

## INCITING LEGAL FICTIONS

### 'Disability's' Date with Ontology and the Ableist Body of the Law

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Activists with 'disabilities' have placed great trust in the legal body to deliver freedoms in the form of equality rights and protections against discrimination. This article argues that, while such equalisation initiatives have provided remedies in the lives of some individuals with 'disabilities', the sub-text of 'disability' as *negative ontology* has remained substantially unchallenged. Understanding disability requires more sustained attention to the ontological nature of disability, in particular the ways in which a 'disabled person' is produced. The article opens with a discussion of the difficult and complex(ing) area of ontology — in particular the performativity of 'disability' as a *history of unthought* and then moves on to a discussion of the ways 'disabled bodies' negotiate the *symbol trade* in 'disability' within the confines of the ableist regime of law.

The increasing disability *ontology wars* are foregrounded by discussing the ways in which 'negative ontologies' are written into the practices and effects of law. As such, the article's focal concerns extend to law's understanding of the autonomous individual and technologies of freedom, strategies of 'social injuries', and attempts to introduce new formations of disability related to matters of 'election' and 'mitigation'. These battles over the (re)writing of disability are important because they affect the access of people with disabilities to welfare provision, protection under anti-discrimination legislation and formations of the perfectible, abled human self.

Finally, the article concludes by suggesting that the law's continual reiteration of defective corporeality through the signification of 'disability' as legal proclamation (prescription) not only disallows the 'disabled' subject any escape from the normalising practices of compensation and mitigation but continues to negate possibilities of imagining the desiring 'disabled subject' in any voluptuous way.

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Sociological inquiry or legal investigations into disability<sup>1</sup> implicitly return to and usually at some point have to negotiate matters of 'disability' at an ontological level.<sup>2</sup> I say implicitly, because the predominant forms of socio-therapeutic analysis of disability adopt a reductionist approach — situating 'the problem' of disability at the level of attitudes or bias leading to devaluation. Rarely is the matter of ontology — negative ontologies in this case — considered a paramount focal concern in unpacking disability subjectification. This article seeks to redress this imbalance, first by foregrounding the ontology question, and second by discussing disability negative ontologies as they are inflected in the practices and effects of law.

### Ontology Wars and the 'Unthinkability' of Disability

A system of thought ... is founded on a series of acts of partition whose ambiguity, here as elsewhere, is to open up the terrain of their transgression at the very moment when they mark off a limit. To discover the complete horizon of a society's symbolic values, it is also necessary to map out its transgressions, its deviants.<sup>3</sup>

Activists with disabilities have placed great trust in the legal system to deliver freedoms in the form of equality rights and protections against discrimination. Whilst such equalisation initiatives have provided remedies in the lives of some individuals with disabilities, the sub-text of disability as *negative ontology* has remained substantially unchallenged. We need to keep returning continually to the matter of disability as negative ontology, a malignancy, a body constituted by what Michael Oliver terms 'the personal tragedy theory of disability', wherein disability cannot be spoken about as anything other than an anathema: 'disability is some terrible chance event which occurs at random to unfortunate individuals'.<sup>4</sup> Disability is assumed to be ontologically intolerable, *inherently* negative. Such an attitude of mind underpins most claims of social injury within the welfare state and is imbricated in compensatory initiatives and the compulsion towards therapeutic interventions. The presence of disability, I argue, upsets the modernist craving for ontological security.

The conundrum is not a mere fear of the unknown, an apprehensiveness towards that which is foreign or strange — the subaltern. Rather, disability and disabled bodies are positioned in the nether regions of 'unthought'. Let me

<sup>1</sup> 'Disability' as a signifier may be understood in terms of *catachresis*. That is, there is no literal referent for this concept. As soon as we discursively interrogate 'disability', its meaning loses fixity and generality, and ultimately collapses. From this perspective, I argue that the citation 'disability' invokes a reading of corporeal differences, particularities and unintelligibilities within the context of culturally delineated normative and ableist (benchmark) bodies.

<sup>2</sup> I am using ontology not in an essentialist sense, but rather to denote ways of being that are inscribed, fabricated and shifting. Cf Butler (1997), pp 3–4.

<sup>3</sup> Detienne (1979), p ix.

<sup>4</sup> Oliver (1996), p 32.

explain further. The ongoing stability of ableism,<sup>5</sup> a diffuse network of thought, depends upon the capacity of that network to 'shut away', to exteriorise and unthink disability and its resemblance to the essential (ableist) human self. French philosopher-historian Michel Foucault explains:

The unthought (whatever name we give it) is not lodged in man [sic] like a shrivelled up nature or a stratified history; it is in relation to man, the Other: the Other that is not only a brother but a twin, born not of man, nor in man, but beside him and at the same time, in an identical newness, in an unavoidable duality.<sup>6</sup>

We can see that, for the notion of 'ableness' to exist and be transmogrified into the sovereign subject of liberalism, there is a requirement for its constitutive outside: a *logic of supplementarity*. So, even though we can speak in ontological terms of disability as a history of unthought, this figuring should not be confused with notions of erasure by way of mere absence or exclusion. Rather, disability is *always present*, despite its absence in the ableist talk of normalcy, normalisation and humanness. In turn, the truth claims of disability are dependent upon discourses of ableism for their very legitimation.

This *logic of supplementarity*, imbued within modernism's unitary subject that produces the Other in a liminal space, in addition deploys what we may call a 'compulsion towards terror' — a terror, ontological and actual, of 'falling away' and 'crossing over' into an uncertain void of dis-ease. Such effects of terror may produce instances of disability hate crimes,<sup>7</sup> disability vilification and disability panic.<sup>8</sup> Manifestations generated by this terror rarely enter the public domains, being excluded from law's permissible inquiry and codification. In other words, such erasure forecloses the possibility of pursuing legal remedies through the refusal of law's power to name and countenance oppositional disability discourses. Disability 'harms' and 'injuries' are only deemed *bona fide* within a framework of scaled-down disability fictions (read: definitions) rendered viable in law.

