Contestable Bodies: Law, Medicine, and the Case of Conjoined Twins

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Abstract

Modern society is ordered on normative presumptions of the body, including the presumption of individuality inherent in singular bodies. Law and medicine in particular rely on the concept of individuality in order to articulate a coherent discourse of bodily autonomy and individual rights. The case of Mary and Jodie illustrates how conjoined twins contest these discourses, rendering them incomprehensible at the very point at which the discourses connect. The bodies of conjoined twins thus become sites of control where medical ethics and legal reasoning reproduce the cultural imperative of embodied individuality, literally and figuratively severing both their interests and their bodies. A critical reading of the case illustrates the degree to which the dominant discourses are rendered incomprehensible in the face of conjoined twins: conjoined twins can thus be taken as a starting point for contesting the discourses that insist on individualizing us all.

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For my children, who at the ages of 8 and 9 understand more about conjoined twins than most people I know.

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Fluid-preserved conjoined twins¹

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¹ Image courtesy of National Museum of Health and Medicine at
http://nmhm.washingtondc.museum/collections/anatomical/imgs/preserved_twins_sm.gif.

Introduction: Why Conjoined twins?
(Contesting appropriate thesis topics)

*"Anyone who does not grasp the close juxtaposition of the vulgar and the scholarly has either too refined
or too compartmentalized a view of life"*

-Stephen Gould²

Selecting an appropriate topic for a Masters thesis is not an easy task. You fear that there is a lot riding on your choice: that you will somehow position yourself academically for life with your first single, serious work. Do you establish yourself as a new explorer in the hot realm of a popular discipline, or a proponent of the latest and greatest academic trend, theory, subject? Or are you more of an academic risk-taker, a visionary, a rebel? There are practical matters as well. How easy or difficult should you make it for yourself? How long can you sustain an interest in the subject matter? What are your supervisor's views on the subject? Can your spouse put up with it? While these questions haunted me - and still do - the topic at least seemed obvious, for I had become fascinated

¹ Image courtesy of the National Library of Medicine at <http://www.nlm.nih.gov>.

² Stephen J. Gould, The Flamingo's Smile. Reflections in Natural History (New York: W.W. Norton & Co., 1985) at 66.

with a current event; the birth, on August 8, 2000, at St. Mary's Hospital, Manchester, England, of conjoined twins "Mary and Jodie A"³.

The girls were fused at the lower abdomen, sharing uro-genital structures, a spinal cord, and a circulatory system that was continuous, running from one to the other and back again. The medical prognosis for the children was poor. Doctors feared that as the children grew, the stress of pumping blood for the fused body would become too much for the one functioning heart. Additional concern was that growth itself might be impeded, as had been observed in "Jodie" who was "failing to thrive." It was felt that unless surgical separation took place, both would die within six months. Attending physicians determined that the twins could be separated, but only at the cost of the life of one, "Mary", whose heart and lungs were too deficient to sustain her as a singleton.

The children's parents refused to consent to the operation, with the hospital contesting that decision on the basis that, while separation surgery would result in the death of "Mary", it could save "Jodie", and provide her the prospect of a near- normal life. St. Mary's Hospital brought a petition under The Children Act 1989 (c.41), which gives the court inherent jurisdiction to decide matters of children's "upbringing" in accordance with their welfare. The petition requested a declaration that it be lawful and in the children's best interest to carry out emergency separation and/or perform elective separation.

The proceedings were extraordinary, representing the first instance of a court providing detailed reasoning in consideration of the ethical and legal issues raised by

³ These are the names used by the court to identify the children. The first names are not those given by the parents. While we would later learn the true identities of the children, they remain "Mary and Jodie A" in most writings referring to them.

surgical sacrifice. Prior to this decision the determination of whether and how conjoined twins should be separated had almost always been decided between doctors and parents without resort to the judiciary.⁴ The legal, ethical, and moral questions raised were astounding and quickly captured the attention of the world. By the end of August, the popular press was full of accounts of “Mr. and Mrs. A”, and their daughters “Mary” and “Jodie”. I, along with so many others, was fascinated. Stories of conjoined twins began to be retold, re-broadcast, and re-circulated. People, including me, debated the matter of Mary and Jodie in bars and searched the Internet on lunch hours for pictures.

Much of the discussion in the popular press, and even in the academic writing that had begun to emerge, was focused on one of two major themes: either seeking to resolve the problem of the proposed sacrificial separation of Mary from Jodie through identifying the appropriate legal principles upon which a decision should be grounded, or seeking to identify or expound fundamental ethical principles to apply in the quest for the “right” answer to the questions posed. In both cases, the focus was on “who” and “how”: who should be involved in making the decision, and on what basis it ultimately should be made. Popular discussion did not grapple with a fundamental “why”, but took as a starting point the premise that the decision had to be made and could be made by a court of law. Of course, there eventually were decisions by courts of law, and ultimately on September 22, 2000 by the Supreme Court of Judicature, Court of Appeal (Civil Division) in the United Kingdom, which proved to be fascinating reading⁵. And the more I read the more I realized the nature of the basic problems that were nagging me, and how little there was out there to help me come to terms with them. My puzzle was an animal

⁴ An unreported case is referred to by George Annas in his article “Siamese Twins: Killing One to Save the Other”, *Hastings Centre Report*, April 1987 at p 27. This is explored more fully in Chapter five.

⁵ *Re A (Children)(conjoined twins: surgical separation)* [2000] 4 ALL ER 961 (C.A. Civ.)

of a very different sort, and it was no wonder I was frustrated. I was so struck by what I saw as the uniqueness of the decision; by the fact that to my knowledge at the time, there had never before been a judicial pronouncement on the separation of conjoined twins. I was less interested in what I saw as trying to discover the technical elements of a proper legal or ethical decision, and much more interested in trying to discover how it was that we came to make the decision in the manner we did in the first place. While the project of seeking a basis for making the decision might be perfectly valid, it's not the project that caught my attention. I felt that the very fact of this judgement being the first of its kind was being taken for granted, and that there was a gap in work directed at trying to understand how we came to make such a decision in this manner. In short, I was less interested in the *problem* of determining whether or not to separate conjoined twins at the cost of the life of one; what interested me was the *problematic*, and what seemed to be a new space in medico-legal discourse opening up.

My thesis, then, explores this problematic. It takes as its general departure point the question of how it is that conjoined twins and the issue of their surgical separation have become a matter for law to resolve, and how medicine and law resolve the questions raised in the manner they do. To begin, I have necessarily restricted the parameters of my inquiry. For the purpose of my thesis, I have confined my definition of "conjoined twins" to those who exhibit two separate consciousnesses in one body: i.e. two heads, exhibiting at least some level of functioning or awareness. My thesis excludes births where extra "non thinking" body parts are present, including extra heads with no brain activity. This definition will exclude some births that might be medically classified as particular types of conjoined twins, such as those referred to as *fetus in fetu* twins or conjoined twins where only one brain is present as in some craniothoracopogus twins, as these normally pose no medical or legal dilemma under the current principles of medical ethics or law.

The work that I am undertaking is consistent and complimentary to the body of work that explores how the human body and our understandings of it emerge through a set of practices and discourses that give it meaning⁶. Of course, emphasis will be given to how the body is constituted in law and medicine, and how the related discourses and practices deal with and resolve the challenges posed to them by the extraordinary bodies of Mary and Jodie A. By focusing on the particular instance of Mary and Jodie, I will interrogate the way in which law and medicine work together to mediate the extraordinary bodies of conjoined twins. My thesis will argue that conjoined twins confound the way in which law and medicine necessarily must construct them, as autonomous individuals, and will expose the role of law and medicine in producing and reproducing the dominant discourses of the normalized body and the normative concepts defining personhood.

Chapter one begins with an overview of work that explores how our ideas and understandings of the body emerge in a specific context, through practices and discourses. It introduces in broad strokes the theories and ideas that I will be drawing upon to conduct my analysis. In chapter two, I explore the social history of conjoined twins, focusing on the shifts in the meanings inscribed on their bodies. I trace the discourse of conjoined twins from one imbued with the mythological to the modern pathological discourse of medical “correction”. Chapter three presents a more in-depth look at the modern day medical discourse surrounding conjoined twins, and illustrates the impact of these discourses on their bodies. Chapter four examines the individualizing nature of legal discourse. Finally, chapter five draws on the previous chapters to present a critical analysis in the decision of the High Court, illustrating the interconnectivity and

⁶ See for example, Butler, Judith, Bodies that Matter: on the Discursive Limits of “Sex”, (New York and London: Routledge 1993)

force of the normalizing legal and medical discourses, and the implications for Mary and Jodie.

At its core, then, my thesis is about contestable bodies: not just the bodies of Mary and Jodie, but the body of law and the body of medical knowledge that act upon them: literally and figuratively cutting them up and reconstructing them into the individuals we require them to be. My thesis looks at the relationships between medicine, law, bodies and selves, and asks: Where does one end and another begin?

Chapter One: In the Beginning

(There is no Chapter One)

Illustration of Conjoined Twins¹

"They had a pretty crude way of telling me. They said, 'They've got one body and two heads.'" Patty, still under sedation, heard the word Siamese and couldn't quite grasp it. "I had cats?" she asked

-Patty Hensel, mother of conjoined twins²

"The body is a material organism, but also a metaphor; it is the trunk apart from the head and limbs, but also the person (as in 'anybody' and 'somebody'). The body may also be an aggregate of bodies, often with legal personality as in 'corporation' or in 'the mystical body of Christ'. Such aggregate bodies may be about legal fictions or as social facts which exist independently of the 'real' bodies which happen to constitute them...the body is at once the most solid, the most elusive, illusory, concrete, metaphorical, ever present and ever distant thing – a site, an instrument, an environment, a singularity and a multiplicity."

-Bryan Turner³

The human body: "ship of the soul". Beautiful. Symmetrical. Honoured in painting, poetry, sculpture and music since the beginning of memory. When we conjure images of the human body in our minds we will often think in aesthetic terms, in classic images like

¹ Image courtesy of the National Library of Medicine at <http://www.nlm.nih.gov>.

² Patty Hensel, quoted in THE MOST INTIMATE BOND, TIME Magazine, March 25, 1996 Volume 147, No. 13 at 43.

³ Turner, Bryan S. The Body & Society: Explorations in Social Theory, (Oxford: Basil Blackwell, 1984) at 42.

those of Michelangelo's David or Venus DeMilo, or even in more modern bodily images from GQ and Vogue magazines. But the human body is highly variable, with dramatic anomalies possible, observable, and very real. "The Bearded Lady". "Tom Thumb." "The Elephant Man". Intertwined limbs, fused torsos, excess parts, and multiple heads: images of the abnormal human body, the perverted human body, are disturbing. These images make us think of the words "freak" and "monster" and stir, however faintly, deeply rooted feelings of revulsion, very often interspersed with a morbid curiosity about those who are so visibly different from what we have come to think of as normal. These bodies challenge and compel us to explain them, in whatever manner we can.

All anomalous bodies incite our imaginations because they seem to challenge basic assumptions we have about "the way we are", about certain states of being. Giants and dwarves, for example, are disturbing as they represent anomalies of stature that confuse the lines between children and adults. Hermaphrodites challenge the specificity of distinctions of sex. Other anomalous bodies can seemingly blur the lines we draw between men and beasts. But conjoined twins are unsettling at a far more basic level. They are especially ambiguous: more than wholly one yet at the same time somewhat less than two. They blur the boundaries between selves and others.

Perhaps this is the reason that the birth of conjoined twins and any subsequent medical examinations and interventions tends to excite modern public interest. Frequent reports of conjoined twin births, and especially those pertaining to surgeries attempting to separate them, appear widely in the popular press, often with follow-on reports over a number of days, and even months or years, as the whole world engages in an almost voyeuristic manner with the human drama that they present. In the Western world in particular, reports of conjoined twins and medical efforts to separate them are often spun into stories of brave babies and heroic doctors seeking to overcome a medical condition

so abnormal as to be intolerable: intolerable for both the children involved as well as their parents and communities. We hear of two tragic children, afflicted by a fetal development gone horribly awry. Media coverage increases in intensity in accordance with the degree of attachment or the complexity of any proposed separation surgery, and the focus is primarily technical: on medical diagnosis, prognosis, and surgical options and inherent risks associated with a proposed separation, calculated in hard, cold ratios and percentages⁴. Still, a sense of unsettling monstrosity ripples just below the surface of these stories, with pictures and anatomical diagrams of little naked babies, detailing their shared bodies and any deformed parts, absolutely required. Full colour and downloadable images preferred.

This fascination with conjoined twins is not new; it is in fact a very ancient one. Throughout recorded history, incidents and stories of conjoined twins, or beings very like them, have appeared in mythology and religious texts as well as secular spheres. Mythological and symbolic beings, like the roman two-faced god Janus or the double-headed eagles of heraldic symbol, echo the bodies of conjoined twins. The “Biddenden Maidens”, conjoined twins Mary and Eliza Chulkhurst, born in Kent around the year 1100, inspired a whole lore including the local distribution of cakes imprinted with their images, a practice that appears to have continued until at least the early 19th century⁵. In more recent times, we have spiritedly followed other stories of conjoined twins: Violet and Daisy Hilton, one of whom was denied a marriage license in numerous states and incited great public debate about the propriety of marriage when a third participant is

⁴ For example, see “Conjoined South Korean Twins Separated”, retrieved July 15, 2004 from MedServ Medical News web site: <http://www.medserv.dk/modules.php?name=News&file=article&sid=2320>, where doctors gave the twins a 85% chance of survival after separation.

⁵ C.J.S Thompson, The History and Lore of Freaks (London: Random House, 1996) at 32-33.

necessarily part of the deal. Or the very recent case of “The Iranian sisters”, Ladan and Laleh Bijani, adult women joined at the head, who in July 2003 sought a very dangerous separation against the advice and general sentiment of numerous doctors⁶. Their ultimate deaths inspired numerous tributes to their bravery, from across the world and from all manner of persons: doctors, religious leaders, and statesmen were quoted in the press and common men and women posted personal reflections on internet discussion boards⁷. These are but a few illustrations of how conjoined twins have and continue to excite interest and discussion among spiritual leaders, scientists, and the common man alike.

Though they have always excited interest, deeper meanings attached to conjoined twins have shifted. Once associated with the power of God and clearly bound up with ideas about man’s relationship to the supernatural, conjoined twins now are primarily associated with science and man’s control of it, integrally linked with medical advance and technological imperatives. Our modern framework for interpreting conjoined twins as biological errors resulting in the physical fusion of two individuals, and representing a potentially curable condition, is so ingrained in our social psyche that it seems almost intuitive. The possibility of surgical separation today places our understanding of conjoined twins in a primarily medical sphere: since we can diagnose, categorize and “correct” them there is little mythological or supernatural about them. Conjoined twins are predominately a “medical problem”: medical advance provides possibilities for their treatment, and the possibility of separation allows our attention to focus on the possibility

⁶ Ladan and Laleh were an especially interesting case in that, as adults, they expressed a desire for separation and pursued it despite very poor odds. It is rare for adult conjoined twins to undergo separation surgery: though several surviving adult conjoined twins not able to be separated at birth have been offered separation surgery in the past decade due to medical advance, most have refused.

⁷ Any Internet search on these twins will turn up numerous articles and discussion boards. For a typical example of press coverage, see “Iranian twins die in surgery”, retrieved September 5, 2003 from BBC web site: news.bbc.co.uk/1/hi/world/asia-pacific/3053638.stm.

of individualizing them completely, their inherent individuality seeming so compromised by their physical affliction. We are inclined to ignore the implications of any historic difference in the interpretations of conjoined twins, preferring instead to trust scientific progress: we believe that modern science has taken a proper account of conjoined twins as caused through mistakes of fetal development, can provide the means to separate them, and their lives are most thankfully better for it. From here it is a natural step to assert that the legal wrangling over surgical separation in the case of Mary and Jodie, or the highly public ethical debates over the separation of the Iranian sisters, are just examples of the many inevitable legal and ethical dilemmas that arise in the wake of modern medicine. In this dominant view, courts are clearly mandated to deal with rights-based problems arising from both potential medical interventions or omissions, and the limits of parental control of children: while the case of Jodie and Mary was a gripping and gut wrenching one there is nothing inherently noteworthy or problematic in using legal recourse to resolve the issues raised.

As natural as all of this seems, however, there exists in academic writing a solid body of work that can provide an alternative lens through which to critically analyze our understanding of conjoined twins both as a potentially reparable accident of biology and as an appropriate focal point for legal decision making. This alternative view would interrogate conjoined twins as a social phenomenon: one inextricably linked to the time and space it occupies, and an appropriate subject not just of physiological, but also of sociological, analysis. *This* approach to examining conjoined twins in general and the case of Mary and Jodie specifically provides a theoretical and analytical grounding for interrogating how our understanding of the human body and the subject within it is mediated by social practices and discourse, including those that arise through medicine and law. The use of the legal system to resolve the issues and the way in which the legal analysis is undertaken can in this perspective be viewed as a problematic: a social

phenomenon in itself. Academic works expressing this alternative view argue that the body is not just an object of knowledge, it is very much a subject of knowledge as well, and one which is defined and revised not through the objective observations of science, but through the subjective discourses and practices of science and other disciplines, including law.

Examining conjoined twins in this manner must find as a starting point the notion that the body is an appropriate subject of sociological inquiry in the first instance. This idea has best found expression in the works of Bryan Turner, who canvassed the general lack of sociological study featuring bodies as a focal point, and called attention to the absence of the human body from sociological theory. He noted that at a macro level, sociological tradition has focused primarily on the structures and inter-relationships of collectivities, in which human bodies are not accommodated. He explored the “problematic status and nature of the human body,”⁸ seeking to define new areas of academic inquiry into the relationship between body and society, and into the nature of “embodiment”, which for Turner referred to the notion of “becoming a body in social space.”⁹ His starting point was the body, and much of his project seeks to trace what happens to it through social attributes that become attached to it.

Many of Turner’s ideas as well as the general drive towards a sociology of the body owe an academic “tip of the hat”, or even better a very deep bow, to the writings of Michel Foucault. While it has become almost trite to note that Foucault’s writings should not, and indeed can not, be read as the elaboration of single theoretical framework, still

⁸ Turner, supra note 3, at 1

⁹ Id. at 3.

his work articulates a general approach that serves as an excellent starting point for any inquiry seeking to grapple with why a particular problem or issue has arisen in the first place. Though Foucault cannot - and would never have wanted to - offer a comprehensive theory to explain what happened in the case of Mary and Jodie, his work can be drawn on as a series of tools that can help lead to an appreciation of **today's** “problematic” of conjoined twins: how it emerged and why we seek to resolve it in the manner that we do.¹⁰

In many of his works Foucault examined how things that appear “natural” are actually performatively created. Foucault showed how concepts, such as what constitutes a healthy body, what is the cause of disease, or what are the social meanings of madness, are historically contingent and subject to change. He was particularly interested in tracing historical shifts or changes in overarching concepts, or what Foucault termed “epistemes” or “discursive formations”, during periods of transformation in elements of society, such as prisons, hospitals, etc. By the term episteme, Foucault meant the unconscious ways of thinking about things which function to define the possibilities of intellectual inquiry: what is an appropriate subject or focus of study as well as, and perhaps more tellingly, what gets excluded from either examination or discussion. Thus, for Foucault, changes were not necessarily changes of progress or a march towards the truth: changes were merely different. He consciously sought to avoid the tendency in scholarly writing to view moments in history or historical shifts in epistemes through the lens of current day thinking, and to therefore see a pattern of “advance” or progress. For Foucault, the emphasis of academic enquiry must always be on revealing the understandings behind

¹⁰ Foucault’s concept of problematisation does not contemplate a mere tracing of the history of ideas, it is a more genealogical concept that recognizes and uncovers the role of social practices in leading us to focus on an aspect of ourselves, and to constitute it as an important matter for truth seeking. See Michel Foucault, The History of Sexuality, Volume 2: The Use of Pleasure, (New York: Pantheon Books, 1985) at 3 – 13.

terms or practices and how they fit within the overarching framework of the times, and how modalities of thought were influenced by institutions of the day. Emphasis is not on discovering truth, but on examining what is contemporarily presented as truth by institutions through their practices. This focus, which Foucault termed “archaeological” in approach, was a departure from classic “lines of attack” promulgated by many social historians, who tended to view history as a continuity, with a historical force of progress or improvement. For Foucault, the project of examining the human body in society was at least in part a historization of the body, and an exploration of the history of “body meanings”, or what Turner would perhaps term “embodiment”,¹¹ as distinct from our physical selves.

Distinguishing who we are within our bodies from our bodies themselves is an idea most often deployed and elaborated on in academic writing about race and gender, which builds on this basis to assert that race and gender are not objective categories with uncontested attributes, but are categories that must be understood as **social** categories: those that emerge through sets of social practices. The meanings attached to these categories are also socially constructed, and thus the discourses that surround them actually mediate the experience of living within them. Judith Butler writes in this vein¹², arguing for the “performativity” of social realities and identity. She illustrates how through speech-acts, a performative actually creates the thing it names, as for example in the classic utterance “I now pronounce you man and wife” of a traditional marriage

¹¹ Turner’s concept of embodiment separates the body from the experience of living in it, which is normatively derived through sets of social practices and expectations. With embodiment separate from body, it becomes possible to contest the former without denying the facticity of the latter.

