related to the ideology of cure or care.

II. Legal Baggage and Backdrops

Law has traditionally had an ambivalent attitude towards disabled people, restricting itself to being an arbiter of rules and to policies of care and protection. A. V. Dicey enunciates that the rule of law and its enactment in common law constitutions is due to the rights of individuals enforced by courts, and not the other way around.³ A frequent motif in the literature on the rule of law is that the rule protects against the use of arbitrary power by governments against individuals. Constitutionalist Joseph Raz, for instance, invokes the trope of the rule's curbing of power.⁴ Despite this insight, Raz raises the pertinent concern about the elasticity of the notion of arbitrary power, concluding, "... many forms of arbitrary rule are complementary with the rule of law"⁵. One aspect of this paper's focal concerns asks the question—does the trend toward representing disablement in terms of mitigation represent a slide towards the arbitrary use of power by government through the apparatus of law? The insights of legal geography have pointed to the intersection of law, space and power, whereby the spatial order of things (political, economic, ontological and cultural) are lived before they are recited and theorized. Legal texts invoke narratives that involve choices about which spaces and places to include and exclude. These spatial partitionings can mask and obscure power relations and power dynamics. Doreen Massey explains,

Social space can helpfully be understood as a social product, as constituted out of social relations, social interactions. Moreover, precisely because it is constituted out of social relations, *spatiality is always and everywhere an expression and a medium of power*.⁶

Thus, critical legal geographers, the 'space invaders'⁷, contest the notion of neutral or empty space and point to the centrality of law as enacting spatial hierarchies. Such cartographical dividing and partitioning, John Comaroff asserts exposes law as "the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion ... [which became a]

³ A.V. Dicey, *cited from* T. BLACKSHIELD and G. WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY 105-106 (2002).

⁴ Joseph Raz, *The Rule of Law and its Virtue*, 93 L. Q. REV. 202 (1977).

⁵ RAZ, THE RULE 202 (1977).

⁶ Doreen Massey, *Space/Power, Identity/Difference: Tensions in the City*, in THE URBANIZATION OF INJUSTICE 104 (Andy Merrifield and Erik Swyngedouw eds., 1997).

⁷ Keith Aoki, *Space Invaders: Critical Geography, the 'Third World' in International law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000).

tool for pacifying and governing colonized peoples".⁸ What role has law played in the colonization of disabled people in asserting the rule of ableism? Certainly, as Thomas Barton points out, the law is more comfortable in focusing on a *singular place* in the form of an individual person – case by case diachronically, rather than in interrogating communally inherited beliefs synchronically. This has resulted in a process of decontextualization, whereby action is reduced to individual volition rather than being connected to context, history and legacies.⁹ This topographical denial does not present any real difficulties and is quite in keeping with the common law tradition, which as Wesley Pue readily points out, is already *anti-geographical*—deriving its meaning in an abstracted, acontextual way, removed from the spatially materialities in which it is contested.¹⁰ When courts construct legal doctrine and write judicial opinions, they do so by organizing and interpreting events and ontologies of personhood according to a narrative in which the events and characters "relate to one another and to some overarching structure, in the context of an opposition or struggle."¹¹ The elusive nature of impairment (particular when lived out in a social context) and the problematical difficulties, in some instances, of forecasting prognosis, does not neatly fit with the law's focus on rules, formulae and predictability.

Legal responses to the challenges of disablement persistently demonstrate a *performative passion for sameness*.¹² Not just *any* sameness, but paradoxically and deliberately a sameness underpinned by shifting constitutional divides that enact an ontological separation between 'abled' and 'disabled', where 'mixtures' are expiated through processes of fabrication and simulation. The constitution of spatiality is an attempt to create order out of disorder (diversity and difference) through a process of purification—the establishment and demarcation of distinct ontological zones (disabled/abled, human/nonhuman), and through a process of translation that acknowledges the reality of mixtures, or as Latour puts it, makes visible the effort "... to extirpate ourselves from

⁸ John Comaroff, *Symposium Introduction: Colonialism, Culture and the Law: A Forward*, 26 L. & SOC. INQUIRY 305,306 (2001).

⁹ Thomas Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47(1) EMORY L.J. (1998).

¹⁰ Wesley Pue, *Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction*, 11 URBAN GEOGRAPHY 566 (1990).

¹¹ Patrick Ewick & Susan Sibley, *Sociology of Narrative*, 29 L. & SOC'Y REV. 200 (1995).

¹² HENRI STIKER, *A HISTORY OF DISABILITY* (1995).

those horrid mixtures as forcibly as possible by not confusing what pertains to mere social preoccupations and what pertains to the real nature of things.”¹³

Furthermore, those who contest over the delimitation or specificity of disability, I argue, are part of a desire to *drive down disability*—thus ensuring that this class of enumerated persons remains problematically as a *state of exceptionality*, defined rather than being figured as a significant part of a country’s population. A state of exceptionality refuses to conceive of disability as a form of difference that is inflected to different degrees throughout the population and as a conceptualization that is spatially and historically contingent. The role of biomedicalism coupled with law’s regulative aspect can be found in India’s definition of disability contained in the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which reduces disability to diagnostic types: § 2 (i) a “person with a disability” to “a person suffering from not less than forty per cent of any disability as certified by a medical authority” (§ 2 (t)). And there you have it – laws enactment of purification zones that attempt to settle the matter by way of enumerative exactness and tend to any confusion by reducing disability to a medical model. Of course it is not hard to see that the motif of disability is *much more* than a state of being. Nationalism demands that the archetypal normative citizen be free from flaws and matters of possible degeneracy. In these times of economic rationalism and panics over risk and terror, the sentiments of famous U.S. eugenicist case *Buck v. Bell*¹⁴ find new credence:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. ... Three generations of imbeciles are enough.

