



PALGRAVE SOCIO-LEGAL STUDIES

A Jurisprudence of the Body

Edited by

Chris Dietz · Mitchell Travis · Michael Thomson



palgrave
macmillan

Palgrave Socio-Legal Studies

Series Editor

Dave Cowan
School of Law
University of Bristol
Bristol, UK

The Palgrave Socio-Legal Studies series is a developing series of monographs and textbooks featuring cutting edge work which, in the best tradition of socio-legal studies, reach out to a wide international audience.

Editorial Board

Dame Hazel Genn, University College London, UK

Fiona Haines, University of Melbourne, Australia

Herbert Kritzer, University of Minnesota, USA

Linda Mulcahy, University of Oxford, UK

Rosemary Hunter, University of Kent

Carl Stychin, University of London, UK

Mariana Valverde, University of Toronto, Canada

Sally Wheeler, Australian National University College of Law, Australia

More information about this series at

<http://www.palgrave.com/gp/series/14679>

Chris Dietz • Mitchell Travis
Michael Thomson
Editors

A Jurisprudence of the Body

palgrave
macmillan

Editors

Chris Dietz
School of Law
University of Leeds
Leeds, UK

Mitchell Travis
School of Law
University of Leeds
Leeds, UK

Michael Thomson
Faculty of Law
University of Technology Sydney
Sydney, Australia

School of Law
University of Leeds
Leeds, UK

Palgrave Socio-Legal Studies

ISBN 978-3-030-42199-1

ISBN 978-3-030-42200-4 (eBook)

<https://doi.org/10.1007/978-3-030-42200-4>

© The Editor(s) (if applicable) and The Author(s) 2020, corrected publication 2022

Chapter 5 is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>). For further details see licence information in the chapter.

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Cover illustration: Getty/Gremlin

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG. The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Acknowledgements

We would like to express our gratitude to our contributors for giving so freely of their important ideas. Whilst the initial idea for the collection was ours, it is the contributors to this collection who have added so much to this project and made it worthwhile. We have been inspired by their work and we hope this collection goes on to inspire others. We are thankful to the Socio-Legal Studies Association (SLSA) conference convenors in Leeds 2019 for allowing us to convene a *Jurisprudence of the Body* stream. This enabled us to test some of our ideas in the supportive and engaged environment that the SLSA always provides in its conferences and other events. The Leeds conference also helped us to make important connections with people who would go on to be contributors to this collection. We are very grateful for the input of our pool of reviewers: David Griffiths, Marie-Andrée Jacob, Amanda Keeling, Sam Lewis, Stu Marvel, Jose Miola, Craig Purshouse, Sally Sheldon, and Jens Thielen. Each provided the generosity, clarity, and insight that we have come to expect from them over the years. Thanks are also due to the editorial team at Palgrave—David Cowan and Liam Inscoc-Jones—whose assistance has helped us get over the finishing line. Finally, our thanks also go out to our colleagues in the Centre for Law and Social Justice, University of Leeds. This creative and productive space has allowed the ideas that sparked this book to be explored and developed.

Praise for *A Jurisprudence of the Body*

“Health law offers a key site for rethinking the place of the body in legal systems. With its definitive focus on wellness and vulnerability, death and reproduction, the law’s role in producing bodies in all their variety is especially clear. As this timely collection demonstrates, the ‘turn to the material’ in feminist theory and its concern with social practices of embodiment, offer an opportunity to review the field critically and to take stock of the political contexts and normative implications of health law’s many bodies. It also challenges us to consider again what we mean by health law: who are its audiences, who is heard, who is seen, who goes unseen? These challenges are ably taken up in the rich, engaging and coherent set of essays which make up *A Jurisprudence of the Body*.”

—John Harrington, *Professor of Global Health Law, Cardiff University*

Contents

| | | |
|---------------|--|-----------|
| 1 | Nobody, Anybody, Somebody, Everybody: A Jurisprudence of the Body | 1 |
| | <i>Chris Dietz, Mitchell Travis, and Michael Thomson</i> | |
| Part I | The Body of Health Law | 15 |
| 2 | Reasoning from the Body: Universal Vulnerability and Social Justice | 17 |
| | <i>Martha Albertson Fineman</i> | |
| 3 | Studying Public Health Law: Principles, Politics, and Populations as Patients | 35 |
| | <i>John Coggon</i> | |
| 4 | Bioinequalities: Rethinking Legal Responses to the Biological and Intergenerational Harm Caused by Inequality | 63 |
| | <i>Karen O'Connell and Isabel Karpin</i> | |
| 5 | Healthcare, Well-being, and the Regulation of Diversity in Healing | 91 |
| | <i>Emilie Cloatre and Nayeli Urquiza-Haas</i> | |

| | |
|---|------------|
| Part II Bodies of Health | 117 |
| | |
| 6 Temporal Bodies: Emergencies, Emergence, and Intersex Embodiment | 119 |
| <i>Fae Garland and Mitchell Travis</i> | |
| | |
| 7 Death Before Birth: Liminal Bodies and Legal Frameworks | 149 |
| <i>Karolina Kuberska, Danielle Fuller, Jeannette Littlemore, Sheelagh McGuinness, and Sarah Turner</i> | |
| | |
| 8 Depathologising Gender: Vulnerability in Trans Health Law | 179 |
| <i>Chris Dietz and Ruth Pearce</i> | |
| | |
| 9 Feminist Activism in the Context of Clinical Trials and Drug Roll-Out | 205 |
| <i>Aziza Ahmed</i> | |
| | |
| Part III Reframing Health Law Through Bodies | 225 |
| | |
| 10 Establishing Boundaries for Speculation About Artificial Wombs, Ectogenesis, Gender, and the Gestating Body | 227 |
| <i>Claire Horn and Elizabeth Chloe Romanis</i> | |
| | |
| 11 A Relational Responsibilities Framework for Children's Healthcare Law | 255 |
| <i>Jo Bridgeman</i> | |
| | |
| 12 Embodied Integrity, Shaping Surgeries and the Profoundly Disabled Child | 281 |
| <i>Marie Fox, Michael Thomson, and Joshua Warburton</i> | |
| | |
| Correction to: Healthcare, Well-being, and the Regulation of Diversity in Healing | C1 |
| <i>Emilie Cloatre and Nayeli Urquiza-Haas</i> | |
| | |
| Index | 315 |