¹² See for example Judith Butler, “Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory.” In Sue-Ellen Case (ed.) Performing Feminisms: Feminist Critical Theory and Theatre, Baltimore: Johns Hopkins UP, 1990.

ceremony. In *Gender Trouble*¹³, she separates gender from sex and contests gender concepts by illustrating the performativity of gender. She argues that gender is separate from sex, that gender distinctions are artificial, and challenges the notion that they are an independent and natural reality. With gender separate from sex, and with gender performatively produced, her concept of gender is able to be more fluid and multi-faceted than one based on two-typologies, and is thus something radically more open. Her concept of gender is therefore constitutive: independent of any biological imperative. Her later work, *Bodies that Matter*¹⁴, builds on her earlier project and takes it one step further, arguing that the body itself is produced discursively, interpreted and regulated through social norms. This work is important in arguing for constructed relations between sex, sexuality, and gender, and the way that we interpret “appropriately” and “inappropriately” gendered bodies. While her focus has been predominately on gender, her work articulates the idea that body and embodiment are independent concepts, and both they and their interrelationships are socially produced.

Thomas Lacqueur's writings have also examined gender and have traced the discursive construction of the body. In *Making Sex*¹⁵ Lacqueur argues that the idea of two biologically based sexes has developed over time, as biological ideas of sex shifted from unitary to binary models. Employing a genealogical method in the Foucaultian tradition, he illustrates how earlier scientists believed that there was only one sex, and that in this worldview observed differences in bodies were interpreted differently. For Lacqueur, under the unitary model of sex to be a man or a woman was a social characteristic,

¹³Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 1990, 1999)

¹⁴Judith Butler, *Bodies that Matter: on the Discursive Limits of “Sex”*, (New York and London: Routledge, 1993)

¹⁵ Thomas Lacqueur, *Making Sex: Body and Gender from the Greeks to Freud*, (Cambridge, Mass.: Harvard University Press, 1990).

denoting a specific role and place in the society; it was not an ontological category. So for example, the womb in a more ancient view was not qualitatively different from the phallus, it was instead an inverted phallus itself, a variation of the same organ. Interpreting sexual organs in this manner, however, could not provide an account for different gender roles, increasingly contested. Eventually, a reconstruction of the womb in the wake of the scientific revolution led to its identification as distinct from the phallus, something inherently different, and therefore something upon which to ground naturalistic justifications of different gender roles. Lacqueur's core argument is that modern ideas of gender arose politically, and that the "natural" distinction between men and women occurred as the body was interpreted in a new worldview. "To be sure," he said, "differences and sameness, more or less recondite, are everywhere; but which ones count and for what ends is determined outside the bounds of empirical investigation."¹⁶

Other writers working in a similar vein have challenged the essentialism of modern biological science. Pointing to hermaphrodites and other sexually ambiguous bodies, they argue that there is no biological basis for the idea that gender types are necessarily correlated to two biological sexes. While the idea that biology itself is discursively determined has not received wide attention, it can be found in the works of Anne Fausto-Sterling¹⁷, who mobilizes her criticism of the "nucleocentric assumptions" of molecular biology as a challenge to the accepted assumption within modern medicine that persons of mixed genital formation ought to be transformed by surgery or hormonal treatment into either male or female. Instead, Fausto-Sterling proposes a more fluid concept of sexuality, in many ways similar to that of Judith Butler. Echoing some of the ideas presented by Lacquer, Fausto-Sterling argues that it is only a social need that

¹⁶Id. at 10.

¹⁷ Anne Fausto-Sterling, "The Five Sexes: Why Male and Female are not Enough", (1993) 33(2) *The Sciences* 20.

maintains clear distinctions between two sexes, arguing that biology, individuality, and society cannot be viewed as distinct phenomena.

Turning back to Foucault's work, we can also find assistance through several more of his concepts that are especially germane to any analysis of medicine and law. His examinations of medicine and law illustrated how, in contemporary society, these and other "expert" disciplines¹⁸ produce discourses that are widely dispersed. Foucault's analysis of discourse illustrated how language does more than name things; it imbues them with social meanings. So, for example, sex labelling does more than identify a biological difference between male and female: the way we talk about biological differences mediates and contextualizes the simple label of boy or girl, overlaying deep and complex meanings about what it means to be a boy or girl. And more than this: it not only creates the framework in which meanings are constituted, it circulates and functions to restrict – or downright exclude – other ways of thinking about something like gender differences. Discourses are not benign, but have real effects; "...they are not just the way that social issues get talked about and thought about. They structure the possibility of what gets included and excluded and of what gets done or remains undone."¹⁹ Thus, discourses understood in this sense do more than explain: they actually constitute subjects and define the spaces they occupy within social institutions. Discourses significantly mediate our experiences of living within our physical bodies.

Foucault's work focused on exploring the power and effect of disciplines in constructing social truths. Disciplines, he argued, form a discursive web, which circulates

¹⁸ Foucault defined expert disciplines as those that shape our society and have their own language that typically separates practitioners from non-practitioners.

¹⁹ Alan Hunt & Gary Wickham, Foucault and Law: Towards a Sociology of Law as Governance (London & Chicago: Pluto Press, 1994) at 8.

among us, mediating our expectations and behaviours, and reproducing power relations. For Foucault, “who we are” is always contextual, arising through the discourse surrounding us, and therefore unable to exist in the same way outside of the discursive web. In this sense, disciplinary institutions and the discourses that circulate among them represent a network of normative coercion: one that defines and reinforces the expectations of members of society. In other words, we act the way we do not through the dictates of a particular social institution, but because through the pervasiveness of disciplines and the discourses they produce we have internalized a set of behaviours and expectations about our world that circulate through all aspects of our lives. Power in the disciplines permeates all we do and all we think. As Foucault put it, “the disciplines characterize, classify, specialize; they distribute along a scale, around a norm, hierarchize individuals in relation to one another and, if necessary, disqualify and invalidate.”²⁰

From this view, one is led to examine law in a manner altogether different from a traditional conception of it as a key form of state power over the individual. While many academic works, both modern and classic have theorized law in this manner, for Foucault this was a problem. For if we examine law in this sense, as a mechanism of state power, we are not able to fully examine or account for the influences of other disciplines, like medicine; nor can we examine the social influences that law exerts as a discipline in its own right, circulating discourse beyond the confines of legislatures and courts. A Foucaultian perspective would urge an understanding of law as part of the web of discursive productions occurring at multiple sites within our societies which, in a disciplinary fashion, condition us to behave and think in certain ways to the exclusion of alternative views. Foucault would certainly agree that when we are looking at law, we can not analyze it and its impact in isolation: we need to be able to look at how it allows

²⁰ Id. at 223.

or facilitates the regulatory impact of disciplines other than itself. His perspectives allow for a different analysis of the legal pronouncement in the case of Jodie and Mary: one that can examine and take account of the roles played by other disciplines, most especially medical science and practice.

Foucault's work also provides a particularly relevant basis for inquiry into the role played by *both* medicine and law in mediating the bodies of conjoined twins. His *The Birth of the Clinic*²¹ introduces the concept of the “medical gaze”, which performatively determines the nature of the human body: through the medical gaze the body becomes an object which physicians control with medical management or intervention. The nature of the medical gaze itself changes over time with changes in knowledge: as epistemology changes, the body itself, or at the very least the subjective experience of living within it, changes through the influence of the medical discourse of the day. This idea requires a different way of thinking about knowledge; it takes a view of knowledge much more radical than traditional concepts of knowledge as universal, neutral, and unchanging. In classic liberal ideology, knowledge exists even in the absence of power: however, in a Foucaultian perspective, knowledge and power are as intertwined and interdependent as, say, the bodies of conjoined twins.

These ideas about disciplines, knowledge, and power likely resonated with Foucault in part through the influence of his doctoral supervisor, Georges Canguilhem. Canguilhem mobilized a critique of medical pathology that deployed much of the underlying premises that his most famous student Foucault would draw on. In *On the Normal and the Pathological*²², Canguilhem argued that the medical notion of “normal”

²¹ Michel Foucault, *The Birth of The Clinic: An Archaeology of Medical Perception*, (New York: Vintage Books a Division of Random House Inc. 1994)

²² Georges Canguilhem, *On the Normal and the Pathological*, (New York: Zone Books 1989).

cannot be viewed as a purely objective, observable fact discovered through biological science. Canguilhem's study of medical pathology departed from this standard acceptance of the nature of disease, mobilizing instead a far more complex view. Canguilhem traced how the meaning of "normal" from a physiological perspective takes cues from the scientific idea of "average". He illustrated how 19th century researchers sought to place varying physiological states on a continuous scale, premised on the notion that changes occurring as a result of disease were quantifiable, and not necessarily anything radically unique. So, for example, hypertension came to be diagnosed and therefore defined as the presence of a certain level of elevated blood pressure: all that is required to be certain of the existence of the condition is a specific, measurable increase in blood pressure; there is no need to reference qualitative or experiential elements in reaching diagnosis. Medicine employed, and to this day continues to employ, the idea of "objective", "observable" facts based on measurements along on a continuum of observations in order to determine the existence of a pathological state. However, Canguilhem contested this, illustrating that distinctions between normal, unusual, and pathological based on measurements along a scale do not arise entirely through objective, scientific observation, but are shaped by the adoption or rejection of ideas, points of view, methods, etc.; and that these processes of determining what counts in which studies or what observations are to be accounted when making measurements are imbued with socio-political undercurrents. For example, Canguilhem illustrated that the idea of an average life span "...is not the biologically normal, but in a sense the socially normative, life span. Once more the norm is not deduced from, but rather expressed in the average. This would be clearer still if, instead of considering the average life span in a national society taken as a whole, we broke this society down into classes, occupations, etc."²³

²³ Id. at 161.

Perhaps most interestingly of all, Canguilhem's work illustrated the social effect of this mathematical model of pathology. When measurements of various states are placed on a continuum, the idea of normal, that scientific average, becomes something more than a mathematical value: it is not just normal, it becomes *normative*. If a certain state is measured as closer or further to a statistical point of average, then something more evaluative is taking place. In many instances, the average becomes the ideal. And of course, the ideal is a logical goal of any treatment.

As the ability of science to reach further and further into the body expands, as analytical techniques appear and clinical courses of action increase, new diseases or pathological states are "discovered": new problems emerge, are named, and carry with them a set of expectations about how a person exhibiting a related set of symptoms is supposed to act, or even feel. As suggested by the work of Foucault and Canguilhem among others, the body is not merely an object of medical knowledge; it is increasingly a subject of it as well. And as stated by Turner, the timing for an exploration of the sociology of the body is absolutely right, as macro changes within society "have raised major philosophical, ethical and legal issues in contemporary society which ultimately are related to the nature of personhood, identity and individualism."²⁴

Of course, whenever major philosophical, ethical, and certainly legal issues are raised, one expects to see the long arm of the law at some point. And there is little question that legal discourse in contemporary society has expanded its reach and has acted upon our bodies in very real and tangible ways. Through judicial pronouncement, our bodies or their component parts can be searched, seized, and sold, or variously forced to be kept private, blocked from intrusion, or banned from sale. Working in this vein,

²⁴ Turner, supra note 3 at 5.

Alan Hyde's *Bodies of Law*²⁵ illustrates how those things that we take for granted about our bodies are nothing more than political constructs, established through legal decision-making and linked to the political narratives of the day. Hyde illustrates through numerous examples drawn from American case law how the manner in which legal discourse constructs bodies can be linked to political imperatives. For example, Hyde's analysis shows how legal decisions construct the vagina as a most secretive place, where public interest in its possible illicit contents renders it the most searchable part of the human body, or how the commodification of the body's organs, blood, or even reproductive capacity leads to a battle of proprietary interests, sometimes vesting in the individual, sometimes overridden by the interests of capital, but in all cases linked to contemporary political needs. And so it is that case law expounded in a specific time frame within a specific culture provides a solid legal basis for the sale of blood at a time when paid donors accounted for the lion's share of the blood supply, or a public interest in the urine of certain employees with duties related to public safety and security. Hyde's work would account for the increasing debate, primarily in the United States, over allowing the sale of solid organs such as kidneys, currently prohibited under most state law and The National Organ Transplant Act, 42 U.S.C. 274 (2002). Though The National Organ Transplant Act passed in 1984 with little debate, chronic shortages of transplantable organs secured through a voluntary system of donation have stirred the debate anew.²⁶

Law and medicine as expert discourses do not stand isolated from one another, and while we have always been taught that law is neutral and objective, legal discourse is demonstrably **not** neutral in relation to medical discourse. Law allows, and even

²⁵ Alan Hyde, *Bodies of Law*. (Princeton: Princeton University Press, 1997).

²⁶ For an example of this debate in action, see the Organ Watch web site: <http://sunsite.berkeley.edu/biotech/organswatch/>

facilitates, the discourse of medicine, and together with it defines who we are in its deepest sense. The clear interrelationship between the discourses of medicine and law can be seen through the many concepts that circulate between them. Ideas about insanity and perversion, about the start and end of life, about the nature of everything from childhood to old age, and even what makes a life worth living are ongoing dialogues within both medicine and law. The ideas circulate and define not only the boundaries between, for example, insanity and sanity, but also what it actually means to be insane. The experience of insanity is defined, in part, by the medico-legal discourse surrounding it: who can be allowed to function independently, what constitutes a mental impairment sufficient to excuse legal responsibility for our actions. Medico legal discourse even extends to defining the point at which we come to be or cease to be “alive”. Law and medicine, through the circulation of common epistemes, do more than merely discuss such things as sexual practices or mental illness: they define the very essence of what it means to *be*.

So to return to conjoined twins, and my obsession with Mary and Jodie. Perhaps at its very root my – dare I say our – fascination with conjoined twins is this very thing, introduced at the outset: conjoined twins represent an unsettling challenge to our expectations of being and our understanding of the elements of personhood. That they pose a challenge to our concept of normalized bodies, *a la* Canguilhem or just by gut reaction, is obvious. But most intriguing is the unsettling confrontation they represent to our very basic and deep-seated concept of individuality: arguably the most fundamental building block of both our understanding of personhood and the very society in which we live.

Our common notion of what it means to be a person is based on an ideal of individualism that is unthinkingly inseparable from the idea of separate bodies: where independence is expressible in a physical sense, and where distinctions and boundaries

between selves and others are obvious, tangible, and absolutely secure. We view ourselves in an individualistic fashion, “to be” is to be a single, knowing self: inside a single head! Conjoined twins most definitely challenge this basic assumption of what it means to *be*: presenting us with ambiguous bodies where there is no clear delineation between one and the other. In our shared understanding, *to be* also involves a particular relationship with our bodies: while the essence of who we are is more than our bodies, we are nonetheless “in” our bodies. Being a separate self involves not just a physical separateness from others, but also an independence from others and their actions. We inhabit separate bodies over which we alone are able to exert control. It is the ultimate tangible expression and essence of free will. Though who we are is more than our bodies, our independent bodies feel to us as though they are a necessary precondition of personhood. We cannot conceive of an individual without some notion of separateness and autonomy we see inherent in it.

By presenting us with an unsettling model of inter-relatedness and interdependence, conjoined twins cannot meet any standard claim to autonomy or individuality in our society. In this way, conjoined twins not only pose challenges to our normative ideas about self and other, they fundamentally threaten the very foundations of modern medical ethics and law, for the idea of individuality is at the very root of our medical and legal systems, and is the basis upon which much of their related practices and discourses are founded. Modern medical ethics, for example, privileges patient autonomy in decision making: a concept that relies upon the notion of the liberal ideal of an independent individual, able to exercise free will, in control of a body that is uniquely his. Law too, with its concept of legal personality, analyzes issues from the perspective of units of individualized legal personhood, the basis of legal analysis. Legal personhood also stems from an idea of autonomous free will, which requires one mind in control of one body to make any rational sense. Founded on the same grand narrative of the

rational, liberal individual, Law and medicine privilege a specific way of being, that is being individually, and facilitate power relations in that they exclude alternative ways of being, such as in minds that can not clearly control bodies (as in many cases of disability) or in more relational understandings of existence that might be exhibited by collectivities. It is precisely this discourse of individualism that cannot make sense of the fetus-mother relationship, or that must create legal fictions such as corporate identities in order to construct and analyze separate, independent legal rights and responsibilities.

Through core concepts that de-stabilize some of the normative assumptions surrounding conjoined twins in general and Mary and Jodie in particular, these academic works can be drawn on to help illustrate how the very bodies of these babies become the site of a power struggle beyond one of parents vs. doctors, or of science vs. religion. The body of Mary and Jodie can also be seen as the primary site of medico legal control, a symbol of a political struggle: a locus where the reproduction of the idealized liberal subject, wholly independent, wholly individual in every way, is a cultural imperative in the face of something that challenges it.

Chapter Two: From Mystical to Medical: A Brief History of Conjoined twins

(Looking back to contest the present)

Illustration of Conjoined Twins¹

"One urine passage serves for both, one anus, so they tell; / the other parts their numbers keep, and serve their owners well... Their inner parts concealed do lie, hid from our eyes, alas! / But all the body here you view erect in solid brass."

-Epitaph for conjoined twins "The Hungarian Sisters"²

"[The] history of the marvellous is also a history of pursuits and, more pointedly, the non-pursuits of intellectuals: of why curiosity flows into some channels and not others."

- Excerpt from Wonders and the Order of Nature³

It is through reading the works of Foucault and others writing in his tradition that we come to appreciate the value of historicizing and contextualizing certain social phenomenon in order to understand how they have become problematized within a current perspective. A Foucaultian tradition would urge us not to ask how the uncertain bodies of conjoined twins can be explained, but rather to examine the problems

¹ Image courtesy of the National Library of Medicine at <http://www.nlm.nih.gov>.

² Leslie Fiedler, *Freaks: Myths and Images of the secret self*, (New York: Simon and Schuster, 1978) at 201.

³ Lorraine Datson, & Katherine Park, *Wonders and the Order of Nature 1150-1750*, (New York: Zone Books 1998) at 10.

conceptualized and the meanings inscribed upon these bodies in a particular time-context. While always in some sense or another seen as extraordinary, the deeper meanings and interpretations of the birth of conjoined twins can be illustrated as inextricably linked to the framework of thought in which they existed at any given time.

The history of their discursive construction is one which can trace conjoined twins as beings intimately connected with specific cultural narratives and different modes of thought at given points in times. Thus, while always a subject of interest, different ways of understanding the world inscribed different meanings on conjoined twins. The nature of the discourses which surround the bodies of conjoined twins can be broadly seen as moving from understandings infused with religious meanings, to a discourse of curiosity and marvel, and finally to a discourse of deviance: from a time when conjoined twins were deeply rooted in mythological and/or sacred spheres, to a source of entertainment, to modern times when conjoined twins exist primarily within a medico-technological discourse underscored with concepts of bio-medical abnormality. The shifting nature of these discourses can also be seen as influencing perceptions of the nature of the embodiment of conjoined twins: the discourses that frame the understandings of their bodies have impacted on the interpretations of their very nature, and they have shifted from understandings of the “beings” of conjoined twins that were more fluid and complex, to those of today that tend to both raise and determine questions of embodiment primarily from the observation of the number of heads and the intellectual capacity they display.

While changes in discourses can be examined and illustrated, it is important to note from the outset that they do not occur in a linear fashion: the discourses do not unfold one on top of another, each replacing its antecedent. Rather, these discourses are fluid, and can exist simultaneously, ebbing and flowing into one another. It is also

important to plead for an understanding from the outset: what can best be presented here is but a sketch of the changing landscape, a blurry overview. It is simply beyond the scope of this work to present much more than the basic illustration required, and the intent is merely to demonstrate with broad strokes that understandings of conjoined twins are contextually contingent, socio-specific, and have evolved.⁴

With these caveats in mind, we can begin to trace the social history of conjoined twins from very early on indeed, for the observation of animal or human deviance has troubled mankind since ancient times. Extraordinary creatures of human or animal form exist in many mythological traditions, and beings possessing two or more heads figure in the stories and fairy tales of nearly every country⁵. Many scholars believe that the observation of deviant bodies preceded the mythological stories of them, with beings such as the Roman two-faced God Janus having their ultimate basis in the real observation of conjoined twins.

For most of recorded human history, conjoined twins have existed within the larger category of “monsters”. The word monster itself, commonly used for centuries to refer to anomalous bodies, is derived from the Latin *monstrare* (to show) or *monere* (to warn)⁶. In both etymologies the term monster or monstrous was understood in ancient times to describe something not necessarily dark and frightening, as we might understand the term today, but instead indicated a wonderment or a revelation: a not quite so value-

⁴ Datson and Park, for example, have written extensively on the changing discourses of the monstrous in a manner that considers emotional experiences of monsters as well as changes in aesthetics and the interests of elites. See *supra* note 3.

⁵ C.J.S Thompson, The History and Lore of Freaks, (London: Senate, 1996) (First published in 1930 as The Mystery and Lore of Monsters London: Williams & Norgate, London) at 17.

⁶ Retrieved October 14, 2003 from the Teratology Society web site at <http://teratology.org/jfs/History.html>.

laden term for an illustration or portent, and not necessarily a “bad” one at that. Since abnormal births were primarily interpreted as messages or warnings from gods, the need to understand the particular message was the main focus of curiosity surrounding the occurrence of monsters; interest in the babies themselves was secondary if existent at all. There was no question of exploring ways of repairing or correcting these babies. The bodies were to be viewed, accepted, and learned from in terms of the messages intended from above.

