SPEAKING “TRUTH” TO BIOPOWER

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INTRODUCTION

Left-leaning plaintiffs’ lawyers sometimes describe their work as “Speaking Truth to Power.” The “Truth” they speak usually involves tales of government or corporate wrongdoing, while the power they confront is usually institutional. I am a long-time supporter of the plaintiffs’ bar and believe that the work that they are doing is important. At the same time, I would like to propose an alternative way of “Speaking Truth to Power” that involves somewhat different understandings of both truth and power. I call this strategy “Speaking ‘Truth’ to Biopower.”

“Speaking ‘Truth’ to Biopower” is a pragmatic strategy for legal activism that incorporates postmodern insights regarding the nature of both “truth” and “power.” “Truth” is in quotes to emphasize its contingency – the impossibility of understanding what truth means outside of a particular political and social context. “Biopower” replaces “Power” to highlight the ways in which the body is a key site of contestation in contemporary political struggles. While these insights are postmodern, the strategy I propose is not. Instead of rejecting legal arguments that rely upon foundational beliefs or “truths” (as would be characteristic of a postmodern approach), I argue it is more useful to strategically deploy legal “truths” in

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2. See id. at 243.


ways that acknowledge their political and social contingency. In short, “Speaking ‘Truth’ to Biopower” is a strategy that recognizes both the political utility and the limitations of legal arguments that rest on foundational claims.

“Speaking ‘Truth’ to Biopower” is also a strategy that champions the political utility of rights. While rights-based tactics have many limitations, I argue that they can be useful when they are employed in ways that take into account the surrounding political and material conditions. Moreover, because tort litigation tends to be more focused on material conditions than other areas of the law, I argue that rights-based strategies may be particularly useful when they are deployed in tort litigation. Thus, “Speaking ‘Truth’ to Biopower” encourages activists to view tort litigation as a potentially important site of political struggle where rights can be strategically asserted to address injustices in material conditions.

Because most tort claims typically require some sort of bodily injury for recovery, tort litigation also provides a particularly useful venue in which to confront the postmodern techniques of biopower. Biopower is different from more conventional understandings of power because it does not function as a system of repressive, institutional domination. Instead, biopower operates from multiple points in the social sphere; its aim is the production of seemingly objective bodily “truths,” which we use to regulate ourselves. While the state plays a role in these processes, medical elites and other social actors also play important roles in the production of seemingly objective bodily categories and diagnoses. Tort litigation provides a useful venue in which to confront this power for two reasons: (1) medical elites (including pharmaceutical and medical device companies) are frequently defendants in tort litigation; and (2) tort litigation often involves claims that focus on the condition of the body.

The remainder of this essay proceeds in three parts. In Part I, I address the problem of rights in the postmodern context. I argue that, while rights-based strategies have many limitations, rights-based narratives continue to

7. See RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (1965).
8. Id.
9. See FOUCAULT, supra note 3, at 92-93.
10. Id. See also KARL MARX, CAPITAL, VOLUME ONE (1867), reprinted in THE MARX-ENGELS READER 294, 319-21 (Robert C. Tucker, ed. 1978). (describing the similar notion of the fetishization of the commodities).
12. TORTS § 7 cmt. b (1965).
have political utility for real people negotiating the material conditions of their everyday lives. Part II addresses the problem of biopower and the role of medical elites and corporations in its administration. Part III offers several specific strategies for speaking “truth” to biopower in the current political context. The proposed strategies include the use of rights-based narratives in tort litigation and several related techniques for interrogating claims of objective bodily “truth.”

I. THE PROBLEM OF RIGHTS

The contemporary disaffection with rights among left-leaning scholars has its roots in Marx. While Marx’s views on the utility of legal rights are famously cryptic, most interpreters read Marx as dismissive of rights because they are too abstract and insufficiently grounded in material conditions. This interpretation stems from Marx’s more general criticism of the tendency of Western thinkers to use concepts that are not grounded in the reality of material conditions. For Marx, the problem with this approach was that it led to assumptions about human nature that were grossly decontextualized and overly rigid. His solution was to develop the methodology of historical materialism, which abandoned abstract assumptions in favor of attention to real people and the conditions of their lives. Both his methodology of historical materialism and its underlying critique of abstract concepts made Marx particularly suspicious of rights. These views, however, did not prevent Marx from supporting rights-based claims in his own time as an occasionally useful (if somewhat limited) strategic maneuver.