Law's collusion with bio-medical discourses not only tells us about modes of disability subjectification, but more importantly informs us and exposes the meaning of being 'human' under the reign of ableism. Let us stop for a moment and recap. What I have attempted to do thus far is introduce matters ontological into our discussion, not at the periphery but rather at the centre — revealing the ontological terror, the unthought of disability as a significant actor in the promulgation of ableism within law in liberal society.

<sup>5</sup> Ableism — a network of beliefs, processes and practices that produce 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.

<sup>6</sup> Foucault (1994 ), p 326.

<sup>7</sup> For follow up, consult Disability Rights Advocates (1999); Gallagher (1995); Waxman (1991); Sherry (2000).

<sup>8</sup> Colker (1996) documents the kind of disability panic that has provoked media backlash against the *American with Disabilities Act 1990* (US).

In the next section, I turn to consider the practices of freedom as actualised within the ableist regime of law in more detail.

### Autonomy as Freedom: A Recapitulation of Ableist Subjectivity?

An able-bodied and competent person is thus a body with a set of given functions, skills and properties, which are steered by a central command unit — the consciousness — which is situated in the head. Agency, mobility, the ability to communicate verbally, to make discretionary judgments, make decisions and implement them — is thus located in the body and in the self residing in that body.<sup>9</sup>

Western neo-liberal societies hold freedom to be an inalienable and inherent right of the individual citizen and justice to be a pre-eminent virtue of ‘civilised’ society.<sup>10</sup> The ethos of freedom is a foundation of the politics of our present, a mark and effect of the virtues of practised democracy — a measure of a society’s true worth and ‘advancement’. We are seduced into freedom, a utopic dream that holds within it a promise, a vision of an alternative way of living. Particularly for disability activists and many ‘folk’ living on the ‘underside’ of liberalism, the ethos of freedom has performed as a source of emancipation containing a promise to address social injury. Yet, as Wendy Brown<sup>11</sup> reminds us, freedom contains its own paradox — the incitement of freedom requires those very structures of oppression that freedom emerges to oppose.

In the next two sections, I consider two aspects of the practices of freedom. The first considers how we have come to define the individual subject on the basis of certain notions of freedom. The second critically interrogates the libertarian project’s engagement with the concept of social injury and *ressentiment*.

In recent times, the practices of freedom have been moulded and codified into the apparatus of the welfare state, citizenship and legal personality. This ideal presents *freedom as autonomy*, meaning the drive towards potential maximisation; to be a choosing, desiring and consuming subject. Our subject is assumed to be an independent centre of self-consciousness, which holds autonomy to be intrinsically valuable.<sup>12</sup> Neo-liberalism’s normative citizen, in the words of CB Macpherson, is a nominal ‘possessive individual’:

free in as much as he [sic] is proprietor of his person and capacities. *The human essence* is freedom from dependence on the will of others, and

<sup>9</sup> Moser (2000), p 205.

<sup>10</sup> At least in the sense of ‘negative’ liberty and more recently ‘positive’ liberties encapsulated within human rights regimes. Cf Duncanson (1994), esp pp 29–33; and Stainton (1994), esp pp 9–16.

<sup>11</sup> Brown (1995).

<sup>12</sup> I am not convinced by the instrumentalist value of autonomy alone, for liberalism’s autonomous sovereign subject invokes a certain moral personhood.

*freedom is a function of possession ... Society consists of relations of exchange between proprietors.*<sup>13</sup>

This imaging of the neo-liberal subject insists that all people fit Macpherson's regulatory ideal. It is probably more correct to say that the thrust of shaping identity is geared towards a 'best fit', normalising or morphed approach. The tool of comparison, of normativity is the 'benchmark man', the normative citizen who is:

the paradigmatic incarnation of legality who represents the standard against whom others are measured and who is invariably White, heterosexual, able-bodied, politically conservative, and middle class.<sup>14</sup>

Such techniques of self are not usually imposed but rather sought,<sup>15</sup> as we are all enrolled into the task of self-appropriation and designation.<sup>16</sup> 'Free' citizens are those who can take charge of themselves — to act as their own command centres. A drive towards self-mastery may mean that it is not possible for some disabled people to be truly 'free' within the confines of liberalism unless some protectionist (paternalist) strategy or ethics of 'care' be employed. In any case, the sovereign subject will not be destabilised until we dismantle and refute 'autonomy'<sup>17</sup> as the basis for normative legal theory and revise the meaning of 'humanness' in terms of inter-relatedness. Until then, we are left with the task of managing or governing 'disability' so that its presence only minimally disrupts the system and the truth claims of legal discourse.

Under liberalism, the production and governing of disability occur through its taming into a mere logical and discrete aetiological classification and ensuing ontological space. Such a 'logic of identity' reduces disparity and difference to unity. In law, we find this logic expressed in the ideal of impartiality predicated upon the benchmark legal subject.

<sup>13</sup> Macpherson (1964), p 3 (emphasis added).

<sup>14</sup> Thornton (1996), p 2.

<sup>15</sup> Just as many of people of colour have experienced internalised racism by living within an environment of hegemonic whiteness, many of us with 'impairments' have had to wrestle with an *internalised ableism* — a view that suggests disability is *inherently* negative disallowing any prospects of 'pride'. By being denied access to celebratory representations, disability self-hatred often invokes the desire to 'pass' and assume an (albeit fabricated) ableist posture.