Both CJS Thompson⁷ and Leslie Fielder⁸ record the existence of records of Babylonian astrologers on ancient clay tablets from circa 2800 BC that contain references to unusual births, as well as a lexicon of “monsters” and the meanings to be attributed to their occurrence. The tablets outline three sub classes of monsters, including “*monstres doubles*”; those that we would describe as conjoined twins today. At this time, anomalous births were observed within a framework of understanding that saw heavenly bodies exerting influence on all aspects of life, and so any unusual births were regarded as a result of cosmological positions or occurrences, and could therefore be read as signs from the heavens of events to come. Divination through the observation and interpretation of foetuses (fetomancy) and abnormal births (teratoscopy) was widely practiced, and the occasion of the birth of conjoined twins was an occasion not to study the human body but to peer into the future. To the ancient Babylonians, conjoined twins generally singled a period of good fortune: the tablets record that “When a women gives birth to an infant that has a head on the head, the good augury shall enter into the house.”⁹, and there is some evidence of the worship or reverence of conjoined twins and other “monsters” from ancient times. Other societies, including the ancient Romans, saw all monsters including

⁷ Thompson, supra note 5 at 25.

⁸ Fiedler, supra note 2 at 20-21.

⁹ Id. at 21.

conjoined twins as harbingers of doom, and there is some evidence of the killing of deformed babies in these societies, perhaps to ward off the evil that they represented.

The idea of anomalous births as “heavenly indicators” carried forward into early Christian times. The signs of Armageddon include anomalous births: Ancient references to monstrosity occur in The Bible in 2 Esdras 5: “There shall be a confusion also in many places, and the fire shall be oft sent out again, and the wild beasts shall change their places, and menstruous women shall bring forth monsters.” More often than not, the doom presaged was understood as a collective threat, so the sin that monsters were sent to admonish was not necessarily one of the parents alone. This created an interesting sort of double entendre in the understanding of deviant bodies, making them at once both evidence of God’s wrath and generosity. Thus, as observed by Datson and Park, “The monster was a paradoxical product of God’s mercy, an alert and a warning issued to allow sinners one last chance to reform themselves and avert the catastrophe to come.”¹⁰

Alternate explanations existed and circulated. Aristotle saw “freaks” as “*lusus naturae*”, or jokes of nature. This somewhat light-hearted way of incorporating conjoined twins into the overarching conceptual framework of the day was echoed in the sentiments of Pliny (about 62-113 A.D.). He was quoted as saying, “Nature creates monsters for the purpose of astonishing us and amusing herself,”¹¹ and wrote that “formerly hermaphrodites were regarded as ominous signs, but today they seem merely entertainments.”¹² In this tradition, “prodigies” were sources of amusement, and the legacy of this discourse undoubtedly played a role in the ability to morally ground the

¹⁰ Datson and Park, supra note 3 at 181.

¹¹ Retrieved October 14, 2003 from the Teratology Society Web Site at <http://teratology.org/jfs/History.html>.

¹² Fiedler, supra note 2 at 20.

mass exhibition of monsters and freaks that began in 16th century and continued until the decline of the circus sideshow in the early to mid 20th century.

But whether seen as good omens, bad omens, or jokes of nature, ancient understandings of monstrous births were in essence teleological: understood not in terms of what caused them, but in terms of they were intended to foreshadow. In this worldview, when there were no systems of natural law separate from mythology or religion, conjoined twins reflected divine power and thus occupied an ontological space of religious significance and awe. Conjoined twins were something that did not require explanation based on a set order or on universal laws of nature, and because ancient conjoined twins were seen as evidence of divine power, there was absolutely no question of any “correction” of their bodies, for to think this way would have been to question the will of deities.¹³ The birth of conjoined twins, like the birth of any “monster”, was to be accepted and learned from, in terms of understanding the future or mending one’s ways.

Perhaps in part because conjoined twins were interpreted primarily in terms of what they portended, there is very little record of how their way of being or questions pertaining to their embodiment were perceived in early times. These questions could not have been particularly relevant or pressing where the primary emphasis would have been on deciphering the message conjoined twins or other monstrous births were supposed to be communicating. Still, the few references that do survive suggest an understanding of conjoined twins that is more complicated than the modern one of two individuals abnormally bound. Early reports of conjoined twins often mix both single and plural references, as is seen in an account of twins observed during the reign of Theodosius (379 to 395 AD): “... the emotions, affections, and appetites of this creature were

¹³ There are a couple of very early records of separation surgery, though always only upon the death of one twin in an attempt to save the other.

different...one head might be crying while the other laughed, or one eating while the other was sleeping.”¹⁴ Here, the child is referred to as a singular creature, but the emphasis of the description is placed on the differences observed between the two heads. While we do not have much more to go on in interpreting the thoughts of contemporaries of ancient conjoined twins, it does seem clear that the idea of a singular body with two different heads was troubling enough to note, even if there were no apparent attempt to reconcile these ideas.

Explanations for the birth of conjoined twins evolved over the next two millennia: slowly moving away from supernatural explanation to those that found their basis in nature. While explanations evolved, they were interconnected and interwoven with each other to varying degrees: sometimes ancient discourses would reappear in the middle of new discourses of the day, so that the current discourses, while changing, often repeated elements from the past.

While the idea of conjoined twins as harbingers remained the dominant one for centuries, explanations for the birth of monsters ultimately grounded in more tangible causes also circulated from ancient times. So, while Aristotle had described freaks as *lusus naturae*, he also put forward possible theories of anomalous births that sought causal explanations outside of a mythological framework; the beginning of the quest for teratonic agents. These explanations included such things as the influences of intrauterine trauma, too much or too little semen, or the force of a mother’s perceptions on her unborn child. Early references to more naturalized teratogenic agents appear in the writings of Plato: “Special watch should be kept over our pregnant women during the year of their pregnancy to guard the expectant mother against the experiences of frequent and violent

¹⁴ Thompson, supra note 5 at 31.

pleasures, or pains either, and insure her cultivation of a gracious, bright and serene spirit,”¹⁵ as well as in the Bible: “You will conceive and bear a son: now then be careful to take no wine or strong drink and to eat nothing unclean.”¹⁶ While the dominant discourse placed monsters in a mythological or religious sphere, attempts to establish explanations for unusual births in more secular spheres occurred very early on.

Explanations grounded in theology and those that were etiologically based were able to circulate and co-exist, and gradually seem to merge, producing a single discourse that had elements of both. An early example of the co-existence of these discourses occurs in the writings of Saint Augustine (354-430). He wrote of monstrous births as divine teleology: something man cannot comprehend because it is incomprehensible. He argued that any attempts to discover natural explanations for monsters miss the point: that the framework in which man exists was dictated by God and could be changed by God. In this view, there were general rules of order governing life, but God still had sort of a power of veto: natural laws existed but were variable through the exercise of divine power.¹⁷

The Middle Ages marked the beginning of organized attempts to discover or formulate natural laws and these began to impact on the way in which anomalous births were understood. Early efforts aimed at the discovery of an order of nature independent of divine will were occurring, and this period therefore heralds the beginning of explanations for the birth of conjoined twins that were not inherently teleological, but were shifting to be more and more etiological in nature. While writings referring to the

¹⁵ Retrieved October 14, 2003 from the Teratology Society Web Site at www.teratology.org/jfs/History.html.

¹⁶ Judges 13:3-4 (CEV).

¹⁷ Retrieved July 18, 2004 from http://www.preciousheart.net/ethics/Augustine_Enchiridion.htm.

birth of conjoined twins in this time included references to omens and divine will, the period marks increased references to theories of causation such as intrauterine trauma, too much or too little semen, or “maternal impressions” of pregnant women resulting from exposure to frightening or hideous objects. All of these explanations were able to exist for some time simultaneously, side by side, and it was possible for birth phenomenon to exist as a range along a scale of meaning from purely teleological to purely etiological.

Other developments were occurring in society that would have an impact on the discourses surrounding conjoined twins. The new technology of printing enabled pamphlets and broadsheets to circulate news and items of note to wider and wider audiences. These were employed to spread the word of monstrous births, and contained descriptions and images for all to experience, reinforcing the legitimacy and authenticity of reports of conjoined twins. Not only did broadsides and pamphlets mean more tangible experiences of conjoined twins for more people, they also “brought them home” in a very real sense: no longer were conjoined twins things that occurred in stories from afar, they could easily be seen in woodcuts right in our own cities and towns. Increased travel both within and without of western European boundaries also meant the ability to observe and report on more and more specimens, and a gradual realization that conjoined twins occurred not just in far away foreign places, but in our own backyards.

Around the beginning of the 16th century, conjoined twins came to be increasingly patronised and more widely exhibited, and it appears as though there were fewer stories or conjoined twin lore circulating and more actual specimens making the rounds of public display, as objects of amusement. This may be linked to the influence of printing, but may also be an artefact of the mass realization that conjoined twins were not just inhabitants of exotic, “other” realms. In the middle ages, stories of foreign monstrous

racés abounded, representing the deep-seated need to distinguish between selves and others, “us(s) and thems”. While reports from travellers fuelled the belief in exotic monstrous races, conjoined twins were a special category that seemed to occur everywhere, making them more unsettling than dog-faced men or men with their faces in their chests which were not observed at home. Both because of their very nature and because they could be observed domestically, they literally and figuratively represented a problem closer to home: conjoined twins were obviously not limited to the unknown realms of mysterious lands, and therefore were a site for anxiety about the stability of the boundaries of self in a far more intimate and personal context. This must have made them all the more compelling in the same way that we all slow down to look when passing the scene of an accident: “there but for the grace of God.”

By 1531 displays of “prodigies of nature”, including conjoined twins, were being licensed¹⁸, and in 1616 Paduan physician Liceti wrote that the term “monster” is derived from *monstrare* not because God uses them to demonstrate his wrath to sinners, but because due to their “novelty and enormity, provoking as much wonder as surprise and astonishment, everyone shows them to one another.”¹⁹ Public circulation of pamphlets and woodcuts as well as the exhibit of actual bodies, alive or dead, contributed to the partial de-mythologizing of conjoined twins and moved them more and more out of the less reachable spiritual realms and closer to the secularized, concrete realms of everyday existence. By the close of the 15th century, recorded instances of the birth of conjoined twins, while still provoking excitement, were becoming less connected to the notion of the births as omens or portents. The birth of conjoined twins near Heidelberg in 1486 was remarked upon precisely because nothing memorable happened in Germany that year.

¹⁸ Datson & Park, *supra* note 4 at 190.

¹⁹ *Id.* at 200.

About a decade later, Sebastian Brant refused to comment on the birth of a child with two heads, writing: “Some people have pressed me to write [and I would do so,] except for the fact that monsters have become so frequent. Rather than a wonder they appear to me to represent the common course of nature in our time.”²⁰

Contemporary authors writing about conjoined twins in their own communities in this time period emphasized observed differences in behaviour. CJS Thompson records that Bruchius, writing about 1225, wrote of one set of conjoined twins “...there was one living with two bodies knit together from the top of their heads to their navels...having two heades, two mouthes, two noses, with their faces faire, well-formed and made in every point requisite in nature and from the navel downwards, it had but the figure and shape of one only....When one wept the other laughed, if one talked, the other held her peace, as the one eat, the other drank”²¹ Later, in Scotland, the “Glasgow Brothers” prompted many observations. Born about 1490, they were eventually brought to the court of King James IV of Scotland where they were educated and lived under royal patronage. Records of these brothers also emphasize their differences “...the two bodies appeared to disagree between themselves, sometimes disputing, each preferring different objects...they learned to sing...singing two parts, treble and tenor.” While these writings dwell on the differences of behaviour observed in conjoined twins of the day, they also persist in mixing singular and plural references to conjoined twins. So, describing the Scottish twins in plural terms in one breath as above, and in the singular, for example, “The king caused it to be carefully brought up and educated; particularly in music, in which it wonderfully excelled,”²² in the next.

²⁰ Datson & Park, supra note 4 at 173.

²¹ Thompson, supra note 5 at 31.

²² Id. at 39.

By the 16th century, more writing on the subject of conjoined twins or monsters in general that was etiologically focused was emerging. The French surgeon Ambroise Pare wrote in 1573 in *Monstres et prodiges*, that monsters are “contrary to the common decree and order of nature,” and listed thirteen causes of their births:

“The first is the glory of God. The second, his wrath. The third, too great a quantity of semen. The fourth, too small a quantity. The fifth, imagination. The sixth, the narrowness or smallness of the womb. The seventh, the unbecoming sitting position of the mother, who, while pregnant, remains seated too long with her thighs crossed or pressed against her stomach. The eighth, by a fall or blows struck against the stomach of the mother during pregnancy. The ninth, by hereditary or accidental illnesses. The tenth, by the rotting or corruption of the semen. The eleventh, by the mingling or mixture of seed. The twelfth, by the artifice of wandering beggars. The thirteenth, by demons or devils.”²³

In Pare’s writing, conjoined twins were largely seen as anomalies of excess: that is, too many heads and limbs, and therefore attributed primarily to an excessive quantity of semen. His contemporary, Sebastien Munster, preferred the maternal impressions school of thought and wrote in *Cosmography*, 1552, an explanation for the birth of conjoined twins, joined by the forehead: “This wondrous phenomenon thus had its origin. As the mother of these two children was gossiping with another woman upon the street, an unexpected thing happened and struck the two foreheads of the women together; thereupon, the pregnant woman became ill with fright, so that the fruit within her womb had to suffer for it.”²⁴

²³ Fiedler, *supra* note 2 at 233 – 234.

²⁴ Daniel Bergsma, M.D. ed., *Birth Defects: Original Article Series: Conjoined Twins*, (New York: National Foundation - March of Dimes, 1967) at 5. This explanation, that of the ability of maternal impressions to influence babies in the womb, has persisted in some areas to this day, and as late as 1945, some Norman women said they had black children not because of sex with black American soldiers but because they were frightened by the first blacks they had ever seen.

While etiological explanations were clearly emerging, there still remained some emphasis on the connections between the birth of conjoined twins and religious or spiritual meanings. Pare's writing, as an example, mixes understandings of monstrous births as arising through "the Wrath of God" with those understandings founded in more clinical approaches, such as the mother's sitting position. Bulwer, referring to a two-headed infant born about 1552, notes "We must know above all things, that these apparitions that be contrarie to nature, happen not without the providence of Almighty God, but for the punishing and admonishing of men, these things by just judgment are often permitted, not but that man hath a great hand in these monstrosities."²⁵ Even ancient explanations related to the movement of heavenly bodies persisted, with Rueff, writing in 1637 that during a solar eclipse in Sicily women immediately began to bring forth "deformed and double headed children."²⁶

Though volumes 1 & 2 of *Histoires prodigieuses* published in France by Pierre Boaistuau (1560) and Claude Tesserant (1567) still explained monstrous births as primarily linked to divine will, the impact of mechanical and maternal influences were also sources of causation for anomalous bodies. God's wrath, a mother's imagination, and excess of seed were thus all bound up together as explanations for the birth of conjoined twins, and two different sets of conjoined twins exhibiting similar physical structures could be interpreted as having widely different causes.

Increasingly, it became possible to explore and admit to possible natural explanations for conjoined twins without impact on religious tenets: God could still be all-powerful; He was just inclined to work through a nature that was largely discoverable

²⁵ Thompson, *supra* note 5 at 43.

²⁶ George M Gould. & Walter L. Pyle, *Medical Curiosities*. (Adapted from *Anomalies and Curiosities of Medicine*: Original copyright 1896 by W.B. Saunders) at.147.

and explainable. His divine plan included natural law: theology and science could coexist relatively harmoniously at this time. In 1706, Jacques Francois Marie DuVerney, a Paris surgeon, noted how a set of twins joined at the hips had a “supple ligament” in place of the usual hard cartilage joining the pubic bones, thus permitting some independent motion. This, he argued, testified to the “richness of the Mechanics of the Creator, at least as much as the more regular productions (of nature).”²⁷ While not specifically on point, perhaps the best example of the ability of God and rational science to co-exist is illustrated by the works of John Arbuthnot, who in 1710 used the unequal sex ratios in observed births to argue for the existence of God: that statistically, chance could not explain the birth of more males than females, and this was clear evidence of God’s design in ensuring observable and discoverable reproductive capacities favoured males, given the greater likelihood of men to die in war or in the course of employment.²⁸

The work of French philosopher Rene Descartes (1596-1650) had a profound effect on the emerging sciences of biology as he argued, among many other important things, that the body and soul were distinct from one another. This work influenced the Catholic Church, which began to permit doctors to perform human dissections on the dead. With the Cartesian idea of the soul and body as separate, dead bodies no longer were sacred or at least as sacred as they had been when the body and soul had a more integrated relationship. The ability to perform church sanctioned dissection opened a whole new plane for inquiry, literally. Explorations of human anatomy could become more frequent and more detailed, and researchers could now attempt to extrapolate from the dead to the living. Combine these two notions together, that conjoined twins are

²⁷ Datson and Park, supra note 4 at 205.

²⁸ Retrieved July 16, 2004 from the Internet at <http://www.york.ac.uk/depts/maths/histstat/arbuthnot.pdf>.

natural, not supernatural or preternatural phenomenon, and that the soul and body are separate things, and it is easy to see how this period in the social history of conjoined twins is marked by increased dissection of dead specimens as well as by early attempts at surgical separation of the living. While there were two ancient records of separation surgery, both occurred in response to the death of one twin: the first known instance of an attempt at surgical separation where both twins were alive occurred in Germany in 1689.²⁹ In case you were wondering, the operation was “successful”: the definition of success not being absolutely clear.³⁰

It is in the work of Ambroise Pare that we see the beginning of scientific exploration of the nature of the embodiment of conjoined twins. While earlier writings indicate some dissection and exploration of the bodies of conjoined twins occurred, this was done in response to the need to resolve issues presented by conjoined twins that were still primarily connected to the practice of fetomancy or teratamancy, where access to the actual bodily structures of conjoined twins could enhance the ability to accurately prophesize from the birth. Pare provides one of the first recorded instances where questions of the individuality of twins were settled on the physical evidence of their bodies alone. Discussing a child brought to him after its death that had two heads, two arms, and four legs, he wrote “I dissected it and found but one heart by which one may know it was but one infant.”³¹ The evidence of singularity was found in the observation of the heart alone, likely because at this time the heart was considered the seat of the soul.

²⁹ A recorded attempt at separating a twin from his dead brother exists from 925 A.D. For details on it and the 1689 surgery in Germany, see Christine Quigley, Conjoined Twins: An Historical, Biographical and Ethical Issues Encyclopaedia, (London: McFarland & Company, 2001) at 149.

³⁰ What constitutes a successful separation surgery is still debated today. Since separation is the primary goal, survival of one singleton is the primary factor that determines success, and as such a “successful” operation can result in one or two living babies with major physical or intellectual impairments that did not exist prior to surgical intervention.

³¹ Thompson, supra note 5 at 52.

For more ancient writers, who had no access to internal structures, the question of individuality was answerable by a combination of observation of external structures and of behavior, while by Pare's time the organs themselves contained all the evidence needed to be certain. It was not only possible to interpret the essence of the individuality of conjoined twins within their fused bodies without talking to or even observing live twins: in fact it was easier to interpret them if they were dead and greater access to their internal structures was available.

It is about this time that the bodily interpretations of conjoined twins began to be imbued with more normative evaluations, stemming at least in part from the drive to classify things, including monsters. Pare's work, borrowing from both earlier and more contemporary authors, proposed three major categories of classification: Monsters of excess, monsters of default, and monsters of duplicity. But here's the rub: for such a classificatory system to make sense it must necessarily refer back to some idealized archetype: for how can excess or default be measured or defined without some primary standard against which to compare? This is not that far a cry from more sophisticated means of establishing the yardstick, some of which involve observations of numerous specimens and the development of measurements and statistics. Here, by observing and classifying monsters according to how they differ from most bodies, the idea of most bodies as normalized bodies or even idealized bodies takes root. In 1596, Martin Weinrich reflected these thoughts when he wrote in his *De ortu monstrorum commentarius* "All that is imperfect is ugly, and monsters are full of imperfections."³²

The 17th century brought significant shifts in the prevailing approach to knowledge and learning, marking the emergence of a theory of science grounded in

³² Datson and Park, supra note 4 at 202-203.

rational inquiry, wholly separated from faith-based systems of thought. Francis Bacon (1561-1626), the father of the scientific method, wrote of the importance of knowledge that existed in the natural world and the need for a clear system of scientific inquiry based on inductive thought, as opposed to past approaches to seeking understanding that started from an acceptance of basic, often religious, tenets and then built from them. "There are and can be only two ways of searching into and discovering truth," he wrote. "The one flies from the senses and particulars to the most general axioms: this way is now in fashion. The other derives axioms from the senses and particulars, rising by a gradual and unbroken ascent, so that it arrives at the most general axioms last of all. This is the true way, but as yet untried."³³ We can see how Bacon's conceptualization of knowledge and inductive method involves discovery through the senses with the information they provided processed by reason: Bacon probably would have urged his contemporaries to look first at the actual, material bodies of conjoined twins, with structures their senses can observe, and to derive meaning by reasoning outward.