The utilization of legal remedies by disabled people, especially after acquisition of impairment, occurs within a broader sociological context of an increasing ‘culture of blame’, where the disabled litigant responding to the

¹³ BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* 100 (1993).

¹⁴ *Carrie Buck v. James Hendren Bell, Superintendent of State Colony for Epileptics and Feeble Minded*, 274 U.S. 200, 208.

codification of injury is required to show that he has suffered.¹⁵ For example, when a court declares whether a disabled litigant conforms to a certain legal rendering of disability, the court has to first construct a narrative in which a character (the disabled plaintiff) is faced with an obstacle or conundrum (disability discrimination) posed by an antagonist (a disability discriminatory employer, for instance). In framing a disability discrimination case in this way, a court is assembling a set of circumstances into an intelligible whole, into a coherent narrative in which the actions and events are endowed with intentionality, meaning, and purpose.

Indeed the whole goal of legal pleadings is *context reduction* and reconstruction through the transmogrification of complex and often contrary realities in the lives of disabled people into coherent, factual ‘stock stories’. There are some aspects of non-conforming disability realities which are, so to speak, ‘zoned out’ because they dispute the seemingly coherent ontology of what a disabled person should be like. On occasion these outlaw realities of disability are subject to being governed and therefore regulated by absorption into *anomalous zones*. According to Razack, these anomalous zones are spaces that tolerate departures from norms and therefore are places where there is the possibility of norm subversion.¹⁶ Legal consciousness, combined with a matrix of scientific ableism (biomedicalism) has produced a fabricated sense of a ‘natural’ (albeit colonized) space where the juridical tentacles of the law are difficult to trace, let alone to assess what those fabricated ‘spaces’ enable.

It is the claim of this paper that spatial realities within disability law, due to the ontological basis of spatiality, have produced the contours of disabled subjectivity. This subjectivity in turn shapes debates about the purview of citizenship, and about which impairments (and the degree thereof) are to be seen as ‘acceptable’ in advanced capitalist liberal nation-states. In contrast, in so-called ‘developing nations’, there are disputes regarding the best way to discern the field of not-disability (i.e. the healthy comparator). Without the specifically marked space of the *disabled person* where human corporeal differences are partitioned from each other, it would not have been possible to *see* the person who is ‘disabled’ (and who is not), to make visible the disabled gaze. This paper has an investment in exploring ‘interest convergence’, a

¹⁵ See Wendy Brown, *Wounded Attachments: Oppositional Political Formations in Late Modern Democracy*, 21 POL. THEORY (1993) [hereinafter Brown, 1993]; WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995).

¹⁶ Sherene Razack, *Race, Space and Prostitution: the Making of the Bourgeois Subject* 10 CAN. J. WOMEN & L. 357 (1998).

concept developed by Derrick Bell to delineate situations where white people with power endure or foster black advancements only to the extent that these advancements promote white interests.¹⁷ Within the arena of the subordination of people of color, the US Supreme Court in the 1989 decision of *Richmond v. Croson*¹⁸ already revealed the limits of raced based interest convergence. Aside from resorting to the usual technicist approach of legal formalism in negotiating anti-discrimination law, the *Croson* decision significantly rewrote the landscape of racial spatiality. In that decision, the Court proclaimed that African-Americans had accomplished racial equity with white people, and as a consequence of their ‘success’, African-Americans could no longer rely on a history of racial discrimination to argue for the maintenance and introduction of affirmative action programs.

A critical disability studies perspective invites us to explore the limits of liberal tolerance of disability and the points of departure away from the interests of ableism. The trend in courts of narrowing the definition of disability by reframing disabled subjectivities and redrawing topographies of disablement in terms of mitigation has already occurred in the United States and this pattern in reading disability in law is likely to have international implications. Theresia Degener and Gerard Quinn note that although US Federal law is jurisdictionally autonomous from the domestic law of other nation states, its flagship disability statute, the Americans with Disabilities Act 1990 [hereinafter ADA], has become a template globally, to the extent “... that the international impact of this law [the ADA] is larger than its domestic effect”.¹⁹ Regardless of where we live, the mitigation crisis will seek to transform civic understandings of disablement as provisional and tentative. This trend is of concern when the tendency towards a universalized codification of disability (norms) is on the increase.

III. When Law Meets Disability – Possibilities and Dangers

¹⁷ CRITICAL RACE THEORY THE CUTTING EDGE (2nd edn., Richard Delgado & Jean Stefancic eds., 2000).

¹⁸ *Richmond v. Croson*, 488 U.S. 469 (1989).

¹⁹ Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform, paper presented at “From Principles to Practice”, An International Disability Law and Policy Symposium, October 22 – 26, 2000, Disability Rights Education and Defense Fund, available at <http://www.dredf.org/synposium/degener1.html>.*

Disability studies proceed from a frame which figures disability as a *representational system* of bodily differences and not a medical problem primed with tragedy. Furthermore, I contend that the production and designation of the neologism ‘disability’ (especially in law) cannot occur outside of the purview of the processes and practices of ableism. Legal reasoning is fundamentally ableist, just as it has been argued elsewhere that hegemonic tropes of legal reasoning are inherently masculinist.²⁰ Indeed, as Rosemary Tong notes that increasing one’s understanding of the production of discrimination in general is best done by becoming knowledgeable about discrimination against disabled people. Disability, she argues, should become the paradigmatic instance of discrimination.²¹ At the font of this disability bias is ableism. Ableism refers to

a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then, is cast as a diminished state of being human.²²

For the notion of ableness to exist and to transmogrify into the benchmark subject of law, normative individuals of liberalism must have a constitutive outside – this individual must participate in a logic of supplementarity, or in other words act as a fictive comparator. This logic of supplementarity is achieved through epistemologies of biomedicalism. Law is uneasy with bodies that ooze or are leaky, especially those that are fat, distressed, sick, dying, addicted and appear impermanent. These demarcations have become increasingly relevant, as I will show later on in this paper when we look closer at the mitigation conundrum.

