

LAW OF THE BODY SYMPOSIUM INTRODUCTION

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*O my Body! I dare not desert the likes of you in other men and
women, nor the likes of the parts of you;
I believe the likes of you are to stand or fall with the likes of the
Soul, (and that they are the Soul).
~ Walt Whitman, I Sing the Body Electric¹*

John Stuart Mill espoused a libertarian view that the right to swing your arm ends where your neighbor's nose begins.² Under this view, a person has the *right* to exercise dominion over his body and the area in which his body can operate—so long as the exercise of that dominion has no effect on others. And to the extent that the body is a thing over which we can exercise dominion, it may be fairly said that we “own” our bodies.

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1. WALT WHITMAN, *I Sing the Body Electric*, in LEAVES OF GRASS (1855).

2. The statement has been attributed variously to Sir Zelman Cowen and to Oliver Wendall Holmes, Jr., among others. See SIR ZELMAN COWEN, *The Right to Swing My Arm*, in INDIVIDUAL LIBERTY AND THE LAW 1, 1–25 (1977); Brainy Quote, Oliver Wendall Holmes, Jr., Quotes, <http://www.brainyquote.com/quotes/quotes/o/oliverwend103754.html>. However, the sentiment is, for me, derived from Mill's famous essay, ON LIBERTY, which stated:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be

One need not look far for evidence that we have unrestricted dominion over our bodies. We can donate our bodies to science,³ and we can donate organs—both after death⁴ and during life.⁵ We can work at jobs that are very dangerous—working with radiation in nuclear power plants,⁶ fighting in foreign wars⁷—and we can volunteer for medical testing for new products and procedures⁸. We can engage in elective surgeries that carry terrible risks.⁹ We can skydive, drink to excess, smoke cigarettes, and more. We seem to have the “right” to damage and waste our bodies.

However, we exercise our bodily rights within limits. Personal autonomy exists in perfect tension with social life, and the law regulates that tension. The government prevents or restricts a great many activities that are profoundly personal. Among other choices that one could make that seem to be entirely about dominion of the body are trading sex for money,¹⁰ displaying one’s body in certain

3. You can even do it on the web! *See* MedCure, Your Support for Finding a Cure, http://www.medcure.org/?gclid=CKfp2_WOu5UCFSAUagodfR5sQQ (last visited Oct. 13, 2008).

4. You can get priority for an organ yourself if you agree to donate yours after death. *See* LifeSharers, Welcome to LifeSharers, h

ways,¹¹ selling your own organs¹² (although you can sell others' organs¹³), using controlled substances,¹⁴ and terminating one's own life in the manner of one's own choosing.¹⁵

This tension and the regulations that define it constitute a law of the body. While this tension is traced back well before John Stuart Mill, there are aspects of this tension that are the product of the unique times in which we live. The state of science and politics in the early part of the twenty-first century presents problems that Mill and his contemporaries could not possibly imagine. A short list of these problems might include the circumstances that follow.

While organs may not be sold by their owners, blood and eggs can, and thanks to the advanced state of medical technology, there is a ready market in those commodities.¹⁶ Of course, those sales are heavily regulated and taxed. But how should these commodities be taxed? As ordinary income? As capital assets?¹⁷

11. While Oregon is typical with respect to its prostitution laws, it is the "Nevada" of nude dancing, thanks to a very strongly worded constitutional free speech clause. *See* *State v. Henry*, 732 P.2d 9, 10 (Or. 1987). *See also* Rex Armstrong, *Free Speech Fundamentalism—Justice Linde's Lasting Legacy*, 70 OR. L. REV. 855 (1991) (Oregon's guarantee of free speech provides greater protection than the federal First Amendment). Judge Armstrong currently sits on the Oregon Court of Appeals. For a particularly interesting opinion ruling that a "live sex show" was protected by the Oregon Constitution, see *State v. Ciancanelli*, 121 P.3d 613 (Or. 2005).

12. 42 U.S.C. § 274e(a) (2007).

13. 42 U.S.C. § 274e(c)(2) ("The term 'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.").

14. 21 U.S.C. § 802 (2007).

15. Most states criminalize suicide or at least prohibit another person from assisting in the commission of suicide. Therefore, if a person attempts to commit suicide with the aid of another person, the person soliciting help has engaged in the solicitation of a criminal act. *See, e.g.,* CAL. PENAL CODE § 401 (West 2007). Again, Oregon stands alone in the United States on this subject. *See* OR. REV. STAT. §§ 127.800–127.995 (2007).