In addition to writing in favour of a new system of inquiry, Bacon suggested an approach to the study of natural history which essentially established three different spheres of inquiry: the study of the natural, the artificial, and the preternatural or that which transcend the natural or material order. While those things that would have fallen into Bacon's preternatural sphere were not a matter for science, all else was: and under his philosophy, natural science had to be able to explain the birth of conjoined twins and other monsters within one universal law of biology. In this system of inquiry conjoined twins and other birth phenomenon were no longer clearly within the preternatural spheres: the study of anomalies was increasingly seen as a secular matter. Questions posed by conjoined twins and methods to seek the answers were claimed for science: the

³³ From Bacon, Francis First Book of Aphorisms, XIX, available in the Modern History Sourcebook Web Site, <http://www.fordham.edu/halsall/mod/bacon-aphor.html> .

laws of nature, not of God, had to be able to account for monstrosities. The focus thus was now squarely on exploring and uncovering the bodies and the structures themselves and not on seeking to understand heaven-sent messages. By the 18th century, most developed western societies were imbued with a belief that the material and phenomenal world could be discovered and understood through rational inquiry. This was the height of “The Age of Reason”: a time in the history of science and philosophy when great emphasis was placed on the ideals of the autonomy of reason, the quest for causality, the importance of observable facts rather than principles, and a loss of confidence in religious sources of authority. Part of the underlying beliefs were a belief in universalism: that all natural laws must apply to all things, and that therefore observations of a particular phenomenon or specimen can produce generalizable findings. This was a time of the quest for meta-narratives. While God was still “on top” as a sort of first cause, pretty much everything else was open for theorizing.

Writing in 1748, James Parsons, MD described an autopsy of conjoined twin girls in which he participated along with James Sherwood, surgeon. His letter, published in 1748 in the *Philosophical Transactions of the Royal Society of London*³⁴, provides his report to the president of the Royal Society of London. Dr. Parsons begins with a statement that beautifully reflects the whole point of academic work that argues that scientific knowledge is contingent: “When some former Authors (before the Learned were so happy as to know the Sweets of experimental Philosophy) endeavored to account for the monstrous Productions in the animal World, they could have recourse to no other means to explain them, than to the then reigning Systems by which they usually explained the *Phenomena* of the natural generation of Animals...”³⁵ These are views that

³⁴ J. Parsons, “A Letter from James Parsons M.D. F.R.S. to the President, containing an Accounts of a preternatural Conjunction of two Female Children” (1748) 489 *Philosophical Transactions of the Royal Society of London* at 526 - 541.

³⁵ *Id.* at 532.

persist today: the idea that the history of science is a history of progress, and that previous generations got it wrong because they just didn't know as much as we know now. Parsons goes on to explain that the "gracious Design" ensures that all should be "good", and that conjoined twins and other monstrous children are accidents, in his theory, due to the force of compression on developing embryos. Like his colleagues, he believes his observations themselves are neutral: he takes no account of how he chooses what to observe and record, and he uses his observations to theorize from the specific to the general. Like many before him, he imports normative values into his theories: conjoined twins as "accidents", opposed to all that is "good", rather than seen as something more benign.

A major milestone in the history of the discourse surrounding conjoined twins occurred in 1832, when the French zoologist Isidore Geoffroy St. Hilaire laid out the basis of a new field, the science of teratology. The science of teratology is dedicated to the study of monstrous bodies, and Hillaire established it as a serious, legitimate pursuit for scientists and academics. Validation for a specialized study of monstrous births was based on the knowledge it could provide to the study of the human body in general. Conjoined twins in fact make up the great majority of the "major terrata" as defined in teratology, and though old beliefs about their causes persisted in some corners, particularly maternal impressions³⁶, they were predominately understood not through an accounting of external events and influences, but through an understanding based on the evidence, internal and external, of their bodies. An entire system for classifying various types of conjoined twins was developed based on the point at which they are joined, meaning that the various ways to "be" conjoined twins came to be viewed not as inherent

³⁶ Gould & Walter, supra note 26 at 152, there is a note that at the time of Serres' dissection, conjoined twins were not permitted to be exhibited in France for fear of the "production of monsters by maternal impressions in pregnant women."

in differential experiences living in particular bodies, but as being dictated by a structural specificity. This system of classification is still in use today, and so conjoined twins are not classified as more or less mobile, or more or less interdependent, but are classified according to categories of major terrata such as pygopagus, meaning posterior union of the rump, or “thoracopagus: anterior union of the upper half of the trunk. The most common form of conjoined twins (about 35%), it always involves sharing the heart.”³⁷ The words are from the Greek, are technical, sound so gosh darned scientific, and focus our attention to specific physical points on specific physical structures.

Etienne Serres was a famous French anatomist who examined the autopsy report of conjoined twins Ritta-Christina who died in 1829. Serres was interested both in the opportunity to test his natural laws of embryological development and in the question of the individuality of conjoined twins. His observations are recorded in *Théorie des formations et des déformations organiques, appliquée à l'anatomie de Ritta-Christina, et de la duplicité monstrueuse*³⁸ published in 1833. Like most biologists of the day he saw the role of biology as looking for underlying patterns in observable diversity in order to discover universal rules. Serres theories of embryology were based on three laws: (1) eccentric development: that organs form at the edge of the embryo and migrate towards the centre; (2) symmetry: that organs that become single in adults start out as double on opposite ends of the forming embryo, and then move towards the centre; and (3) Affinity: that like organs in rudimentary form are drawn to each other and fuse in the centre. Using these three laws of embryological development, Serres explores the

³⁷ “Types of Conjoined Twins”, retrieved October 15, 2003 from Zygote web site at zygote.swarthmore.edu/cleave4a.html.

³⁸ Etienne Serres, Recherches d'anatomie transcendante et pathologique. Théorie des formations et des déformations organiques, appliquée à l'anatomie de Ritta-Christina, et de la duplicité monstrueuse 11 Mémoires de L'Académie Royale des Sciences de L'Institut de France, 1832.

question of the individuality of Ritta-Christina through the observation of her organs: finding that she was the product of the fusion of two people, not merely because of the presence of two heads, but most importantly because of the presence of **single** organs where they would normally be expected. To focus on one particular organ will illustrate the reasoning: since the twins were observed to have one uterus, then the right half must have come from one individual and the left half from the other, in accordance with the theory above.³⁹ Taking the observation of the single uterus to its ultimate end, Serres determined that Ritta-Christina could have had children with their single uterus, and that those children would have had two mothers. He uses the same rules to discuss a male with **one** head and 4 legs, and argues again for a duality by noting, that according to his laws, the single brain would have come half from one twin and half from the other: one brain sharing the thoughts of two: "There is perfect unity produced by the two distinct individualities. There are sense organs, and cerebral hemispheres for a single individual, adapted to the service of two, since it is evident that there are two 'me's' in this single head."⁴⁰

But, while Serres' research makes for fascinating reading in its own right, the bottom line is this: by assessing the physical structures of Ritta-Christina, Serres purports to discover the very essence of their personhood. Serres work stands for the maturation of a principal, which we will see again in the case of Mary and Jodie: that questions of embodiment can be determined by observations of body alone. And more than this: these determinations have powerful implications for the social spaces and roles that conjoined twins can expect to inhabit. For example, by exploring the ability of Ritta-Christina to

³⁹ Stephen J. Gould, The Flamingo's Smile. Reflections in Natural History. (New York: W.W. Norton & Co., 1985) at 74. This is from an English summary of Stephen J. Gould's review of the original French manuscript.

⁴⁰ Id. at 75.

have children, had they lived, Serres not only establishes and reinforces child bearing as an important role for women to be able to fulfill, but also sets out the parameters for their relationship with any hypothetical offspring: their child would have two mothers: the essence of motherhood lying in the single uterus, with its two halves. Of course, this is no surprise, as writers such as Foucault have already warned us that discourses are linked to the socio-political contexts of the day. More than merely moving from super natural to natural spheres, from objects of religious significance to subjects of scientific study, conjoined twins can be seen right here, in the pages of Serres' report, as both the objects AND subjects of social practices and shared understanding. The bodies of conjoined twins, like all bodies, are material, yes: but they are also social signifiers and they are deeply symbolic. Deviant bodies have been used not only as indicators of what is abnormal and undesired, but also to underscore what is socially acceptable and what is not in the larger social body. As Foucault so clearly illustrated, science cannot and does not stand outside of history or culture, and it therefore necessarily inscribes profound social meanings on the subject-objects of its focus. The importance of the autopsy report on Ritta-Cristina is not in its documentation of their internal structures for future generations. The importance of the report lies in how it raises fundamental socio-political questions about the twins (are they to be read as two individuals or one? Can they fulfil the childbearing roll society expects? What would be their relationship to their children?), how it then determines the answers to the questions posed through observation of bodily structure, and finally how it serves to legitimize its own findings through the rubric of objective science.

So it is that conjoined twins can be seen as a site of a struggle both over constructs of **bodily** norms AND **socio-political** norms. As noted by Jaqueline Urla and Jennifer Terry, "The power of staking political claims through the body...rests in the assumption that bodies, like property, are real material objects whose disposition is of

great concern to society as a whole. In this way, bodies...are condensations and displacements of social relations. They do indeed enjoy the status of the real and the material, and thus become a powerful source of medical evidence and scientific knowledge as much as they become grounds for articulating political claims.”⁴¹ Harkening back to Mr. Arbuthnot’s observations above on the birth of greater numbers of males during the period he analyzed, it is clear that his work is deeply imbued with social political ideas about the role of men of the day, and not only are the ideas of men as soldiers or workers reflected, they are legitimized through scientific observation and explanation grounded in natural law itself all part of the divine plan.

Perhaps the best example of this idea in action can be seen in the discourse that surrounded Chang and Eng, the original Siamese twins, during their widespread public exhibition from 1830 to 1870, a period of great political uncertainty in their adopted home country, the United States. Chang and Eng were seen by many Americans as a real life embodiment of their own political struggles. The twins presented an opportunity for Americans to inscribe political struggles onto their bodies, and the question of their separation was thus not merely a private question between the brothers and their doctors, but a very politicized and highly public one. The band of tissue that connected them across their abdomens was variously seen as an allegory of a naturally united States, as well as an allegory of unnatural connections. This politicized discourse was not always a subtle one but could at times be highly explicit, as was seen in an 1836 handbill advertising the twin’s appearance entitled “A Few Particulars concerning Chang-Eng, The United Siamese Brothers.” Under the title was an American eagle with shield, emblazoned with “*E pluribus unum.*” In a legend on the handbill was a variation on a

⁴¹ Jennifer Terry & Jacqueline Urla, “Mapping Embodied Deviance” in Jennifer Terry and Jacqueline Urla, eds., Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture, (Bloomington: Indiana University Press, 1995) at 1-18 and 6.

famous quotation from an anti-separatist speech made in 1830 by Massachusetts's senator Daniel Webster: "Union and Liberty, one and inseparable, now and forever."⁴² Mark Twain exploited the story of the twins in a farcical essay authored in 1868, writing that the twins both fought in the Civil War "...Eng on the Union side and Chang on the Confederate. They took each other prisoners at Seven Oaks."⁴³ In the end of the essay, the twins are fighting, and "bystanders interfered, and tried to separate them, but they could not do it, and so allowed them to fight it out."⁴⁴

Lucky Chang and Eng, they also became immersed in and acted upon by a social discourse of sexual morality. Married in 1843 to two North Carolinian sisters, Chang and Eng went on to father 21 children between them. Their marriage was seen as both a triumph of monogamous models of domesticity, in contrast to polygamous customs in their homeland at the time, and as raising disquieting spectres of homosexuality, adultery, and orgies of the flesh. As Alice Dormurat Dreger notes, the primary focal point for scientific interest in Chang and Eng did not seem to be on improving their particular lives, but in protecting the well being of the *social* body⁴⁵. Dreger cites a contemporary report of W.H. Pancost, the anatomist who dissected Chang and Eng. In "Report on the Surgical Considerations in Regard to the Propriety of an Operation for the Separation of Eng and Chang Bunker, commonly known as the Siamese Twins," Pancost notes how the sexually active Bunker brothers "shocked the moral sense of the community,"⁴⁶ how it

⁴² Retrieved July 18, 2004 from Zygote web site at <http://zygote.swarthmore.edu/cleave4b.html>. Webster's actual words were "Liberty and Union, now and forever, one and inseparable."

⁴³ Fiedler, *supra* note 2 at 205.

⁴⁴ *Ibid.*

⁴⁵ Alice Domurat-Dreger, "The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins" (1998) 29 (1) *Studies in History, Philosophy, Biology, & Biomedical Science* 1 at 3.

⁴⁶ *Ibid.*

was “most immoral and shocking that the two should occupy the same marital couch with the wife of one.”⁴⁷ Pancost went on to say that the family had a duty to both science and humanity to permit an autopsy in order to inform future possible cases, thereby allowing for the correction of any other Bunkers, and that it would have been best if the twins had been separated in their life time, given “moral and even physical considerations.”⁴⁸

The apparent threat conjoined twins posed to the moral decency of the social body was a discourse that clearly reappeared in the case of Violet and Daisy Hilton, conjoined twins who lived 1911-1969. In the 1930’s, Violet was refused a marriage license in 21 states, primarily on the grounds of “morality and decency” and “a matter of public policy”, one city official in Manhattan noting, “The very idea of such a marriage is quite immoral and indecent. I feel that a publicity stunt is involved.”⁴⁹ The moral repugnancy at the possible marriage was still very much alive when Todd Browning made his film “Freaks” in 1932, featuring an appearance of Violet and Daisy Hilton. Publicity posters for the film posed several titillating questions, including “Do Siamese twins make love?” Reporters wanted to know the answer to this, as well as another pressing question: “If yes, how?”, as the mental images of Siamese twins having sex conjured the spectre of group sex, or at the very least erotic voyeurism. Violet Hilton provided a somewhat disappointing answer: “Sometimes I quit paying attention...sometimes I read and sometimes I just took a nap.”⁵⁰ Doesn’t seem like much to make a movie about.

⁴⁷ Id. at 11.

⁴⁸ Ibid.

⁴⁹ Quigley, supra note 29 at 84. Both twins were eventually granted marriage licenses, though neither marriage lasted.

⁵⁰ Fiedler, supra note 2 at 206.

Allison Pingree ties the responses provoked to the twins' desire to marry to "dramatic changes in the political, economic, and domestic circumstances of women in the early twentieth century."⁵¹ She cites an essay by Henry Carey, published in *Harpers* in 1928, in which he discusses the threat of female emancipation to traditional family life: "Feminists, note this well! It is the double-headedness of the modern American family which is causing it so frequently to split down the middle...the heads are at war with each other. The house divided against itself does not, we observe, stand."⁵² In this quote, Carey has used the imagery of conjoined twins to invoke the idea that female independence is unnatural and monstrous. As the Barkers were an embodiment of political struggles of the 1860's, Violet and Daisy Hilton could be and were read in terms of broader struggles of gender, domesticity, and power.

The idea that conjoined twins are the subject-objects of epistemological change is in essence the idea, explored in Chapter one, that the body can be fundamentally redefined as part of sociological development. Through the dominant discourses of the day, the reality of the body is not just studied, but is performatively created: a body analysed through cosmological occurrence is a body imbued with cosmological meaning in the same way that a body analysed based on its structures or contents is a body constituted by these things. The meanings given to expectations associated with the body change through social discourse, which in many cases is infused with political imperatives or animated by political needs. While conjoined twins seem always to have existed, our understanding of them and the political struggles we read into or onto them is fundamentally different today. Conjoined twins today are grounded in a primarily

⁵¹ Allison Pingree, "The 'Exceptions That Prove the Rule': Daisy and Violet Hilton, the 'New Woman,' and the Bonds of Marriage" in Rosemarie Garland Thomson (ed) *Freakery*, (New York and London, New York University Press, 1996) at 174.

⁵² *Id.* at 177.

medical context, and the possibility of surgical separation, which was not available to previous generations of conjoined twins like Violet and Daisy Hilton, is the main tool we use not just to understand them, but to manage them. The next chapter examines the modern surgical discourse in more detail, but for now it is enough to note that the power to literally deconstruct the bodies of conjoined twins and to reconstruct them anew within a “separate person, separate body” model threatens them with obsolescence. Today, we see them as something to be fixed, and we are driven to fix them at almost any cost. As stated by Leslie Fielder, conjoined twins “... are increasingly defined as patients, whose deviation is something to be corrected, rather than as in other times and other cultures celebrated, exploited, or merely lived.”⁵³

⁵³ Fielder, supra note 2 at 254.

Chapter Three: Medically “De / Re” constructing Conjoined Twins

(Contesting the Dotted Line)

Abigail and Brittany Hensel¹

Everyone here is keenly aware of the risk. There is a chance they'll have to sew Charity and Kathleen back together if they find they don't have enough vital organs to sustain them both separately. The Lincolns decide to be optimistic. They buy a second car seat.

- Dateline NBC News: Separate Lives²

Since their birth, Baby A and Baby B have been literally inseparable, within arms' length of one another whether they're fighting over a favorite toy or giving each other an impromptu hug. After the surgery, they hopefully will be able to embrace not only each other – but also their freedom as separate individuals.

-Press release from Children's Hospital of Los Angeles³

¹ Image courtesy of the Hensel Twins Web Site at <http://www.members.tripod.com/~Midnightwill/twins.html>.

² Dateline NBC News (February, 2001), Separate Lives, retrieved from MSNBC web site at <http://www.msnbc.com/Fnews/F526838.asp?cp1=1>.

³ “Conjoined twins – part of a set of triplets – Separate at Children's Hospital Los Angeles during Milestone surgery” press release September 11, 2003, <http://www.childrenshospitala.org/1855.cfm>

In the late 20th-early 21st century, we view conjoined twins from a perspective that sees them as the result of a developmental abnormality, which we can repair through radical surgical intervention. This is obvious to any one who reads the newspaper or logs on to CNN.com with any regularity. Advances in technology and surgical technique have made separation a possibility in more and more cases, and the information age and mass communication has let us watch from afar as the medical dramas unfold in hospitals around the world. We believe that through medical technique and technology we can help many conjoined twins achieve the telos of normal, individual development. In this view, the biological variation twins represent can be and should be managed. Vast surgical and technological advancement means medicine more and more becomes the primary acceptable perspective to employ in understanding and managing physiological anomalies like conjoined twins. As this chapter will illustrate, the way of being a conjoined twin today is to be the sum of a set of body parts, and potential site of surgical reconstruction: and by reading conjoined twins in this manner we avoid the troubling metaphysical questions about the nature of individuality and the stability of boundaries between selves and others that conjoined twins seem to embody.

Today's conjoined twins exist squarely under the spotlight of the "medical gaze" as contemplated by Foucault in *The Birth of the Clinic*⁴. In Foucault's concept of the medical gaze, the ability of hospitals to effectively and efficiently scan large numbers of bodies has lead to the ability to draw conclusions about disease through observation of structures alone. Access to internal structures through autopsy and dissection has allowed the gaze to penetrate deeper than ever before and observation has moved beyond external evidence. Disease, affliction, and many forms of deviance have thus come to be located **in the body itself**, rendering the patient relevant primarily as a corpus, to be measured

⁴ Foucault, Michel, *The Birth of The Clinic: An Archaeology of Medical Perception*, (New York: Vintage Books a Division of Random House Inc. 1994).

and corrected, and not much more. With disease rooted in the body, and more often than not in organs and soft tissues beneath the body surface, doctors only can confirm the existence of illness through the ability of the gaze to penetrate the body, thus decreasing the importance of any correlating subjective experience of it from the patient, and privileging medical expertise. Given the large numbers of sick that can be seen in a hospital or clinical setting, the medical gaze also allows doctors to abstract from numerous individual patients to humanity as a whole, making any unique cultural or social traits of a particular person under treatment of little import, separating bodies from other elements of being and fixing them wholly to the expertise of doctors.⁵

For conjoined twins, being under the medical gaze has meant an increase in the focus on their bodies and an absence of interest in the nature of their embodiment: while observed behaviours or autobiographical accounts were part of understanding conjoined twins in more ancient times and helped provide clues as to the nature of their individuality, they are not relevant in modern medical discourse. Watching a documentary about the surgical separation of 3 year-old conjoined twins, David Clark and Catherine Myser note: "In a documentary that is crowded with every manner of medical specialist, the absence of a child psychiatrist is revealing, for it points to, among other things, a hierarchical exclusion of non surgical concerns even *within* the discipline of medicine."⁶ Despite the increasing number of conjoined twins undergoing separation

⁵ The increasing influence of the medical gaze in the 20thC is partly manifest in the increasing organization of physicians seen through the increased founding of professional organizations, for example the American Medical Association in 1876, The Association of American Medical Colleges also in 1876, American College of Surgeons in 1913, the American Academy of Pediatrics in 1930 and the Teratology Society in 1960. Increasing specialization within medical science continues to consolidate the medical gaze through new expert discourses within the overall discipline.

⁶ David L. Clark, & Catherine Myser. "Being Humaned: Medical Documentaries and the Hyperrealization of Conjoined Twins", in Rosemarie Garland Thomson (ed.) Freakery: Cultural Aspects of the Extraordinary Body, (New York and London: New York University Press, 1996) at 348.

surgery, Alice Domurat Dreger's search for results of psychological tests on conjoined twins could locate only one report.⁷ The emphasis now is on discovering the degree of fusion of internal organs and envisioning how they may be divided: we rarely ask **whether** to separate a specific set of conjoined twins anymore, but we always ask **how**.