Biomedicalism which assumes that impairment has an existence that is *accurate, significant and impartial*, altogether independent of any social context or discursive representation, has encroached on the psychic life of the disabled individual because it asserts that disability is internal, inaugurating a crisis within the person’s bodily or cerebral self. Disability is a state that warrants medical interventions, curative treatment and mitigation of the

²⁰ CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

²¹ Rosemary Tong, *Dealing with Difference Justly: Perspectives on Disability*, 25 *SOC. THEORY & PRACTICE* 519-530 (1999).

²² Kumari-Campbell, *Legal Fiction*, *supra* note 1 at 44.

impairment or compensatory legal remedies wherever possible. Medicine in cooperation with law is brought in to assess the ‘damaged’ body by utilizing scaled enumerative scripts such as those typified by the *Table of Maims* whose fiction is legislated into existence. Law’s investment in biomedicalism invokes a moral landscape wherein the unruly body is culpable (and thus held responsible) and the ‘real’ disabled body is innocent (and thus deserving legal protection). Discourses around medical research, new technologies and practices contain implicit narratives of disability as a *personal medical tragedy*. This theory regards the existence of impairment and the experience of disability to be inherently negative. As Michael Oliver puts it: “disability is some terrible chance event which occurs at random to unfortunate individuals”.²³ Biomedical fabrications of ontologies of disability as tragic are policed by law which has the authorizing power to say what disability *is* and *is not*. By showing that a story achieves its meaning and persuasiveness by burying and discounting relevant facts and often by restricting and fixing the spatial scope of a narrative, dominant legal narratives fail to correspond with material reality.

Increasingly, legal regimes are utilized by disabled people to access greater resources and services to mitigate the effects of impairment, and as a vehicle for the monetary compensation of loss. Recent studies suggest the emergence of a paradox, wherein the application for disability benefits and compensation can generate feelings of despondency as the disabled person engages in a process of altered perceptions and puts on the ‘clothes of a disabled identity’.²⁴ But for now, it is important to highlight the fact that the disabled litigant is required to ‘identify’ with law’s rendering of the disabled person (for recognition and access) before even commencing the process of articulating a breach of rights and securing protective remedies.²⁵ In the instance of disability, the litigant needs to draw on a wellspring of suffering (‘wounded attachments’) of grand proportions and like a parasite clasp the disabled litigant’s psyche into the future. Under the ADA disabled people are viewed as a “discrete, insular

²³ MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32 (1996).

²⁴ G. Holloway, *Susto and the career Path of the Victim of an Industrial Accident: A Sociological case study*, 38(7) SOCIAL SCIENCE & MEDICINE 989-997 (1994); N. Sayer, M. Spont & D. Nelson, *Veterans seeking disability benefits for post-traumatic stress disorder: who applies and the self-reported meaning of disability compensation*, 58 SOC. SCIENCE & MED. 2133-2143 (2004).

²⁵ I am refreshed to see some exciting argument in this area by Laura Rovner, see Laura Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2 UTAH L. REV. 247 (2001). Also my own piece, Kumari-Campbell, *Litigation Neurosis*, *supra* note 1.

minority”.²⁶ This figuring is an example of an attempt to reinforce the belief in the fiction that disability is exceptional rather than normative. The *insular version* of disablement also carries with it a negative connotation that Rovner argues is “hard wired into law”.²⁷

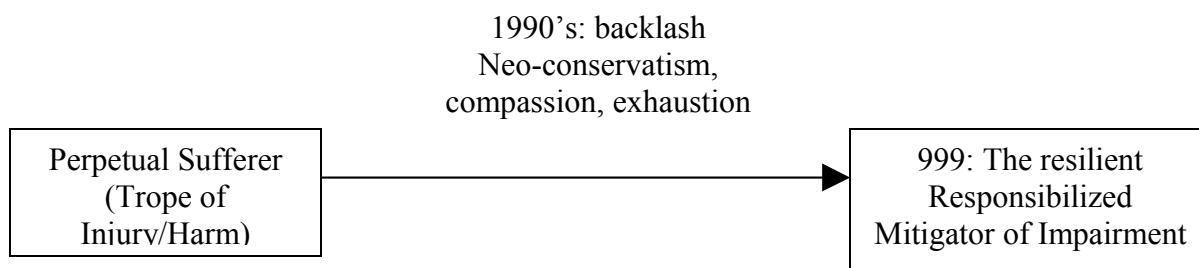


Figure 1: Shifts in legal performances of disability

Courts' rendering of legal disability reflect the shifts in contested terrain about the ways disability should be known, from the theologically inspired notion of the disabled sufferer who seeks to prove injury or harm at law, to the current ethos where increased corporatization of the welfare state emphasizes the trope of responsabilization: a good citizen is one who does the 'right thing' by mitigating an assumed burden associated with their impairment (See *Figure 1*). Through the performance and enactment of disability subjectivities, legal discourses play a critical role in maintaining the structures of purification between those designated as 'sick', 'well', 'deserving' and 'undeserving'. Disabled peoples' interactions with law necessitate that disabled performativity and its ensuing subjectivities are iterated in accordance with discourses mediated within a norm of ableism. Maybe the spectacle of the disabled litigant acting out a part in the court would be amusing, a necessity instrumentally justified to achieve a remedy, were it not for the enduring psychic consequences of such a drama.²⁸ However, I wish to reiterate that the performances of disability in law produces subjectifying discourses where disabled subjects are brought into being, not just for ourselves, but for the rest of the population, inaugurating what can be said and what is unsayable about disability. It is important to not just look at what is confessed within discourse,