<sup>16</sup> In order to access goods and services and have coverage under 'disability laws', individuals are required to move towards a 'best fit' with the definitional parameters of what constitutes disability. This process of subjectification not only produces and reiterates their own notion of self but also results in the reproduction of themselves (ontologically) as 'disabled subjects'. The process of resisting such signification is fraught with danger. One consequence may be a de-legitimisation of bodily difference and a banishment to further peripheral zones of social life.

<sup>17</sup> For a good summary of the impact of 'autonomy' theory on 'intellectual' disability, consult Stainton (1994).

Whilst feminist literature<sup>18</sup> has critiqued this perspective by foregrounding the primary masculinist figuring of the legal subject, I argue that a more nuanced reading of 'legal man' must also extend its reasoning to incorporate ableism as a key characteristic of rampant masculinist subjectivity. Without ableism, the masculinist figuring would, we could colloquially say, 'lose its balls'.

But such classifying practices go deeper than this. The unruly, monstrous and boundary-breaching qualities of 'disability' need a kind of taming that distinguishes disability from associative fluid and leaky categories such as illness, poverty, ageing and other ontological confusions. Disability is not only catachrestic but also contestable. Yet such corporeal slippages of the disability kind need containment, a civilised workability for procedural justice, a regulated liberty that produces practices of normality, rationality and pathology.<sup>19</sup> An example of this is the continued use of intelligence tests to separate the 'eligible' from the 'ineligible' within international and national<sup>20</sup> disability legislation, despite serious concerns about their validity.<sup>21</sup> I submit, then, that matters ontological are inextricably bound up with the politics of inclusion. Linton adds weight to this conclusion in her suggestion that:

the term 'disability' is a linchpin in a complex web of social ideals, institutional structures and government policies. As a result, many people have a vested interest in keeping a tenacious hold on the current meaning because it is consistent with the practice and policies that are central to their livelihood or their ideologies.<sup>22</sup>

Let us consider what this means for understandings of disability and the way those figurings are mediated in law. The working model of inclusion is really only successful to the extent that people with disabilities are able to 'opt in' or be assimilated.<sup>23</sup> For those who don't, it is assumed they will developmentally progress towards autonomy over time. The governing of

<sup>18</sup> Cheah et al (1996); Grbich (1992); Howe (1994); O'Donovan (1997).

<sup>19</sup> Rose (1992). The work of Bickenbach (1993) on the bio-medical model and its convergence with law as 'gatekeeper' is useful here, esp Ch 3, pp 61–92.

<sup>20</sup> *The Intellectually Disabled Persons' Services Act 1986* (Vic) s 8(1)(b) states that an assessment of eligibility be performed by use of 'one or more standardized measurements of intelligence'.

<sup>21</sup> Scheerenberger (1983), p 21 points to the difficulties of IQ tests in distinguishing between 'mild degrees of mental retardation [sic] and normality'. The shifting of mental age goal posts has resulted in 50 per cent of the white population in the United States being rendered 'intellectually disabled'. He goes on to say that 'even the most ardent advocates of mental tests did not want the percentage of mentally retarded persons to deviate significantly from approximately 2 or 3 per cent of the population'.

<sup>22</sup> Linton (1998), p 10.

<sup>23</sup> Commonly concepts such as 'integration' are construed in terms of assimilation. This is not surprising given the dominance of Social Role Valorisation Theory (SRV) or the normalisation principle within human services.

liberal unfreedom responds to the problem of what is to be done with 'governing the remainder, with those it identifies as being less than fully autonomous'.<sup>24</sup> Hindess suggests three approaches: (1) a clearing away;<sup>25</sup> (2) the compulsion towards disciplinary techniques (eg Social Role Valorisation Theory); and (3) targeting external causes by creating welfare safety nets.

Legal intersections/interventions assist in the activity of government by allocating and regulating populations into distinct ontological categories such as 'disability' so that they are visible, calculable and therefore governable. The management of disability is possible through the partitioning and ranking of disability (high, medium, low support needs), and by instituting guardianship and programmatic arrangements based on sets of competency standards.

The fixity of disability within both legislative and case law not only establishes the boundaries of permissible inquiry, but also establishes the legal fiction of 'disability'. It is this hardening of disability — based more often than not on bio-medical technologies and ascriptions — that enforces the centrality of the ableist body and the *terms of its negotiation*. The formulations often engaged by disability activists and enshrined in disability-related law end up discursively entrenching and thus reinscribing, the very oppressive ontological figurings of disability many of us would like to escape.<sup>26</sup> Alternative renderings of disability, if they are not able to 'fit' such prescribed 'fictions', are barred from entry. Consider the instructions in a recent staff survey produced by the Equity section of Queensland University of Technology and its banishment of certain 'kinds' of disability:

You should answer 'yes' to question 2 only if you are a person with a disability which is likely to last, or has lasted two or more years. *Please note that if you use spectacles, contact lenses or other aids to fully correct your vision or hearing, you do not need to indicate that you are a person with a disability, and would answer 'no'*.<sup>27</sup>

### Social Injury: A Transgressive or Recuperative Tool?

Freedom is neither a philosophical absolute nor a tangible entity but a relational and contextual practice that takes shape in opposition to whatever is locally and ideologically conceived as unfreedom.<sup>28</sup>

Attempts have been made by feminist legal scholars to re-work and engage with liberalism; to find some way out of the deadlock that focuses on

<sup>24</sup> Hindess (2000).

<sup>25</sup> See Campbell (2000a) and Campbell (2000b).

<sup>26</sup> For comparisons in the area of gay law reform, see Morgan (1996).

<sup>27</sup> Equity Section Queensland University of Technology (2000). 'Everybody Counts Equity Staff Data Collection', QUT (emphasis added).