Advances in computer tomography, in-utero diagnostics, and magnetic resonance imaging allows doctors to see where they could not before, in a way no less dramatic than the opening of corpses must have been to early anatomists. These new technologies and techniques provide the ability to envision separation surgeries that would have been outside of the realm of imagination in earlier times, and mean greater possibility for surgical intervention. This is clearly illustrated by the dramatic rise of separation surgeries performed on conjoined twins: Where two separation surgeries are recorded in the entire 19th century, in 1866 and 1881⁸, by 1950, there were reports of 16 surgical separations with 13 operative survivors.⁹ The drive to separate has continued to escalate exponentially through the 20th century: by 1964, at least 26 surgical separations had been attempted¹⁰, and by 1998 the count was roughly 200¹¹. Surgical success or partial success rates, defined in terms of the numbers of survivors, have also increased exponentially, with only a handful of survivors noted prior to the 1950's. The 20th century also marked the first known instance of intentional surgical sacrifice of one conjoined twin to "save" another, with the first intended death of one conscious twin occurring in 1955. By 1994 it

⁷ Domurat-Dreger, Alice, "The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins" (1998) 29 (1) *Studies in History, Philosophy, Biology, & Biomedical Science*, 1 at 13.

⁸ Gould, George M. & Walter L. Pyle, *Medical Curiosities*. (Adapted from *Anomalies and Curiosities of Medicine*: Original copyright 1896 by W.B. Saunders) at 156.

⁹ Raffensperger, T., "A Philosophical approach to conjoined twins", (1997) 12 *Pediatric Surgery International*, 249 at 249.

¹⁰ Domurat-Dreger, *supra* note 7 at 5.

¹¹ *Ibid.*

had occurred at least six times, and by 1996 there were at least nine intentional sacrifices, mostly in the United States: notably, in the large majority of those cases, the twin chosen to survive did not.¹²

The medical discourse surrounding separation drives the very way in which the bodily structures of conjoined twins are understood and the related goals of surgery are framed. Dominant notions of what is normal influence how one interprets what is observed, and in a biological context what is important and what is not important is underpinned by the medical science of the day. Medical science thus acts as its own alibi: it establishes bodily norms through the medical gaze, performs the measures against it, and then legitimizes its actions through the imperative of science, and the “cultural prestige of medical learning”.¹³ Thus, for conjoined twins, operative success is measured in terms of progress towards normalized, biological models of individuality over any other factor. The primary goal of surgical intervention is separation, and separation is geared as much as possible to the production of two physically distinct persons. “Success” is discussed almost solely on these terms, and as a result, a survey of medical literature reveals that “successful separations” include those that have left twins more severely compromised, either physically or intellectually, than they may have been had they been left conjoined¹⁴ Of course, “successful” surgeries also include those where one

¹² *Id.* at 17.

¹³ Lacqueur, Thomas. Making Sex: Body and Gender from the Greeks to Freud, (Cambridge, Mass.: Harvard University Press, 1990) at 115.

¹⁴ Recent examples include Patrick and Benjamin Binder, who were born and separated in 1987. The surgery resulted in severe neurological deficits that left them institutionalized. See Christine Quigley, Conjoined Twins: An Historical, Biographical and Ethical Issues Encyclopaedia, (London: McFarland & Company, 2001) at 18. Another example from Quigley at 154 is Ganga and Lamuna Shrestha, born May 9, 2000, who were fused at the skull but were in apparently good health. Separation surgery at 10 months of age left Ganga with vision problems, unable to eat solid food, and with signs of neurological impairment.

twin dies, so long as the other survives¹⁵. The underlying imperative of separateness as more important than life is underscored in a statement by the father of conjoined twins Katie and Ellish, who, despite the death of Katie, is constrained to justify the operation by remarking on Ellish's improved quality of life, seen in that "She's free of being joined to another human being".¹⁶

The ability to penetrate the body deeper than ever before through technological advance influences the grounding of both the nature of conjoined twins and the **solution** to the problem they pose wholly within their structures. For example, in a show of breathtaking machinery in a broadcast on BBC2 Thursday, October 19th (2000), the special program "Conjoined Twins" interviewed surgeon Ben Carson who used a new virtual workstation to plan a 1997 separation surgery on conjoined twins joined at the head. The workstation consisted of MRI images of the brains of conjoined twins, which were fed into a computer to create a 3D replica, allowing the surgeon to rehearse the operation, and to uncover things not before visible in advance of surgery. Ben Carson says "There came a point when looking at their brains it appeared there was no plane and that we wouldn't be able to get them apart - except that I knew from having done the virtual surgery before, that there was a plane and I remembered where the plane was. So I began to tease in that direction and eventually the plane showed itself."¹⁷ The Narrator then comments: "The technology had revealed something his own eyes would not have seen. Dr. Carson went on to complete a unique separation."¹⁸. Here, the doctor relies on

¹⁵ The implication that some babies are better off as dead singletons than as live conjoined twins is an idea that we will see resurface in the legal reasoning in the case of Mary and Jodie, discussed in Chapter five.

¹⁶ Shildrick, M., "This Body which is not one: Dealing with differences", in Mike Featherstone (ed.) Body Modification, (London: Sage Publications 2000) 77 at 85.

¹⁷ "Conjoined Twins", broadcast on BBC2 9:00 p.m. October 19th, 2000.

¹⁸ Ibid.

the technology to reveal the truth of the bodily nature of his patients, and once that truth is revealed, the surgical path suggests itself. In this view, it is the evidence of the twins body and the observable truths about their organs that seem to make the surgical determination, not the doctor himself.

While the bodies of conjoined twins could be viewed as continuous and intermingled, medical discourse interprets some structures as shared, while others are seen to clearly “belong” to one twin or another. These interpretations are not benign, but can have significant influence on surgical outcomes, for structures that are seen as clearly belonging to one twin or another are generally left to that twin, while those that are seen as “shared” must be “allocated”. Because many of the bodily structures of conjoined twins cannot simply be “halved” in the process of separation surgery, decisions about “who gets what” and how to allocate organs and structures must be taken: sometimes through reference to pre-surgical diagnostics, sometimes right in the middle of the surgery itself; but in all cases, decisions taken are grounded in medical perspectives, with reference to normal physiology. The implication can mean very differential “qualities of life” for each twin. Imagine the impact on twin B of a surgical discussion that includes a statement such as “the vagina and anterior ectopic anus appeared to belong to [twin A],”¹⁹ or “the parents agreed that although every attempt would be made to save both children, shared organs would be given to [twin A].”²⁰ As noted in one report following a surgical separation of conjoined twins as it occurred, “Surgeons will have to make difficult, spot decisions about who gets what. The decisions they make here today will affect these girls for life.”²¹ Or: “Although it might seem unfair that Duan, who will also

¹⁹ T. Raffensperger, “A Philosophical approach to conjoined twins”, (1997) 12 *Pediatric Surgery* at 252.

²⁰ *Id.* at 252.

²¹ NBC Dateline, *supra* note 2.

get the third leg, also gets the most of the bladder, these decisions are made on purely medical grounds. The point is not to simply divide shared organs, but to give the organ to the twin in whom it has the best chance of surviving and growing. This depends most critically on the nerve and blood supplies.”²² This is fascinating indeed, again illustrating how doctors do not always clearly acknowledge the choices they are making, but hark back to the construct that the anatomy they observe and interpret is objective, neutral truth.

This idea is especially manifest in the diagnosis and designation of a “weaker twin”. Medical justification for proceeding with surgery where one twin is likely or certain to die, and/or for making specific decisions on the allocation of structures, finds its basis in this diagnosis: the designation of twins as “weaker or stronger” in comparison to one another. This notion of a “weaker” and “stronger” twin is well canvassed: according to medical literature, “monozygotic twinning increases the prevalence of congenital defects, and conjoined twins have an even higher rate of associated anomalies. Thus, in almost every instance of conjoined twinning, one twin will have additional congenital defects and will be smaller and weaker than his or her mate.”²³ It’s a small leap from there to: “Thus, based on the observation that in almost every case of extensive conjoining one twin will have a greater opportunity for a relatively normal life, should we not provide that twin with shared organs such as the rectum, genitalia, and limb? This decision must be made prior to the operation so that even the initial incision favours the stronger twin with tissue for wound closure.”²⁴ As Alice Dormurat Dreger notes: “Increasingly, medical professionals involved in sacrifice surgeries also seek

²² D.L. Clark & C. Myser, “Being Humaned: Medical Documentaries and the Hyperrealization of Conjoined Twins” in Freakery: Cultural spectacles of the extraordinary body, (New York, U.S.A.: New York University Press, 1996) at page 345.

²³ Raffensperger, supra note 19 at 251.

²⁴ Id. at 251.

psychological comfort in the rationalization that the inherent anatomy is the determining factor in the decision to kill one twin.”²⁵ She cites a study by pediatric surgeon J. A. O’Neill Jr. wherein the doctor notes that he and his team rely on this astonishing hypothesis: “the operation itself does not actually determine which twin will survive, rather this is determined by the twins’ condition before surgery even commences.”²⁶ We can see certainly see the potential impact of such a construct on possible surgical outcomes for the “weaker twin”.²⁷

More than a hegemonic narrative of bodily norms, the push to separate conjoined twins is not just about what is best for conjoined bodies, it remains a narrative infused with political meaning that seeks what is best for the social body, as seen in the discourses surrounding Chang and Eng Bunker or Violet and Daisy Hilton presented in chapter two. Decisions about surgery to correct conjoined twins today are made through medical ethics, which increasingly focuses decision making based on “how we should be” as opposed to “what we should do” about a particular condition or bodily state. The designation of a weaker twin and decisions about how shared organs should be divided reflect these underlying political narratives that emphasizes the importance of being able to fulfil social expectations: the stronger twin is expected, through surgery, to be able to take his or her place in society and be productive in a way that he or she could not without the surgical correction. For this reason, discussions of surgical separation examine, for example, how to ensure the division of reproductive organs so that at least one twin can have children of thier own. As an element of “quality of life”, reproductive capacity is given greater importance than, in some instances, life itself, as seen in the

²⁵ Domurat-Dreger, supra note 7 at 19.

²⁶ Ibid.

²⁷ Again, the medical construct of the weaker twin is an idea we will see resurface in the legal reasoning in the case of Mary and Jodie, explored in Chapter five.

following: “...(Dao) has only one leg, a partial bladder, and half a pelvis....but today’s procedure will leave her with a complete set of reproductive organs. If she survives...she will be able to have children when she grows up”²⁸ The alibi for decisions is often grounded in the observations of the anatomy, but the choices, framed in medical ethics as matters of “quality of life”, are often political: in this case reinforcing the primacy of gender and the importance of childbearing.

Of course, the weightiest imperative of “how we should be” is the core assumption of individuality and the belief that it requires physical separateness to be intelligible. Separation surgery ensures the reproduction of this socio-political norm that conjoined twins seem so manifestly to contest. Uniqueness and separateness govern everything: we cannot make sense of society without a distinction between selves and others that the idea of individualism allows us to make, and the threat to this model posed by conjoined twins is socially intolerable.

The discourse is so forceful that we use it to make medical decisions about conjoined twins even though they do not easily fit into our system for doing so. The idea of autonomy is at the very basis of modern day bioethics, employed as one of the highest principles to inform medical decision-making. Patient autonomy in medical ethics rests on the liberalized ideal of personhood and contemplates a subject who is rational, independent, and decidedly in control of his or her body. A particular patient’s best interests and/or an assessment of the potential for his quality of life often refer back to the very same elements that are present in the meaning of patient autonomy: it is in a patient’s best interests and enhances his quality of life if he is rational, independent, and autonomous. The closer he can come to having a thinking brain in control of one body,

²⁸ Clark and Myser, supra note 22 at 347.

the more he can achieve autonomy, and be able to be independent, able to freely exercise choice, and give expression to will without hindrance. The idealized patient becomes a reference point for the choices we make and the meanings we give to “quality of life”, and thus becomes a normative patient in medical decisions: quality of life is found in seeking to maximize surgical outcomes that produce rational, independent patients in control of their own bodies to the greatest extent possible.

But, this framework for making medical decisions could not and can not help us if, for example, Laleh and Ladan Bijani, the adult Iranian sisters joined at the head, had opposing views of surgical separation. The problem gets more perplexing when we consider not just issues of separation, but other issues where shared interest in single body structures might exist. How can liberal bioethics of patient autonomy assist in a decision where adult conjoined twins sharing a single uterus have differing views on the treatment of a pregnancy? How could it assist where two heads sharing one single body disagree on something as mundane in our regular lives as vaccination, blood donation, or even the removal of a shared tattoo?²⁹ It cannot, though we continue to employ it in making real decisions with real impacts on behalf of conjoined babies. I suppose, where medical disagreements arise between conjoined adults, they could always appeal to the courts for assistance.

²⁹ The examples are of course hypothetical. My research has turned up no instance where conjoined twins have been unable to agree on decisions concerning their treatment. Perhaps because of the very nature of living co-dependently, conjoined twins are well equipped to reach joint decisions and acceptable compromises.

Chapter Four: The Law of the Singular Self

(Objection, Your Honour)

Illustration of Conjoined Twins¹

Jodie may live, but only if Mary dies. Doctors want to operate, but the girls' parents prefer to trust the will of God. Thus, the fate of conjoined twins from Eastern Europe is in the hands of doctors and appeals court judges, who are struggling with the ethical issues. Speaking of Mary, the twin whose less-developed body depends on her sister for oxygenated blood, Lord Justice Henry Brooke asked Tuesday: "What is this creature in the eyes of the law?"

-Reporter quoting Henry Brooke LJ²

In the previous chapters we have seen how, together with ideas of normal physiology, the cultural imperative of individuality animates our understanding of the bodies of conjoined twins, the relationships inherent in their structures, and the appropriate medical treatment for them. We have also explored how our beliefs about the nature of individualism and its relationship to bodies is contingent on specific historical contexts: we have seen how conjoined twins have historically been understood in a more complex

¹ Image courtesy of the National Library of Medicine at <http://www.nlm.nih.gov>.

² Reported by Robert Barr in "Ethical dilemma with conjoined twins", Associated Press London (9/5/2000, 2:51 p.m. CDT).

manner than the modern view of two selves abnormally joined that are appropriate subjects for medical correction. With these points of reference to start, we can make the next step: we can see how the frameworks we build from our understanding of bodies and our concept of individuality have influence beyond the obvious. The normative physical body and embodied individual don't stop at mediating how we understand the relationship of self to body, or even how we understand the physical relationships between our own bodies and those of others. Our belief in individualism and our understanding of it, including the idea that inherent within individuality is a bodily separateness, is a powerful cultural meta-narrative that circulates notions and values about how we should order our political, economic, and social relationships. One man, one vote. One man, one wage. One man plus one woman is the basis for a traditional family. And of course, the meta-narrative of individualism has a profound impact on the ordering of legal relationships and the way we articulate legal principles to be governed by.

Liberal thought, founded on the basis of Kantian individualism, remains the dominant philosophical framework for the modern western world. Liberal political philosophy is reflected in and permeates the legal system. Law is ordered in accordance with the precepts of liberal thought, including the liberal subject, who is above all classically individual: morally autonomous, and physically single. While we increasingly recognize collective interests and collective rights, the concept of legal "collectiveness" still requires a group of individuals who may share some important trait, but can and ultimately must stand alone in order to enjoy the rights they may have or pursue as a group. It is for each member of a collective to decide individually whether or not to pursue or assert rights recognized in the collective, and the individual right to assert an identity separate from the collective is paramount. Even in the predominate academic

writing that explores the characteristics of the powerful archetypes of Kantian liberal individuals and seeks to contest them will not cross a very basic line: A western world “subject” may or may not be male, may or may not be black, may or may not be old, young, gay, disabled, or any other number of contestable categories we have grown to place people in, but our subject or subjects is or are always, **always** single at the end of the day.³

Law rests on this basis, with the individual as the most basic unit of legal analysis. Law places restrictions on individuals and enshrines what they can do. Legal discourse proceeds from an analysis of the various interests, rights, and/or obligations with respect to individual parties: a rights bearer in legal rights based discourse is necessarily an individual. Even the basic notion of equality before the law requires that there are severable parties who can be equal to one another. So imbued is law with the concept of individualism, it creates legal fictions, such as the “corporate body”, in order to give separate, severable “legal personality” to things that cannot intuitively be seen as individuals. Law must create separate things that aren’t inherently reachable by individualizing law. It therefore constitutes us as *legal* subjects in the only image that it knows how. Legal subjects are individual subjects, and individually is pretty much the only legal way of being. Because legal subjects must be individual subjects, their rights and obligations can only be articulated and analysed separately, and this of course is what allows analysis of legal rights in relation to other individuals. Law has to reduce inter-relatedness and interconnectivity in order to allocate responsibilities and rights. We accept this because it makes cultural sense, and we talk about “my rights” or “your

³ Indeed, this seems to me to be the very basic challenge in much of critical theory in the areas of gender, race, and now, queer theory. At the end of the day, these theories seek to advance the interests of so called marginalized groups, like women for example, but can not come to terms with the fact that each member of that group has a right to assert her own individual identity that may be quite at odds with attempts to advance the interests of the whole.

rights” without being the slightest bit aware that the effect of the framework is to reinforce the idea that we should not stand together and must naturally stand apart.

Where law is required to make decisions in situations that are appear to be inherently relational, such as those impacting corporations, families, or even pregnant women and their fetuses, law is ill equipped to cope: it has difficulty undertaking any sort of relational analysis, but favours the establishment of competing rights within individual units of legal consideration. Cases that could have a broad impact on a group or groups of people must generally be brought by one individual, and we naturally come to accept the individualizing narratives created, as, for example, when one poor man suffering from a widespread harm takes on a complex multi-national corporation, each as one equal legal unit. The legal need to sever us can create and fuel further legal crises that lead to broader culture crises: The abortion debate, for example, is primarily animated by the question of whether or not a fetus is a separate person from its carrier, and at what stage it may or may not become one. The discussion has the appearance of an objectively valid question answerable in science and resolvable through legal analysis, but in fact it has only arisen in the first place because law cannot analyze a mother-fetus in any other way but to separate them, their interests, and their legal rights.

Our core concepts of what individualism entails not only carry basic assumptions about physical separateness, they are also embedded with particular views about both the mind-body relationship and human behaviour, and these, too, as underpinnings of individuality, in turn underpin legal reasoning. The body as a machine in relation to the thinking mind, and the mind as the seat of personality and therefore the site of that intangible thing that makes us all unique (or individual)⁴, influence the way law resolves

⁴ This idea is still the dominant view, but may be shifting as scientific study of genetics and its impact on behaviour and temperament continues. We may be at the beginning of

issues around vegetative states, the various possible types of death, or the self determination rights of children or others viewed as possessing less than normal adult rationality. Law severs body and mind when it distinguishes between brain death and bodily death, or when it reduces the right to self-determination for otherwise healthy bodies because minds are found to be compromised in the normative sense. In terms of human behaviour, the legal perspective on individualism and its role in decision making presumes that not only are human beings self-contained, but they are also primarily self interested: for in conducting legal analysis, a Court must almost always emphasize the self interest of each legal subject. As an example, take any number of decisions on live child sibling-to-sibling organ donation. In the vast majority, each child's interests are legally analyzed separate from the interests of his or her a family, and there is very little legal recognition of the possibility that a child might choose to be altruistic⁵. The best interests standard in any application refers to the best interests of the individual legal unit under consideration: a patient's best interest, for example, is rarely analysed with reference to a family's best interests or a community's best interests. Legal reasoning and jurisprudence like this re-enforce individual boundaries, draw focus away from shared interest or from relationships, and add further fodder to the cultural norm that at the very end of the day, we really have no right to have an interest in others. We can, do, and must ultimately stand alone: physically, legally, culturally.

an understanding of some elements of "being" as rooted in our DNA. As of yet the impact this discourse will have on the traditional view of mind-body relationships or on legal discourse is not clear, though I would bet the prospect of clones will present an interesting new problematic.

⁵ See, for example, James Dwyer and Elizabeth Vig in "Rethinking Transplantation between Siblings", (1995) 25 (5) Hastings Center Report 7. The authors present several cases, and argue that the discourse of the best interests standard, focused as it is on an individual child, misdirects attention from the real problem of grasping the implications of particular relationships in cases of live familial organ transplantation. See also *Curran v. Bosze* 141 Ill 2d 473, 566 N.E.2d 1319 (1990), wherein the Illinois Supreme Court ruled that it was not in the best interests of 3 ½ year old twins to donate bone marrow to a brother they barely knew.

Harkening back to the theoretical foundations explored in the opening chapter of this thesis, we now have a much more tangible sense of what Foucault had in mind when he observed that Law is itself a justificatory discourse that operates more like a normative control than a less pervasive, purely regulatory control. In this sense, law is not so much a punitive force as it is a disciplinary force, as contemplated by Foucault and discussed at length in his works⁶. And, as noted in chapter one, its effects are not benign but have real consequences.