²⁶ Stacie Barhorst, *What does Disability Mean: The Americans with Disabilities Act of 1990 in the Aftermath of Sutton, Murphy, and Albertsons*, 48 *DRAKE L. REV.* 138-171, 139 (1999-2000).

²⁷ Rovner, *supra* note 25, at 250.

²⁸ See Kumari-Campbell, *Legal Fiction*, *supra* note 1.

in this case the trial judgments, but also whether there is a need to interrogate the silences.

Injury then, and its companion response: mitigation of impairment, has become the interpretative lens, the trope, from which to speak of the experiences of impairment and its performative and economic impacts. In short, the entry point of disability into law is through the doors of “deficiency” – an assumed deficiency in the body, merging into a deficiency in character. The art of lawyering is a process that involves fictional creations of truth, where as Cain puts it “lawyers are imaginative traders in words. But these symbols traders are also creative. They invent categories and these categories constitute the practices and institutions within which their clients can achieve their objectives”.²⁹ In so far as deficiency and the tragedy of impairment are assumed, liminality created by an ableist culture, and the ways law culturally mediates difference and marginality become curtailed and hidden. The necessity to embrace the trope of suffering binds enactments of disabled subjectification into the perpetual vortex that signifies disability as negative ontologically. The burden of negative formulations of disablement means that the litigant with disability would have difficulty if she wishes to present an affirmative approach to living with impairment colored with a mixture of joy and despair. Such a representation is in opposition to dominant cultural narratives of disablement as catastrophe and therefore as Rovner observes, “law’s constraints make it impossible for [those] stories ... to be heard and recognized”.³⁰

In summary, the inscription of certain figurations of legal disability requires that disabled people’s ‘experiences’ be regulated within the confines of juridical formations, which ultimately foreclose any alternative perspectives. Interestingly, the delimitation and marking of certain bodies as ‘disabled’ or ‘injured’, bears little resemblance to varieties of self-referentiality attested to by people with impairments and is ostensibly “imposed through policies of repression and coercion”³¹. Legal rendering of disability through statutory definitions and case law can produce a psychic dissonance between those ‘official’ imprimaturs and private realities.³²

²⁹ Maureen Cain, *The Symbol Traders*, in *LAWYERS IN A POST-MODERN WORLD* 33 (Maureen Cain and Mark Harrington. eds., 1994).

³⁰ Rovner, *supra* note 25, at 277.

³¹ C. Emecke, *Between Choice and Coercion: Identities, Injuries, and Different Forms of Recognition*, 7(4) *CONSTELLATIONS* 483-495 (2000).

IV. Mitigation Compulsions or “The Most Envenomed Serpents Admit Of Some Mitigation, And Will Not Bite Their Benefactors”³³

This section focuses at the philosophical level on the meaning of mitigation, in particular what the deployment of this concept says about the status of disability and the disabled person in civil society. For illustrative purposes and to show that explanatory frameworks do inform judicial practice, I will survey legal reasoning around mitigation in a series of United States Federal Court decisions.

i. Philosophical conversations

Philosophical conversations about what I have termed *mitigation compulsions* attempt to discern a number of questions related to the quandary of impairment –such as, what does it mean to mitigate impairment? What is the justification for mitigation? And finally do people with disabilities have a *duty* to mitigate their impairment? In exploring these questions, I argue that it is important to also think about how answers to these questions would differ (or not) if we were responding to the mitigation problem for people of color, gay men, lesbians and women. In which case, what difference does having a disability make and why does disability make a difference? Evolutions in techno-science continue to disrupt the fixity of defining disability and normalcy, especially within the arenas of law and bioethics. The borderlands of disability and the security of impassable crossings between the realities of able-bodiedness and disablement, mean that such orderings are not just repressive, but ultimately productive: they tell us stories, they contain narratives as to ‘who’ we are and how we ‘should be’. In other words, as John Law rightly concludes: “... ethics will derive from ontology. And ontology, what there is, is being made at least in part in narratives.”³⁴ The fact is that hegemonic narratives of disablement undoubtedly assume that disability *qua* disability is

³² The self-understanding of impairment is very complex. It is not clear about the extent to which individual with impairments internalize the tragic scripts (known as internalized ableism) not refashion them as acts of resistance. See Kumari-Campbell, *Legal fiction* 2008, *supra* note 1 and Emcke, *supra* note 32.

³³ JOSEPHUS, *JEWISH ANTIQUITIES*, xvii. v. §5

³⁴ J. Law, *Political Philosophy and Disabled Specificities (draft)* (1999), Department of Sociology and Centre for Science Studies, Lancaster University available at <http://www.comp.lancs.ac.uk/sociology/soc026jl.html>.

inherently negative. I want to start, rather unusually on my part, with a dictionary definition of the etymology of ‘mitigation’:

Mitigation: 1. Compassion, mercy, favour. Obs.

