**Book Review**

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Book: The State and the Body: Legal Regulation of Bodily Autonomy

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With regular media coverage of stories that focus on our bodies and what we, or others, do with our physical structures, this is a timely book to answer the question where does bodily autonomy begin and state intervention end? Recent media coverage has highlighted the complex nature of this debate with newspaper articles and news stories that have examined the emerging market in the transportation of gametes across borders, a trade of body cells discovered in places such as Laos and intended for use in the international surrogacy trade.[[1]](#footnote-1) Equally, radical reform proposals made by the Citizens Assembly in April 2017[[2]](#footnote-2) to amend Ireland’s Abortion laws have reignited the debate about an individual’s bodily rights in pregnancy. A recent challenge to the Suicide Act 1961 in relation to the right to die[[3]](#footnote-3)as well as the right of doctors to withdraw life sustaining treatment[[4]](#footnote-4) ensure that this debate is never far from our minds.

Elizabeth Wicks’ (“the author”) takes us on a philosophical journey through this maze of moral and legal conundrums and constructs strong arguments in favour of bodily autonomy, arguments that should act as a compass when navigating the difficult question of whether regulation of the body is needed or desirable. Legal moralism or legal paternalism have no room to play in bodily autonomy argues the author and the key focus of any regulation should be legal protection of others rather than the body itself. Surrogacy is given as one of the few examples of when state intervention might be justified given the potential for conflict between multiple parties.

The five embodiments upon which bodily autonomy are measured in this book relate to reproduction, death, sex, body modifications and the sale of the body. The author argues that questions of liberty mark the catalyst for the complex relationship between the state and the body, a relationship that is both stark and cumbersome.

The author builds her arguments by first deconstructing the concepts of autonomy and privacy before moving on to embodiment. The separatist approach to the body and mind adopted by philosophers of the Kantian or Cartesian theories is criticised, as is the discourse of bioethicists espousing personhood paradigms. These, the author argues are approaches that fail to appreciate how the body and mind interact but at the same time are distinct. The author instead prefers Mary Ford’s approach to the supportive nature of embodiment to personhood and argues that this approach is necessary to ensure compatibility with the human rights approach to universal equal rights. However, the author’s claim that that our focus should be on the embodied self rather than the disembodied mind is not she claims an intent to return to arguments about the distinctness of the body and mind but to remind us that they frequently interact with each other but that it is the body that is truly important in autonomous decision making because ‘decisions can only be made within a particular embodied experience.

Whilst academics may disagree about the extent a person can be said to be fully autonomous when choices may be externally influenced, the author argues that the legal world is concerned only with issues of how capacity, voluntariness and information impact on autonomy and the rationality of the choices is largely dismissed. She calls for a more subjective treatment of autonomy and this aligns with similar calls made by others.[[5]](#footnote-5)

The author is perhaps too quick to dismiss the importance of relational autonomy as espoused by academics such as Jennifer Nedelsky[[6]](#footnote-6) arguing that relationships are choices made by individuals rather than a way in which to understand what has defined the woman making those choices and prefers instead to proceed on the basis of the individualistic nature of autonomy. Yet one might argue that bodily autonomy may have relational aspects especially when dealing with disputes between hospital and parent or hospital and spouse that relate to the continuation or withdrawal of treatment for their loved ones. However, the author is careful to build her arguments on autonomy from an individual perspective given the human rights importance to the embodiment paradigm that she constructs.

Next the author moves on to examine privacy. Privacy, it is contended is paradoxically a description of private entitlement but with a normative label that means private behaviour may be open to regulation by the State. Yet, as the author observes, an activity can retain the status of private even when the activity is conducted in the public domain. The law’s construction of the body in to private and public sphere’s as noted by Alan Hyde[[7]](#footnote-7) allows a legal discourse to flourish as to the social uses of the body which the author elegantly positions as primarily of intimate and sexual uses. Given the private nature of the activity it is argued that consent must play a central role in the definition of a private sphere and in this way privacy and autonomy are inextricably linked. However, what moves privacy from the private domain are the public consequences of the private action, only when harm results is state intervention is justified. The nature of the activity, the agreement of all the actors and the public consequences of the action all thus serve to determine private choice.