Beyond law as a normative force, law can be seen to act upon us as a governing force, in the sense that law controls us by actually defining us. Law categorizes us into segments, problematizes certain of those segments once they have been called into existence, and then proffers solutions to their condition. Law, as an expert discourse, governs not in the classic sense, but in the Foucaultian sense of a social practice that controls things by creating them in the first place. Legal subjectivity is about a certain way of being: it is about being a uniquely analyzable social unit with distinguishable rights. While we believe that our legal system protects us by giving us rights, the legal rights are themselves instruments of power, or techniques of normalization. For our rights to have meaning, we must conform to cultural imperatives inherent in being rights-bearing individuals: the possibilities for who we wish to be or can be are restricted. If we do not conform to the dominant conception of what human beings are by nature, then we are disciplined, in the Foucaultian sense, by being labelled deviant and then subject to some form of cure or control. In the legal arena this is of course obvious in the histories of such things as criminal sexual deviance, or legal insanity, but through core normative assumptions about the essence of human nature, including the assumption of

⁶ See, for example, Michel Foucault, Discipline & Punish /The Birth of the Prison, (New York: Vintage Books a division of Random House Inc. 1995).

individuality, the scope is much wider and the impact much deeper. For Mary and Jodie Attard, their legal rights could only be coherent and implemented if they were severed, in the strictest sense of the word: and of course in the end, the disciplinary force of the individualizing legal rights based discourse was to leave poor little Mary dead.

Foucault was highly critical of liberal rights based societies because he saw this very problem: rights, particularly legal rights, do not necessarily counter-balance the effects of real power. Our legal system does not protect us from itself, as it were, and it also does not protect us from the effects of other disciplinary discourses outside of it. In *Discipline and Punish* (1995), he traced the shifts in sites of power from power vested in the state to power below the level of the state, residing in emerging disciplines of the 17th to 19th century, such as psychiatry, education, and of course medicine. These disciplines produced and still produce normalizing discourses which function as a disciplinary power, unimpeded by rights designed to limit the power of the state. Foucault illustrated the disciplinary force of medical science in *Birth of the Clinic*⁷: through the practice of medicine, clinicians and physicians have the power of diagnosis and treatment, defining diseases as deviance, and locating them within bodies. Their attention to deviant bodies has the effect of making body-subjects become body-objects through the power of diagnosis and treatment. Both law and medicine, in Foucault's conception, are disciplinary forces that control people through surveillance⁸, and through the scrutiny of many a body of knowledge is established: "truth" emerges from our institutional surroundings. Through normalizing standards within those bodies, law and medicine

⁷ Michel Foucault, *The Birth of The Clinic: An Archaeology of Medical Perception*, (New York: Vintage Books a Division of Random House Inc. 1994).

⁸ Foucault, *supra* note 6. While Foucault's work in *Discipline and Punish* focused on the ability of law to survey many through the prison, case law itself can be read as a long history of surveillance that builds up a specialized body of knowledge which is then used to manage those who come before the court.

manage and correct deviation by identifying it in the first instance, and providing the means and the measure of correction.

Pushing Foucault a little harder through the concept of governmentality, and linking back to our discussion of law, we can see how chillingly far **medicine** as a disciplinary discourse can go in its reach, by framing or helping to frame legal issues. Certain questions and answers arise in law because of how medicine acts on our bodies, and while the actual bodies may be the physical site of medico-legal control, the force and effect of the disciplinary discourse goes beyond our structures and delves into the very basis of who are we. The power of medical discourse is amplified and made all the more material through legal discourse: because law is a particularly special discourse in our world, as it is able to reach in to so many areas of our lives that are not as readily accessible to other disciplinary discourses. It has a primary role in facilitating many other disciplinary discourses. For example, in recent rulings of the Supreme Court of the United States⁹, the legal limits of disability were found to be within the control of medicine through the determination that physical conditions that are correctible are not disabilities under the Americans with Disabilities Act.¹⁰ Law allows medicine to give it real meaning and real effect. The potential power of the intersection of medical and legal discourses can be seen thus: while medical discourse can define death, it can not order the pulling of the plug: But law can, and does. The particular interplay between law and medicine is thus an especially powerful force: Medicine provides advice and evidence which ground and legitimize legal analysis, and the force of law in turn can amplify the force and effect of medical findings. Arguably, no other site within our modern societies allows for the level of intervention into our lives as the place at which law and medicine come together.

⁹ Sutton v. United Air Lines, Inc. (97-1943) 527 U.S. 471 (1999).

¹⁰ Americans With Disabilities Act of 1990.

Our system of law allows and indeed often requires input, in the form of expert evidence, from other disciplinary discourses. Ultimately, law uses its special place and special force to enforce the medical view about medical states and medical problems, and what should properly be done with them. Law in action defers to medical opinion: medical opinion and associated expert testimony opens new spaces in law for it to fill up with dominant ideologies including the hegemonic discourse of individuality. Law not only allows but facilitates the regulatory impact of other disciplines than itself: Law legitimizes other discourses of normalcy and of individuality in our society, and especially that of medicine. Law, like medicine, is therefore not only determinative but productive, with power in not just the legitimation of other discourses but also in the ability to fundamentally create and recreate us in ways that affect our very experiences of who we are. It is normative and normalizing, and through defining medico-legal categories like insane, brain dead, or even the simple categories of doctor and patient, who each have distinct legal obligations and rights with respect to each other, law and medicine restrict the possibilities of being that are open to us.

The assumption of individuality, which lies at the very heart of our world and is rarely contested as anything but a natural way of being, is no different from any other normative idea about what human beings are. Like any other grouping or box into which we sort ourselves, individuality is a made up category in our culture. It just happens to be an all-important one, and one from which deviation can scarcely be imagined, let alone tolerated. Ian Hacking perhaps explained it best: in his essay "Making Up People", he uses a concept similar to Foucault's conditions of possibility, exploring the possibilities for personhood in the idea of "making up people" through "dynamic nominalism", which conceives of who we are as based not only on what we do, what we did do, and will do, but also what we might have done and may do. Using examples of new categorizations of

people that emerged over the 19th and 20th centuries, such as those with multiple personality disorder or homosexuality and the category of “gayness”, Hacking argues that the possibilities for personhood are inexhaustible, but also are bounded by the specific social context in which a self exists: “Making up people changes the space of possibilities for personhood”¹¹. To draw on Hacking’s own use of Sarte, “absolute, unthinkable and undecipherable nothingness”¹² is where we are when we try to conceive of an existence other than an individual one within the liberal framework of our modern society.¹³

Unfortunately, the problem associated with any norm, including medical or legal ones, is that it cannot be intelligible in every situation. If most norms can be thought of as emerging from the middle, as elements of the idea of average, they have greater and greater difficulty making sense of or even existing as they move further away from their archetypes. Conjoined twins are a perfect example. As seen in chapter three, we use medical science and the yardstick of normal biology as the tools to help us understand them, with arguable success. But the main point here is that no matter how we slice it, or them, conjoined twins are legally unintelligible; and by challenging the coherence of medical and legal individuality, they render it an unstable concept, no longer firmly rooted in nature.

¹¹ Hacking, Ian “Making up people” in Thomas Heller et al. (eds.) Reconstructing Individualism (Stanford: Stanford University Press, 1986) 222 at 229.

¹² Id. at 232.

¹³ Hacking’s essay raises one other interesting example of challenges to normative individuality in the form of multiple personalities, but he does not directly explore the clash between multiples and individualizing society. Interesting implications, however, are present in the classification of multiples as a mental illness and treatment aimed at eliminating multiple personality or consolidating multiple personalities into a single identifiable personality.

Mary and Jodie were certainly not the first conjoined twins to run up against the law and confused it almost to the point of gibberish. St. Hilaire records a case decided in Paris in the 17th century in relation to a “double headed monster” who killed a man. The monster was condemned to death, but was not executed on account of the innocence of one of its component halves¹⁴. While this case occurred at a time when the understanding of the nature of conjoined twins was more fluid than the modern one of severable individuals, as seen in chapter two, and as echoed in the notion of “component halves”, law still apportions out responsibility and accountability individually, separating the halves one from the other for the purpose of legal analysis, and ultimately concluding upon a sentence it can not possibly carry out within the framework used. Several 20th century and even 21st century cases of conjoined twins seeking legal marriage are clearly bound up in individualizing discourses of marriage, with proposed unions posing challenges to the legal definition of bigamy¹⁵. Better still is the story of legal incomprehensibility involving the famous Siamese Twins Eng and Chang Bunker: at one point in their lives they frequently disagreed with each other so vehemently that a peace bond was put on the brothers to stop them from hurting each other¹⁶. I could find no report of how effective this peace bond was in resolving the issue, but it amuses me to consider the ways in which it could possibly be enforced.

Once conjoined twins are medically determined to be separate individuals, and then in turn separate legal individuals, they have distinct individual rights. But, the rights they have as legal individuals cannot always be exercised or enjoyed as physical

¹⁴ C.J.S Thompson, The History and Lore of Freaks, (London: Senate, 1996) (First published in 1930 as The Mystery and Lore of Monsters London: Williams & Norgate, London) at 126.

¹⁵ Ibid. As recorded by Thompson, The Bohemian sisters raised this debate in 1910, the Hilton sisters raised it in 1934.

¹⁶ Leslie Fiedler, Freaks: Myths and Images of the secret self, (New York: Simon and Schuster, 1978) at 217.

individuals. For example, one twin's right to be free cannot be enjoyed if another has lost that right through a criminal act. Totally aside from the question of bigamy, one twin's right to marry would be difficult if the other insisted on remaining alone. One's right to privacy, if such a legal right exists, cannot be exercised to make one's conjoined twin go away. Even the freedom to make decisions about something as dull and boring as disagreeing on whether to park illegally illustrates the problematic: Conjoined twins fail to live up to the telos of the perfect legal individual.

Any case of conjoined twins in court could be a perfect poster child for a new understanding of the admonition of "bad facts, bad law", in the sense that facts can be a good or bad fit for the way we have ordered our world. We use law that might work perfectly well for **us** to decide about **them**. The result is unintelligible, no matter how well written it is or learned the author. Conjoined twins **SHOULD** confront us with the instability of the legal or even individual subject, yet, we continue to use individualizing discourses to resolve issues they pose and when we do, as we will plainly see, we produce nonsense.

Chapter Five: A Lawful Killing

(Contesting the Murder of Mary Attard)

Artist's impression of Mary and Jodie
Widely published August – September 2000¹

"The reality here - harsh as it is to state it, and unnatural as it is that it should be happening - is that Mary is killing Jodie. That is the effect of the incontrovertible medical evidence and it is common ground in the case. Mary uses Jodie's heart and lungs to receive and use Jodie's oxygenated blood. This will cause Jodie's heart to fail and cause Jodie's death as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs?"

- Ward LJ
Re A (Children)(conjoined twins: surgical separation) [2000] 4 ALL ER 961 (C.A. Civ.)²

"My Lord, the responses that Mary shows are certain stereotype responses that we can observe as doctors, but it is how you interpret those responses which matters"

- Evidence of neonatologist cited by Ward LJ³.

Turning finally to Mary and Jodie, we can see how the discourses of law and medicine, underscored by the cultural imperative of individuality, come together and act upon them, defining them and problematizing them, both medically and legally, in a very specific way and with very specific, and dare I say highly predictable, results. With the backdrop of the previous chapters, we can read the decision of the court with a different perspective: not looking for the technical legal principles, nor seeking the appropriate

¹ Can be seen at <http://edition.cnn.com/2000/LAW/law.and.health/09/22/britain.twins/index.html> ; last accessed July 12, 2004.

² *Re A (Children)(conjoined twins: surgical separation) [2000] 4 ALL ER 961 (C.A. Civ.)* at 1016.

³ *Id.* at 984.

legal or moral grounding, but from a perspective that uncovers the core basis on which the legal issues were found and calls into question the basic assumptions behind the framework used to make the legal rulings. When we read the decision from a starting point that sees contingency in physical states that are medically defined, and questions the core assumptions inherent in ideas about legal personhood, the dicta in the case looks less like the expounding of legal rules and more like a performance by a contortionist, with the physiological and legal standards we so readily accept twisted and pulled beyond common sense and bent out of recognizable shape. As we will see, the determination, that surgical separation could lawfully be undertaken against the parent's wishes and notwithstanding that it would cause Mary's death, was not achieved easily in the face of the law. It required a foundation of specific medical evidence to ground it, and even then needed significant breaking of new legal ground. Critical analysis of the court's decision illustrates the contestable foundation on which the decision was based, and clearly shows the internal inconsistencies and legal calisthenics required to determine a lawful killing of Mary Attard. No matter how much the decision appears to be based on doctrinal analysis, it is imbued with forceful normative narrative that must individualize Mary and Jodie in every sense of the word even if it reduces itself to internal nonsense.

But first, a brief reminder of where we began: a summary of the facts. On August 8, 2000, conjoined twins "Mary" and "Jodie" Attard were born at St. Mary's Hospital, Manchester, England. They were joined at the lower abdomen, sharing uro-genital structures, a fused spinal cord, and a circulatory system that was continuous, running from one to the other and back again. The medical prognosis for the children was poor. Doctors feared that as the children grew, the stress of pumping blood for the fused body would become too much for the one functioning heart. Additional concern was that growth itself might be impeded, as had been observed in Jodie who was "failing to

thrive". It was felt that unless surgical separation took place, both would die within six months. Attending physicians determined that the twins could be separated, but only at the cost of the life of one, "Mary", whose heart and lungs were too deficient to sustain her as a singleton. The children's parents refused consent to the operation. The hospital did not accept the parent's decision, preferring instead the medical outcome of the separation surgery, which, though it would result in the death of Mary, was the only option to save Jodie and provide her the prospect of a near normal life. The Hospital initiated court proceedings under the Children Act 1989 (U.K.), which gives the court inherent jurisdiction to decide matters of children's "upbringing" in accordance with their welfare. They sought a declaration from the court that the separation surgery could be lawfully performed in the absence of parental consent, petitioning: "That where the children can not consent and where the parents withhold consent, it shall be lawful and in the children's best interest to (1) Carry out operative procedures not amounting to separation and/or (2) Perform emergency separation and/or (3) Perform elective separation."⁴ The petition thus sought to cover all circumstances under which the surgery could be performed, though the hearings made it clear the focus was on elective separation despite the fact that the girls were described in the medical evidence as stable at the time and showing no immediate clinical signs of concern.

The ethical and legal issues raised by the question of sacrificing one twin to save the other can only make sense if one starts from the idea that conjoined twins represent two separate individuals with individual interest in their shared structures. To even ask the legal question of whether or how to choose "one over the other" must take as its foundation two premises: that there are two legally distinct children, and that they have competing interests. In the case of Mary and Jodie, the determination of legal

⁴ Id. at 987.

individuality begins with the *medical* findings and interpretation of their bodies. Part of the medical findings were based on an analysis of bodily structures against the standard of normalized physiology, and this is discussed further below, but the most significant factor influencing the way medicine understands Mary and Jodie, and arguably the way we as a society understand any conjoined twins in the modern era, is based on the simple exercise of counting heads. We count heads because we believe that the very essence of personhood, that which makes each of us who we are as distinct from any other person, is rooted in the brain: *cogito ergo sum*⁵. At the end of the day, we believe that our bodies are not all that relevant to who we are, that so long as our brains are intact the essence of our personhood is stable. For Mary and Jodie, two heads were present. Each head was found to contain brain matter; and both heads responded, albeit very differently, to external stimuli. With two identifiable heads and two distinct brains functioning at least at some level, the children could never seriously be considered within a modern philosophical or medical framework as anything else but two separate persons, severable from each other and severable from their shared body. Each head was given a name - its own name- Jodie and Mary: different and distinct: symbolically solidifying the idea that the one little body had within it two little girls.⁶ This has significant implications for the determination of both the materiality of the twin's body as well as their medical

⁵ "I think. Therefore I am" is of course the famous basis on which Rene Descartes grounds the reality of his existence in his *Discourse on Method* (1673). In this same work, Descartes finds that the "me" who he is, his soul, is in his thinking mind, which is entirely separate from his body.

⁶ The power of naming and its impact on how conjoined twins are constructed can be heard clearly in a statement by Dr. Keith Roberts, a pioneer in British separation surgeries. His short but thought-provoking comment is what ultimately led me to pursue this thesis: "Where the egg has not divided symmetrically, the lesser half is not a human being.... By giving it a name, these poor parents have created a situation where they think they are killing a baby by having an operation. But what they are calling Mary is really a tumour, and all that is being proposed is the removal of that tumour." (retrieved February 2001 from the Grada World web site: www.linone.net/express/00/09/08/features/f0100splash-d.html).

prognosis, for with two different subjects to observe, one may make comparisons of each not just to an idealized normal, but also of one to the other.

This rather easy determination of the “clinical individuality” of Mary and Jodie provides the foundation for the legal determination of “separateness”. Seen as clinically distinct, it is difficult for law to deny that they are two separate legal individuals, each with a separate legal personality. As clinical individuals, the twins are thus legally distinct, and though conjoined physically, their interests are instantly “severed” in law, even before their bodies may be. This conclusion was briefly summarized by Ward LJ, who noted:

“The fact that Mary is dependent upon Jodie, or the fact that twins may be interdependent if they share heart and lungs, should not lead the law to fly in the face of the clinical judgement that each child is alive and that each child is separate both for the purposes of the civil law and the criminal law.”

Beyond the “two heads = two persons” formula, the fused little body was also subject to physiological evaluation, and this evaluation too had a significant impact on how the legal issues in the case are framed. The notion of the “natural” individuality of Mary and Jodie as seated in the presence of two heads becomes the basis for determining the nature of their physical conjoin. With two heads, Mary and Jodie are clinically separate, yet they are not physically two whole individuals. Assessment of their body parts starts from the idea of two persons and uses normalized individual human anatomy as a comparator. Thus, the twins are not assessed against the bodies of other conjoined twins, nor are they jointly compared to “normal” bodies. The starting premise is that there are two people, therefore there are two incomplete bodies, and they are thus analysed separately, in turn, against BOTH the normal standard and to each other, through comparison of the degree to which each “measures up”. A dotted line is drawn

on their body, at the site of their conjunction at the base of their spinal cord, and the physiological analysis starts from there. The external examination counts heads, and then counts legs and arms, and though the lower spine is fused, finds legs that are distinctly Mary's and legs that are distinctly Jodie's, based on which side of the line they happen to fall. The comparison to the normative standard is so forceful, that though there is a single vagina, it is not seen as a single structure on a neutral body, it is divided: shared, but also split, with the dotted line running through it: "The vulva for each twin is composed of two halves, each coming from the other twin.... each twin has two hemi vaginae and two hemi uteri."⁷ Internally, the doctors use advanced technology to peer inside the girls and interpret what they see: organs not located at the site of the conjoin were "attributed" to one or the other, in accordance with where normal organs are found in normal bodies. The only shared major organ was said to be a large bladder, "which lies predominately in Jodie's abdomen."⁸ Mary and Jodie were found to have their own lungs, liver, kidneys etc. Each also had her own heart⁹, although the hearts were hooked together, sharing an artery. The hearts are not equal, however, as Mary's heart, the one located in her chest, is deficient. The hearts are the main focus of attention, medially and legally: "For our purposes", says Ward LJ, "the absolutely crucial anatomical fact is that: Jodie's aorta feeds into Mary's aorta, and the arterial circulation runs from Jodie to Mary."¹⁰ This analysis, this specific interpretation of their bodies, has very specific and highly significant legal ramifications. Most critically, under this framework, even though the children's circulatory system was intermingled through a common artery, the functioning

⁷ Supra note 2 at 972. Medical evidence cited by Ward LJ.

⁸ Ibid.

⁹ As was seen in chapter two, the heart was at one time considered the seat of the soul in the way the brain is believed to contain the essence of personality today. Hearts remain important in the construct of being, still representing a core element of life. Brains, however, dominate hearts in determining individuality: conjoined twins with one functioning heart and two heads are seen as two people.

¹⁰ Supra note 2 at 972.

heart physically located in the chest of Jodie is determined to be Jodie's heart, and hers alone, and the direction in which the blood flows is seized upon as a highly relevant factor.

In comparison to the yardstick of normal human physiology, while neither Mary nor Jodie fully measure up, Mary falls especially short. The primitive lungs located in her chest are not working; the heart that is “hers” is enlarged and not functioning efficiently. But she also has structural abnormalities of the brain, with brain scans showing malformations “associated with seizure disorders/epileptic fits...developmental delay and learning difficulties”¹¹, and she is said to have a 75% chance of developing hydrocephalus, which would “increase brain damage.”¹² Her observed behaviour is pitiable: “...she just screws her face up in what appears to be a painful sort of way and that is the only facial expression I see her make...”¹³, especially in contrast to her sister who is “... very sparkling really, wriggling, very alert, ... very much a with it sort of baby.”¹⁴ Here, the doctors have ownership not just in determining the nature of the twin’s physical structure, but also in both the essence of their personhood, and the prognosis for their future. Compared to Jodie, Mary just doesn’t have a lot going for her: physically, mentally, or even in hopes for her future. She is far from the standard. She survives on the back of her sister. She is not a “with it sort of baby” at all. She is the weaker twin.

Before we even turn to the legal analysis, we can almost see the conclusion that it will reach. The medical “evidence” functions to frame the legal issues and in many ways

¹¹ Id. at 975.

¹² Ibid.

¹³ Id. at 984. Evidence of neonatologist.