Many contemporary critics of rights take a similar approach. The leading critic of rights, for example, argues that rights “in the abstract” have

16. See id. at 155.
17. See id.
18. See e.g., Karl Marx, On the Jewish Question, reprinted in The Marx-Engels Reader, supra note 10, at 26, 40.
19. See Sparer, supra note 14, at 529.
no meaning and, as a result, it only makes sense to speak of rights in terms of how they operate in particular social settings. Contemporary legal scholars also detail the limitations of placing too much emphasis on rights-based claims, including the tendency of right-based legal tactics to fragment political movements and to deemphasize or obscure a movement’s desire for more fundamental reform. Despite these critiques, however, many Critical Race and Feminist Scholars argue for the continuing utility of rights if only because there appears to be no other useful strategy.

My argument here begins at a similar place. Whatever the limitations of rights, I do not believe it is possible to do resistance work today without engaging the language of rights. The language of rights and equality currently structures our thinking so much that it is all but impossible to get outside of these discourses, particularly in legal settings. Even if it were possible, however, I would be more than a little afraid to abandon rights rhetoric all together. While critics are correct to point out how rights-based strategies can be damaging to political movements, strategies without respect for rights also pose problems. As Patricia Williams has noted, the United States’ “worst historical moments have not been attributable to rights assertion but to a failure of rights commitment.” Certainly, rights-based work can be confining. But, like Williams, I am more afraid of what might happen in the absence of rights.

To say that someone has rights is to show respect for her as an individual and acknowledge that she is part of a shared humanity. The conferral of rights makes the person a recognized member of society to whom, at least in theory, some respect and “collective responsibility” is owed. These expressions of respect and collective responsibility are

21. Tushnet, supra note 6, at 1364.
23. See, e.g., Crenshaw, supra note 20, at 1366 (“[T]he focus on delegitimating rights rhetoric seems to suggest that…there exists a more productive strategy…. Unfortunately, no such strategy has yet been articulated.”).
25. See e.g., MCCANN, supra note 22, at 90.
26. See WILLIAMS, supra note 20, at 159.
27. Id.
28. See id.
29. See id. at 159-61.
30. See id. at 153.
31. Id. at 153.
extremely important in a political system – such as ours – that is largely inaccessible to certain classes and groups of people. For these otherwise excluded individuals and groups, rights-based claims provide an important opening and an opportunity to be heard in ways that are otherwise not available. The fact that the system frequently fails to respond to rights-based claims does not diminish their significance. The mere making of a demand for inclusion and respect can be empowering, even when the demand goes unrealized.

I would also argue that the problem is not rights per se but the ways in which some claimed rights are employed. A return to Marx is helpful here because Marx reminds us that the real problem with rights is that they tend to be articulated in ways that reproduce or obscure material conditions. When this is the case, critics of rights are correct to note the gap between idealistic conceptions of rights and the realities of lived experience. The existence of this gap, however, does not mean that rights are utterly without utility. Activists can and should exploit the gap to nurture demands for change. Indeed, meaningful rights-based strategies are possible precisely because of the gap. The gap exists because the ideological structure of legal rights requires some independence from manipulation by dominant groups to retain its legitimacy. To the extent that activists identify material differences between what the rights seem to promise and the realities on the ground, the independent legitimacy of the right can be drawn upon as a measure against which an entity might reasonably be held accountable. Under these circumstances, the failure of abstract rights to address material conditions can be used to tactical advantage.

Activists may also re-work rights to serve different political aims. Since a right has no concrete meaning of its own, activists can give it whatever meaning they desire. The right of equal protection under the law, for example, has served not only to support the inequalities of capitalism, but also to challenge capitalism. Strategies like this suggest just how
historically and politically contingent the meanings of rights really are.\textsuperscript{41} While in many instances, this has meant that rights have been used to reproduce or obscure injustice,\textsuperscript{42} they are equally available as a tool for resistance to those conditions.

