

## 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 Electric<sup>1</sup>*

John Stuart Mill espoused a libertarian view that the right to swing your arm ends where your neighbor's nose begins.<sup>2</sup> 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 compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one [sic] else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN STUART MILL, ON LIBERTY 16 (Prometheus Books 1986) (1859).

One need not look far for evidence that we have unrestricted dominion over our bodies. We can donate our bodies to science,<sup>3</sup> and we can donate organs—both after death<sup>4</sup> and during life.<sup>5</sup> We can work at jobs that are very dangerous—working with radiation in nuclear power plants,<sup>6</sup> fighting in foreign wars<sup>7</sup>—and we can volunteer for medical testing for new products and procedures<sup>8</sup>. We can engage in elective surgeries that carry terrible risks.<sup>9</sup> 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,<sup>10</sup> displaying one’s body in certain

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3. You can even do it on the web! *See* MedCure, Your Support for Finding a Cure, [http://www.medcure.org/?gclid=CKfp2\\_WOu5UCFSAUagodfR5sQQ](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, <http://www.lifesharers.org/?gclid=CKCypNWPu5UCFSD8iAodDUQWQg> (last visited Oct. 13, 2008).

5. For a list of organs you can donate while alive (mostly kidneys and livers) and a discussion of the topic, see Nat’l Health Serv., Organ and Tissue Donation: Your Questions Answered, [http://www.uktransplant.org.uk/ukt/how\\_to\\_become\\_a\\_donor/questions/answers/answers\\_5.jsp](http://www.uktransplant.org.uk/ukt/how_to_become_a_donor/questions/answers/answers_5.jsp) (last visited Oct. 13, 2008).

6. If interested, and to find out more, see Nuclear JobsOnline.com, Nuclear Jobs and Resume Posts, <http://www.nuclearjobsonline.com> (last visited Oct. 13, 2008).

7. As of this writing, 4,183 Americans have died in the Iraq war, 3,387 of them in combat. *See* Margaret Griffis, ed., *Casualties in Iraq: The Human Cost of Occupation*, <http://www.antiwar.com/casualties/> (last visited Oct. 13, 2008).

8. The Food and Drug Administration website exhorts people to volunteer for “clinical trials” of products “to see if the product is safe and effective for people to use.” Women and minorities are especially encouraged to apply. *See* U.S. DEP’T OF HEALTH AND HUMAN SERV., FOOD AND DRUG ADMIN., CLINICAL TRIALS OF MEDICAL TREATMENTS: WHY VOLUNTEER?, available at [http://www.fda.gov/opacom/lowlit/cltr\\_standard.pdf](http://www.fda.gov/opacom/lowlit/cltr_standard.pdf) (last visited Oct. 13, 2008). A Google search for “volunteer for medical testing” conducted in August 2008, turned up hundreds of opportunities.

9. In addition to the typical risks associated with invasive surgery (e.g., infection, negative reaction to anesthetic), some elective surgeries carry special risks. For an article about the risks of lap band surgery for teens, see Sandy Szwarc, Junkfood Science, *Selling an Elective Surgery*, Feb. 5, 2007, <http://junkfoodscience.blogspot.com/2007/02/selling-elective-surgery.html>.

10. Most states prohibit prostitution and related crimes. *See, e.g.*, OR. REV. STAT. ANN. § 167.007 (West 2003). Some parts of Nevada (counties under 400,000 population) are exempt. *See* NEV. REV. STAT. ANN. § 244.345(8) (LexisNexis 2005).

ways,<sup>11</sup> selling your own organs<sup>12</sup> (although you can sell others' organs<sup>13</sup>), using controlled substances,<sup>14</sup> and terminating one's own life in the manner of one's own choosing.<sup>15</sup>

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.<sup>16</sup> Of course, those sales are heavily regulated and taxed. But how should these commodities be taxed? As ordinary income? As capital assets?<sup>17</sup>

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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](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/](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 research<sup>18</sup> (unless, of course, they pay a fee<sup>19</sup>). The use of stem cells obtained from unused genetic material<sup>20</sup> is offensive to some religious groups,<sup>21</sup> but the potential benefits are touted by scientists to be enormous.<sup>22</sup> 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 threat<sup>23</sup>—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.<sup>24</sup> 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

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18. Mary Ann Liebert, *One Fifth of the Human Genome Covered by Patents*, 25 BIOTECH L. REP. 13 (2006).