2a. The action of mitigating or moderating; the fact or condition of being mitigated; an instance of this; spec. abatement or relaxation of the severity or rigour of a law, penalty, etc.; extenuation or palliation of an offence, fault, etc.; abatement or minimization of the loss or damage resulting from a wrongful act. in mitigation (Law): by way of extenuation or palliation (esp. of an offence) in order to obtain a favourable modification (of judgment, a penalty, damages).

b. Something that serves to mitigate; a mitigating circumstance or provision; a palliative. Later also in Criminal Law: mitigating circumstances collectively, esp. presented or accepted in extenuation of an offence.

3. Prob.: a soothing remedy. Obs.

4. Softening or qualification of wording, etc. Obs.

5. Taming (of an animal). Obs.³⁵.

At the outset, ‘mitigation’ signals a desire to soothe, to make mild or gentle³⁶ that which is being mitigated. When applying such sentiments to disablement, the trope of soothing the suffering body under the guise of care and compassion comes to mind. Moving through the definition, phrases like “minimization of the loss or damage” appear through to “a palliative” (2b) and interestingly, in point 5, a “taming” of an animal. Does mitigation then, when it comes down to it, transcend a therapeutic response and really become a strategy for taming the unruly disabled, possibly outlaw body?

The trope of restraint features highly in this liturgical/litigious play of the courtroom and in the arguments utilized in judgments. One development is a new way of classifying and portioning disability in law euphemistically termed ‘elective’ or ‘voluntary’ disability, and has attracted the attention of some legal scholars. Proponents of the legal concept of elective disability argue that

³⁵ *Oxford English Dictionary Online* (2nd edn., 1989) available online at <http://dictionary.oed.com/entrance.dtl>.

³⁶ The 1432 sense of the word is “make mild or gentle”, whilst “soft, mild” is attested to in the 1362 understanding. *Online Etymology Dictionary*, available online at <http://www.etymonline.com/index.php?term=mitigate>.

legislatures should distinguish between two categories of ‘disability’ when they make assessments for coverage (protection) under anti-discrimination legislation, namely, the categories of immutable and elective (or voluntary) disability. As these legal theorists explain it, the category of ‘immutable disability’ should apply to situations in which it is not possible (at least, not at present) to eliminate the disability (where this term usually means ‘impairment’). Under these circumstances, a plaintiff should be deemed innocent and, therefore, deserving. Proponents of this bifurcation of disability argue, furthermore, that the category of ‘voluntary’ (‘elective’) disability should, on the other hand, be used in situations where disabilities were caused, continue to exist, or have been worsened by individual ‘voluntary’ conduct.³⁷

The philosophical discussion of these proposed concepts is heavily laden with the language of moral judgment. I have selected text from the argument of Lisa Key. In an argument about the need to ensure the integrity of the ADA and to maintain public support for that statute, she remarks that extending protections to those people who she identifies as “voluntarily disabled” may result in “the loss of protection for those who are truly deserving”.³⁸ In another hypothetical case of a janitor with a back injury who did not attend therapy, she states “[he] refused to help himself, while at the same time expecting others, ... to bear the costs of accommodation”.³⁹ No reason is proffered as to why the hypothetical janitor may not have attended therapy. Further into her argument, another hypothetical⁴⁰ example of a man who sustained a spinal injury through the ‘reckless’ behavior of diving in shallow water without first checking is used. Keys paints a picture of an individual who fails to lift more than 30 pounds in a rehabilitation program. She concludes:

He is making an informed, conscious decision to continue living with the impairment. This is his prerogative. However, society should not be obligated to bear the cost of his choice.⁴¹

³⁷ Elizabeth Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of 'Reasonable Accommodation'* 48 HASTINGS L.J. 75-104 (1996); Bonnie Tucker, *Deaf Culture, Cochlear Implants, and Elective Disability*, 28 HASTINGS CENTRE REPORT 6-14 (1998).

³⁸ *Id.*, at 80.

³⁹ *Id.*, at 82.

⁴⁰ It is interesting the use of ‘extreme’ hypothetical examples as a rhetorical strategy to support an argument, which I argue serves to incite hostility towards disabled people who adopt ‘unpopular’ approaches to living with impairment and generally distracts the reader from the core issues under consideration.

⁴¹ Elizabeth Key, *supra* note 37, at 84. For a more elaborate discussion of Keys argument see Fiona Campbell 2005a, *supra* note 1.

The perspective of Keys reveals the anti-geographicalness of legal reasoning, a kind of reasoning which denies the reality of competing demands and intrudes into the lives of people with disabilities. These legal arguments occur within the politico-juridical context that disability is ontologically intolerable, a corporeal state that slips closely towards the precipice of the human underbelly. Further I contend that arguments such as those proposed by Tucker and Keys are underscored by the presupposition that disability is harm⁴² and impairment is harmful to disabled people psychologically, spiritually and bodily and more particularly, that the existence of impairment is harmful to the order of the polis, particular economic life.