¹⁴ Id. at 973.

suggests the answer. The children are separate individuals. They have some distinct organs, each their own, and are in competition over the intermingled circulatory system. Not only are their interests in their shared body in competition, but one child has already been framed as a child with “weightier” rights: with the functioning heart located in Jodie’s chest, and the oxygenated blood running from her to Mary, Jodie seems to be “in possession” of the functioning vital organs. Mary is painted as “dependent” on Jodie, ultimately leading to the feeling that she has no natural right to the heart she naturally shares. “She lives on borrowed time, all of which is borrowed from Jodie.”¹⁵ The medical interpretation becomes evidence of fact establishing the “truth” of the situation in which Mary and Jodie find themselves. And the legal issues are thereby framed: The children are separate, are in competition over one functioning heart that “belongs” to Jodie, and if separation surgery is to be performed, someone must give up their life and step aside. With the foreseen death of one child the definite result of the surgery, would the operation amount to a legal murder? What ever is a court to do?

The decision of the High Court leads with the judgement of Lord Justice Ward, who begins with the question of whether or not the surgery **should** legally proceed before considering whether or not it **could**, separating the issue of the legality of the operation in a criminal context from the question of the children's best interest in the realm of family law. For Ward LJ, the question of the legality of the separation could only be considered once the court had determined the first issue of whether or not the proposed operation is in the children's best interest. Obviously, if the surgery is not in the interests of the children, then there is no need to determine the questions of its legality. His determination of the children’s best interests was adopted by Brooke LJ, and therefore constitutes the majority decision on the matter.

¹⁵ Id. at 976.

Ward LJ's survey of the principles in family law notes that the law authorises parents to consent to medical treatment on behalf of their children, and that in the absence of parental consent, the separation surgery on Mary and Jodie would be within the realm of criminal assault. Ward LJ notes, however, that a parent's right to exercise their powers and responsibilities with respect to their children is not absolute, but must be in accordance with the welfare of the child and is subject to review by the court, both through the common law power of *parens patriae*, and the statutory scheme for the resolution of disputes concerning the upbringing of children explicitly provided for in the Children's Act 1989. And so Ward LJ embarks on his own determination of the best interest of Mary and Jodie. He begins, he says, from an acceptance that each life has an inherent value in itself and the right to life, being universal, is equal for both Mary and Jodie. For Ward LJ, the notion of equality further demands that the question of each child's interests be surveyed without reference to her sister: the legal imperative of individuality is powerful, and as discussed in the previous chapter, law generally can not analyze interests that are inherently relational.

Articulating the legal principles for the determination of best interests in medical treatments, Ward LJ notes that an operation will be in a particular patient's interest if it is required in order to save their lives, or ensure improvement or prevent deterioration in their physical or mental health. Applying these principles, Ward LJ concludes that the surgery is clearly in Jodie's interest: on the medical evidence the surgery involves little significant risk to Jodie (such as death or brain damage), will likely extend her life expectancy to normal, and will provide her with a normal or near normal body¹⁶.

¹⁶ This idea, or better stated, imperative, of having a "normal" body as an important end is a theme that runs through the entire decision, but the force of it is better illustrated in the decision of Walker LJ, as will be seen below.

Turning to Mary's interests, Ward LJ predictably finds the question is more complex. He says that the question is not about whether it is in Mary's interests to continue to provide her with treatment that will artificially prolong her life; it is about whether it is in her interests to perform a procedure that will terminate her life. On Ward LJ's framing, then, the operation can not be said to be in Mary's interests, and this is what he must determine: Ward LJ has no choice but to conclude that the surgery offers no benefit to her, as it would in effect "unplug" her from Jodie's functioning heart, bringing her life to an end before its natural span. Separation surgery was therefore found by Ward LJ to be contrary to Mary's best interests when her position was viewed in isolation.

At this point in the decision, Ward LJ appeared to be stuck. Having established that the children are in a position of competing interests with respect to the surgery, and that the court has an obligation to decide, for each individually, in their best interests, Ward LJ is in a seemingly impossible situation. The idea of two people occupying the exact same physical space has come up against the individualized discourse of law and confounded it. It is interesting to pause at this point and wonder why Lord Justice Ward's decision did not end here. Unable to conclude that the surgery was in Mary's best interest, Ward LJ might have stopped right here and ruled that there was no basis for interfering in the parents' decision. Totally aside from the questionable *ethical* foundation in proceeding despite there being no clear basis for overturning parental authority, the *technical* question of jurisdiction can be posed. With a determination that the operation is not in Mary's interests, on what basis can the court proceed? But proceed Ward LJ does, asking if and how the conflict of interests he has determined can be resolved. Is the court to balance the interests of one against the other and allow one to prevail? Ward LJ makes no bones about what this would entail, framing the question:

“...can one’s right to life be traded against another’s?”¹⁷ The only way the answer to this question can be found is for Ward LJ to break with principle of legal equality between Mary and Jodie as individuals in their own right, and embark on some sort of utilitarian calculation that will favour one over the other. This is exactly what he does.

Ward LJ finds a precedent for weighing competing values in family law, referring to *Birmingham City Council v. H (A Minor)* (1993) 1 F.L.R. 883, where the Court of Appeal was faced with the question of contact between a baby and a mother, herself a minor under the Children Act. While in that case a lower court had avoided competing interests by deciding the issue only on the basis of the baby’s interest, the appeal court determined that the upbringing of both the minor mother and the infant were involved. The Court of Appeal found that the Act requires that the interests of the child be paramount, but since both interests can not be paramount, where they are in conflict, the court must weigh and consider the potential detriment for one in light of the potential benefit of the other. In the absence of any contrary indication from the House of Lords, Ward LJ found that this precedent was persuasive, if not binding, authority on how to deal with competing interests under the Act:

“If the court is to make a decision that puts Jodie’s interests paramount and that decision would be contrary to the paramount interests of Mary, I do not see how the court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it. ...Given the conflict of duty, I can see no other way of dealing with it than by choosing the lesser of the two evils and so finding the least detrimental alternative.”¹⁸

Now hold on a minute here. This is an extraordinary application of the dicta in *Birmingham*, generalizing from a case involving visitation rights to a matter of life and

¹⁷ *Supra* note 2 at 1004.

¹⁸ *Id.* at 1006.

death. It is important to remember that at this point in the decision, we have not even reached the question of whether or not the separation surgery can lawfully be performed, but we can certainly already anticipate the answer. By setting up his decision as a choice between two competing interests to be determined with reference to the utilitarian standard of the least detrimental choice, Ward LJ has already departed from fundamental principles of the sanctity of life and the fundamental rights inherent in each child, and now any legal equality between Mary and Jodie as legal individuals is lost right here¹⁹. While the legal equality between the children is lost as soon as the Court decides to choose, the idea of any physical equality in the children was lost when doctors drew the dotted line. Once the single body is viewed as two bodies fused together and the parts are attributed, the children no longer share all structures. We know who comes up short in a comparison of physical structures, whether it's to normal bodies, or each child to the other, when doctors compared Mary to Jodie. Given the force of the medical discourse, which seeks through comparison to normalize the children's physical structures as much as possible, and which interprets the intermingled circulator system in a very specific way, we can be pretty sure who will come up short in a choice between two *legal* equalities.

In a bizarre exercise that follows, Ward LJ specifies the criteria for the calculation he conducts in order to decide which of the girls' interests should take priority over the other. He accepts that the universality of the right to life must be equal, "...so the right of each goes into the scales and the scales remain equal."²⁰ He goes on consider the worthwhileness of the treatment, stating that in making this determination it is legitimate

¹⁹ Interestingly, the net effect of Ward LJ's decision on this point seems to be that the children can not be equal without being individual first, and once they are analysed as individuals, they can not be equal. There is just no way for Mary to win this one, I think.

²⁰ Supra note 2 at 1010.

to consider the quality of life of each twin. This again departs from the notion of legal equality, importing arbitrary and potentially discriminatory criteria into the decision. It also imports precisely the ethical framework used by doctors to justify stacking the odds in favour of the stronger twin when conjoined twins are surgically separated, as canvassed in chapter three, and of course it ultimately leads to inequality for the designated weaker twin. Weighing the prospect of a “full” life for Jodie against the acceleration of an already certain death for Mary, Ward LJ not surprisingly finds the scales tipping heavily in Jodie's favour, concluding:

“The best interests of the twins' is to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage, even if that was at the cost of the sacrifice of the life so unnaturally supported.”²¹

This is indeed fascinating: having determined the operation is not in Mary's interest, Ward LJ now wants us to find that the operation is in “the twins' best interest”. Where Mary and Jodie were legally severed for the purpose of the determination of their individual interests, they now seem to be “re-united” in a common interest that Jodie be permitted to accept the advantage that the surgery can offer. While of course Ward LJ does not say it, there is almost a sense here of Mary's altruism, as she steps aside to allow Jodie to accept the advantage that she cannot. Mary, we almost feel, would want it this way.²²

Summarizing his calculations, Ward LJ says:

²¹ Id. at 1011.

²² This is all the more ridiculous when one considers, as canvassed in Chapter four, that the law generally does not recognize the interests or rights of a minor to be altruistic, as seen, for example, in the established case law surrounding sibling to sibling organ donation.

“In this unique case it is, in my judgement, impossible not to put in the scales of each child the manner in which they are individually able to exercise their right to life. Mary may have a right to life, but she has little right to be alive. She is alive because and only because ...she sucks the lifeblood out of Jodie.”²³

While poor little Mary has been legally severed from her sister in order to allow a determination of her individual rights in the matter at hand, she can not stay on equal footing because she is somehow not able to exercise her right to life as effectively as Jodie. Though it seems rather ridiculous, especially since Mary has done nothing morally or legally culpable, Ward LJ distinguishes between a right to life and the right to be alive in her case, based on the medical interpretation of the intermingled circulatory system.

“If Jodie could speak, she would surely protest ‘Stop it Mary, you’re killing me’. Mary would have no answer to that. Into my scales of fairness and justice between the children goes the fact that nobody but the doctors can help Jodie. Mary is beyond help.”²⁴

The powerful imagery paints the twins in a situation somewhat akin to Mary launching a vampirish attack on her innocent sister. Thank goodness the doctors have a wooden stake ready²⁵, in the clamp that will ultimately fasten around Mary’s aorta. While Ward LJ has so far only concluded in matters of family law that the court can and must decide that the operation can proceed, the questions raised in criminal law seem likely to lead to a foregone conclusion.

²³ Supra note 2 at 1010.

²⁴ Ibid.

²⁵ In vampire lore, a vampire is most effectively dispatched by driving a wooden stake through its heart.

While Ward LJ's determination on the matter in family law is adopted by Brooke LJ, Walker LJ, had a different view of the matter. Walker LJ argued that the decision to operate did not require the court to value one life above another, for a remarkable reason. Essentially, his decision on the question of children's welfare was that surgery would be in **both** Jodie's and Mary's interests, because to allow the twins to remain conjoined would deprive each of the bodily integrity and human dignity they have equal right to. He cited an extra-jurisdictional case in *Auckland Area Health Board v. Attorney General* (1993) 1 NZLR 235, 245 where Thomas J said at 245: "Human dignity and personal privacy belong to every person, whether living or dying." Walker LJ states:

"Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy - the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body.... By a rare and tragic mischance, Mary and Jodie have both been deprived of the bodily integrity and autonomy which is their natural right. There is a strong presumption that an operation to separate them would be in the best interests of each of them."²⁶

Of course, underscoring this passage is the idea that bodily integrity and autonomy can only be found in those normalized ideals of physical states and individuality, and that those normalized states are in fact natural states. The decision does not allow the idea that the conjoined twins are born with any kind of natural bodily integrity: their bodies must be invasively explored and radically altered in order to achieve it. The normalizing discourse is loud and clear: bodies should be whole and intact, and if they are not, not only is the right to bodily integrity compromised, but autonomy is also at stake. It is interesting to think this through: the "natural right" to bodily integrity for Mary and Jodie can only be achieved through the technological and procedural advances found in late 20th century medicine. Without bodily integrity,

²⁶ Id. at 1070.

autonomy is compromised: a body that is not the norm somehow negatively confronts the “me” in my body. The implication is I must have a whole body to be fully autonomous: autonomy is not only a mental state; it is very much a specific physical state as well, and one that can be achieved through surgical techniques. For Walker LJ, life held nothing for Mary: her life was not worth living, and the separation surgery held real value for her, as it would bestow “... *even in death*, bodily integrity as a human being.”²⁷ He avoids the weighing exercise conducted by Ward LJ, by finding the surgery is the right thing to do for Mary's sake. He ignores that, even if bodily integrity is an important achievement and a proper matter for the court to ensure, its value to Mary is completely fictitious, as in obtaining it she will die.

With these determinations on the matter of the children's best interests, the Lord Justices still have one more hurdle to overcome in order for the surgery to separate Mary and Jodie to proceed. Whether the surgery is to be performed as the correct choice of two evils or in the interests of both children, the court must still address the issues it raises in criminal law. However, having gone to the lengths they have to reach conclusions on the matter of the children's best interest, we can guess that they will ensure a finding in criminal law that allows the operation to proceed.

Though the published decision leads with Ward LJs determinations, it is Brooke LJ who has undertaken the more exhaustive survey of the issues in criminal law. After some introductory remarks, Brooke LJ's decision outlines the elements of murder in English law, citing from the 2000 edition of Archbold:

“...the crime of murder is committed where a person of sound mind and discretion unlawfully kills any reasonable creature in being and under the

²⁷ Ibid.

Queen's peace with intent to kill or cause bodily harm...(see p 1622, para 19-1")²⁸

An act that meets these elements constitutes murder in England. In order to determine whether or not the surgery would amount to murder, Brooke LJ focuses on defining four key phrases this passage in the context of the case at hand: "Unlawfully", "kills", "reasonable creature", and "with intent to kill."

Brooke LJ's determination that Mary is a "reasonable creature" and entitled to the protection of the law is based on "The Sanctity of Life and the Criminal Law" (1958) by Glanville Williams. Brooke LJ begins consideration of this document from page 31: 'There is, indeed some kind of legal argument that a 'monster' is not protected even under the existing law. This argument depends upon the very old legal writers, because the matter has not been considered in any modern work or in any court judgment.' Brooke LJ goes on:

"After discussing the meaning of the word 'monster' ...(Williams) states at pp 33-34: 'Locked (Siamese) twins present a special case, though they are treated in medical works as a species of monster. Here the recent medical practice is to attempt a severance, notwithstanding the risks involved. Either the twins are successfully unlocked, or they die'. It is implicit in this analysis that the author is of the view that 'Siamese' twins are capable of being murdered ...Advances in medical treatment of deformed neonates suggest that the criminal law's protection should be as wide as possible and a conclusion that a creature in being was not reasonable would be confined only to the most extreme cases, of which this is not an example. Whatever might have been thought of as 'monstrous' by Bracton, Coke, Blackstone, Locke and Hobbes, different considerations would clearly apply today."²⁹

²⁸ Id. at 1023.

²⁹ Id. at 1026.

Brooke LJ himself illustrates the shifting meaning of the word monster and links it to advances in medical treatment of deformed neonates. To put it bluntly, if it can reasonably be made to resemble something close to a normal human being through surgical repair, it is entitled to the protection of criminal law and is therefore no longer monstrous. This is, of course, a fairly black and white reading of monstrosity, in opposition to more historically fluid interpretations as discussed in chapter two, and again ignores any experiential element of being monstrous: being monstrous or being a reasonable creature is determined through the ability of medical intervention to act upon a particular subject. On the surface it may seem that there is a benefit to Brooke LJ's determination that Mary is a reasonable creature, as it appears that under it those who are reasonable beings will be protected from unreasonable surgical intervention through criminal law. But, we know that ultimately the criminal law will not protect Mary from death by advances in medical treatment. More critically, of the two, Mary has already been read as the "less reasonable" creature through contrast to her sister, and we know that she is not going to benefit from the protection of the criminal law to the same extent. It would seem that although Brooke LJ concludes that Mary is a reasonable creature, the finding is entirely a hollow one.

With respect to the interpretation of "kills", the question for Brooke LJ in the present case has to do with whether or not medical treatment can in some circumstances amount to murder. The leading English case in this matter is *Airedale NHS Trust v. Bland* (1993) 1 All ER 821, 1993 AC 789, which dealt with the removal from life support of a patient who had been in a persistent vegetative state for three years. *Bland* dealt with the classic question in medical law of the distinction between positive acts and omissions in medical treatment.³⁰ To his credit, Brooke LJ refuses to take the easy way out,

³⁰ A dubious distinction in itself, in my opinion, but a matter for a different thesis!

determining that the separation surgery “....would involve a number of invasions of Mary’s body, in the process of identifying which organ belong to which child, before the positive step was taken of clamping Mary’s aorta and bringing about Mary’s death.”³¹ He finds the surgery would “kill” Mary, in the legal sense of murder. He struggles next with the phrase “intent to kill”, as of course the argument is made that while doctors know in advance that the surgery they seek to perform would kill Mary, it is not their primary intention that she die. Brooke LJ looks to *R v. Woollin* (1998) 4 All ER 103, (1999) 1 AC 82, where in a case involving a father throwing his son against a hard surface, on appeal to the House of Lords the line between murder and manslaughter was found to lie in the mental element of certainty that one’s actions would lead to death. Brooke LJ readily concludes that although it may not be the purpose of the doctors to cause Mary’s death, since they know that her death as a result of their actions is inevitable, they “intend” to kill her under English law.

Brooke LJ has not made it easy for himself or for his colleague Ward LJ, who adopts Brooke LJ’s reading of the criminal law in the case. The surgery meets the criteria for murder unless it can be found to be “lawful”; in this case it is unlawful in the absence of a legal defence. He is encouraged to forge ahead in the written argument of the QC acting on behalf of MARY, for goodness sake, and he cites the important passage before continuing:

“...Existing case law is based upon the presumptions of bodily integrity. John Locke’s assertion that “every Man has a Property in his own Person. This no Body has any Right to but himself” (*Two Treaties of Government* (1690)) which underpins much of the moral dialogue in this area is difficult to apply in

³¹ *Supra* note 4 at 1027. By characterizing the act as a positive one and not one of omission, Brooks LJ and by adoption Ward LJ and Walker LJ disagree with the lower court’s characterization of the separation as an act of omission: the removal of Mary from her blood supply. The lower court decision is fascinating in its own right; as of course the “blood supply” we are talking about here is Jodie! Again, a matter for another day.

the case of conjoined twins. Both twins' physical autonomy was compromised at birth with the result that they now have fundamentally inconsistent interests and needs. In these circumstances, the court may wish to explore the possibility of the development of the law to enable a doctor lawfully to undertake surgery to preserve the life and achieve the independence of one twin even though that may result in the death of the other....³²

We continue to see the force of discourses of bodily integrity, and frankly, if I had been Mary, I would have wanted another lawyer!

The doctrine of necessity must have been the “hot topic” around the “justicial” dinner table, since it is where Brooke LJ turns, and where both he and Ward LJ eventually hang their hats. Brooke undertakes a survey of the doctrine, noting that it is obscure and seldom featured in English case law. He looks broadly to find principles of necessity, including readings from Thomas Hobbes, 19th century writings by Commissioners on Criminal Law, recent studies by the Law Commission, writings by modern academics, relevant Acts of Parliament, court decisions on the defence of duress of circumstances, and even a detailed reading of Canadian Wilson J’s dissenting opinion in *Perka v. R* (1984) 13 DLR (4th) 1. He is seeking a basis to ground a defence of necessity in the case of Mary and Jodie, but no matter how exhaustively he looks, he can find very little academic or other writing to support a defence of necessity in a case of intentional killing and absolutely no legal precedent for it. In fact, what he can find, and rather easily, is explicit legal precedent **against** it in *R v. Dudley and Stephens* (1884) 14 QBD 273. Brooke LJ must come to terms with the force of the precedent established in *Dudley and Stephens*, that necessity can never be a defence to murder. He must either follow or distinguish the case.

³² Id. at 1031.

Brooke LJ said:

“[*Dudley and Stephens*] has sometimes been taken as authority for the proposition that necessity can never under any circumstances provide a legal justification for murder. While it is true that a passage in the speech of Lord Hailsham in *R v Howe* [1987] 1 AC 417 might be interpreted to this effect, in my judgement neither that passage nor a similar passage in Lord Mackay of Clashfern’s speech...displays any evidence that they had in mind a situation in which a court was invited to sanction a defence (or justification) of necessity on facts comparable to those with which we are confronted in the present case. I accept Miss Davies’s submission that *R v. Dudley and Stephens*, endorsed though it was by the House of Lords in *R v. Howe*, is not conclusive of the matter”³³

We can see that Brooke LJ is going to find a way around *Dudley and Stephens*. In order to distinguish *Dudley and Stephens*, he considers the policy reasons behind it. Echoing Wilson LJ’s concerns expressed in *Perka*, he notes that a very important policy reason for objecting to the defence of necessity in the case of murder is the question, posed so eloquently by Lord Coleridge in *Dudley and Stephens*, “who is to be the judge of this sort of necessity? By what measure was the comparative value of lives to be weighed?”³⁴ Brooke LJ argues from a policy perspective, that *Dudley and Stephens* is distinguishable from other situations in which necessity might arise, because the situation in *Dudley and Stephens* contained an element of human choice in selecting who would die. Brooke LJ puts forward various other situations to make his point: a rope climber slipping and dragging down his mountaineering companion, a man immobilized with fear blocking the escape of others from a sinking ship. In each of these situations, Brooke LJ posits, there is no human agency involved in choosing the victim. The victim is “pre-

³³ *Id.* at 1038.