19. For an interesting discussion of this general area, see Ian Ayres & Gideon Parchomovsky, *Tradable Patent Rights*, 60 STAN. L. REV. 863 (2007).

20. I intentionally use a vague term here. Given the rapidly advancing state of science, I hesitate to use the term “stem cell” or “fetuses” as the terms change too rapidly for me to keep up. In the short period between Professor Korobkin’s book on the subject and his symposium paper, both cited below, there was a change in the technology and possibly in the source of stem cells. I expect there to be similar advances between the time of writing this article and its publication.

21. For a transcript of President George W. Bush discussing his veto of S. 5, the “Stem Cell Research Enhancement Act of 2007,” and his threat to veto any legislation authorizing stem cell research, see Press Release, Office of the Press Secretary, President Bush Discusses Stem Cell Veto and Executive Order (June 20, 2007), *available at* <http://www.whitehouse.gov/news/releases/2007/06/20070620-8.html>.

22. *See, e.g.*, BRENT WATERS & RONALD COLE-TURNER, *GOD AND THE EMBRYO: RELIGIOUS VOICES ON STEM CELLS AND CLONING* (Georgetown Univ. Press 2003).

23. For the National Institutes of Health’s lengthy list of benefits related to stem cell research, see Nat’l Inst. of Health, *Stem Cells and Diseases*, <http://stemcells.nih.gov/info/health.asp> (last visited Oct. 13, 2008).

24. *See supra* note 15 and accompanying text.

great many baseball stars, pitchers and hitters alike,<sup>25</sup> have been involved in congressional hearings about their use of such supplements.<sup>26</sup> And baseball is hardly alone.<sup>27</sup> Should the government regulate sports—in particular, should they regulate what an athlete consumes?

Thus, the timeless debate over personal autonomy and government regulation of the body takes a particular shape in 2008. Indeed, 2008 is an important time to hold a symposium that draws together disparate thinkers whose work is in a variety of disciplines, yet who all focus in some way on the debate over the regulation of the body. While no single event could cover all the relevant questions, this symposium spans a wide variety of disciplines and approaches to the topic.

First, we have someone speaking and writing about the time before any of us were born. Doctor David Linden is a professor of neurobiology at Johns Hopkins University, and the author of *The Accidental Mind: How Brain Evolution Has Given Us Love, Memory, Dreams and God*.<sup>28</sup> Dr. Linden's marvelous book and his talk at the symposium detailed how "every aspect of our transcendent human experience from love to memory to our dreams to our pre-disposition for religious thought ultimately derives from our inefficient and bizarre brains, which are a weird agglomeration of ad hoc solutions that have been piled on through millions of years of evolutionary history."<sup>29</sup>

Dr. Linden's argument revolves around the notion that the brain is actually three different brains.<sup>30</sup> The three brains consist of an early

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25. I refer now to Roger Clemens and Barry Bonds. For a look at the Bonds case, see SFGate.com, The BLACO Investigation, <http://www.sfgate.com/balco/> (last visited October 13, 2008). For the Clemens story, see Bob Hohler, *A Long, Star-Studded Drug Roster: Enhancement Use Tainted All Teams, Sweeping Report Says 'Steroids Era' Blamed on a Collective Failure*, BOSTON GLOBE, Dec. 14, 2007, at A1.

26. See Dave Sheinin, *Baseball Has a Day of Reckoning in Congress*, WASH. POST, March 18, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A43422-2005Mar17.html>.

27. Bicycling, football, swimming, and weightlifting are just a few of the sports in which elite participants are routinely accused of consuming banned substances.

28. DAVID J. LINDEN, *THE ACCIDENTAL MIND: HOW BRAIN EVOLUTION HAS GIVEN US LOVE, MEMORY, DREAMS AND GOD* (2007).

29. David J. Linden, *Brain Evolution and Human Cognition: The Accidental Mind*, 45 WILLAMETTE L. REV. 17, 18 (2008) (this article is a slightly edited transcript of Dr. Linden's keynote address delivered at the Willamette Law Review's Law of the Body Symposium, held at the Willamette University College of Law on March 7, 2008).

30. LINDEN, *THE ACCIDENTAL MIND*, *supra* note 28, at 5–27.

brain that evolved first and is associated with reptiles and amphibians and which still exists as what we call our brainstem,<sup>31</sup> a second brain associated with early mammals and which still exists in what we call our cerebellum and midbrain,<sup>32</sup> and a third brain which are our frontal and lateral cortices.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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,<sup>36</sup> 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,<sup>37</sup> yet it is a cornerstone of the American trial system.