Embodiment theory (the union of the body and mind) thus becomes the foundation upon which most of the authors arguments rest. The mental self is important to the physical self and the mental self must be free to make decisions and choices about the physical self. Using examples such as pregnancy, surrogacy, assisted dying and as examples, the author argues that autonomous decisions are made by the embodied rather than the disembodied self. To illustrate how such decision-making would work the author uses assisted dying as an example and asks whether a decision can be said to be truly autonomous unless the individual has had the embodied experience of the pain and suffering connected to dying which could then inform their decision- making process. This measure of decision-making however becomes problematic in the author’s discussion of Female Genital Mutilation (a term preferred by the author which runs counter to her defence of the practice). The author uses Female Genital Mutilation (FGM) later on in the book to argue that an adult who consents to such a practice cannot be said to be harming the human dignity of society as a whole and that criminal laws against FGM are excessive if compared to lenient laws for cosmetic surgery. This argument is made problematic if the reader considers the author’s earlier definition of decision-making as being connected to an embodied experience This might lead the reader to the conclusion that until a person has experienced FGM they cannot be said to have made decisions within an embodied experience, how then can they make the decision to subject themselves to FGM?

Relying on the ‘harm principle’ most closely associated with John Stuart Mill, the author places her defence of bodily autonomy as one that relies on consent and capacity of the individual. For example, human reproduction is within the private realm when it involves consenting adults (and even consenting children) and thus should be allowed where there is capacity to consent regardless of the criminal law definition of capacity. Any regulation, in the author’s view, should be limited unless it can be defended on the basis of policing capacity, human dignity or the rights of others.

The author makes recommendations for the repeal of consensual sexual offences such as incest unless harm is caused by such activities as well as the repeal of more recent laws prohibiting FGM. These practices should be legalised is the recommendation that the author makes, unless the adult is not of decision making capacity. The author suggests ‘robust safeguards’ should be put in place to ensure free-choice. It also leads the reader back to more questions such as how do we ensure free-choice? How do we prevent harm where there has not been free-choice and should state intervention take place before harm occurs or after it has occurred? The recommendations for radical changes to the present law are not supported with any concrete models to ensure protection of the individual other than using the Mental Capacity Act 2005 as a framework to decide capacity and choice. The author does

however accept that some ‘soft paternalism’ might be necessary at times in order to ensure that choice is freely given and capacity exists but the detail is lacking here and the recommendations to support the detailed arguments within the book take up a mere two pages. This is an issue that merits further discussion in order to support some of the calls for repeal of the criminal law. However, the author’s journey is largely a theoretical one to foster debate and thought. This is indeed a thought-provoking book that continues an important debate about the dichotomy of privacy and paternalism, autonomy and regulation, harm and protection and the body and the mind. This book is likely to appeal to legal scholars, philosophers and bioethicists alike. It is well written and easy to read with a logical flow to the arguments. Whilst it includes plenty of controversial arguments this lends itself to a passionate rather than a disspationate analysis of the topical issues.

(1556 words)

1. See for example the recent media coverage of the transportation of vials of semen in to Laos <<http://www.bbc.co.uk/news/world-asia-39663671> [↑](#footnote-ref-1)
2. See for example, <<http://www.irishtimes.com/news/ireland/irish-news/assembly-votes-to-mandate-oireachtas-to-legislate-for-abortion-1.3057940> [↑](#footnote-ref-2)
3. See the recent decision by the Court of Appeal to allow Noel Conway to mount a judicial review challenge to the Suicide Act 1961 as reported at <<http://www.bbc.co.uk/news/uk-england-39578510> [↑](#footnote-ref-3)
4. See for example, the recent media coverage of baby Charlie Gard <<http://www.bbc.co.uk/news/uk-england-london-39777073>>accessed 4th May 2017 [↑](#footnote-ref-4)
5. See for example, CF Stychin, ‘Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self’ in S Heldon and M Thompson, *Feminist Perspectives on Health Care Law* (London, Cavendish, 1998), M Shildrick, Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio) Ethics (London, Routledge, 1997) and R Fletcher, M Fox and J McCandless, ‘Legal Embodiment: Analysing the Body of Healthcare Law (2008) Medical Law Review vol.16, 321. [↑](#footnote-ref-5)
6. J Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities (1989) Yale Journal of Law and Feminism 7. [↑](#footnote-ref-6)
7. A Hyde, *Bodies of Law* (Princeton, NJ, Princeton University Press, 1997) [↑](#footnote-ref-7)