<sup>28</sup> Brown (1996), p 6.

procedural rights without effecting substantive change. One feminist strategy that has gained currency is the concept of *social injury*, a device that translates once-privatised injuries into collectivist raced, sexed and disabled domains,<sup>29</sup> from which to claim remedies.<sup>30</sup> What I want to attend to in this section is argument put by Wendy Brown and Margaret Thornton concerning the development of oppositional strategies of legal engagement.

In the opening pages of *States of Injury*, Wendy Brown asks: 'What kinds of domination are enacted by practices of freedom?'<sup>31</sup> The evolution of anti-discrimination law has led to the codification of injury, victimhood and dependency within an overall context of docile subject positions. Brown comments that the social injury project establishes certain harms as 'morally heinous in the law'.<sup>32</sup> But exactly what 'harms' are we talking about? What kinds of 'harm' have legitimacy? I argue that, at best, an uncritical approach to *social injury* establishes certain authenticated specific sites and instances of 'disability discrimination'.<sup>33</sup> However, this discovery has not extended to uncovering 'ableism' as the *very font* of that 'harm'.<sup>34</sup> 'Disability discrimination', I suggest, is an effect of the practices of 'ableism' and not the converse.

Both Brown and Thornton utilise Nietzsche's<sup>35</sup> concept of *ressentiment* as part of their analysis. Such analysis, Brown explains involves developing:

a righteous critique of power from the perspective of the injured, it delimits a specific site of blame for suffering by constituting sovereign subjects and events as responsible for the 'injury' of social subordination.<sup>36</sup>

Part of this process, according to Brown, involves a refusal to be absorbed into liberal positionalities. Given that liberal undertakings of disability are an entry point into law, we can rightly question the extent to which disabled people have engaged in this process of refusal. The conditions of engagement within the emancipatory project require that 'the injured' give up their investment in a harmed politicised identity in order to be free. But does it work that way? What kind of ontologies of disability are being traded in, renegotiated and maintained? Isn't the use of legal mechanisms to structure political demands

<sup>29</sup> The danger with this approach is that it solidifies the notion of a fixed, bounded group identity and does not handle the intersection of various subordinated subject positions.

<sup>30</sup> Brown (1996); Howe (1990); Howe (1997); Thornton (2000).

<sup>31</sup> Brown (1995), p 6.

<sup>32</sup> Brown (1995), p 27.

<sup>33</sup> These findings should not be easily dismissed and are useful for various activist campaigns.

<sup>34</sup> For instance, there has been a hesitance amongst policy-makers and law reform advocates to recognise the legitimacy of disability vilification and hate crimes.

<sup>35</sup> Nietzsche (1956).

<sup>36</sup> Brown (1995), p 27.



an act of self-subversion enforcing an internalised ableism? The political identity of disability (the disabled citizen) within law not only contributes to an essentialised and interiorised ontology, but normalises and delimits 'disability' in order to make it regulative. So we can build on Brown's analysis here by saying that the language of (disability) recognition in law:

becomes the language of unfreedom ... becomes a vehicle of subordination through individualisation, normalisation, and regulation, even as it strives to produce visibility and acceptance.<sup>37</sup>

In other words, the inscribing of certain figurations of legal disability insists on regulating disabled people's 'experiences' within the confines of juridical formations, ultimately foreclosing any alternative perspectives. The message conveyed suggests that, in order to be free within neo-liberal societies, one must submit to the strictures of ableist renderings of disability in law and embrace a personal tragedy view of disability.<sup>38</sup>

In 'Neo-liberalism, Discrimination and the Politics of Ressentiment', Margaret Thornton,<sup>39</sup> in contrast, provides an optimistic reading of a politics of *ressentiment*. Whilst this picture may appear attractive in its treatment of disability subjectification, Thornton's treatment fails to adequately consider the impact of negative ontologies of disability upon the formations of disability subjectivities in law.

Whilst critically reviewing Australia's *Disability Discrimination Act 1992* (Cth) (DDA), Thornton concludes that neo-liberalism and its shift from equal *opportunities* to equal *responsibilities* provides evidence that disabled people can only be assimilated (accommodated) if they appear like their benchmark confreres and do not make too many economic demands on the system. As Thornton puts it: 'Neo-liberalism is discomfited by prophylactic measures that are perceived as impediments to the freedom to pursue profits.'<sup>40</sup> Indeed, the tensions between the necessity to work on the 'unproductive' disabled body in order to make it 'productive' in a recessionist economy grow increasingly evident.<sup>41</sup>

Despite this rather disastrous situation, Thornton argues that not all is lost, for people with disabilities are still able to 'come out' about disability discrimination (by using anti-discrimination legislation) and thereby enact positive images of disability via a process of *ressentiment*. The forces of

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<sup>37</sup> Brown (1995), p 66.

<sup>38</sup> The consequences of such a theory are given recognition in the definition of 'disability' in s 4 of Australia's *Disability Discrimination Act 1992* (Cth), which incorporates imputed as well as temporal aspects of impairment. I would further suggest that to resist such negative imputations and 'celebrate' the ontological and phenomenological manifestations of 'impairment' runs the risk of erasure and reinscription through the pathologisation of such desires.

<sup>39</sup> Thornton (2000).

<sup>40</sup> Thornton (2000), p 19.

<sup>41</sup> McClure (2000).

*ressentiment*, she argues, produce a groundswell of dissatisfaction by people with disabilities where such sentiment can be deployed as a positive force. Whilst recognising that *ressentiment* can produce other emotions aside from righteous anger — such as passivity or fear — the response Thornton suggests can be attributed to the vulnerability of a person speaking from an institutional location.<sup>42</sup> I am less optimistic.