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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).

Lest we think that the relationship between the body and the law is limited to brain science, let us move on to the work of Professor Russell Korobkin, whose talk at the symposium and superb book, *Stem Cell Century*,<sup>38</sup> focused on one of the hottest debates of recent times—should stem cells be used in medical research? Professor Korobkin attacks this controversial subject at a time when national politics have posited an untenable conflict between medical research and conservative religious beliefs. President George W. Bush has refused on many occasions to endorse or condone the use of stem cell research at a time when the vast majority of the medical community extols the curative potential that would emerge from such research.<sup>39</sup> This debate is only one data point in an apparent attempt to politicize religion. I have listened some to AM talk radio stations that seem to extol the idea that good conservatives abide by God’s laws and liberals are God-hating heathens.<sup>40</sup> In my experience, such sentiments are antithetical to centrist politics and, moreover, are untrue. But today’s politics are filled with attempts to roll back laws legalizing abortion and to prevent an expanded definition of marriage. The debate over the use of stem cells is just one important example of how answers to pressing legal questions might be better resolved through the biological sciences rather than through majority polling.

In his article, Professor Korobkin offers an important update to his book, namely a recent scientific advance that may allow the use of stem cells derived not from early stage human embryos, but rather from “induced pluripotent stem cells (iPSCs),<sup>41</sup> which behave

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38. See generally RUSSELL KOROBKIN WITH STEPHEN MUNZER, *STEM CELL CENTURY: LAW AND POLICY FOR A BREAKTHROUGH TECHNOLOGY* (2007).

39. Professor Korobkin includes the following quotes in his book: former National Institutes of Health director Harold Varmus testified before Congress that “there is almost no realm of medicine that might not be touched by this innovation . . . . It is not too unrealistic to say that this research has the potential to revolutionize the practice of medicine and improve the quality and length of life;” the dean of the Harvard University Faculty of Medicine claimed that stem cell therapies “have the potential to do for chronic diseases what antibiotics did for infectious diseases” and hopes that current research will lead to a “penicillin for Parkinson’s.” *Id.* at 2–3.

40. It is no secret that the Republican base, circa 2008, has a substantial element of Christian Conservatism. For one example, see the website of the Christian Coalition for America, which in reference to “Voter Guides” states: “Christian Coalition Voter Guides are one of the most powerful tools that pro-family conservatives have ever had to educate others on where candidates for public office stand on key faith and family issues. They have helped inform tens of millions of voters in every election since 1992.” Christian Coal. of Am., *Voter Guides*, [http://www.cc.org/voter\\_guides](http://www.cc.org/voter_guides) (last visited Oct. 13, 2008).

41. Russell Korobkin, *Reprogrammed Stem Cells and Federal Funding of Embryo Research*, 45 WILLAMETTE L. REV. 31 (2008).

similarly to embryonic stem cells but can be produced without harming—or even using—embryos.”<sup>42</sup> 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 ethical questions that help us understand why the availability of iPSCs may not put an end to the question about whether we should put to use a malleable cell that could help delay or reverse the onset of a variety of degenerative diseases.<sup>43</sup> Current laws prohibit the use of such cells but science suggests that the law is out of step with the times.<sup>44</sup>

Professor Korobkin is joined in debate by the person who is, perhaps, better suited to discuss the law of the body than any of our other panelists. Dr. Kenneth Gatter is at once a lawyer, a law professor, a doctor, a researcher and a medical school professor. Dr. Gatter’s symposium piece discusses the differences between various kinds of stems cells<sup>45</sup> with a specific focus on the iPSC. Some of the differences are medically significant<sup>46</sup> and failure to treat them differently from an ethical standpoint results in laws that lack internal coherence.<sup>47</sup> Dr. Gatter focuses specifically on the iPSC and argues that the mere fact that iPSCs are obtained without the use or destruction of an embryo is not sufficient reason to abandon other avenues of stem cell research. Dr. Gatter argues persuasively that the law has divided the world of iPSC science into a binary but ill-fitting partition. A more nuanced approach to the law would better suit the actual state of the science. However, Dr. Gatter (and I) are skeptical that legislators will turn away from the simple kinds of messages that help form public opinion and towards the intensely apolitical views inherent in scientific thinking.<sup>48</sup> Once again, we see that a deeper

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42. *Id.* at 31.