Rights-based tactics are also not limited to strategies directed at institutional forms of power. Although rights were historically conceptualized as a tool with which to confront the power of the state,\textsuperscript{43} rights rhetoric is now conceptualized much more broadly to include claims against a wide array of institutions and individuals.\textsuperscript{44} I will argue in Part III that rights-based tactics can provide a particularly effective means of resisting the much more diffuse operations of biopower. In short, while mere rights articulation – without more – is unlikely to lead to changes in material conditions, rights-based legal tactics are nevertheless useful for purposes of “naming and scrutinizing” power in all its guises.\textsuperscript{45}

II. THE PROBLEM OF BIOPOWER

Postmodern power or “biopower” operates in ways that are both institutional and diffuse. In both forms, however, the focus of biopower is on the body. Foucault described this new emphasis on the body in terms of the physical demands of capitalism.\textsuperscript{46} In his account, biopower arose in response to the need for well-regulated bodies to maintain the capitalist system of production.\textsuperscript{47} But we need not accept Foucault’s explanation of biopower’s history to acknowledge the extraordinary role that biopower plays in contemporary life. The significance of biopower can be seen especially in the growing influence of pharmaceutical and medical companies in shaping our perceptions of health and well-being.\textsuperscript{48} While these companies wield considerable institutional power,\textsuperscript{49} biopower is also exercised from other, less concentrated points in the social sphere.\textsuperscript{50} Perhaps the best example of this more diffuse form of biopower is the

\begin{thebibliography}{9}
\bibitem{41} See id. at 236.
\bibitem{42} See id. at 243.
\bibitem{43} See id. at 241.
\bibitem{45} See id. at 383.
\bibitem{46} See \textit{Foucault, supra} note 3, at 140-41.
\bibitem{47} See id. at 141.
\bibitem{49} See id. at 394.
\bibitem{50} See \textit{Foucault, supra} note 3, at 94.
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The dominance of medical and other bodily narratives in the modern world.51

As Foucault explained, these narratives exercise biopower through the classification and categorization of bodies, and through the production of bodily “truths” to which bodies must conform.52 Foucault was particularly concerned with the role of discourse in regulating sex, but biopower also involves the production of “truths” in a variety of other areas involving the body, including medicine, psychiatry, and self-help.53 Over the last several decades, the power of these narratives has become even more pronounced, as we have seen the medical baselines for “normality” shift from the characteristics of an average body to medicalized conceptions of what “ideal” bodies should look like.54 Because very few (and perhaps no) bodies can fully comply with these idealized conceptions, virtually all bodies are more or less continuously pathologized and targeted for treatment.

Perhaps the most insidious aspect of biopower, however, is the way in which it teaches us to regulate ourselves. The war on drugs,55 the increasing emphasis on fitness and diet,56 the rise of practices aimed at eliminating the birth of children with physical differences,57 and the explosive growth in plastic surgery58 are all examples of how the narratives of biopower exercise control through the demand for self-regulation. Each of these practices reflects, and reproduces, a dominant narrative, which dictates that “normal” bodies must, to the extent possible, operate according to certain essential bodily “truths” (with which, paradoxically, no body can fully comply).

But “where there is power, there is resistance.”59 Moreover, when power is exercised diffusely – as is the case with some forms of biopower – it increases the opportunities for resistance.60 Foucault believed that resistance would take the form of an insistence on bodily pleasures.61 But it is clear that resistance to biopower can take a variety of other forms as well.

51. See id. at 41.
52. See id.
54. See Mackenzie, supra note 48, at 390.
55. See RASMUSSEN, supra note 53, at 62.
56. See Mackenzie, supra note 48, at 394.
57. See Lyria Bennett Moses, Understanding the Legal Responses to Technological Change: The Example of In Vitro Fertilization, 6 MINN. J. SCI. & TECH. 505, 514-15 (2005).
58. See Mackenzie, supra note 48, at 391.
59. FOUCAULT, supra note 3, at 95.
60. See id. at 95-96.
61. See id. at 45-46.
including a simple refusal to self-regulate, without regard to bodily pleasure, and other acts aimed at exposing the gap between abstract bodily “truths” and the reality of lived experience. Intersex and transgender activists who refuse to adopt a consistent, or medically perfected, male or female identity, for example, expose a gap between the bodily “truth” of “natural” sexual classification along binary lines and the material conditions of lived experience. Similarly, the desire of some people with disabilities to use in vitro fertilization processes to affirmatively select children with the genetic traits associated with their disabilities also exposes a gap, this time between the medical “truth” that disability is undesirable and the lived experience of the people involved.