The traumatic performance of disability at law institutes certain harms as “morally heinous in the law”.⁴³ Such a compulsion delimits a specific site of blame by constituting certain legal subjects (and events) as responsible for the ‘injury’ of social subordination of that other subject’s experience. What kinds of ‘harm’ have legitimacy before the law? Codification of case law has established certain authenticated sites and specific instances of ‘disability discrimination’ as harm. As I have already mentioned, what if disability as disability (in and of itself) is considered as a kind of harm? I argue that harms that recite the tragic interiorization of disablement are acquiesced within legal discourses. Emecke refers to this kind of unauthorized ‘harm’ as a moral injury of misrecognition where there is a “specific – mostly structural and permanent – discrepancy between one’s self understanding and the other’s description”.⁴⁴

Law’s role of scaling suffering and injury according to biomedicalist perspectives can be contrasted with an alternative way of rendering suffering or more specifically ‘injury’. Emecke argues that ‘injury’ captures those asymmetrical power relations between self-referentiality and external retort or perception, in this instance in the reasoning and pronouncements of courts. This conclusion finds support in the writing of Laura Rovner, a legal practitioner and academic who argues that under the ADA the disabled person carries the burden of proving that they have been harmed. In order to do so, she is required to adopt a victim identity, which may not only be in conflict with her own sense of self but reinforce the very negative figurings of disablement (as weak, passive, suffering victims) that the ADA purports to challenge.⁴⁵ This

⁴² One word for disability in French is ‘mal’ meaning ‘harm’.

⁴³ Brown, 1993, *supra* note 15, at 27.

⁴⁴ Emecke, *supra* note 31, at 484.

⁴⁵ Rovner, *supra* note 25, at 252 – 253.

negative clothing of disablement remains even after the litigation has ended and is difficult to shake off.⁴⁶ In a rather bizarre outcome, the act of strategic essentialism, (utilizing labels and ontologies of tragedy to access social benefits) which might initially seem commendable and might even be viewed as an act of subversive resistance, can also bring into itself acts of ‘self-degradation’, wherein passports of recognition (the limit-pointed identities of being a ‘disabled person’) become passports of unfreedom or anxiety.

ii. Casing Disability

Contest over the meaning of disability under the Americans with Disabilities Act, 1990 is exemplified in a series of cases brought in the U.S. Supreme Court in 1999 known as the *mitigation trilogy*,⁴⁷ More recently, the High Court in Australia, in *Purvis v. New South Wales (Department of Education and Training)*⁴⁸ was asked to decide the definition (delimitation) of ‘disability’ under the Disability Discrimination Act, 1992. Disputes over the definition of ‘disability’ in disability discrimination cases under domestic laws are more often than not about broader philosophical issues about where to ‘draw a line in the sand’ about disability and non-disability. These disputes go to the heart of ‘dilemmas of difference’,⁴⁹ and how archaeologies of difference are mapped. One thing that becomes clear in a number of ADA judgments is the struggle by judges to deal with the arbitrariness of impairment. In the District court case of *Lawson v. CSX Transportation*⁵⁰ this conundrum is brought to the foreground. The Court argued that should they fail to account for mitigating measures “all diabetics would be considered disabled ...A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she is diabetic”.⁵¹ Later, the judges exclaim that proposing to broaden the definition of major life activities “would

⁴⁶ Rovner, *supra* note 25, at 253; Also Kumari-Campbell, *supra* note 1, 2006, 2008.

⁴⁷ Known as the ‘mitigation of disability cases’ the parameters of defining ‘disability’ under the *ADA* have been realigned, in respect to ‘corrective measures’ to mitigate ‘disabling conditions’: *Sutton v. United Airlines Inc.*, 527 US 471 (1999); *Murphy v. United Parcel Service*, 527 US 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 US 555 (1999). I would argue in addition that the ‘disability’ concept is already occluded – as prong of the definition is tied to the notion of substantially limiting a major life activity’. §3 (2)(a) of the *ADA*.

⁴⁸ (2003) 202 ALR 133.

⁴⁹ See Minow, *supra* note 20, for a greater consideration of this issue.

⁵⁰ 101 F.Supp.2d 1089 (S.D.Ind.2000)

⁵¹ *Id.*, at 1104.

open the ADA to countless potential plaintiffs who have innumerable conditions that cause their bodies to function in ways outside normal parameters, notwithstanding the condition's impacts on the plaintiffs' daily activities".⁵² Rather vividly, Justice Antonio Scalia in *Murphy v. United Parcel Service* is reported to have gestured in removing his glasses the dilemma of his 'sightlessness' and potential inclusion as 'disabled' 'when acting without a mitigating device'.⁵³

The juridical power of law and its capacity to name or erase different ways of framing disability were put to the test in a series of decisions that the U.S. Supreme Court handed down in 1999. There were three cases that altered the definition of disability under Title 1 (Employment) of the ADA. The central question in the trio of cases was whether disability should be measured in its 'untreated' state, or in light of any corrective measures that would give the appearance of normal functioning. In its examination of the meaning of the term 'disability' in the context of the ADA, the U.S. Supreme Court in *Sutton* held that the terms could not be read to support the proposition that determination of whether a person is 'disabled' or not should be made by evaluating an impairment in its unmitigated state".⁵⁴ To the contrary, the majority judgment of Justice Sandra Day O'Connor held that:

if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures — both positive and negative — must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.

The courts complicity in the semantic recuperation of what constitutes a mitigating measure may open a Pandora's Box as various Courts' attempt to discern the difference between compensatory measures and corrections. Stacie Barhorst concludes "...disabled persons who must mitigate their impairment to survive will have no recourse against an employer's decision."⁵⁵ Returning to my earlier dictionary definition of mitigation, we may wish to reflect upon

⁵² *Id.* at 1103 – 1104.

⁵³ David Wasserman, *Stigma without Impairment: Broadening the Scope of Disability Discrimination Law*, in *AMERICANS WITH DISABILITIES: IMPLICATIONS OF THE LAW FOR INSTITUTIONS AND INDIVIDUALS* (Leslie Francis & Anita Silvers eds., 2000).

⁵⁴ *Sutton v. United Airlines Inc.*, 527 US 471 (1999), 2146-2147, per O'Connor.