Notes on Contributors

Aziza Ahmed is a Professor at Northeastern University School of Law. Her scholarship examines the legal, regulatory and political environments regarding health in US domestic law, US foreign policy and international law. She was a member of the Technical Advisory Group on HIV and the Law convened by the United Nations Development Programme (UNDP) and has been an expert for many institutions, including the American Bar Association and UNIFEM. Her latest monograph *Feminism's Medicine: Law, Science, Race, and Gender in an Epidemic* is forthcoming with Cambridge University Press.

Jo Bridgeman is Professor of Healthcare Law and Feminist Ethics at the University of Sussex where she teaches Perspectives on Healthcare Law, Tort, Gender Equality, Feminism, Law and Society. Her research adopts a critical feminist perspective informed by and developing the feminist ethics of care in consideration of parental, professional and state responsibilities to children. Her work on the medical treatment of children, including the care of children with complex needs, parental responsibility for children undergoing treatment for cancer, withholding/withdrawal of life-sustaining treatment from a child and issues arising from the Bristol Royal Infirmary Inquiry, has been published widely. This chapter develops the conceptual framework advanced in her book, *Parental Responsibility, Young Children and Healthcare Law* (2007). She is working on a book which examines the development of the law governing the medical treatment of children over the past four decades within the changing social, political and legal context.

Emilie Cloatre is Professor of Law at the University of Kent. Her research focuses on the relationship between law and ‘science in society’, and in particular between law and medical practices. She is Principal Investigator on a Wellcome Investigator Award entitled ‘Law, Knowledges and the Making of “Modern” Healthcare’ (2017–2022).

John Coggon is Professor of Law at the University of Bristol Law School, where he is a member of the Centre for Health, Law, and Society. He is also a member of the University’s Centre for Public Health and Population Health Science Institute, and an honorary member of the UK Faculty of Public Health. His research interests lie primarily in the areas of mental capacity law and public health ethics and law, and his publications include the monograph, *What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health* (2012), and the textbook, co-authored with Keith Syrett and A.M. Viens, *Public Health Law: Ethics, Governance, and Regulation* (2017).

Chris Dietz is a Lecturer in Law and Social Justice at the School of Law, University of Leeds. His work considers the regulation of gendered embodiment, with a focus on trans health. He has undertaken visiting fellowships at the Unit of Gender Studies, Linköping University; the Centre for Gender Studies, Karlstad University; and the Centre for Gender Studies, University of Copenhagen.

Martha Albertson Fineman is an American jurist, legal theorist, and political philosopher. She is Robert W. Woodruff Professor of Law at Emory University School of Law. Since 2008, Fineman has directed the Vulnerability and Human Condition Initiative at Emory, as well as the Feminism and Legal Theory Project, which she founded at the University of Wisconsin in 1984. Her work considers the legal, social, and political implications of universal dependency and vulnerability, formulating a robust theory of social justice that is an alternative to a rights-based model for determining state or collective responsibility for individual and societal wellbeing.

Marie Fox holds the Queen Victoria Chair of Law in the School of Law and Social Justice, University of Liverpool. Her research is concerned with the legal governance of human and animal bodies, legal conceptions of embodiment and regulation of reproduction. Her projects (funded by the Dunhill Medical Trust, Wellcome Trust and Socio-legal Studies Association) focus on pet loss and the place of companion animals in care homes, governance of assisted reproductive technologies, abortion law reform in Northern Ireland

and legal regulation of genital cutting. She is a co-ordinating editor of the journals *Social & Legal Studies* and *Medical Law International*.

Danielle Fuller is a Professor in the Department of English and Film Studies at the University of Alberta. Her main areas of research are contemporary cultures of reading and interdisciplinary research methods that combine textual and empirical modes of investigation. Before emigrating to Canada in May 2018, she worked for nearly 21 years at the University of Birmingham, UK. She was the Principle Investigator for 'Death Before Birth' project from its inception to April 2018, and has also led collaborative projects funded by the Arts and Humanities Research Council, Arts Council England and the British Academy.

Fae Garland is Lecturer in Law at the University of Manchester where she is a member of both the Centre for Social Ethics and Policy and the Manchester Centre for Regulation and Governance. Her work on gender, sex and law has been widely published in journals such as the *American Journal of Bioethics*, *Edinburgh Law Review*, *Journal of Law and Society*, *Legal Studies* and *New Zealand Law Review*. She has also co-authored a number of national and international governmental reports that explore intersex rights and law and has been PI on a range of empirical projects which consider the impact of law reform on intersex lives. Most recently, she has been awarded funding by the British Academy (with Mitchell Travis) to examine the operation of Maltese legislation which prohibits unnecessary surgeries on intersex infants.