More commonly, dominant narratives about bodily “truths” are adopted without much resistance. Most of us accept the diagnoses that are suggested by the narratives of bodily “truths” and, in response, we buy products and undergo treatments aimed at helping our bodies to comply with the expectations that those narratives create. When these products and treatments fail, however, the gap between bodily “truth” and lived experience is again exposed, generating new opportunities for both resistance and reproduction of the underlying narrative. When breast implants rupture, for example, some people choose to defy the normative expectation and decide not to replace the implants, while others try again with a new set of implants and, in doing so, help to reproduce the norm.⁶²

Sometimes people also undergo treatments in ways that seem to subtly challenge, or perhaps rework, the norms. The extreme plastic surgery practices of the French performance artist, Orlan — who is reconstructing her face to copy features that appear in iconic works of art — for example, might be read as a form of resistance to dominant narratives which insist upon the “truth” of a different set of bodily ideals. Less dramatically, women who insist on larger implants than their doctors recommend might also be seen as engaging in a kind of subtle resistance to the controlling imperative of the dominant norms. On the other hand, the practice may simply represent an attempt to negotiate conflicting demands.

The point is that, in all of these examples, the body is a conduit for the exercise of power. Not only are bodies classified and diagnosed according to the dictates of bodily “truths,” but bodies are also treated to ensure compliance with the expectations that accompany these “truths.” Institutions play a role in generating these narratives but the force of

⁶². See Mackenzie, supra note 48, at 390-96.
⁶³. See id. at 404-05. See generally ORLAN OFFICIAL WEBSITE, www.orlan.net (last visited Nov. 18, 2011).
narratives wields an important power of its own. In all these ways, biopower operates to make the body an important site of contestation in contemporary political struggles.

III. SPEAKING “TRUTH” TO BIOPower

If contemporary power struggles increasingly involve the operations of biopower, then the legal tactics of activist lawyers ought to reflect this change. Yet conventional tactics have changed little over the years; activist litigation today typically involves many of the same civil rights-based claims that were made several years ago, directed at the same institutional actors. Because biopower operates more diffusely than can be captured by this institutional approach, it is important to consider how attention to other types of claims and other types of defendants might offer opportunities to challenge the narratives of bodily “truths” that biopower purveys. My argument is that tort litigation presents us with an interesting alternative to the emphasis on civil rights-based strategies that ought to be more seriously pursued.

Historically, tort litigation has played a relatively minor role in the legal tactics of activist lawyers. While tort claims are occasionally tacked on to civil rights cases, they are rarely the focus of activist lawyers’ legal strategies. There are many reasons for this, including the structure of tax laws, which makes it more difficult for nonprofits to litigate cases on the contingency fee basis on which most tort claims proceed. There is also the stigma that is associated with tort litigation; in the minds of many elite lawyers (including those who make up the public interest bar), tort practice is less prestigious, particularly when it involves representation of plaintiffs. These biases against the pursuit of tort litigation as part of a broader strategy of resistance need to change.

Tort litigation provides a relatively unique opportunity to confront and resist biopower, in both its institutional and more diffuse forms. In part, this is because tort litigation is the area of law that people tend to turn to when medical products and treatments fail to help them successfully comply with biopower’s demands. In recent years, for example, we have

64. See supra Part II.
65. See supra Part I.
66. See FOUCAULT, supra note 3, at 141-42, 145.
67. See Scheingold & Bloom, supra note 1, at 237-38; Martha Chamallas, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss, 38 LOY. L.A. L. REV. 1435, 1436-37 (2005) (making an argument for better linkages between tort law and rights claims, in the context of race and gender).
68. See, e.g., Anne Bloom, To Be Real: Sexual Identity Politics in Tort Litigation, 88 N.C. L.
seen increased litigation around the failure of a variety of sexual identity enhancing products, such as breast implants,\textsuperscript{69} erectile dysfunction medication,\textsuperscript{70} and weight-loss drugs.\textsuperscript{71} The existence of this litigation suggests that a very large number of people feel that they need artificial help for their bodies to successfully comply with the bodily “truth” of binary (“male” or “female”) identity. Because of this, the litigation exposes the gap between biopower’s bodily “truths” and lived experience. At the same time, however, the exposure of this gap presents an opportunity to resist, rework, or reproduce those “truths.”

Tort litigation is also an important site in which to confront and resist the operation of biopower because of the heavy role that medical experts play in most tort cases. In the typical tort case, medical elites take the stand to offer a diagnosis of how the plaintiff’s body varies from idealized bodily “truths” about what normal bodies should look like and how they should function.\textsuperscript{72} Moreover, in many cases, medical elites are also relied upon to suggest a course of treatment aimed at helping to bring the body into compliance with these “truths.”\textsuperscript{73} As a result, tort litigation routinely acts as a venue in which the idealized bodily narratives of biopower are compared against particular material conditions (plaintiffs’ bodies). This juxtaposition, however, also presents an important opportunity to expose how these dominant narratives create expectations that are at odds with lived experience. For the same reasons, the litigation also presents an opportunity to directly challenge those narratives with counter-narratives that better reflect lived experience.