³⁴ *Id.* at 1037. Cited by Brooks LJ as 14 QBD 273 at 286-88 (1881-5) All ER Rep 61 at 67.

selected”, either by circumstance through losing foot, or “self-selection” by refusing to abandon ship. In each of these cases, someone was “destined to die”.

For Brooke LJ, the concern that *Dudley and Stephens* had with the determination of one's right to life over another's was not germane to the case of Jodie and Mary, for this very important reason: “Mary is, sadly, self-designated for a very early death.”³⁵ Again, this harks back to the medical context in which the situation was framed. Mary, though “hooked in” to the common circulatory system and sustaining life quite nicely at this point, thank you, is not a “viable singleton” on the basis of her physiology as interpreted against the yardstick of “normal” human anatomy. The heart in her chest is hers and hers alone, and it cannot sustain her, *if separated*. And there's the rub: without surgery Jodie is every bit as “destined to die” as Mary. Jodie will die without medical intervention. A mere 50 years ago there would have been no question that both children would naturally die. It is only the potential for medical intervention that allows Brooke LJ to contemplate that Mary's status as destined for death is different from Jodie's: it is not something inherent in the children themselves. Is there **really** no moral question of “choosing one's victim” in the present case, as *Dudley and Stephens* did? Even the internal framing of the matter cannot support Brooke LJ's conclusion. The separation surgery has been clearly characterized by the court as a positive act, and there is no medical evidence of imminent peril. Ward LJ has already suggested in his canvassing of family law that the doctors might have chosen to abide by the parents' decision and allowed the children to die.³⁶ The real policy question is no different from *Dudley and Stephens*: it is not about who is or isn't “self-designated for death”, it remains a question of whether or not to permit a human choice in undertaking a surgical procedure which will terminate the life of Mary.

³⁵ *Id.* at 1051.

³⁶ Ward LJ notes this in *supra* note 4 at 1016, see also below.

Another problem with this formulation of necessity is that while all the various other situations Brooke puts forward to make his point might give us pause to consider such a defence, they are fundamentally different from the case of Jodie and Mary. In each of Brooke LJ's illustrations, the acts might, if we wanted, be excused on a defence of necessity grounded in acts of self-preservation, which, as Brooke has discovered through his analysis, might be supported in Hobbes' writings and the dissenting opinion in *Perka*. Severing a mountaineer from the rope that binds us as he drags me to my certain death is an act of self-preservation, which the law might not reasonably expect me to abandon. Pushing a man frozen with fear out of my path as I flee a sinking ship is another such act. The analogies are different in substance: in the case of Mary and Jodie there is no imminent peril to be avoided.

Interestingly, perhaps to reassure us that he is not entirely forging new ground, Brooke LJ refers to the one other known case of a court determining issues related to the surgical sacrifice of one conjoined twin. This case occurred in Philadelphia in 1977, and is unreported. It is discussed by George Annas in his article "Siamese Twins: Killing One to Save the Other"³⁷, wherein Annas notes that this was the basis on which rabbinical scholars consulted by the parents agreed that one twin could be separated so that the other might live: that the one was pre-designated to die. What is not clear is whether the legal determination was founded on similar grounds. For all we know, the decision may have been legally determined on the basis of parental authority and the lack of a positive duty to resort to extraordinary medical intervention. The unreported case in Philadelphia can certainly not be determinative.³⁸

³⁷ Annas, G. J. , "Siamese Twins - Killing One To Save The Other", 1987 17(2) Hastings Center Report 27 at 27.

³⁸ *Supra* note 4 at 1022. Brooks LJ himself notes in that the parents in this case had refused to consent without rabbinical support. Rabbinical scholars gave a favourable

Brooke LJ forges ahead, quoting from the “Principles of Criminal Law” by Professor Andrew Ashworth, Third Edition (1999), in the section entitled “Justifications, Necessity and the Choice of Evils”, pp 153-4: “...it is clear that only the strongest prohibition on the taking of an innocent life would prevent a finding of justification... in an urgent situation involving a decision between n lives and $n + 1$ lives, is there not a strong social interest in preserving the greater number of lives?” Brooke LJ determines that in such a situation, where, as he has asserted, there is no question of human choice in determining against whom action must be taken,

“.... A dire choice has to be made, and it must be made on a principle of welfare or community that requires the minimisation of overall harm. A fair procedure for resolving the problem – perhaps the drawing of lots – must be found. But here, as with self-defence and the ‘uplifted knife’ cases, one should not obscure the clearer cases where there is no need to choose a victim: in the case of the young man on the rope-ladder, blocking the escape of several others, there was no doubt about the person who must be subjected to force, probably with fatal consequences.”³⁹

He looks for examples of this principle in action, and seizes on *R v. Bourne* [1939] 1 KB 687 which derived a necessity defence out of the word “unlawfully” in the Abortion Act 1929 (U.K.) Macnaghten J said at page 691 that the word “unlawfully” imported the meaning expressed by the proviso in S.1 (1) of the Infant Life Preservation Act 1929 (U.K.), where an abortion is not unlawful if performed to save the life of the mother. Imminent peril was not required to exempt the doctors’ action, and on this basis a doctor was permitted to perform an abortion in order to save the life of the mother.

response, and the three judge panel of a local family court retired for only 3 minutes. Later, at 1031 he notes that the parents were willing to consent when they had rabbinical support. It seems highly probable from Brooks LJ’s own characterization of the case that it was decided ultimately on the basis of positive parental consent.

³⁹ Id. at 1024.

While it is an interesting case, Brooke overlooks that today a foetus does not have positive legal rights while Mary certainly does, and so *Bourne* should not really be seen as all that forceful.

Though we are not convinced, Brooke LJ is satisfied that *Dudley and Stephens* is not applicable. From here it will be a small matter to craft a defence of necessity for doctors seeking to sever Mary from Jodie. He finds that there are three requirements for the application of the doctrine of necessity, namely: that the act was needed to avoid inevitable and irreparable evil; no more should be done than was reasonably necessary for the purpose to be achieved; and the evil inflicted should not be disproportionate to the evil avoided. Brooke LJ finds: that the surgery was needed to avoid the inevitable and irreparable evil of Jodie's death; that the operation was no more than was reasonably necessary to achieve that purpose; and that the evil inflicted was not disproportionate to the evil avoided, in part as the principles of modern family law "pointed irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interest of Mary."⁴⁰ As such, the requirements for necessity were met and the surgeons who performed the operation would not be guilty of murder.

Brooke LJ's final words on the matter hark back to Walker LJ's findings in the matter of the children's best interest:

"Finally, the doctrine of the sanctity of life respects the integrity of the human body. The proposed operations would give these children's bodies the integrity which nature denied them."

⁴⁰ *Id.* at 1052.

Even Brooke LJ in these concluding remarks seems to suggest at the end of the day the real issue at the heart of the matter is bodily integrity, that best interests and necessity must all be determined with bodily norms at the core.

Ward LJ agreed with Brooke LJ that the surgery would amount to murder in the absence of a defence, and, of course, could also find no precedent. He frames his grounding of a defence of necessity in a slightly different manner, however, and one that is particularly interesting. For Ward LJ, the most important legal feature of a potential criminal case against the doctors is that the doctors are under conflicting legal duties. He argues that as much as the doctors are under a legal duty not to harm Mary, they are equally under a legal duty to save Jodie. Doctors cannot be denied a right of choice if they are under a duty to choose, Ward LJ says. He tells us that in such a situation, faced with an irreconcilable conflict of choice, doctors should be in the same position as the court in the performance of its duty to give paramount consideration to the welfare of each child:

“...The doctors must be given the same freedom of choice along the same lines as the court has done, giving the sanctity of life principle its place in the balancing exercise that has to be undertaken. The respect the law must have for the right to life of each must go in the scales and weigh equally but other factors have to go in the scales as well. For the same reasons that led to my concluding that consent should be given to operate so the conclusion has to be that the carrying out of the operation will be justified as the lesser evil and no unlawful act would be committed.”⁴¹

Through this passage, Ward LJ has formulated a defence of necessity grounded as a justification based on a pure utilitarian balance, in complete opposition to the principles of the sanctity of life and equality, cornerstones of western law. But more than this, he

⁴¹ Id. at 1016.

has given doctors an elevated, quasi-judicial status, a special status that he does not extend to parental authority. Doctors are equated with the courts in having the authority to exercise their choices, while the choices and views of Mary and Jodie's parents seem left out of the equation. He has already noted elsewhere that:

“...it would, nevertheless, have been a perfectly acceptable response for the hospital to bow to the weight of the parental wish however fundamentally the medical team disagreed with it. Other medical teams may well have accepted the parents' decision. Had St. Mary's done so, there could not have been the slightest criticism of them for letting nature take its course in accordance with the parents' wishes.”⁴²

And now we see what he really means. What counts is what doctors want. In Ward LJ's decision, medicine is so privileged a discourse over parenthood⁴³, the right of doctors to choose is paramount over the parent's decision, even though the parent's decision to refuse the surgery was lawful, and consistent with the principles of equality and the sanctity of life.⁴⁴

Ward LJ realises his grounding of necessity might be seen to be in conflict with the principle of the sanctity of life, and might be open to challenge on this basis. Ward LJ argues, then, that while he has found the operation to be lawful as the choice of a lesser evil, the operation can be justified on a second set of grounds, which do not offend against sanctity of life. He states that the principle of sanctity of life requires life be

⁴² Id. at 987.

⁴³ See Armstrong, David, Political Anatomy of the Body: Medical Knowledge in Britain in the Twentieth Century. (Cambridge: Cambridge University Press, 1983) for a very interesting account of the increasing influence of medicine on parenting

⁴⁴ Id. at 985. The parents' views in the matter are read into the decision. While they present their objections to the surgery on primarily religious grounds, a close reading of their views illustrates that underscoring their religious belief is a belief in the sanctity of Mary's life and the inherent equality of each child, beliefs that should have been wholly consistent with fundamental legal principles.

protected from unjust attack, and permits one to protect one's life in an act of self-defence. A plea of quasi self-defence is available to the doctors, who are coming to Jodie's defence removing the threat of fatal harm to her that is present in Mary. Once again, we are focused on the little hearts, and the idea that the functioning heart **belongs** to Jodie. Because the heart is not Mary's, she has no right to it, and is thus using it "unjustly". Jodie is entitled to "defend" herself against this unjust situation. She is entitled to defend herself, which she can only do through the good graces of doctors.

Echoing back to his colleague Ward LJ's elevated opinion of doctors, Walker LJ is careful to say that though doctors' opinion cannot be determinative of the legality of what is proposed, calling them "highly skilled and conscientious"⁴⁵, Walker LJ says their opinion is entitled to "serious respect."⁴⁶ In Walker LJ's determination, their status as doctors seems to give them special exemption from the general principle established in *Reg. V. Woollin [1999] 1 A.C. 82, 91*, and applied by both Ward LJ and Brooke, that "Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen."⁴⁷ Walker LJ thus excuses doctors: "...the proposed operation would not be unlawful. It would involve the positive act of invasive surgery and Mary's death would be foreseen as an inevitable consequence of an operation which is intended, and is necessary, to save Jodie's life. But Mary's death would not be the purpose or intention of the surgery..."⁴⁸ And rather anti-climatically, this is Ward LJ's conclusion.

⁴⁵ *Id.* at 1069.

⁴⁶ *Ibid.*

⁴⁷ *Id.* at 1062.

⁴⁸ *Id.* at 1070.

By finding that the operation would not be unlawful, Walker LJ could have avoided having to ground some sort of defence. But he just can't seem to help himself, having earlier argued:

“.... the doctrine of double effect prevents the doctor's foresight of accelerated death from counting as a guilty intention. This type of double effect cannot be relevant to conduct directed towards Mary unless the mere fact of restoring her separate bodily integrity, even at the moment of death, can be seen as a good end in itself and as something which ought to be achieved in the best interests of Mary as well as Jodie.”⁴⁹

This is of course precisely what he has concluded on matters of family law above, and so while he does not come right out and say it, he seems to suggest that if he really wanted to, he could ground the defence on this basis.

Not to be left out of the necessity debate, Walker LJ also considered whether it could ever be a defence to murder. He notes that it had been effectively employed in other matters of “serious crime”⁵⁰, though with the condition of imminent peril. He agrees with Ward LJ that doctors are under a conflicting legal duty, and in one interesting paragraph suggests that he would break with *Dudley and Stephens* and allow a defence of necessity in a case of murder if he had to:

“In the absence of parliamentary intervention the law as to the defence of necessity is going to have to develop on a case by case basis.... I would extend it, if it needs to be extended, to cover this case. It is a case of doctors owing conflicting legal (and not merely social or moral) duties. It is a case where the test of proportionality is met, since it is a matter of life and death, and on the evidence Mary is bound to die soon in any event. It is not a case of evaluating the relative worth of two human lives, but of undertaking surgery

⁴⁹ *Id.* at 1063.

⁵⁰ *Id.* at 1065. Walker LJ cites *R v. Abdul-Hussain* [1999] *Crim. LR* 570, a case of aircraft hijacking, which itself notes that necessity is not available as a defence to murder.

without which neither life will have the bodily integrity (or wholeness) which is its due. It should not be regarded as a further step down a slippery slope because the case of conjoined twins presents an unique problem.”⁵¹

Walker LJ continues to deny any wholeness or integrity in the fused body, and to insist that bodily integrity is the real issue at stake, and the most important feature to consider in deciding on the legal principles.

Although through different means in differing decisions, the court has determined a lawful killing of Mary Attard. Jodie is offered the promise of surgical reconstruction. The state of affairs noted at the very beginning, that “This (permanent union) condemns a potentially normal Jodie to carry her very abnormal sister, Mary, throughout the life of both”⁵² is not to be tolerated. The knives are out, the dotted line is drawn, and from a whole we will carve an individual piece in the best image of normal we can.

⁵¹ The September 2000 decision in *Re A* was cited and followed as quickly as 2001, in the Australian case of *Queensland v Nolan* [2001] Q.S.C. 174. The health of the conjoined twins in that case was deteriorating and the judge seems to have followed Robert Walker LJ's reasoning that the operation would be in the weaker twin's best interests.

⁵² *Supra* note 4 at 976.

Conclusion: Contesting Ourselves

*Though Abigail and Brittany Hensel share one body,
"each completes her own homework and test papers" ¹*

"They share a significant portion of their frontal lobes. The frontal lobe is probably still one of the last mystery areas of the brain, but it does seem to have relationship to personality as well as to higher intellect, so in spite of our prediction that they would have the same personality, same likes and dislikes, they're really quite unique individuals, so it tells us that medically scientifically we're a long way from understanding how the brain works. We're also a long way from understanding what makes individuality."

- Surgeon John Templeton discussing conjoined twins Lori and Reba Schappell²

"If the study of the body teaches us anything, it is that the proclaimed determinancies of one theoretical movement (whether that movement is medical, artistic, political, or social theoretical) usually signify little more than the imminence of that system's collapse into a wholly different order of things"

- Arthur Frank³

The operation to separate Mary and Jodie began on November 4th, 2000 and ended the next day on November 6, 2000. It took 20 hours, and involved up to 20 or more staff members of St. Mary's Hospital in Manchester, including neo-natal and pediatric surgeons, neuro-surgeons, anaesthetists and nursing staff. Mary cooperated fully by dying off as she was expected to do. Jodie survived and made a rapid recovery, though

¹ Landau, Elaine. Joined at Birth: The lives of Conjoined Twins (Danbury, Connecticut: Franklin Watts A division of Grolier Publishing, 1997). Photo and quotation at 51.

² "Conjoined Twins", broadcast on BBC2 9:00 p.m. October 19th, 2000.

³ Frank, Arthur W., "For a sociology of the Body: An Analytical Review" in Mike Featherstone, Mike Hepworth and Bryan Turner (eds) The Body: Social Process and Cultural Theory (London: Sage, 1991) 36 at 38.

she faces years of additional reconstructive surgery. She was allowed to return to Malta with her parents in June of 2001.

While other cases of conjoined twin surgeries continue to appear regularly, arguably none have saturated the popular press like Jodie and Mary. The main feature of Jodie and Mary's case that made it so unique compared to other stories of conjoined twins was not that one died in the course of separation, or even the idea that one had to die to save the other. What made the case unique was that it was referred to and decided by a court of law. We placed ourselves in the decision maker's seats and wrangled with the ethical and moral issues the situation raised. It was fascinating because we could sit in judgement vicariously through the press, as "neutral", uninvolved parties to a normally private anguish. But we cannot be truly neutral, for the tools that we have require us to start from basic assumptions. Our shared legal and ethical frameworks are built around a presumption of physical separateness and "being" in individuality. It is likely that the reason we were so engaged was because the decision was so intractable within those confines: we simply could not make sense of Mary and Jodie using our individualizing models. I mean this in the deepest sense: not only are we ill equipped to make decisions about conjoined twins within our modern ethical framework; we simply can not grasp "who they are". They are fundamentally incoherent under any set of "normal" criteria.

Our system of law is especially redolent with the concept of individuality as rooted in our system of rights, and our modern medical system is built on a base of normalized ideas about the human body and the primacy of the autonomous patient. Conjoined twins collide with the point at which medicine and law interconnect, challenging the very core assumptions in each discourse, and in many ways rendering them incoherent. The drive to separate them is an imperative in law and medicine,

because individuality and the separate bodies that facilitate it are culture imperatives that we cannot possibly imagine an alternative too. We need to separate conjoined twins: it is not only the way in which we ensure the reproduction of the physical norm, but it is also the way we protect the continued comprehensibility of our dominant social discourses, for our world is ordered not only on individual rights, but on a fundamental presumption of uniqueness and separateness, that can not permit or comprehend an interrelated or interconnected way of being.

Perhaps another reason why the case of Mary and Jodie attracted so much attention is because while individualism is still the overarching cultural narrative, we are living in a time of increasing instability of both the individual model and the dominant presumptions of bodily norms. Mass communication, the Internet, increasing global threats through environmental degradation, are all things that increasingly facilitate our ability to visualize and emphasize interconnectivity. In resolving disputes, we are seeing increasing use of alternative dispute resolution techniques, both inside and outside the court, which emphasize community driven responses and / or the preservation of relationships. New surgical techniques and medical treatments allow for the survival and reintegration into society of more and more abnormal bodies that in previous generations might not have been sustainable or would have been locked away from view,⁴ and the shifting limits of social acceptability permit more deviant bodies to be on display in our daily lives.⁵

⁴ For example, Mash and Dasha Krivoslyopova, who were taken from their mother at birth in 1950, and kept in a Soviet research institute for 20 years. The mother was told the girls had died.

⁵ For example, transgendered bodies, bodies with multiple piercings or tattoos, or even a greater acceptance of disabled bodies in the workplace, etc.

Whether through law, medicine, or other discourses, the boundaries of many of our established ethical presumptions are increasingly being pushed. While for the most part the dominant forces of normalization are reproduced, we still have many occasions to pause and reconsider the rules and assumptions by which we live. Dominant discourses ultimately function to exclude something or someone, and it is important to think about what or who that is, and how we might visualize a different, more inclusive and less restrictive discourse. Law and medicine influence at a very fundamental level the actual experience of who we are. A different discourse of conjoined twins might offer an opening into a radically re-visualized discourse of the self, with freedom from the limitations of individualism, and greater acceptance of what the human body is and can be. As noted by Bryan Turner,

“In the postmodern cultural context within which the self evolves, the boundary of the self becomes uncertain and problematic and with technological change in the medical sciences, the body can indeed be restructured and refashioned to bring about profound changes of identity... Thus, rather than thinking about the body as a regulated topic, we should conceptualize the body in a more fluid manner to allow these important social changes in a wider social context.”⁶

I have suggested throughout that embodied individuality is not the only way to be embodied. I have illustrated that how the body is lived and experienced is historically contingent, and mediated by both medical and legal discourse. I have demonstrated that law and medicine rest on similar principles of individualism and separateness. I have shown that though conjoined twins exist outside of normative assumptions of body and being, the Court of Appeal made its determination entirely with reference to the normative standard and through comparison to the rights of non-conjoined persons. I

⁶Turner, Bryan S. The Body & Society: Explorations in Social Theory, (Oxford: Basil Blackwell, 1984) at 21.

have not suggested how the court might better have made its decision, nor would I wish to. It was my purpose only to raise some questions, contest the discourse, and perhaps encourage the exploration of new or different discourses of body and being.

The flurry of media attention that surrounded Mary and Jodie diminished and eventually faded completely away. As noted in chapter 5, a case before the Australian Courts cited the decision in *Re A*, but did not draw the media circus of the original. New reports of conjoined twins occasionally circulate, still predominately rooted in a discourse of the medicalization of bodily deviance. Jodie's life goes on in her Maltese village. The world as a whole seems relatively unchanged by the decision in *Re A*. But with more and more radical surgeries possible, the ability to radically re-visualize self, body, and the relationships between them will continue to, and without doubt the normalizing discourses of law and medicine will be challenged again, perhaps even eventually giving way to new forms of governance, based on something other than individual rights, or entirely new ways of being.

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