Claire Horn holds a BA from McGill University and an MA from New York University. She was awarded her PhD in Law at Birkbeck, University of London, where she was co-supervised by Elena Loizidou and Daniel Monk. Her dissertation "Gestation Beyond Mother/Machine: Legal Frameworks for Artificial Wombs, Abortion, and Care," uses a comparative analysis of the impact of ectogenesis on abortion law in the UK, US and Canada to argue for abortion decriminalization and affirmative protections to abortion access ahead of the development of artificial womb technologies. Horn is a recipient of the Canadian Centennial Scholarship Fund 2018–2019, and is continuing her research on artificial wombs as a Wellcome Postdoctoral Researcher at Birkbeck Law.

Isabel Karpin is a Professor at the University of Technology Sydney. She researches on the bioethical implications of laws governing reproductive technologies, genetic testing and disability. She explores the challenge posed by

new biotechnological developments on legal understandings of normality, disability, individuality and family.

Karolina Kuberska is a medical anthropologist with a special interest in understandings of health, wellbeing, and healthcare. She holds her PhD from the University of St Andrews. Between 2016 and 2018, she was a postdoctoral fellow in the Death Before Birth research team at the University of Birmingham. She is a research associate at THIS Institute at the University of Cambridge where she is involved in a range of projects designed to strengthen the evidence base for improving the quality and safety of healthcare.

Jeannette Littlemore is Professor of Applied Linguistics in the Department of English Language and Linguistics at the University of Birmingham. Her research focuses on metaphor and metonymy and explores the facilitative and debilitating role played by metaphor and metonymy in language education and in cross-linguistic and cross-cultural communication more generally. She is interested in the creative use of metaphor and metonymy and in the ways in which figurative meaning is negotiated by speakers with different kinds of background knowledge and different emotional experiences. Her monographs include *Metaphors in the Mind: Sources of Variation in Embodied Metaphor* (2019).

Sheelagh McGuinness is Reader in Law at the University of Bristol Law School, where she is Co-Director of the Centre for Health, Law, and Society. Her research focuses on health law and the regulation of reproduction. She is interested in the ways in which law and legal frameworks can shape experience of health care and reproduction and has published across these areas in law, ethics, and health care journals. She was a co-investigator on the Economic and Social Research Council funded (ES-N008359) project “Death Before Birth: Understanding, informing and supporting the choices made by people who have experienced miscarriage, termination and stillbirth”.

Karen O’Connell is an Associate Professor at the University of Technology Sydney and an expert in discrimination law and biotechnologies of the body. Her research addresses the ways that equality laws might better respond to the experiences of stigmatised groups in society, particularly given emerging neuroscientific and genetic knowledge about the body and disability. She is the recipient of a UTS Chancellor’s Postdoctoral Research Fellowship (2010–2015) and an Australia Research Council Discovery Grant (2015–2019).

Ruth Pearce is a Research Fellow in the School of Sociology and Social Policy at the University of Leeds, UK. Her research explores issues of inequality,

marginalisation, power and political struggle from a trans feminist perspective. Ruth is the author of *Understanding Trans Health* (2018) and editor of *The Emergence of Trans* (2020), with Igi Moon, Kat Gupta, and Deborah Lynn Steinberg. She blogs about her work on <http://ruthpearce.net>.

Elizabeth Chloe Romanis is an Assistant Professor in Biolaw at Durham University and holds an LLB (Hons) in Law and LLM in Healthcare Ethics and Law from the University of Manchester. She is a PhD Candidate at the University of Manchester co-supervised by Alexandra Mullock and Rebecca Bennett. Her PhD is supported by a Wellcome Trust Studentship in Society and Ethics. Her research focuses on the ethical and legal questions arising from the potential use of artificial womb technology as an experimental alternative to neonatal intensive care. Her thesis is entitled: ‘Regulating the “Brave New World”: Ethico-Legal Implications of the Quest for Ectogenesis.’ Her broader research interests include pregnancy and the law, assisted reproduction, innovative reproductive technologies and the legal meaning of birth and life.

Michael Thomson is Professor of Health Law at the University of Technology Sydney and the University of Leeds. His research spans health law, children’s rights, and legal theory. He has written extensively on non-therapeutic interventions on children and the regulation of reproduction. He is the author of two books, *Reproducing Narrative: Gender, Reproduction & Law* (1998) and *Endowed: Regulating the Male Sexed Body* (2008), and two previous edited collections, *Feminist Perspectives on Healthcare Law* (with Sally Sheldon, 1998) and *Exploring Masculinities: Feminist Legal Theory Reflections* (with Martha Fineman, 2013). His current work explores the place of the body in contemporary theories of social justice and the increasing attention paid to the social environment across the life sciences.

Mitchell Travis is an Associate Professor in law at the Centre for Law and Social Justice at the University of Leeds. His work considers the relationships between embodiment, institutions and culture with a primary focus on working with the intersex community. He has worked with the UK Government Equalities Office, the National Health Service and the Norwegian Directorate for Children, Youth and Family Affairs. His continuing work with Fae Garland has been cited by the Office of the United Nations High Commissioner for Human Rights, the Law Society and various intersex organisations.

Sarah Turner is a cognitive linguist with a particular interest in the analysis of metaphor and figurative language. She holds her PhD from the University of Birmingham in 2014, then held a teaching position at the University of

Tokyo before taking up a postdoctoral research fellowship at the University of Birmingham on the Death Before Birth project team, 2016–2018. She is Lecturer in English in the School of Humanities at Coventry University. Her research focuses on the analysis of figurative language production to provide insights into physical, psychological and social experiences, with a current focus on the experience of bereavement and grief.