It is not only those disabled people confined by an institutional location who display emotions of antipathy, ambivalence and fear. *All* people with disabilities to some extent confront the daily challenges of *internalised ableism* when negotiating daily existence in a world that erases our value.<sup>43</sup> I am more inclined to propose that neo-liberalism's engagement with minority identities provokes a politics of *ressentiment* on behalf of the 'majority'.<sup>44</sup> We only need to remind ourselves of the cries of 'special rights', legislative rollbacks and reactive campaigns both in Australia and in the United States.

The increased use of disability-related anti-discrimination legislation might induce a new way of thinking about citizenship, with disabled people having 'the tenacity and conviction that one is right to be able to complain of discrimination'.<sup>45</sup> Yet disabled people's complaints are required to be funnelled into the enunciatory processes of reductionist and single-cause classifications, interpreted both within and outside law through a paradigm of ableism.<sup>46</sup> There are always possibilities for resistance; however, a positive politics of *ressentiment* is always in danger of being chipped away and unravelled when the legal prescriptions of disability and foregoing remedies foreclose oppositional renderings of disability and play into (provoke) the internalised ableism of the complainant.

As a device of social change, is the concept of 'social injury' recuperative or transgressive of the structures of liberalism? As a tool of opposition, the 'social injury' approach appears to offer a way out of the loop of discriminatory practices. Yet one cannot help being suspicious of a practice that fabricates the elasticity and inclusiveness of the liberal *polis*. The enduring strength of liberalism lies in its capacity to rewrite and repair the edges of its domain and recuperate any flaws that may expose its fundamentalist and ableist basis/bias.

What I have been attempting to do so far is foreground the problematic project of inserting 'disability' uncritically into the neo-liberal project of freedom claims without firstly examining the benchmark legal subject and its relationship to disability as negative ontology. In addition, I have considered the strategy of bringing complaints based on claims of 'social injury' and the

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<sup>42</sup> Thornton (2000), p 20.

<sup>43</sup> Mullaly (1997), p 156 points out that assimilationist incitement not only means internalised devaluation, but the very act of participation 'means to accept an identity other than one's own and to be reminded by others and by oneself of one's real identity'.

<sup>44</sup> Hughes (1993).

<sup>45</sup> Thornton (2000), p 22.

<sup>46</sup> In a different article, Thornton (1997) also makes a similar point.

limitation of that approach given the overwhelming deployment of internalised ableism. The fact remains that disability is not viewed as a neutral category. Rather, it is laden and underpinned by a view of tragedy that makes possibilities of 'pride' difficult. In the next section, I discuss a particular example of battles over the legal definition of 'disability'.

### 'Disability' as Inherently Negative?

Deafness is increasingly an outlaw ontology, a hunted existence, an experience or way of being that, by definition, evades the biopolitics of the new eugenics. Some believe that deafness has always been an outlaw ontology, but whose fugitive status was generally ignored. How long this fugitive will keep evading capture is increasingly in question.<sup>47</sup>

Utilitarian philosopher Jeremy Bentham, in *A Fragment on Government* (1776), coined the term 'legal fiction' in reference to the fables and wilful falsehoods committed for the purpose of:

stealing legislative power, by and for hands, which could not, or durst not, openly claim it — and, *but for the delusion thus produced*, could not exercise it. Thus it was that, by means of mendacity, usurpation was, on each occasion set up, exercised, and established.<sup>48</sup>

Bentham goes on to propose the effects of such 'legal fictions', suggesting, *inter alia*, that delusions produce a sense of debility not only in the very subjection of individuals but in their trust and faith in law to deliver 'justice'. Bentham concludes:

for the more prostrate that debility, the more flagrant the *ulterior degree of depredation and oppression*, to which they might thus be brought to submit. Of the degree of debility produced, no better measure need be given, than *the fact of men's being* in this way made to regard falsehood, as an instrument, not only serviceable *but necessary* to justice.<sup>49</sup>

Returning to the focal concerns of this paper, it would seem that such 'legal fictions' give rise to a false or distorted ontology of disability — that is, disability as lack or as negative, formulated on the basis of biomedical realism. The 'fiction', in this case, suggests that a negative ontology of disability coupled with a bio-medical orientation towards disability prescriptions and evaluative rankings is necessary, a prerequisite for the efficient administrative management and legal delimitation of 'disability'. A poignant example of the

<sup>47</sup> Wrigley (1996), p 95.

<sup>48</sup> Taken from the 'Preface to the Second Edition', Bentham (1990), p 118 (emphasis added). I thank Dr Peter Hutchings for assistance with this source.

<sup>49</sup> Bentham (1990), p 118 (emphasis added).

continuing recitation of this kind of legal fiction of disability can be found in the introduction to a year 2000 journal collection by Jones and Marks, *Explorations on Law and Disability in Australia*:

*Most people with disabilities would share the view that being disabled is not a desirable state to be in, and even agree that disability should, where possible, be prevented. However, the suggestion that this carries negative implications about the entitlement to rights, or the values, respect and dignity of people with disabilities, should be resisted. While it may seem paradoxical, it is essential to meet the challenge of truly valuing those who are disabled at the same time as taking action to prevent or limit disability.*<sup>50</sup>

The pursuit of legal liberal rights discourse encouraged by Jones and Marks is deployed within the context of a negative ontological framework of disability and an assumed permissibility to performatively enact injurious speech. The authors not only foreground their inherently ableist speaking position, but also expose the recuperative, totalising tendencies and tensions in the flawed logic of ableist liberalism. This logic allows the rhetoric of rights to 'have it both ways': holding out the promise of equalisation whilst reinscribing negative ontologies of disability that continually produce and effect subordination.