43. *Id.* at 37.

44. *Id.*

45. Ken Gatter, *Pluripotent Stem Cells: The Problem with Binary Potential and the Benefit of the Slippery Slope*, 45 WILLAMETTE L. REV. 41 (2008).

46. For example, an iPSC reduces the risk of immune rejection, but increases risk of cancer. *Id.* at 43.

47. These same iPSCs never had “potential for a born baby,” and legislation banning stem cell research based on ethical concerns about life potential would be overbroad were it to cover iPSCs.

48. Gatter, *supra* note 45, at 64–66.



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.<sup>49</sup> 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.<sup>50</sup> This glow was remarkably similar to the display that occurred when someone made a voluntary charitable donation.<sup>51</sup> This work, when first published, made national news and was reported in newspapers across the nation.<sup>52</sup> 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.<sup>53</sup>

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

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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,”<sup>54</sup> 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,”<sup>55</sup> 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).<sup>56</sup> 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.<sup>57</sup> However, as her title suggests, Professor Milot argues that the tax code should not be changed to provide incentives for increased donation.<sup>58</sup>

In part, Professor Milot’s argument is an argument against commodification of the body,<sup>59</sup> 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,<sup>60</sup> and so she has already established herself as a scholar concerned with the ways in which legal regimes impact women. I

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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=E5DZBFbMjI&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](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).

expect that the argument in her Willamette symposium article is one of a series of works she will produce that will speak equally to two groups not commonly thought of together: feminists and accountants. I look forward to her forthcoming work, and I am grateful that she appeared at our symposium.

When we are not making money or being taxed, many of us play sports and many more watch sports. At Willamette, we are lucky to have on our faculty Professor Jeffrey Standen, an excellent and accomplished scholar and an avid sports fan. In his virtual identity, Professor Standen is “The Sports Law Professor.” Professor Standen’s blog<sup>61</sup> covers everything from golf<sup>62</sup> to gambling,<sup>63</sup> betting referees<sup>64</sup> to dogfighting quarterbacks,<sup>65</sup> and more.

Professor Standen’s symposium presentation described yet another aspect of the law of the body, namely the history and use of performance enhancing drugs (PEDs) in modern sports. Attendees learned about dirty and clean weightlifting competitions, performance enhancement in the early Greek Olympiads, and Professor Standen’s sense that legislators ought to refrain from engaging in futile efforts to regulate performance enhancement in professional baseball. We heard about Barry Bonds and Roger Clemens, and what emerged was as much a discussion about evidence and procedure as about sports and drugs.

The regulation of PEDs in sports touches on an enormous body of law that forms part of the law of the body. Should the government proscribe substances in sports that are otherwise legal for consumption? Is the justification that sports figures are role models to young children? Is it that the requirements to compete are so hard that even high school athletes who wish to obtain college scholarships have no choice but to consume arguably harmful subjects? Or is it the right of an adult to do what he will in an effort to break an athletic record? Are these drugs different from performance enhancing

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61. Jeffrey Standen, The Sports Law Professor, <http://thesportslawprofessor.blogspot.com> (last visited Oct. 13, 2008).

62. *Id.* at *Slow Play and the Rules of Golf*, July 25, 2008, <http://thesportslawprofessor.blogspot.com/2008/07/slow-play-and-rules-of-golf.html>.

63. Standen, *supra* note 61, at *The Donaghy Sentencing and Its Discontents*, July 29, 2008, <http://thesportslawprofessor.blogspot.com/2008/07/donaghy-sentencing-and-its-discontents.html>.

64. *Id.*

65. Standen, *supra* note 61, at *Vick’s Sentence Too Long*, Dec. 10, 2007, <http://thesportslawprofessor.blogspot.com/2007/12/vicks-sentence-too-long.html>.

equipment—like Michael Phelps “LZR” swimsuit?<sup>66</sup> And in that regard, how do we prevent unfair international competition? Should suits—and PEDs—be provided for all comers, regardless of income and assets?<sup>67</sup>

There is also a question of who should regulate the intake of PEDs. The government through a regulatory agency? The sports organizations themselves?<sup>68</sup> And what is the standard of proof required for a “conviction”? What penalties ought to be meted out? Who sets the penalties?<sup>69</sup> Clearly, the law of the body in 2008 requires examination of these questions and more. I encourage you to

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66. Speedo advertises on its website that the LZR suit has been laboratory proven to be the fastest swimsuit in the world. See Speedo, Speedo LZR Racer Suit, <http://www.speedo80.com/lzr-racer/> (last visited Oct. 13, 2008).