Nayeli Urquiza-Haas is a Wellcome Trust Research Associate at the University of Kent, working on the project ‘Law, Knowledges and the Making of “Modern” Healthcare’ (Wellcome Investigator Award (2017–2022)). She holds a PhD from the University of Kent (2015). Her research focuses on vulnerability in feminist legal studies and the regulation of traditional and non-conventional medicines.

Joshua Warburton is a researcher and teaching fellow at the School of Law at the University of Leeds. His research interests include health law, consumer law, EU Law, and tort law. He obtained his PhD in Law at the University of Manchester. His projects include studies on medical practice, legal educational reform, and theoretical contract forms.



1

Nobody, Anybody, Somebody, Everybody: A Jurisprudence of the Body

Chris Dietz, Mitchell Travis, and Michael Thomson

1 Introduction

Health and embodiment are inextricably linked. How we feel about our bodies has a significant impact upon our health. When we feel healthy, we tend to experience our bodies positively, and vice versa. Similarly, it is difficult to think of an occasion when we experience poor health and yet feel good about our bodies. An unexpected diagnosis can dramatically alter our experience of our bodies, even if we felt fine immediately before we received it. Meanwhile, getting the all-clear from a medical professional following a health test can have unparalleled positive effects upon our general well-being. For this reason, few dispute the centrality of the body within health studies. Yet as we turn our attention to the law, and health law specifically,¹ we note that bodies have not

¹ The sub-discipline of 'health law' covers similar ground to 'health care law' or 'medical law' (though boundaries are contested). Herein, the former is understood as more inclusive than the latter, as it accepts that a subject's 'health' exceeds matters which are dealt with in a medical context (Montgomery 2002: 1–3).

C. Dietz (✉) • M. Travis
School of Law, University of Leeds, Leeds, UK
e-mail: c.p.dietz@leeds.ac.uk; M.Travis@leeds.ac.uk

M. Thomson
Faculty of Law, University of Technology Sydney, Sydney, NSW, Australia
School of Law, University of Leeds, Leeds, UK
e-mail: michael.thomson@uts.edu.au

always been considered as seriously as they might have been. Rather than being front and centre in the minds of health law scholars and practitioners, the body has tended to be obscured in various ways. Even when the body has not been masked within health law—for example, in the case of the bodies which have been considered disordered, diseased or disabled, and which have animated many discussions about health—they have tended to be under-theorised. Such bodies have been framed in a manner which fails to address the complexity of embodiment, and the messy instability of bodies.

This collection seeks to uncover and challenge some of the fundamental assumptions that underpin medico-legal knowledge about bodies. In doing so, it raises important questions about how various types of bodies are, and ought to be, regulated. The question of what the body is and how it directs our thinking about law and health is hereby positioned alongside a wider question about how institutions such as law and the healthcare system shape our understanding of bodies. *A Jurisprudence of the Body* brings together a range of theoretical perspectives to consider fundamental questions about health law and the place of the body within it. The collection reflects the shift in feminist thinking ‘from an emphasis on the discursive toward the material’ (Garland-Thomson 2011: 594), positioning its theoretical focus on the connections between the law and flesh. Some contributors discuss bodies which have been located at the heart of health law debates since the inception of the field. Others consider bodies which remain on the margins. But each contribution addresses the discursive and institutional boundaries of health, and in some cases, seek to dismantle them. This collection is hereby positioned at the intersection of theory, health and law but also at the limits of these spheres—pushing them to breaking point in order to facilitate the possibility of new directions in health care and health justice.

In this introduction, we seek to frame the discussion that will follow. After briefly charting law’s (lack of) engagement with the body in the first section (entitled ‘Nobody’), we then address the ways in which a de-contextualised conception of bodies has been used to regulate embodiment in the second (‘Anybody’). As we explain, such framings inevitably underplay the inherent diversity of human bodies, which will have significant impact upon law and policy, particularly within a health law context. In the third section (‘Somebody’), we identify how attempts have been made to re-contextualise bodies in relation to the specific institutions and regulations to which they are subjected in order to better account for this embodied diversity. This improved, but fragmented, understanding of bodies will then be contrasted with the recent return to universality in the fourth section (‘Everybody’). In an attempt to move law and policy beyond interrogation of identities, universal

approaches—including those developed within vulnerability theory and other embodied theories of justice—have become increasingly pronounced in contemporary legal studies. Intersectional, identarian and post-identarian understandings of bodies are well represented in this collection, as emphasised in the fifth and final section of this introduction.

2 Nobody

Traditional jurisprudential approaches have been reluctant to engage with the idea of the body. Positivists have neglected to outline either the impact of law on bodies or the effect of bodies on their relationships with law. Such formulations have failed to consider the body as a determining factor in the attribution of personhood; instead espousing, for example, the view that the person is a legalistic shorthand (Dewey 1926: 655). This view is elaborated by Derham, who writes:

Just as the concept “one” in arithmetic is essential to the logical system developed and yet is not one something (e.g. apple or orange, etc.), so a legal system (or any system perhaps) must be provided with a basic unit before legal relationships can be devised. The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure “concept” as “one” in arithmetic. It is just as independent from a human being as one is from an “apple”. (Derham 1958: 5)

Under this understanding of personhood, the legal person is a unit devised and utilised by law, a container capable of being filled by any entity (such as the doctor or patient of health law). Yet while it may be correct to say that anyone (or anything) can be a legal person, this does not ascribe a basis for *determining* personhood. Nor can it account for the diverse bodies to which personhood has been applied, the injustices it conceals or the bodies that it has privileged and underprivileged. This separation of law and bodies fails to account for the ways in which bodies are shaped, constituted and constructed by the institutions that they are imbricated within. As a result, this disembodied conception of law has been critically described by Grear as ‘a socially decontextualized, hyper-rational, wilful individual systematically stripped of embodied particularities in order to appear neutral and, of course, theoretically genderless’ (2011: 44).