The very inclusiveness of liberalism's understanding of 'citizenship' hinges upon governing disability according to an ethics of normalisation and minimalisation. Western neo-liberalism's 'individual' is an increasingly commodified entity. Like inanimate objects, individuals are constantly being packaged and marketed in terms of 'use value'. This use value becomes a measure of one's worth.<sup>51</sup> Recent technological 'advancements' hold out the possibilities of 'elevating' the bodies (and minds) of individuals designated as disabled to the level of 'nearly' able. We can argue that 'enhancing' and 'perfecting' technologies are really a form of assimilation by way of *morphing* ableism. A technological dynamic of *morphing* creates an *illusion* (appearance) of the 'disabled' body transmogrifying into the 'normal', resulting in a corporeal re-composition and re-formation of subjectivity.<sup>52</sup> Though such phantasmic re-imaging occurs at an ontological level, the violence of some technological applications is profoundly real:

Footbinding was a method to attract a good husband and secure a happier life. At the speech and hearing clinic, I was trained to bind the

<sup>50</sup> Jones and Marks (2000), pp 1–7 (emphasis added).

<sup>51</sup> The Howard government's increased emphasis in social security reform on 'mutual obligation' is a case in point. Cf McClure (2000).

<sup>52</sup> This usually occurs through the engagement of technological practices that mimic what is understood to be 'able-bodied' or 'normalcy'. The morphing aspect refers to those elements of technological practice or application that give the appearance of bodily wholeness. For instance, amputee = lack; returned to able-bodied status = normal by way of hand transplant or prosthesis.

mind of my daughter. Like the twisting of feet into lotus hooks, I was encouraged to force her deaf mind into a hearing shape. I must withhold recognition of her most eloquent gestures until she makes a sound, any sound. I must force her to wear hearing aids no matter how she struggles against them. The shape of a hearing mind is so much more attractive.<sup>53</sup>

An inducement to cooperate with treatments, surgery and fittings may not be necessary due to the enduring hegemonic compulsion towards ableist normativity, but rather individuals with disabilities and/or their families develop a sense of *responsibilisation*, correct ethical conduct, a 'regime of truth' about being a 'proper' citizen.<sup>54</sup> Such judgments about the 'correct' way to conduct oneself can be shaped by an awareness of the ontological and epistemological effects of resistance or transgression.<sup>55</sup> I want to briefly consider moves within the US context, which could easily be replicated in Australia — the attempt to introduce the legal category of *voluntary/elective/chosen disability*.

### To 'Elect Disability' or Not to 'Elect' — that is the Question

Advocates of the legal concept of *elective disability* argue that the legislature should distinguish between two categories of 'disability' when providing protection/coverage under anti-discrimination legislation. The term '*immutable disability*' refers to situations where it is not possible (for the time being) to eliminate the disability (usually meaning 'impairment'). The subject here is deemed to be innocent, and therefore deserving. In contrast, 'voluntary' or 'elective' disability designates those disabilities that were 'caused, continue to exist, or [are] worsened' by an individual's 'voluntary' conduct.<sup>56</sup> Aside from the imputation of culpability, such a regime invokes a moral discourse in its suggestion that:

someone who chooses not to mitigate his [sic] condition voluntarily chooses to be disabled ... 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.<sup>57</sup>

<sup>53</sup> Robert Carver (1990) 'Cochlear Implants in Prelingual Deaf Children: A Deaf Perspective', Deaf World Web, <http://dww.deafworldweb.org/pub/c/rjc/cicarver.html>.

<sup>54</sup> For a further explanation of the neo-Foucaultian concept of technologies of responsibilisation, see Rose (1999), esp pp 69–78.

<sup>55</sup> The media/medical treatment of Clint Hallam, recipient of the world's first hand-forearm transplant, and his request to have the transplant amputated, is an apt example.

<sup>56</sup> Key (1996).

<sup>57</sup> Key (1996), p 84.

Lisa Key proposes that coverage under the *Americans with Disabilities Act 1990* (US) be limited by the introduction of the notion of 'reasonable accommodation' that formulates 'unreasonableness' as a *refusal* by a person with a 'mutable' disability to take steps to *eliminate* their 'disability'.<sup>58</sup>

Similarly, Bonnie Tucker<sup>59</sup> is also strongly critical of what she terms 'deaf culturalists' — people who are proud to be deaf. The crux of her argument is that government has provided welfare and equal opportunity provisions on the basis of a moral obligation. With the advent of 'perfecting technologies', it is time for deaf people (and, by extension, people with disabilities) to reduce the state's mounting financial burden by submitting themselves to transforming surgery/technologies:

To fulfil these obligations and responsibilities, people who are deaf should support, rather than protest, research to ameliorate or eliminate deafness, and agree to accept full responsibility for *the ramifications of chosen* deafness or the refusal to take reasonable steps to modify the ramifications of their deafness ... An individual who chooses not to correct his or her deafness (or the deafness of his or her child) will *lack the moral right to demand* that others pay for costly accommodations to compensate for the lack of hearing of that individual (or his or her child).<sup>60</sup>

Ideas such as Key's and Tucker's are dangerous. They incite a reconfiguration of 'disability' wherein corporeally anomalous bodies are cast out into the wilderness and left to fend for themselves.<sup>61</sup> The 'choices' can in some instances be grim — to submit to the use of technologies where the long-term risks are unknown<sup>62</sup> or exist in a state of little or no legal protection. Indeed, the very notion of 'choice' in this instance appears as a kind of sick fabrication. As Owen Wrigley notes in the opening quotation to this section,<sup>63</sup> any positive ontology of disability is an oppositional or outlaw ontology. What space, if any, can be made for this fugitive and dissident body? Is there any

<sup>58</sup> Key (1996), p 96 (emphasis added).

