

## Book Review: Theodore Bennett *Cuts and Criminality* (Ashgate Publishing 2015)

Theodore Bennett's *Cuts and Criminality* analyses the power of discourse in shaping the legal regulation of human bodies. He contends that the 'criminal law does not construct its divisions between lawful and criminal body alterations in an arbitrary way'.<sup>1</sup> Rather the legal regulation of bodies is 'patterned around certain conceptualisations and understandings about the body and about society that find authoritative purchase within legal discourse'.<sup>2</sup> It is this claim that Bennett seeks to demonstrate in his book – the 'underlying goal of this analysis is to lay bare the operational techniques of law and discourse'<sup>3</sup> and, consequently, 'denaturalise the restrictions that law places on our relations to our bodies and open up room within legal discourse to allow for the possibility of a broader ranges of embodied expression'.<sup>4</sup> So how does Bennett go about achieving this?

He first sets out the two theoretical frameworks that are used to perform the analysis – postmodernist and discourse theory. The key ingredients from each theory in forming an analytical framework concern the status of discourse and truth. From postmodernist theory Bennett focuses 'on subjectivity [which] allows the law to be read as a system of internal truth-production'<sup>5</sup> rather than reading the law as reflecting '(purportedly) "objective" principles such as justice, fairness or the *grundnorm*'.<sup>6</sup> Consequently, Bennett is not seeking 'to find, bring to light and reconcile "hidden truths" about bodies that are submerged by the operations of law and discourse'.<sup>7</sup> From discourse theory Bennett contextualises the particular discursive contours of law – 'thus [legal discourse is] sufficiently separate to be recognised as an individual discursive formation, but it is not separate enough to be free from the influence of other dominant discourses'<sup>8</sup>. The 'value of discourse theory comes in recognising that discursive formations are not merely representational, they are also productive'<sup>9</sup>. The

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<sup>1</sup> Theodore Bennett, *Cuts and Criminality* (Ashgate Publishing 2015) 5.

<sup>2</sup> Bennett 5.

<sup>3</sup> Bennett 6.

<sup>4</sup> Bennett 6.

<sup>5</sup> Bennett 12.

<sup>6</sup> Bennett 12.

<sup>7</sup> Bennett 13.

<sup>8</sup> Bennett 17.

<sup>9</sup> Bennett 19.

‘law does not passively represent or reproduce social phenomena’<sup>10</sup> rather ‘legal discourse actively constructs a particular model of reality’.<sup>11</sup> This theoretical framework allows Bennett to treat the law as a form of truth-production within the context of recognised/marginalised discursive formations and so expose the power structures between these formations which lead to particular legal regimes.

Bennett applies this analytical framework to the regulation of bodies and, in particular, body alterations. From the perspective of postmodernist and discourse theory the ‘body does not just display the marks of its struggle with external social forces, rather the body is itself the site where cultural knowledge is worked through, negotiated, (re)produced and/or challenged’<sup>12</sup>. Thus bodies are ‘both inscriptive and active’<sup>13</sup> and ‘body alterations constitute important battlegrounds within this conflict’<sup>14</sup> between external society and the individual. It is through an analysis of the legal discourse, other discursive formations and the regulation of body alteration that Bennett seeks to expose and challenge the operational techniques which legitimise some bodies and alterations while marginalising others. In doing so he highlights the role discourses play in the general functioning of judicial regimes. Once he has set out this theoretical framework Bennett proceeds to review different types of body alteration focusing on the normalisation of bodies that occurs through the legal process.

One of his most crucial claims concerns the role of medical discourse as ‘the single most important legitimating factor’<sup>15</sup> in sustaining particular legal positions not just (for example) in the context of cosmetic surgery but also in relation to ‘Intersex and transsexualism [which] are thoroughly enmeshed within medical discourse’.<sup>16</sup> Female Genital Mutilation (FGM) and Male Circumcision (MC) are also subject to a similar treatment by medical discourse, which ‘constructs FGM as a source of limitless pain’<sup>17</sup> while those who oppose MC ‘seem, at times, to attempt to match the severity of the constructions of harm associated with FGM’.<sup>18</sup> This is achieved through the ‘reliance on medical considerations, which conceptualise these body

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<sup>10</sup> Bennett 19.

<sup>11</sup> Bennett 19.

<sup>12</sup> Bennett 23.

<sup>13</sup> Bennett 23.

<sup>14</sup> Bennett 23.

<sup>15</sup> Bennett 134.

<sup>16</sup> Bennett 134: Note that Bennett uses transsexual rather than transgender.

<sup>17</sup> Bennett 88.

<sup>18</sup> Bennett 88.

alterations as either harmful or beneficial in purely physical terms'.<sup>19</sup> Bennett argues that 'Sole recourse to medical discourse is reductive, as it prevents other considerations from being weighed or valued'.<sup>20</sup> Similarly, sadomasochism is 'discursively constructed as representing the limitless danger that sadists pose to masochists'.<sup>21</sup> By utilising medical discourse to support legal constructions the law enforces a reductive conception of bodies as mere vehicles for physical sensations – with the law seeking to prevent *harmful* activities regardless of other non-medical factors (such as well-being, self-conception, self expression and social and personal identity).

