
OPINION

The Body and the Law: Contested Sites

The body has become a 'sexy' subject — meaning that for many it is an exciting development and has entered the popular discourse.

The broadening circulation of the notion of the body risks losing its context. Feminists contributed significantly to the orisation of the body. They reacted against the traditional liberal idea that all women could achieve real equality by gaining admittance into the same practices as men. The problem with this is that many women have different needs and interests than men; most obviously women have babies and men do not. There are clear bodily differences that make a difference to many women's lives. The limited effectiveness of strategies aimed at achieving real change and equality, such as affirmative action and equal opportunity laws, led feminists to shift to theorising the body, and asking questions about the practices that engender meaning in the body.

Similar theorisation of the body has proceeded about other social minorities leading to new understandings of racial identity, physical disability, and gender embodiment. Slowly, notions of masculinity have emerged.

The contestation over the meaning of bodily identity and recognition of bodily difference occurs in many forums, but law is a significant one. An important assumption of the law is that to arrive at just decisions all people must be seen and treated equally. Individuals are thought to be in some fundamental way equal, and from this it follows that they are to be extended the same sorts of rights and considerations, and that similar cases should have similar treatment. Not to proceed in this way is seen as morally wrong. In this case, the human subject, the individual, is abstracted from her bodily, social and cultural context and then compared. This is problematic because it does not allow for individual difference, including bodily differences to be taken into account. An examination of legal cases shows that similar cases are not the same, nor do they involve the same sorts of people with the same sorts of backgrounds.

What lies behind these assumptions about equality as sameness is that some universal conception of the human subject is being suggested as that against which all cases of injustice are measured. The so-called universal subject is an abstracted human subject because individuality and particularity are denied. As many feminists have argued, this abstraction is not neutral and cannot be claimed to be a universal subject. The reason that bodily difference is ignored is because identity of an individual has traditionally been thought to be located in consciousness. The reality is we cannot expect to have a truly universal subject because people are always culturally bound. Human beings in part socially and culturally construct themselves. The universal standard that is put forward, feminists argue, is the standard of the western white male. The universal subject that is placed before us is not at all universal. Nevertheless, it is the standard that we use to

measure equality. The employment of these sorts of assumptions as shown in Andrew Sharpe's analysis of legal decision making contributes to understanding of how law deals with transsexuality, by eliminating conflict between biological characteristics and gender identity.

Reproductive technology has been the subject of legal intervention for some time. David Clark's analysis of recently emerging case law reports on the property rights of the zygote and shows how the law plays a role in determining what should be considered a person and hence what rights they can have. The inclusion of zygotes into our conception of personhood seems to work on an assumption of there being a universal subject because the biological and social characteristics are ignored.

Even if the universal subject is rejected and difference is embraced then there still may be room for injustice to occur. By accepting differences there is then room to differentiate between people on grounds which have no relevance to the issue at hand. For example, this person is unsuitable for this job because she is a woman or because she is black. A feature of a particular group is taken to be biologically fixed and used to justify why a person or group is more suitable to act in a particular role. It may even be that such a role may be complementary to the role of another person. For example, it could be claimed that women and men are different by nature but their differences are complementary and of comparable value. As Marion Maddox argues, affirmative action law has the capacity to take into account bodily equality, while still recognising that differences exist.

The law is also viewed by some as a site where the misuse of particular bodies can be challenged. A strand of feminism has viewed law as a useful tool to seek social change. Ustinia Dolgopol's article exemplifies this. She records how comfort women are using human rights law to challenge the Japanese Government's unwillingness to take responsibility, and explicitly acknowledge their suffering.

But the law is not the best forum for dealing with all bodily differences, or as some see them, bodily problems. Susan Brady argues that families seeking ways to deal with the bodily reproductive functions of their physically and intellectually impaired daughters are not well served by law. She contends that legal cases centre on medical intervention when families really need home help and other resources.

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