<sup>59</sup> Tucker (1998). One wonders whether Tucker's own subject position as a cochlear transplant recipient has a bearing on her perspective.

<sup>60</sup> Tucker (1998), p 10 (emphasis added).

<sup>61</sup> Maybe those rendered ineligible either because of the use/or refusal of technologies fall into the category of being 'supra-disabled'?

<sup>62</sup> The case of Clint Hallam, who recently underwent a radical limb transplant, highlights the violence of the quest for normalcy. According to one perspective: 'Hallam was previously a well man [with amputation] and now, under the influence of immuno suppressive drugs, [needed to keep the 'new' limb viable] is a sick man.': J Ferrari (1998) 'Hands-on Experience', *The Weekend Australian*, 17–18 October 1998, pp 28–29. Likewise, the installation of a cochlear implant is invasive, requiring regular adjustment, often obliterating any residual hearing the recipient might have through permanent ear damage.

<sup>63</sup> See Wrigley (1996), p 95.

future for the queering of disability within the confines/purview of ableist fictions of disability?

### The US Experience: Ableism and the ADA?

The juridical power of law and its capacity to name or erase different ways of framing disability was put to the test in a series of decisions by the US Supreme Court in 1999.<sup>64</sup> These cases relate to coverage under the ADA, in particular delimiting the definition of 'disability'. The test used to decide whether an individual has a 'lawful disability' under the ADA is:

With respect to an individual, the term 'disability' means

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.<sup>65</sup>

In the case of *Bragdon v Abbott*,<sup>66</sup> the meaning of 'major life activity' was clarified by holding that 'life activity' not be restricted to activities in the 'public sphere'. Furthermore, in this case the definition of 'life activity' was extended to include reproduction. At the time, observers believed that *Bragdon* signalled a broadening of the scope and coverage of persons under the Act. This optimism was to be short-lived. Against a backdrop of backlash against the ADA by employer organisations and sections of the financial media, it came as no surprise that a series of ADA-related judgments handed down at the end of the 1998–99 Supreme Court term redefined and evaluated disability in the context of *mitigating*<sup>67</sup> circumstances.

Known as the *mitigation trilogy*,<sup>68</sup> all three cases revised the definition of disability under Title 1 (Employment) of the ADA. The central question in the

<sup>64</sup> Whilst Australian federal legislation such as the DDA differs markedly from the ADA, the history of developments in US disability policy suggests that disability debates have had a *persuasive influence* in the shaping of Australian policy and law reform both at governmental and activist levels. Current debates over the 'meaning' of 'disability' in US law provide a rich environment for the examination and analysis of ontological concerns due to the significant transparency of the ontological dimensions of 'impairment' within US legal discourse.

<sup>65</sup> ADA, s 12102(2).

<sup>66</sup> *Bragdon v Abbott* 524 US 624 (1998).

<sup>67</sup> Space precludes me from teasing out the notion of 'mitigation'. However, I am struck by its relational and comparative quality. The dictionary definition points to an aspect of the word that denotes 'make milder in manner or attitude, make less hostile or mollify': *The New Shorter Oxford English Dictionary*, 5th edn 1993, p 1797.

<sup>68</sup> Known as the 'mitigation of disability cases' the parameters of defining 'disability' under the ADA have been realigned, in respect of 'corrective

trio was whether ‘disability’ should be measured in its ‘untreated’ state or in the light of any corrective measures that give the appearance of normal functioning. In the context of the foregoing discussion, what is interesting about these cases is not only the contestability of the parameters of disability under law, but also the way technological applications mediate various discourses about ontologies of disability in law. The lead case was *Sutton v United Airlines Inc.*<sup>69</sup>

The plaintiffs in *Sutton* were twin sisters and commercial pilots who applied for positions as pilots with United Airlines. Both sisters had a severe myopic eye disability, with uncorrected vision worse than 20/200. However, when using ‘corrective’ lenses, both had a vision of 20/20 or better and could function similarly to individuals without a visual disability. United Airlines had their selection interviews terminated because it was argued that they did not meet the company’s vision requirements of uncorrected visual acuity of 20/100 or better. The sisters took legal action under the ADA, alleging that they were denied employment on the basis of disability. The interesting aspect of this case is that the defendants argued that the plaintiffs were *not disabled* because their *impairments were corrected* through the use of technological aids and therefore did not interfere with any major life activity. We can see, then, how technological engagements can destabilise the meaning of ‘disability’. Let us turn to how the disabled body was rendered in law.

The Supreme Court, when examining the term ‘disability’ within the meaning of the ADA, held that it could not be read to support the proposition that determinations be made in the light of evaluating an impairment in its ‘unmitigated state’.<sup>70</sup> Rather, 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.<sup>71</sup>

What is interesting about the majority judgment is that it was based in part on the court’s particular reading of the legislative history about the number of people reckoned to be covered under the Act.<sup>72</sup> This is not the place

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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 this prong of the definition is tied to the notion of ‘substantially limiting a major life activity’: s 3(2)(a) of the ADA.

<sup>69</sup> *Sutton v United Airlines Inc* 527 US 471 (1999). The other two cases ostensibly followed the reasoning in *Sutton*.

<sup>70</sup> *Sutton’s case* 119 SCt 2139 (1999) per O’Connor J at 2146–47.

<sup>71</sup> *Sutton’s case* 119 SCt 2139 (1999) per O’Connor J at 2146.