This shows how 'authoritative strands of legal discourse construct the meanings attached to sadomasochism'<sup>22</sup>, FGM and MC, intersex and transgender individuals, cosmetic surgery and other body alterations on a medico-legal scale of pain and harm. In a comment on sex surgeries<sup>23</sup>, but which is equally applicable to all body alterations, Bennett suggests that certain discourses and practises 'are legalised and legitimated by law because they work, like law, to resolve ambiguous bodies into (closer) congruence with normative ideas'<sup>24</sup> about bodies (particularly medico-legal normative ideas). The common theme between Bennett's analyses of these different body alterations is in 'revealing and demonstrating how discursive conditions produce the legality of those alterations'.<sup>25</sup> This Bennett does successfully but as he himself notes there is a disjunction between law in theory and law in practice. 'Despite the potential technical criminality of some of these body alterations, most of them are not typically actively policed or prosecuted'.<sup>26</sup> However, Bennett's point here is showing 'that medical discourse is particularly deeply imbricated with legal discourse around body alterations' supporting and sustaining particular legal attitudes towards marginal individuals.<sup>27</sup>

Bennett concludes that 'whilst the discursive frameworks surrounding bodies and the criminal law may structure the sociolegal reality of the ways in which we literally shape ourselves through body alterations, *it is important to remember that we*

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<sup>19</sup> Bennett 90.

<sup>20</sup> Bennett 91.

<sup>21</sup> Bennett 49.

<sup>22</sup> Bennett 50.

<sup>23</sup> Bennett classifies all surgeries that a carried out on intersex and transsexuals as sex surgeries.

<sup>24</sup> Bennett 193.

<sup>25</sup> Bennett 205.

<sup>26</sup> Bennett 206.

<sup>27</sup> Bennett 207.

*have the capacity to shape these frameworks too*'.<sup>28</sup> This is, by far, the most important point Bennett makes after demonstrating the role that *authoritative* discourses play in shaping legal reality. He points out that there is opportunity for change in discursive practice. To this end, his book 'opens up the possibility to envisage these frameworks embodying different constructions, different functions and different results'.<sup>29</sup> In other words, Bennett is trying to bring to mind the options for different legal realities. However, he does not suggest how we should select between different legal discursive frameworks.

Without an indication of how to choose (if we are to choose) between different discursive frameworks it is unclear how we should respond to the exposure of the role of discursive frameworks in law. Does this mean that legal systems should attempt to be more liberal or attempt to accommodate different discourses? Should the extent of legal regulation be reduced or minimised to prevent the adoption of a particular discourse? Some indication about where his analysis takes us in terms of legal evolution would have added an additional insight to his work. At the moment we are left somewhat adrift regarding how the law should mediate or operate to regulate these different discourses, yet some selection procedure seems to be a necessary next step for research in this area. Bennett's analysis exposes the law's reliance on particular discursive frameworks to justify the normative positions it enforces and points out the existence of alternative discourses but it does not suggest a way to navigate between these different discursive realities.

Furthermore, he relates most of his comments to legal constructions of the body so it is unclear whether Bennett's claims regarding discursive frameworks apply to legal systems generally, some or most parts of the law or only in areas subject to a great deal of social discussion. For example, the way in which the notion of family is articulated would seem to be subject to a similar analysis given the change in s.13(5) Human Fertilisation and Embryology Act from 'a father' to 'supportive parenting'.<sup>30</sup> The phrase of supportive parenting encompasses alternative constructions of family and parenting – single or same-sex parent constructions of family and parenting can both fall within supportive parenting. An analysis of the discursive construction of family, along the line of Bennett's analysis, could easily be

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<sup>28</sup> Bennett 213 (my italics).

<sup>29</sup> Bennett 213.

<sup>30</sup> Human Fertilisation and Embryology Act 2008 s.14.

used in this area demonstrating the wider usefulness of this approach. Nevertheless, some hint of Bennett's thoughts on the role and extent of discourse in other areas of law would give us some insight into whether he considers his analysis as a general theory of jurisprudence or whether he regards it as specific to body alterations or particular area of law.

It seems that Bennett's analysis does have general implications for legal theory because we are inescapably ensnared in discursive frameworks. No matter the area of regulation discourse plays a crucial role in framing and justifying different normative positions. Although this may be less obvious in some legal areas than others (for example, the technical management of tax law seems less subject to such an analysis) discourse can greatly influence how these systems function (notions of fair, just, progressive and regressive taxation will play a role in how taxation is structured and operates). In more socially orientated yet ethically diverse areas – such as health law – the problematic role of discourse will be correspondingly greater. Consequently, Bennett's analysis is applicable to all legal regulation. However, this means that the uncertainty introduced in the regulation of body alterations regarding the validity of law applies generally in all legal systems. Law may, therefore, face an existential crisis in justifying particular normative positions as all legal regimes are (merely) competing discourses. Developing a method for designing or selecting between different positions thus gains a sense of urgency under this analytical approach.

These comments should not detract from Bennett's success in achieving his stated goal of opening discussion on the role of discourses in law. Exposing how discourses affect legal frameworks (in particular how medical discourse is used to shore up legal positions) is useful for those seeking to challenge judicial orthodoxy and dominant narratives in contemporary debates. Bennett's book will provide those who are marginalised (and their marginalised discourses) with arguments to undermine the dominant legal regime and its normative claims by demonstrating that the current judicial orthodoxy is but one amongst many possible legal regimes that we might live under. This should give us hope that the law may better reflect the diverse ways in which we live our lives and less often be used to enforce a particular notion of the good life. Bennett's book is an important contribution towards increasing the visibility of marginalised legal subjects and highlighting the partisan nature of current judicial systems. It should be staple reading for any researcher interested in the methods

available for challenging legal orthodoxy and exploring alternative legal regimes based upon different discursive frameworks.