16. For information on selling your blood, see eHow.com, *How to Sell Plasma*, http://www.ehow.com/how_110908_sell-plasma.html (last visited Oct. 13, 2008). For a story on the ethical issues surrounding egg sales, see Carlene Hempel, *Golden Eggs*, THE BOSTON GLOBE, June 25, 2006, available at http://www.boston.com/news/globe/magazine/articles/2006/06/25/golden_eggs/ ("Drowning in credit-card debt and student loans, young women are selling their eggs for big payoffs. But can they really make the right medical and moral decisions when they're tempted with \$15,000?").

17. Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 923 (1999).

In a similar problem, genetic codes common to all people are “patented,” and presumably, patent holders are enabled by the government to prevent others from using information about their own genetic material in their research¹⁸ (unless, of course, they pay a fee¹⁹). The use of stem cells obtained from unused genetic material²⁰ is offensive to some religious groups,²¹ but the potential benefits are touted by scientists to be enormous.²² The resolution of the debate is a legal/structural one, not one based on science or morality. The group who holds the right political cards—in this case, President George W. Bush, in the form of a veto threat²³—decides, not the would-be donor.

Physician assisted death is another problem that has led to regulation of the body. Oregon has the only law in this nation that allows a person to choose to terminate his life with the assistance of a physician.²⁴ The federal government has mounted efforts to defeat the law, but to date their efforts have not yielded a repeal or end of the law. However, as of yet, Oregon stands alone in its position that the decision to terminate one’s life as one sees fit *may* be something that the state will condone.

Another issue is whether athletes should be able to use whatever supplements they want in order to enhance performance. In 2008, a

18. Mary Ann Liebert, *One Fifth of the Human Genome Covered by P -ITc0. 0 02 o iowilom*

brain that evolved first and is associated with reptiles and amphibians and which still exists as what we call our brainstem,³¹ a second brain associated with early mammals and which still exists in what we call our cerebellum and midbrain,³² and a third brain which are our frontal and lateral cortices.³³ Dr. Linden makes a convincing case that all three brains operate at the same time, sometimes in concert with each other, and sometimes in competition with each other. And sometimes they act in a redundant fashion, as illustrated by the first experiment Dr. Linden describes in his article. In that experiment legally blind subjects demonstrate that, despite their neocortical blindness, they retain a connection with their visual centers through their more primitive midbrain.³⁴

While I oversimplify, the noise created between the brains leads to the human experiences Linden describes as transcendent. For the lawyers in the room, the implications of Linden's work are manifest. In one chapter of his book, Dr. Linden details research that suggests strongly that homosexuality is a physical, not a social, state.³⁵ While he refrains from making a definitive statement on the subject, this work should concern anyone who hopes to craft effective legislation about domestic partners or discrimination based on what some call "sexual orientation." In short, if Dr. Linden's work is to be taken seriously (and I think it ought to be), lawmakers need be careful of how they draft legislation that involves apparent choice where instead the "choice" is a product of biological evolution.

Moreover, Dr. Linden's work relates to memory as well, and our entire trial system is based on the use of eyewitness testimony. Indeed, our entire evidentiary system exalts firsthand accounts of events over other kinds of testimony,³⁶ and Dr. Linden's work suggests strongly that these accounts suffer from defects associated with the noisy interaction between the three different brains. Memory is systematically faulty,³⁷ yet it is a cornerstone of the American trial system.

31. *Id.* at 7–8.

32. *Id.* at 9–14.

33. *Id.* at 18.

34. Linden, *Brain Evolution and Human Cognition*, *supra* note 29, at 20.

35. LINDEN, *THE ACCIDENTAL MIND*, *supra* note 28, at 145–83.

36. For an extensive discussion, *see generally* ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* (1996).

37. *See* DANIEL GILBERT, *STUMBLING ON HAPPINESS* 40–41 (2006).

similarly to embryonic stem cells but can be produced without harming—or even using—embryos.”⁴² This recent development may put an end to a ten year old debate about the use of embryonic stem cell research, or it may not. Professor Korobkin’s article outlines the history of the debate and the recent technological advances that mark the current state of the controversy. But the article also outlines the

understanding of the body offers perspective on the appropriate state of the law.

To the extent that the debate over stem cells relates to the stage of life associated with conception, we have moved from pre-birth to conception and now we move to a later phase—making money. And with money comes one of Benjamin Franklin’s “inevitables”—taxes.⁴⁹ Taxation may be, at first blush, one of the fields of law least related to the functions of the body, but at our symposium, taxation questions touched both neuroscience and personal physical autonomy.