<sup>72</sup> The science of counting ‘cripples’ brings to the forefront contestants over the delineation of ‘disability’ in an environment where people are first turned into



to introduce an extended discussion of this aspect of legal reasoning, suffice to say that the court, whilst acknowledging a *biomedical* definition of disability, erred in favour of an economic model of disability. Jerome Bickenbach explains the emphasis of this orientation:

Disability ... is a socially constructed category made necessary by inescapable features of collective action and founded upon an individual's incapacity to participate as a worker in the distribution mechanism founded on merit.<sup>73</sup>

On the basis of such a model, the court concluded that the intention of legislators was to restrict the ADA's coverage to individuals whose impairments are not mitigated by corrective measures.<sup>74</sup> This checkerboard approach to the figuring of 'disability' by the courts exposes the tenuous nature of legal reasoning as well as the capacity of technological artefacts to confound and usurp seemingly self-evident formulations of 'disability'.

Instead of clarifying (securing) the meaning of disability and its relationship to the mitigation question, the *mitigation trilogy* of cases has provoked a series of new questions about the technological morphing of normalcy. At stake is the rendering of the species-typical functioning body. Although *Sutton*, *Murphy* and *Albertson* concluded that individuals who 'mitigate' their impairments must have those factors considered when evaluating whether they come under the lawful 'disability' definitions of the ADA, the matter of whether individuals have a *duty* to mitigate impairment (in the spirit of Key's and Tucker's argument) was not addressed. Furthermore, if individuals 'choose' not to engage technologies (aids and medications) that appear to mitigate their impairments, are they still considered disabled? For example, should a woman with no arms be required to wear a prosthesis or have a hand transplant in order to be considered 'disabled' under the ADA? Extending these questions a bit further, will current (and future) morphing technologies contribute to the framing of a *benchmark mitigated disabled body*,<sup>75</sup> used to assess definitional conformity irrespective of the matter of usage or 'choice'? Will today's 'normal' body be superseded, becoming tomorrow's 'abnormal' body?

The law's ableist leanings (in this instance, the US Supreme Court) are exposed in its attempt to reframe disability subjectification. Yet such attempts

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objects and then numbers. For administrative purposes, it is imperative that the (real) disabled person is made visible through the processes of calculation and therefore can be made governable. The obsession with 'disability fraud' induces such questions as 'who is a genuine disabled person and how many of them are there?'

<sup>73</sup> Bickenbach (1993), p 94.

<sup>74</sup> *Sutton's case* 119 SCt 2139 at 2149 (1999).

<sup>75</sup> One of the problems of operating within the duality of 'abled' and 'disabled' is that the boundaries between both signifiers interpenetrate. For example, the rise of new perfecting technologies not only reinscribes 'disability' but also reinscribes 'normalcy' — that which is species-typical.

at reinscriptions potentially enact two rather strange paradoxes. Advocates of the concept of 'elective disability' would deny individuals access to welfare/social security programs, because they have 'rejected' the normative path, whilst people who are considered to have 'mitigated' their disability, under *Sutton*, may not be covered under the ADA. We are left with a rather ambiguous possibility: technologies that hold out the promise to eradicate/compensate 'disabled' bodies may, by default, create new sites of ontological and corporeal 'confusion'. At the same time, the underlying sub-text figuring disability as anathema remains unchallenged. One wonders how far courts will proceed in deploying the concept of 'mitigation', especially in instances where the 'cure' is more risky than the 'effects' of the impairment? How far will legal reasoning take cognisance of the important issue of the high financial costs often associated with normalising treatments such as immunosuppressant drugs?

Yet the mapping, morphing and warping of disability within the ableist body of the law leave 'space' for discontinuities and ruptures in the shift towards closure and the narrowing of legal 'disability'. 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*,<sup>76</sup> 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. It may be advisable to watch this space, for recent moves in Australian Commonwealth law to narrow the definition of 'disability' within the *Disability Discrimination Act 1992* (Cth) and social security legislation following the recommendations of the *McClure Report*,<sup>77</sup> under the guise of overhauling and making equitable the welfare payments system.

## Conclusion

In this article I have attempted to focus on the relationships between ontology, disability and ableism by highlighting the role law plays in reasserting an ableist dynamic. Under technologies of *responsibilisation*, in tandem with the 'gentle hand' of the ableist body of the law, I have pointed to a resurfacing of the 'problem' of 'disability' that potentially 'rolls back' the civil rights gains of the 1980s and 1990s, especially in the arena of legislative reform. An increased emphasis on the use of coercive strategies through the use of the legal regimes of penalty to eliminate or morph 'disability' provide, I believe, persuasive evidence of a sliding into 'strong' eugenics, albeit under the guise of the liberal promise of 'choice' and 'freedom'. The very inscribing of 'legal' disability may well become the new battleground of the disability politics of the future. My task has been to draw connections between the notion of

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<sup>76</sup> *Finical v Collection Unlimited* 65 FSupp 2d 1032 (1999).

<sup>77</sup> McClure (2000).

disability as unthinkable, bounded by the logic of supplementarity that shores up a place for an autonomous, 'perfectible', transcendent self. Legal fictions of 'disability' act as an incited citation of the logic/neutrality of 'ableness' within the practices of neo-liberal freedom.

Finally, I suggest that the law's continual reiteration of 'defective corporeality' through the designation of the legal categories 'disability' and 'disabled person' disallows the 'disabled' subject any escape from the normalising practices of compensation and mitigation. This reiteration continues to negate possibilities of imagining the desiring 'disabled subject' in any alternative or positive way. Furthermore, engagements with law reform based on the notion of disability as *inherently* negative will continue to produce fabricated equality rights and responses of *ressentiment*. For as long as the figuring of disability as negative ontology lurks as an undercurrent of legal and welfare-economics debates — framed as part of a 'cold' (*ontology*) war, the *unthought* of being fully human — we have much to be concerned about.

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