3 Anybody

The lack of emphasis on bodies has given rise to the liberal conception that bodies are largely interchangeable in their interactions with societal institutions, including law and the healthcare system. Liberal framings, such as human rights discourse, have become the dominant language for thinking about law and the body. These tend to be premised upon the supposed universality of the human body. Yet the meaning of humanity, or even biology, is subject to both social and cultural concerns. As Fuss (1996: 1) has claimed: ‘the human is a linguistic, cultural, and sociopolitical construct of comparatively recent date’. For Fuss, the concept of the human is more than a simple genetic relation. Instead, it relies upon political and cultural ideology to include and exclude entities from its boundaries at different times. As a consequence, it is unsurprising to find that broader liberal legal considerations have, for the most part, categorised the body ‘as an object of analysis rather than as a category of analysis’ (Fletcher et al. 2008: 321). This point of focus has failed to account for the value that society places on the living physical body, particularly in terms of our interactions with others and its facilitation of our experience of being in the world (Fletcher et al. 2008: 321). Hyde (1997) notes that the law uses a variety of unsuccessful conceptualisations when dealing with the body, including property, privacy right and machine. Each of these metaphors fails to encapsulate the importance of the body. As Naffine writes, there has been a shift in legal theory from a bodiless conception of law to a particular type of (assumedly interchangeable) body:

the rational and therefore responsible human legal agent or subject: the classic contractor, the individual who is held personally accountable for his civil and criminal actions. This is the individual who possesses the plenitude of legal rights and responsibilities, the ideal legal actor ... he who asserts his will, who grasps and asserts his legal rights. Now there is a discrete possessor of rights. (Naffine 2003: 362)

Principles of liberty, equality and freedom operate to allow individuals the same opportunities for flourishing within Western states. Liberal understandings of meritocracy suggest that anyone can achieve anything—even good health—provided they work hard enough for it. In turn, anti-discrimination law has become prominent in order to prevent people from being unfairly discriminated against on the basis of the particularities of their bodies. In this theoretical tradition, bodies are understood as interchangeable. The ‘he’ so often used in legislation can be applied to women, while race and disability

are not important aspects for the purposes of general (non-specific) legislation. Despite this, indicators such as race, class and disability all have an important effect on outcomes in terms of wealth distribution, educational attainment, criminalisation and health. The interchangeable ‘anybody’ assumed by liberalism has been shown to privilege a particular type of body. Whiteness, maleness, being able bodied and inheriting wealth are all advantaged by institutions that assume a lack of dependency on the state (Fineman 2004; Brown 2015). Again, as Naffine notes:

the rational subject must be a fully individuated and integrated physical being before he can begin to assert his will against all other subjects. An explicit biological assumption is therefore that this individual is a rational adult human; a tacit assumption is that this rights-asserting competent legal actor is individuated and therefore sexed (at least in the sense of never pregnant, because this compromises individuation). Individuation and self-containment are essential if the rational subject is to be free to act in ways which affect only his self: if he is to be fully capable of confining and containing the effects of his actions to himself and to no other. (Naffine 2003: 364)

Some individuals are able to ‘fit’ into society precisely because of their ability to navigate the everyday topography of existence (Garland-Thomson 2011). This liberal legal subject is afforded material anonymity that is available only to individuals who share characteristics of masculinity, whiteness and able-bodiedness. ‘Others’ are rendered culturally exposed (Travis 2014: 536). This abstraction has led to a focus on rationality and a denial of the importance of the masculine body (Thomson 2008). As a result, ‘many feminists have criticised how women, but not men, are defined in corporeal terms’ (Fletcher et al. 2008: 331).

We can understand the exclusionary effects of this definition through engaging with Garland-Thomson’s (2011) work on the ‘misfit’. Garland-Thomson (2011) attempts to explain disability in terms of fitting or misfitting within a given societal context; ‘A good enough fit’, she explains, ‘produces material anonymity’ (596). Further, she argues that for white, heterosexual and able bodies, ‘fitting is a comfortable and unremarkable majority experience of material anonymity’ (Garland-Thomson 2011: 597). This ‘material anonymity’—or ‘invisibility’ (Whitehead 2001)—allows for the white, heterosexual, able-bodied male experience to become standardised and normative. At the same time this normativity allows for this particular group of bodies to remain relatively anonymous. Gatens elaborates on this point,

noting that the origins of our political system prevent full engagement from those whose bodies are excluded:

Since the political body admitted only very specific types of persons to active membership, to abstract from their specific qualities certain minimal common features is to abstract from an abstraction. In other words, the abstract individual, under these lights, appears as a very specific kind of person.... The laws and ethical systems that are likely to develop in this sociopolitical context are going to amount to the encoding of the values and judgments of very specific kinds of person with very specific kinds of interest. There is nothing neutral or disembodied about the abstract liberal individual when viewed from this perspective. (Gatens 1996: 99)

Part of the appeal of accounts of the body which are grounded in theories of embodiment are that they are both able and willing to consider diversity. Grosz (1994) writes about 'alterity', which concerns the articulation of difference in the multiplicity of bodies (209). These differences include race, sex, sexuality, disability and class, as well as cultural specificities. An examination of bodies reveals the diversity of experience, function and identity. Any theorisation of the body which fails to take this into account, therefore, borders on the reductionist. This has had notable consequences in the health law context, as, for example, patient advice and research protocols are often based upon particular normative bodies (Ries and Thomson 2019). Various critiques of this type of reductionism are offered by our contributors to this collection.