⁵⁵ Barhorst, *supra* note 26, at 164.

whether attempts at mitigating disability are really about taming the beast, the beast not of disability but of bodily difference.

What is interesting about these cases is that they illustrate some of the ways that technological applications mediate various discourses about the ontology of disability in law, and in attempting to mediate disputes over disability discrimination enact discourses that traumatize and penalize the resistant impaired body through ableist partitioning. They proceed from an assumption regarding the efficacy of mitigation and thus bypass any potential conundrums that problematize harms to the disabled person at an ontological or physical level. Furthermore such ableist strictures require the courts to potentially to anticipate “a person’s decision whether or not to pursue medical interventions [as well as evaluate the status of] an operation [that] would have ameliorated the effects of an impairment but was rejected as too risky”.⁵⁶ Instead of clarifying (that is, securing) the meaning of disability and that meaning’s relationship to the question of mitigation, the trilogy of cases (*Sutton*, *Murphy*, and *Albertson’s*) have provoked a series of new questions with respect to the technological morphing of normalcy. At stake is the rendering of the species-typical body.

The Court in all three cases concluded that individuals who ‘mitigate’ their impairments must have this factor considered when evaluation is made with respect to their coverage under the lawful ‘disability’ definitions of the ADA. However, none of those cases addressed the question of whether (as Key and Tucker contend) individuals have a *duty* to mitigate impairment; that is, if individuals ‘choose’ not to engage technologies (aids, prescriptions drugs, and so on) that seem to mitigate their impairments, should they still be considered disabled? For example, should a woman without arms be required to wear a prosthesis or have a hand transplant in order to be considered ‘disabled’ under the ADA? Whilst this line of argument was raised in the District Court case of *Finical v. Collection Unlimited*⁵⁷, it was soundly rejected by the Supreme

⁵⁶ Mayerson, A. & K. Mayer, *Defining Disability in the Aftermath of Sutton: Where Do We Go from Here?* (2000), available at <http://www.dredf.org/mayerson.html>.

⁵⁷ In one recent ADA case, the Arizona District Court upheld a claim of ‘disability’ (and therefore coverage under anti-discrimination legislation) irrespective of the use of compensating/mitigating measures such as prostheses. In *Finical v. Collection Unlimited*, 65 F. Supp 2d 1032 (1999), the plaintiff who was hearing impaired decided against using a hearing aid on the basis that such a device picked up background noise and therefore was annoying. The defendants argued that hearing aids should be included as a mitigating measure. The court however held that an employee with a hearing impairment was disabled irrespective of their use of ‘hearing’ devices.

Court.⁵⁸ We might extend these questions further in order to ask this question: will current (and future) morphing technologies contribute to the framing of a benchmark mitigated disabled body⁵⁹ which is used to assess definitional conformity irrespective of the matter of usage or ‘choice’? Will today’s ‘normal’ body be superseded, that is, become tomorrow’s ‘abnormal’ body? In the next and final section of this paper I will consider some of the implications that the re-spatialization of impairment as tentative or provisional disability has for citizenship.

V. Aftermaths: Disability as Provisional or Tentative

For constitutions ... are like principles that claim to be general, to govern, to regulate. Despite the fact that they never did, this is no doubt a sometimes useful fiction. One we will hold onto sometimes, perhaps even much of the time – but also one which we give up here and there in order to interfere and try to make specific differences to the arrangements of specific institutions.⁶⁰

... the ADA, as constructed by the current Court, can hardly be said to do much of anything to protect people with disabilities. Instead the Court’s activist interventionism has done a great deal to shield both private employers and public officials, in addition to denying the importance of past discrimination while preserving as much of the pre-ADA status quo as possible. The Court’s central message to people with disabilities seems to be, “Get over it”.⁶¹

In Australia, one method of discouraging full entry into the Australian community, complete with full rights and responsibilities, is to give certain classes of immigrant’s temporary visas. Likewise, other classes of immigrants who are deemed to be acceptable as ‘new’ Australians have the opportunity to

⁵⁸ It is beyond the purview of this paper to explore associated argument that asks the Court to look at what a ‘similarly situated person’ would do? An exploration of the type of person who would be deemed an appropriate comparator should be the subject of another paper.

⁵⁹ One of the problems of operating within the duality of ‘abled’ and ‘disabled’ is that the boundaries between these two signifiers interpenetrate. The rise of new perfecting technologies not only re-inscribes ‘disability’; in addition, the ascendancy of these technologies re-inscribes ‘normalcy’ (construed as that which is species-typical).

⁶⁰ Law, *supra* note 34.

⁶¹ Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims* (Boston College Law School Working Paper, No 8, 2003), available at <http://ssm.com/abstract-id=389400>.

avail themselves of permanent resident status or indeed to become a full Australian citizen. Keeping this motif in mind, disabled people, to a greater or lesser extent, are still busy articulating entitlements to full citizenship status—that is, having access to economic, political and cultural resources available to other classes of citizens. Australia's particular brand of welfare liberalism is characterized by a *residual orientation* primarily reliant on paid employment with a sharply targeted (restrictive) safety net of benefits for individuals who for 'no fault of their own' are not in the paid workforce. The residualist approach means that even those groups provided with assistance are positioned out-of-bounds of citizenry – they are, so to speak, 'remainders', euphemistically labeled welfare recipients. Patricia Harris provides a rather snappy definition of what she terms the 'moral-behavioral dimension' of welfare rationalities:

The 'moral-behavioural dimension' revolves around constructs such as responsibility, independence, motive and effort. It embodies governmental evaluations of proper/improper and responsible/ irresponsible behaviours, suggests how people ought to behave, and sets out governmental strategies to achieve the desired ends.⁶²

This paper has pointed to the emergence of conceptual and judicial realities that err towards the notion of mitigated impairment in one country and is already having various ramifications throughout other common law jurisdictions such as Australia and Canada. This is what *has* already happened. In this section of the paper I wish to move forward in time through temporal and material space and speculate what *could* happen, should the notion of mitigated impairment and its associated twin, tentative or provisional disability become mainstreamed within law and service provision.