The neuroscientific aspects of taxation were covered by a speaker whose work will unfortunately not appear in print in our symposium issue, and so I will describe it here. Economist William Harbaugh (who spoke at the symposium), together with psychologist Ulrich Mayr and economist Daniel Burghart (who did not appear), described his work putting subjects into the fMRI and watching them exhibit a “warm glow” when making involuntary tax payments.⁵⁰ This glow was remarkably similar to the display that occurred when someone made a voluntary charitable donation.⁵¹ This work, when first published, made national news and was reported in newspapers across the nation.⁵² It was significant that one of the most despised laws—the one that forces us to pay taxes—produces the same effect on the brain as one of our most favored activities—the voluntary donation of resources to a chosen charitable enterprise.⁵³

While Harbaugh’s work is not strictly about the body, it is a work that shows how the science of the body—in this case the use of visual images of the brain—can help determine the true effects of a law. Moreover, the work examines how one’s true feelings about a law might differ from one’s own *perceptions* of how one feels about that law. The fMRI might just be more of a boon to legislators than was ever previously imagined. A lawmaker might be able to prove that a law that seems, on its face, to be undesirable may actually

49. “[B]ut in this world nothing can be said to be certain, except death and taxes.” Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), in BARTLETT’S FAMILIAR QUOTATIONS 321 (John Bartlett & Justin Kaplan eds., 17th ed. 2002).

50. William T. Harbaugh, Ulrich Mayr & Daniel R. Burghart, *Neural Responses to Taxation and Voluntary Giving Reveal Motives for Charitable Donations*, 316 SCI. 1622, 1622–24 (2007).

51. *Id.* at 1624.

52. John Tierney, *Taxes a Pleasure? Check the Brain Scan*, N.Y. TIMES, June 19, 2007, available at <http://www.nytimes.com/2007/06/19/science/19tier.html?pagewanted=all>.

53. *Id.*

produce pleasure in its intended target audience. The first President Bush may have been able to show that breaking his pledge of “Read my lips. No new taxes,”⁵⁴ produced more pleasure than if he had kept his word. I doubt it would have proved persuasive to an electorate busy responding to Bill Clinton’s message “It’s the economy, stupid,”⁵⁵ but it’s amusing to think about what other unpopular laws in voters’ conscious minds are inducing pleasure in their subconscious minds.

The physical autonomy aspect of taxation is covered by Professor Lisa Milot of the University of Georgia Law School. Her article, “The Case Against Tax Incentives for Organ Transfers,” acknowledges that the demand for donated organs far exceeds supply, and that direct purchase of organs is distasteful at best and exploitative at worst (primarily exploitative of the poor).⁵⁶ Professor Milot shifts the debate away from direct payments toward a less distasteful and less morally problematic approach to incentivize donations—namely, a tax break.⁵⁷ However, as her title suggests, Professor Milot argues that the tax code should not be changed to provide incentives for increased donation.⁵⁸

In part, Professor Milot’s argument is an argument against commodification of the body,⁵⁹ and as such, it is much more than simply a tax paper. The article is concerned with a larger body of work that includes contraception, abortion, prostitution and many other “body-law” controversies that are most often associated with feminist legal studies. Professor Milot has published work on the law of marriage,⁶⁰ and so she has already established herself as a scholar concerned with the ways in which legal regimes impact women. I

54. You can watch the first President Bush speak the line at YouTube, *Read My Lips: No More Taxes*, <http://www.youtube.com/watch?v=E5DZBFbMdlI&feature=related> (last visited Oct. 13, 2008). He went on to break that pledge, and some pundits speculated that the broken promise cost him his bid for re-election.

55. This quote has become famous enough to warrant its own Wikipedia entry. Wikipedia, *It’s the Economy, Stupid*, http://en.wikipedia.org/wiki/It's_the_economy,_stupid (last visited Sept. 14, 2008).

56. Lisa Milot, *The Case Against Tax Incentives for Organ Transfers*, 45 WILLAMETTE L. REV. 67 (2009).

57. *Id.*

58. *Id.* at 90.

59. See e.g., Peter Halewood, *On Commodification and Self-Ownership*, 20 YALE J.L. & HUMAN. 131 (2008).

60. Lisa Milot, Note, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701 (2001).

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learn much more about the studies that the fMRI has enabled. We would explore the nexus between neuroscience and criminal law to

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Vollmar⁸⁶ and Ken Gatter⁸⁷ and the hard working members of the Willamette Law Review for their assistance—especially Rachel Crocker. We hope you enjoy this symposium edition.

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