67. World class athletes often have no choice but to utilize the latest equipment technology in order to be competitive. See Craig Lord, *Olympians Must Wear Speedo ‘or Lose Medals’*, TIMES ONLINE, Apr. 9, 2008, [http://www.timesonline.co.uk/tol/sport/more\\_sport/article3708737.ece](http://www.timesonline.co.uk/tol/sport/more_sport/article3708737.ece). See also, e.g., Eoin Carolan, *The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules*, 16 SETON HALL J. SPORTS & ENT. L. 1, 8 (2006).

To decry drug abuse as an attack on the cherished ideal of equality (and thus elevate it as a value to a position of pre-eminence) while overlooking the existing economic and social inequalities, as well as ignoring those physical inequalities which constitute the very essence of elite international sport, is an untenable position.

*Id.* See also Erin E. Floyd, *The Modern Athlete: Natural Athletic Ability or Technology at Its Best?*, 9 VILL. SPORTS & ENT. L.J. 155 (2002). On a related note, in his blog, Professor Mark Perry describes the correlation between income levels and percentage of medals won in the 2008 Olympics. The blog entry makes clear that the richer the country, the more likely it will be to win medals. See Mark J. Perry, *Carpe Diem, More on Medal Inequity at the 2008 Olympics*, Aug. 23, 2008, <http://mjerry.blogspot.com/2008/08/more-on-medal-inequality-at-2008.html>.

68. The largest international regulatory body presiding over the use of PEDs in sports is the World Anti-Doping Agency (WADA), which was established pursuant to an International Olympic Committee (IOC) conference in 1999. The WADA Foundation Board is jointly composed of representatives from the IOC, National Olympic Committees, International Sports Federations, athletes and representatives of governments from all five continents. See WADA, <http://www.wada-ama.org> (last visited Oct. 13, 2008). See also Joshua H. Whitman, *Winning at All Costs: Using Law and Economics to Determine the Proper Role of Government in Regulating the Use of Performance Enhancing Drugs in Professional Sports*, 2008 U. Ill. L. Rev. 459 (2008).

69. *Id.* at 492, 495–97. See also Sarah Baldwin, *Performance Enhancing Drug Use in Olympic Sport: A Comparison of the United States and Australian Approaches*, 24 LOY. L.A. INT’L & COMP. L. REV. 265, 273 (2002). WADA led the way to codify PED violations when it published the World Anti-Doping Code in 2003, which lists procedures and sanctions according to the severity of the violation. See, e.g., WADA, World Anti-Doping Code art. 10–13 (2003), available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf). For a list of sports organizations that have adopted the code, see WADA, Code Acceptance, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270> (last visited Oct. 13, 2008).

read Professor Standen's blog to stay current on these issues and more.

When we are all done—when the days of sports and money making and paying taxes are over—we encounter Benjamin Franklin's other "inevitable"—death.<sup>70</sup> Oregon is unique among the fifty states in that we have a law, the Oregon Death with Dignity Act,<sup>71</sup> authorizing physician-assisted death (PAD).<sup>72</sup> Thus, Oregon is a perfect place to explore this subject. However, as Professor Peggy Battin's symposium article<sup>73</sup> explains, Oregon is hardly unique in the larger world. A great many countries have seen fit to enact laws that permit terminally ill people to obtain medical assistance in the termination of their own life, including the Netherlands, Belgium and Canada.<sup>74</sup> In addition, many other nations are exploring the subject.

Why is PAD so rare? Is it that a sense of religious or social morality has trumped the individual right to "swing one's arm"? Or is it that a mythology has developed around the concept, a mythology that suggests that only the poorest, least well off, most desperate members of society will use the law to end life? Will doctors become death merchants? Will self-death increase? Professor Battin's article examines, in some depth, the experiences of the world vis-à-vis physician-assisted death, and her Oregonian co-panelist, Ann Jackson, examines in a companion piece<sup>75</sup> the Oregon experience with its own law. Without stealing the thunder from them, the conclusions are that the mythologies described above are just that—myths.