In sum, tort litigation is an important venue for resistance to biopower because so many tort cases expose a gap between the metaphysical ideals of biopower and the reality of lived experience. But I also believe that there are other reasons why tort litigation may be useful for purposes of resistance. By virtue of its common law roots, tort litigation is less rigid and more “local” than civil rights litigation. As compared to other areas of the law—such as civil rights litigation—there is more room for imaginative pleading in tort litigation; there are also more opportunities for dialogue with grass roots activists.\textsuperscript{74} These differences are important because the

\textsuperscript{69} See id.
\textsuperscript{70} See, e.g., In re Viagra Products Liability Litig., 572 F. Supp. 2d 1071, 1075-76 (D. Minn. 2008).
\textsuperscript{73} See id.
\textsuperscript{74} See Scheingold & Bloom, supra note 1, at 230-31.
greater flexibility and the closer connection to the community make it more likely that activists will be able to use the litigation to successfully challenge and rework the dominant bodily narratives of biopower.

In its current operation, however, tort litigation operates primarily to reproduce and obscure the operations of biopower. It does so in part because of its heavy reliance on medical testimony and in part through the practices of legal actors in tort litigation, who frequently present bodily difference, and other failures to comply with bodily norms, as “tragedy.” Accordingly, to effectively “speak ‘truth’ to biopower,” at least two things need to change. First, activist lawyers need to place less emphasis on the testimony of medical elites in tort litigation and, at the same time, make more room for testimony from plaintiffs and others about lived experience. Second, to the extent that lived experience deviates from the idealist bodily narratives that medical elites use to evaluate plaintiffs’ bodies, these differences need to be noted in tort litigation without judgment and without presentation of the difference as “abnormal” or “tragic.”

One way to achieve both of these goals is to place more emphasis on rights rhetoric in tort litigation. A rights-based narrative, for example, might emphasize the right to be free from unwanted bodily interference, instead of using dominant bodily narratives to pathologize the plaintiff’s body as “abnormal” or “tragic.” Such an approach reworks the legal focus of the litigation in the direction of affirming the plaintiff’s right of autonomy instead of reproducing dominant narratives. Depending on what the plaintiff wants, such an approach might also affirm the plaintiff’s right to bodily pleasures, however they are experienced, and without regard to idealist expectations about what bodily pleasure should or should not look like. If Foucault was right, this affirmation of the plaintiff’s right to bodily pleasure may itself serve as an important form of resistance to the discourses of bodily “truths” that characterize biopower.

While rights-based narratives are, without more, unlikely to lead to any sort of fundamental change in how biopower operates, they are more likely to empower plaintiffs than current narratives in tort litigation that largely and uncritically reproduce the dominant narratives of the idealized bodily “truths.” By utilizing the strategy of “speaking ‘truth’ to biopower,”

75. See Gross, supra note 72, at 1119.
76. For a similar argument in the context of disabilities, see Anne Bloom & Paul Steven Miller, Blindsight: How We See Disabilities in Tort Litigation, 86 WASH. L. REV. 709, 737-742 (2011).
77. Id. at 742-46.
78. See FOUCAULT, supra note 3, at 45.
plaintiffs need not adopt the “truths” of dominant bodily narratives. Instead, they may offer their own “truths” grounded in their experience of their own bodies. The speaking of these “truths” in the language of rights allows plaintiffs to demand respect for their lived experience and affirm their membership in a broader community of rights-bearing individuals, however those rights might be experienced differently on the ground. As in other contexts, the making of this demand for respect in the language of rights is likely to be experienced as empowering even if the defendants (and others) refuse to recognize it.

CONCLUSION

“Speaking ‘Truth’ to Biopower” is a strategy of resistance to dominant bodily and medical discourses that pathologize bodily difference and prompt us to self-regulate to comply with the discourses’ demands. I have argued for employing this strategy of resistance in the context of tort litigation, which evaluates bodies according to the dominant narratives of biopower as a matter of course. I have also argued that rights-based rhetoric can provide a useful language of resistance in this litigation in the form of a “right” to live without unwanted bodily interference. The assertion of this “right” creates space for plaintiffs to speak their own “truths,” as informed by their own experience, instead of simply reproducing the assumed “truths” of the dominant biopower regime. Thus, “Speaking ‘Truth’ to Biopower” is a means of empowerment for otherwise marginalized people who seek respect and the opportunity to be heard.