4 Somebody

All contributions to this collection highlight various ways in which bodies play a vital role in how we understand law and health. Crucially, law and health discourses and practices also fundamentally shape our understandings and experiences of the body. In keeping with developments in feminist legal theory, disability studies and critical race theory, this collection seeks to highlight the importance of the particularities of the body. Thus sex, gender, disability, genetic and chromosomal variations, and illnesses have profound contextual and material aspects that undermine the notion that bodies are interchangeable, equal or equivalent. Health, and more recently health law, has long been animated by discussions of particular bodies; whether they are disordered, diseased or disabled. Each of these are classificatory regimes claiming some knowledge about the body. This collection aims to uncover and

challenge the fundamental assumptions that underpin medico-legal knowledge about such bodies.

This interrogation is achieved through a mix of perspectives. A number of contributors look towards embodiment as a perspective that identifies bodies as always shaped by their discursive and institutional contexts (Dietz 2018; Travis 2019; Garland and Travis 2018; Fox and Thomson 2017; Fox and Murphy 2013; Fletcher et al. 2008). Work on embodiment has highlighted the impossibility of separating the material body from its institutional and cultural contexts. Here embodiment is understood as 'a dynamic encounter between flesh and world' (Garland-Thomson 2011: 592). Grosz explains the concept as 'the condition and context through which I am able to have relation to objects' (Grosz 1994: 86). Much of the collection thus draws upon an understanding of embodiment and its subsequent relation to law.

Embodiment theory encourages us to explore the body as a bio-social entanglement (Grabham 2012). It directs us to an examination of the material body and its relationship to its environments and experiences. In the legal sphere, Fletcher, Fox and McCandless (2008) note that 'feminism has shifted from exploring women's rights over their bodies, to analysing how social regulation has gendered the body and embodied experiences' (335). The body becomes central, therefore, in understanding how and where legal phenomena are exacted and the impact that this has on both the individual and groups. This approach presents an alternative analytical focus to traditional feminisms, moving from sexual difference to embodied difference. Such an approach 'helps avoid assumptions that sexual difference will be the primary signifier of embodiment, and allows an intersectional approach to bodily differences' (Fletcher et al. 2008: 334). The term 'embodiment' thus refers to this institutionally constituted, culturally located and material body. Whilst the materiality of the body remains vitally important to such research, for the purposes of this collection, it is located in relation to its discursive and jurisdictional context. This work alerts us to the idea that medical practitioners not only respond to healthcare issues but also create them through their own understandings of 'normality' and 'fixing'. Bodies, as a result, cannot be understood outside of, or as separate to, their medical and legal contexts. Nor can these medical and legal contexts be easily disaggregated when assessing the accessibility of rights or support for such bodies. Instead, the contributors to this collection address the interrelation of these contexts, exploring various power dynamics in the hope of opening them up to challenge.

5 Everybody

As well as highlighting various contexts which help us situate bodies, and thus move away from generalisations about ‘the’ body, a number of contributors to this collection also draw upon, or advocate, theories which re-emphasise the importance of universalism in the regulation of the body. Notably among these is the vulnerability approach pioneered within legal scholarship by Fineman (2008, 2017, this volume). In Fineman’s (2017: 143) work, vulnerability is understood to be a universal trait experienced by all humans at all stages in the life course, in both an ‘embodied’ and socially ‘embedded’ manner. The vulnerability of the body gives Fineman’s theory its normative underpinning and radical potential. Instead of ignoring embodied and embedded vulnerability and leaving individuals to take responsibility for their own health and well-being, we—both as health law scholars and as a society more generally—must do more to build political structures and institutions centred upon providing care for ourselves and other humans.

The starting point of Fineman’s approach is shared by Garland-Thomson, who uses the temporality of vulnerability to note that individual bodies are subject to changes in resilience over the course of a lifetime. The human embodied experience is variable and dependent on context. Vulnerability is implicit, therefore, to understanding embodiment, not only between bodies but also over time (Garland-Thomson 2011: 596). Vulnerability thus becomes a perfect starting point for ethical debate; it is through our bodies ‘that our finitude and uniqueness are signified to others [...]’. Embodiment and ethics are inseparable insofar as we understand human existence in terms of dwelling or spatio-temporal being-in-the-world’ (Diprose 2005: 237–238). It is through our embodied individuality that ethics can come to be conceived, and that ethical structures and institutions can then be built and maintained.

The significance of vulnerability theory lies in its examination of embedded vulnerability played out through our relationships with institutions such as health care and law. These institutional relationships are capable of heightening or attenuating our resilience. Vulnerability theory highlights the institutional and generational ways in which resilience is created rightly dismissing political and policy-led notions of ‘vulnerable groups’ that fail to situate individual bodies in their social contexts. As a consequence, the theory pushes for a more responsive state that is capable of monitoring the ways in which institutions respond to vulnerability and effect resilience (Fineman 2008: 19).

While not all contributors consider vulnerability explicitly, many adopt relational and embodied perspectives of the body to criticise past or present

health law, or to propose alternative regulatory frameworks. Some approaches are more universal, while others prefer to maintain focus upon the value of intersectional or identarian approaches that we have previously highlighted. Yet all approaches attempt to go beyond a simplistic understanding of identity and the body in order to demonstrate how the state and its institutions construct the concepts and categories of bodies as well as the social and cultural contexts those bodies are situated within.