So we cover the world from the time before the modern brain had evolved to our death with some stopping points in between. That does not mean that we have covered all the bases. Indeed, in a more complete version of this symposium (an impractical multi-week or perhaps year-long version) we would hear about current advances in genetic sequencing and the patenting of the genetic code.<sup>76</sup> We would

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70. Franklin, *supra* note 49.

71. OR. REV. STAT. §§ 127.800–127.897 (1999).

72. Ann Jackson, *The Inevitable—Death: Oregon's End-of-Life Choices*, 45 WILLAMETTE L. REV. 137, 143 (2008). The term "assisted suicide" is no longer used. The term "assisted suicide" conjures up images of distraught people who cannot cope with death, which rarely matches those individuals using Oregon's law.

73. Margaret P. Battin, *Physician-Assisted Dying and the Slippery Slope: The Challenge of Empirical Evidence*, 45 WILLAMETTE L. REV. 91 (2008).

74. *See, e.g., id.*

75. *See* Jackson, *supra* note 72.

76. This "mapping" of the genome is the primary work of the Human Genome Project. For a discussion of genetic patents, see Human Genome Project, Genetics and Patenting,

learn much more about the studies that the fMRI has enabled. We would explore the nexus between neuroscience and criminal law to see whether advances in brain science could teach us more about the ability of brain damaged defendants to form criminal intent.<sup>77</sup> We would hear about cloning.<sup>78</sup> We would hear more about advances in fertility science.<sup>79</sup> We might hear about the effects of genetically modified food on the body.<sup>80</sup> We would hear about the battles for generic drugs that are available a mere 300 miles north of here but are prohibited by law from being sold in the USA.<sup>81</sup> We might hear from established luminaries like Hank Greeley<sup>82</sup> and Michael Gazzaniga,<sup>83</sup> as well as from a new cohort of young scholars like Owen Jones<sup>84</sup> and the pair of Joshua Greene and Jonathan Cohen.<sup>85</sup>

In the meantime, we content ourselves to have our own panels of established and up-and-coming scholars who will help map the emergent landscape of the law of the body. We thank all our panelists as well as our moderators and commentators (including Valerie

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[http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/patents.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/patents.shtml) (last visited Oct. 13, 2008).

77. See Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J. L. SCI. & TECH. 1 (2008).

78. The Human Genome Project maintains a thorough website with a page devoted to cloning. See Human Genome Project, Cloning Fact Sheet, [http://www.ornl.gov/sci/techresources/Human\\_Genome/elsi/cloning.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/elsi/cloning.shtml) (last visited Oct. 13, 2008).

79. See, e.g., Rick Weiss, *Babies in Limbo: Laws Outpaced by Fertility Advances*, WASH. POST, Feb. 8, 1998, at A01.

80. It is hard to find a neutral source of information about this subject. One such source that may suffice is the Food and Agriculture Organization (FAO) of the United Nations. See FAO, *Genetically Modified Organisms, Consumers, Food Safety and the Environment*, <http://www.fao.org/DOCREP/003/x9602E/x9602e00.htm> (last visited Oct. 13, 2008). The organization concludes that the potential benefits of feeding more people must be weighed against potential harms. Most groups hold stronger pro and con positions.

81. For a discussion of "reimportation," see Jonathan Ma, *Lowering Prescription Drug Prices in the United States: Are Reimportation and Internet Pharmacies the Answer?*, 15 S. CAL. INTERDISC. L.J. 345 (2006).

82. Henry Greeley is a member of the faculty at Stanford Law School and is one of the country's leading scholars in the field of law and genetics.

83. Michael Gazzaniga is a Professor of Psychology and the Director for the SAGE Center for the Study of Mind at the University of California, Santa Barbara. He has written several important works on cognitive neuroscience and is considered one of the top scholars in the field.

84. Professor Jones is on the faculty of Vanderbilt University Law School, and his specialty is law and neuroscience. He is one of the rare law professors doing empirical research with the fMRI.

85. See Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y BIOLOGICAL SCI. 1775 (2004).

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Vollmar<sup>86</sup> and Ken Gatter<sup>87</sup> 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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86. Professor Valerie Vollmar is a faculty member at the Willamette University College of Law and teaches issues related to elder law and estate planning.

87. Dr. Ken Gatter is an Associate Professor at Oregon Health Sciences University and a senior lecturer at Willamette University College of Law.