As part of this paper's focal concerns, there are two spatial faultlines that are easy to miss that no doubt frequently, but silently, coincide and occasionally collide. The *first faultline's* purview is jurisprudence and involves the cause of action and scope of discrimination. In this scenario judicial reasoning oscillates between seeing discrimination in "a cut and dry manner ... anticipat[ing] all possible scenarios and deciding which should be regulated and how" and the converse response, where discrimination is conceptualized as "...a problem of human interaction that is fluid and constantly manifesting

⁶² Patricia Harris, *From Relief to Mutual Obligation: Welfare Rationalities and Unemployment in 20th-Century Australia*, 37 J. Soc. 5-26, 6 (2001).

itself in new forms such that we have no clear sense of all the circumstances in which it might arise in future or what to do about them”.⁶³ The *second faultline* is specific to the theorization of disability within critical disability studies and the activist movement as a whole. Disability is viewed catachrestically, as an unstable, spatially and historically contingent concept. Yet, rather paradoxically, the notion of disabled people as a protected class is often engaged with strategically as “...a valid and unifying identity that reflects the real experiences and culture of a large group of people...”.⁶⁴ In this paper I have alluded to the fact that the American Courts, when confronted with knowledge about the fluidity of impairment and its potential unboundedness, have in recognition of this state of impairment, sought to make disability more *workable* by attempting to delimit impairment and make it fixed.

A lack of acceptance of impairment in its ‘untreatable state’ and the consequential concept of disability as provisional or tentative re-asserts the belief that disability is inherently negative – a bodily order that is awaiting to be expunged. In the meantime, the mitigation compulsion leaves disabled people with the sense that the only kind of impairment acceptable is one that is veiled or hidden. Passing becomes an esteemed attribute. As Kimberlyn Leary puts it:

Passing occurs when there is perceived danger in disclosure. At its most extreme, it is a form of camouflage to sequester the self from expected trauma. It represents a form of self-protection that nevertheless usually disables, and sometimes destroys, the self it means to safeguard.⁶⁵

The workings of internalized ableism by way of ‘passing’ are only possible when viewed more broadly, moving away from a focus on the impaired individual to the arena of relationships. For it is in the interactivity with the norm (such as an ableized able-bodied person) that another form of erasure is required. Ableist passing is not just about the person with impairment hiding their impairment or morphing their disability; ableism involves a failure to ask about difference, in this instance, disability/impairment. For internalized

⁶³ Denise Réaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 OSGOODE HALL L. J. 113, 122 (2002).

⁶⁴ Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the ‘Disability’ definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405-1477, 1414 (1998-1999).

⁶⁵ Kimberlyn Leary, *Passing, Posing, and ‘Keeping it Real’*, 6 CONSTELLATIONS 85-96, 85 (1999).

ableism to occur there needs to be an existing *a priori* presumption of *compulsory ableness* (or at least the illusion or aspiration of). Such passing is about keeping the colonizer happy by not disturbing the peace, containing the matter that is potentially out of place. The veiling of impairment hides trauma: not the assumed trauma of disability, but where legal spaces are sites of trauma and the notion of disability jurisprudence is perceived as traumatic.

The proposal to conceptualize disability as tentative or provisional, to assign it spatially to a ‘temporary zone’, should not be confused with the Jacques Derrida’s notion of deferability, where in our case the signifier disability has its meaning deferred for the present, still impending and awaiting.⁶⁶ Instead, positioning disability as tentative conjures up the notion of disability *in waiting*, disability *standing in reserve* for technologies that imbricate use value, forming the productive body. Provisional spatialities of disablement have the potential to realign social planning way from a focus on ‘care’ to that of ‘cure’. A shift away from the notion of permanence may mean that governments will become hesitant to invest in long-term service provision infrastructure and cordon off citizenship rights to more immutable, thus protected classes in the population. The political and civil rights implications of these speculations are unimaginable – disabled people who wish to seek good fortunes are likely to feel compelled to resort to mitigation measures, lest they be prepared to feel the full weight of being assigned the label of having an outlaw disability. Hard to imagine – let us feel compelled to imagine so that we can be prepared to act!

In this paper, I have engaged with the insights of legal geographers who have pointed to a multiplicity of geographies all with myriad social, political and economic spaces. Law’s agents, as traders in symbols have constituted such *phantom spaces* as ‘voluntary disability’, ‘elective disability’ and ‘mitigated impairment’. A focus on these fabricated, isolated and atomistic spaces of individualism has resulted in a shift away from examining the ways that the processes of ableism in tandem with the sites of law and technological create spatial divides, impassible crossings between the borderlands of disablement and normalcy. It is heartening to remind ourselves that corporeal spaces are in a constant process of rearrangement and because of this there is possibility that their effect will be conditional, partial, indeterminate and hopefully contestable. In the meantime, much imagination and vigilance is

⁶⁶ Fiona Campbell, ‘*Refreshingly Disabled!*: Interrogations into the Corporeality of ‘*Disablised*’ Bodies, 12 AUSTL. FEMINIST L. J. 57-80, 77 (1999).

required to ensure the possibilities of safe, affirmative homelands of disablement.