6 A Jurisprudence of the Body

Asking our contributors to consider the relationship between law and the body in a health context has provoked a range of responses. A number have been animated by the institutional nature of health care as an apparatus for determining bodily outcomes. The first section—‘The Body of Health Law’—asks questions about the nature and scope of health care, and how this has changed in recent years. It also addresses several important developments affecting how the body is understood within health law in particular.

Martha Fineman begins by addressing the vulnerable body. In her contribution, ‘Reasoning from the Body: Universal Vulnerability and Social Justice’, she eschews fragmented conceptions of bodies in favour of a universal understanding of, and response to, human vulnerability. In a similar vein, John Coggon asserts the public nature of health law in ‘Studying Public Health Law: Principles, Politics, and Populations as Patients’. Like Fineman, he shifts attention from individualised encounters—such as between the doctor and the patient—and onto the body politic. He shares with Fineman concern regarding institutional arrangements of privilege and responsibility over the familiar academic focus on autonomy and consent. Working at the level of populations allows Coggon to demonstrate the importance of including public health within health law.

In ‘Bioinequalities: Rethinking Legal Responses to the Biological and Intergenerational Harm Caused by Inequality’, Karen O’Connell and Isabel Karpin draw upon neuroscience and epigenetics to introduce their conception of ‘bioinequalities’. Understanding the biological and intergenerational impact of the stress and trauma which arise as a consequence of unequal treatment allows them to reconsider how law should address the embodied effects of various forms of discrimination. The first section ends with ‘Healthcare, Wellbeing, and the Regulation of Diversity in Healing’, by Emilie Cloatre and Nayeli Urquiza-Haas, which considers how the medical profession

differentiates itself, and is differentiated, from other forms of health/care. Drawing upon literatures concerning both vulnerability and care, Cloatre and Urquiza-Haas present an intriguing insight into the regulation of bodies and various forms of more or less alternative therapies in a UK and French context. This analysis raises challenges for the idea of health care as a market and lends further support to the need for the responsive state advocated by Fineman.

Moving away from considerations of the broad scope of health law, other contributors are concerned with the types of bodies that struggle at the margins of the healthcare system. The second section—‘Bodies of Health’—teases apart the distinctions and overlaps emerging at the boundaries of health law. It considers how health law shapes and is shaped by the experiences of various types of bodies. These typologies form an important part of the classificatory principles that underpin medicine as science yet may offer alternative and competing conceptions to legal principles. This section also considers the bodies of medical professionals and actors within the system, ensuring that their embodiment is not assumed or taken for granted, but placed at the forefront of theorising about bodies in health law.

The second section begins with ‘Temporal Bodies: Emergencies, Emergence, and Intersex Embodiment’, in which Fae Garland and Mitchell Travis emphasise the position of bodies in time, and how these are framed by regulation including health laws. By considering the position of intersex people within healthcare systems, Garland and Travis advocate moving away from understanding such forms of embodiment as episodic or constitutive of an emergency. Instead they suggest reframing such bodies by adopting a life-course approach to intersex embodiment. In ‘Death Before Birth: Liminal Bodies & Legal Frameworks’, Danielle Fuller, Karolina Kuberska, Jeannette Littlemore, Sheelagh McGuinness and Sarah Turner consider the relative framings of the prospective mother’s body as well as that of the foetus in the case of pregnancy loss. By engaging with metaphors and the concept of liminality, the authors demonstrate the utility of metaphor analysis to uncover the complex emotional responses to a lost pregnancy. This enables them to identify how the prospective mother and the foetus occupy a liminal space between different types of being in health law as in wider society.

In ‘Depathologising Gender: Vulnerability in Trans Health Law’, Chris Dietz and Ruth Pearce analyse how trans bodies have been, and could be, framed in attempts to depathologise trans phenomena. While nodding to the apparent successes of human rights activists in states such as Argentina and

Uruguay, they still harbour doubts about the utility of human rights discourse in this context. Instead, they draw upon Fineman's work to suggest that vulnerability theory has much to offer to the trans depathologisation movement. The second section ends with 'Feminist Activism in the Context of Clinical Trials and Drug Roll Out', by Aziza Ahmed, which describes the management of the rollout of the human papillomavirus (HPV) vaccine Gardasil in the United States and India. The differential response to this vaccine in these states offers insights not only into the regulation of pharmaceuticals in both health law systems but also of the different forms of feminist activism in the two countries as well as the way that value is accorded to female bodies along axes of class and race in the global pharmaceutical market.

The remaining contributors are—in part—more speculative, reflecting upon how theory has altered these debates or may contribute to reframing them in the future. This final section—'Reframing Health Law Through Bodies'—offers suggestions for how health law could be reframed to reveal new and important questions about fundamental and taken for granted assumptions of health. Placing the body at the centre of such theorising allows for new directions to be revealed. In 'Establishing Boundaries for Speculation About Artificial Wombs, Ectogenesis, Gender and the Gestating Body', Claire Horn and Elizabeth Chloe Romanis discuss the increasingly widespread assumption that the possibility of gestating an embryo from conception to full term in an artificial womb (full ectogenesis) will be imminently upon us. By insisting that such assumptions must be grounded in existing realities around reproduction and care, Horn and Romanis posit a shift in critical focus away from the pregnant body and onto the institutions which sustain it. In 'A Relational Responsibilities Framework for Children's Healthcare Law', Jo Bridgeman utilises a hypothetical case to illustrate the importance of relational responsibilities in a children's health law context. In contrast to her previous work, Bridgeman focuses less upon the ethical underpinnings of health law in favour of the social and institutional responsibilities demanded by her relational perspective. Finally, in 'Embodied Integrity, Shaping Surgeries, and the Profoundly Disabled Child', Marie Fox, Michael Thomson and Joshua Warburton offer an innovative model of embodied integrity which could protect profoundly disabled children from irreversible non-therapeutic surgical interventions. Again this would require greater consideration of institutional relations—including familial power dynamics—and could radically reshape the legal regulation of disability and health care in the process.

References

- Brown, W. (2015). *Undoing the Demos: Neoliberalism's Stealth Revolution*. New York: Zone Books.
- Derham, D. P. (1958). Theories of Legal Personality. In L. Webb (Ed.), *Legal Personality and Political Pluralism* (pp. 1–19). Melbourne: Melbourne University Press.
- Dewey, J. (1926). The Historic Background of Corporate Legal Personality. *Yale Law Journal*, 35, 655–673.
- Dietz, C. (2018). Governing Legal Embodiment: On the Limits of Self-Declaration. *Feminist Legal Studies*, 26(2), 185–204.
- Diprose, R. (2005). A 'Genethics' that Makes Sense: Take Two'. In M. Shildrick & R. Mykitiuk (Eds.), *Ethics of the Body: Postconventional Challenges* (pp. 237–238). London: MIT Press.
- Fineman, M. A. (2004). *The Autonomy Myth; A Theory of Dependency*. New York: The New Press.
- Fineman, M. A. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism*, 20(1), 1–23.
- Fineman, M. A. (2017). Vulnerability and Inevitable Inequality. *Oslo Law Review*, 4(3), 133–149.
- Fletcher, R., Fox, M., & McCandless, J. (2008). Legal Embodiment: Analysing the Body of Healthcare Law. *Medical Law Review*, 16, 321–345.
- Fox, M., & Murphy, T. (2013). The Body, Bodies, Embodiment: Feminist Legal Engagement with Health. In M. Davies & V. Munro (Eds.), *The Ashgate Research Companion to Feminist Legal Theory* (pp. 249–268). Farnham: Ashgate.
- Fox, M., & Thomson, M. (2017). Bodily Integrity, Embodiment, and the Regulation of Parental Choice. *Journal of Law and Society*, 44(4), 501–531.
- Fuss, D. (1996). *Human, All Too Human*. New York: Routledge.
- Garland, F., & Travis, M. (2018). Legislating Intersex Equality: Building the Resilience of Intersex People Through Law. *Legal Studies*, 38(4), 587–606.
- Garland-Thomson, R. (2011). Misfits: A Feminist Materialist Disability Concept. *Hypatia*, 26(3), 591–609.
- Gatens, M. (1996). *Imaginary Bodies; Ethics, Power and Corporeality*. London: Routledge.
- Grabham, E. (2012). Bodily Integrity and the Surgical Management of Intersex. *Body and Society*, 18, 1–26.
- Grear, A. (2011). Sexing the Matrix: Embodiment, Disembodiment and the Law – Towards the Re-Gendering of Legal Rationality. In J. Jones, A. Grear, R. A. Fenton, & K. Stevenson (Eds.), *Gender, Sexualities and Law*. Oxon: Routledge.
- Grosz, E. (1994). *Volatile Bodies*. Bloomington/Indianapolis: Indiana University Press.
- Hyde, A. (1997). *Bodies of Law*. Princeton: Princeton University Press.
- Montgomery, J. (2002). *Health Care Law*. Oxford: Oxford University Press.

- Naffine, N. (2003). Who Are Law's Persons? From Cheshire Cats to Responsible Subjects. *Modern Law Review*, 66, 346–367.
- Ries, N. M., & Thomson, M. (2019). Bioethics and Universal Vulnerability: Exploring the Ethics and Practices of Research Participation. *Medical Law Review*, fwz026. <https://doi.org/10.1093/medlaw/fwz026>.
- Thomson, M. (2008). *Endowed; Regulating the Male Sexed Body*. Oxon: Routledge.
- Travis, M. (2014). Non-Normative Bodies, Rationality and Legal Personhood. *Medical Law Review*, 22(4), 526–547.
- Travis, M. (2019). The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment. *Social & Legal Studies*, 28(3), 303–326.
- Whitehead, S. M. (2001). Man: The Invisible Gendered Subject? In S. M. Whitehead & F. J. Barrett (Eds.), *The Masculinities Reader* (pp. 351–368). Oxford: Blackwell.

Part I

The Body of Health Law



2

Reasoning from the Body: Universal Vulnerability and Social Justice

Martha Albertson Fineman

1 Introduction

What do we mean when we refer to “the body” and speculate about the legal and political significance of “embodiment”? The bodies we typically encounter in critical theory are not uniform or universal, but individualised, modified and defined by certain characteristics that give particularised bodies particular political and legal significance. Bodies are sexed, gendered, aged, raced, abled (or not), displaced, disadvantaged, and so on. The particularity of such bodies (as well as the political and moral implications it is asserted they then acquire) serves as the basis for legal claims against the state, as well as those perceived to be in positions of power and privilege. The perceived social harm done to these particularised bodies (which is typically identified as inappropriate discrimination or exclusion from social benefits enjoyed by others) is the primary focus of most critical thought. Identification of exclusionary harm propels demands for recognition, equality, and inclusion, with an abstract ideal of equality employed to create a space of legal empowerment that allows some individuals and groups to make demands on an otherwise ideally neutral state.

The inevitability of particularity or difference among bodies is implicit in the call for papers that led to this collection. The editors asked if bodies can be understood as outside of, or separate from, medical and legal contexts

M. A. Fineman (✉)

Emory University School of Law, Atlanta, GA, USA

e-mail: MLFINEM@emory.edu