

EXPLORATIONS IN PROPERTY RIGHTS: CONJOINED TWINS

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1. Introduction

The purpose of this article is to survey the question of property rights within the framework of conjoined twins. The questions entertained include: who owns the body if it is under the control of two *wills*? Is it even intelligible to consider property under dual ownership of two *wills*? Are there limits of a dominant twin based on the demands of the other twin? Could one twin commit a crime while the other was innocent? What, if any, are the limits of restitution and punishment regarding conjoined twins? Could one twin legally end his life if it meant the end of both of their lives? Could one twin enter into a contract without the consent of the other.

Before plunging into the subject of conjoined twins, we must first disclose the variety of conjoined forms that exist with this birth defect. There are 15 categories,¹ though many twins don't fit perfectly within any of the classifications. Therefore, to even condense the subject of conjoined twins with one heading is to oversimplify the topic.

We base our analysis on the nonaggression principle (Rothbard, 1978, 1982) the idea that aggression is inherently illegitimate. We must conclude that, aside from an inability that leaves you under the willing care of another individual, there is no negation of liberty that emanates from a birth defect. A

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¹ For more medical information regarding conjoined twins see www.umm.edu/conjoined_twins/facts.htm and www.phreeque.com/conjoined_twins.html.

birth defect does not, in and of itself, negate an individual's ability to live free from either committing or receiving aggression. However, such scenarios where a person is left to the willing care of another, meaning such individuals cannot directly maintain their existence by way of direct or indirect means without the intervention of another, are difficult for the libertarian theoretician. Naturally, we want to grant all people the freedom afforded to them by fact that they are human. The problem we quickly run into is that we do not have positive rights only negative ones. For example, a man has the right to not be aggressed against in his person or property, yet, these rights are different when applied to questions of positive obligations. Though an individual has the right to not be physically aggressed against, he does not have the right to demand someone help or save him if he is being physically aggressed against. For that matter, no one has the right to demand to be fed when hungry or clothed when naked or even doused with water if on fire. The reason is rooted in the fact that one cannot force another's charity. By definition charity must be free from force; if it is coerced, it cannot be charity. With this outline in mind, we return to our topic of conjoined twins. In section II we relate conjoined twins and the criminal law. Section III is given over to considering a real live example of this phenomenon. The burden of section IV is to deal with some analogies. We conclude in section V.

II. Conjoined twins and the criminal law

Consider the case where our conjoined twins are under the rightful will of another individual, given that they are unable to maintain their own preservation without the direct charity of this person. Here, there exists no convolution of libertarian property rights. The twins, like a single child, is under the control of their caretaker. Such conjoined twins, like any children, may be defined legally as the wards of their caretaker, and he their guardian. Any purposeful actions take place within the domain and legal responsibility of the latter. However, if we venture outside such a position of custodianship and survey conjoined twins as two fully independent *wills* governing their own actions, we may begin our thought experiment.

Foremost, we must conclude that if one twin has no control over the body's muscular movements, then he is left only with verbal persuasion to limit the actions of the other twin. Persuasion, however, is limited to one's ability to influence and thus guarantees no action or non-action. Therefore, if the dominant twin wishes to eat ice cream with no regard to the body mass index of the other conjoined twin, the submissive twin is physically at a loss. But is this a matter of law as well? Can the dominant twin legally be made to oblige the desires of the submissive twin?

Thus, the question becomes, if one twin is doing harm to his sibling by way of personal action, is there a negative rights violation or is there simply the disavowing of a positive obligation? Such a scenario may be paralleled to that of a pregnant woman who disregards the health of her unborn child, though not necessarily her personal health, by smoking, drinking, consuming too much or not enough calories or even over/under exercising. In such a situation, the question must be asked, is the mother infringing on any negative rights of her fetus or is she simply disobeying positive obligations? For example, does the baby have a right to not ingest smoke, alcohol, too few/too many calories, etc.; or is it simply in the babies' interest to not necessitate these acts. Likewise, are the negative rights of the submissive twin being violated or is the dominant twin simply ignoring any positive obligation to act?

To phrase this question in terms of homesteading rights, it may help to consider bodily ownership as simply that of the *will* as homesteader of the body, and thus the body is property of the *will*. Though there is a lot to unpack in such an analogy it may help us through some of the logic of property rights in this rather bizarre case. Thus, to homestead is to gain ownership of a natural object, without a present owner, by way of putting the object to use.

For some analysts, property rights over one's body is realized once the individual is no longer parasitic, that is, when he is independent of others' actions. Yet, what about the scenario of our conjoined twins, that is, when an individual body is homesteaded by two opposing *wills*? Are we to then say that there is a division of ownership? Hoppe (2006, 197), makes the argument that ownership cannot be divided, or more clearly that, "Two individuals cannot be the exclusive owner of one and the same thing at the same time."

If we accept this argument, it would seem to follow that ownership cannot be partitioned without an original owner. Who, then, is the original and thus proper owner of the conjoined body? By our definition, a homesteader only gains ownership of a natural object (like a body) by putting it to use. Therefore, we must ask, how a submissive twin, one that has limited control over muscular movements, could ever be described as putting such body parts to use. Only the dominant twin would be controlling the muscular movements of the two of them² and thus it would follow via homesteading, only the dominant twin owns the body from which it operates and thus needs not labor under any positive obligation to his twin. If the analysis offered

² That would be the extreme case of dominance. It is also possible to define this characteristic relatively: one twin controls the body to a *greater* (but not total) degree than the other.

above is true, then the dominant twin may proceed to act in accordance to his own will without legal obligation to his sibling.³

However, it may be within the realm of probability that the caretaker, though not the original homesteader of the body, but the independent force that meets the needs of the dependent twins, also has a say in the division of ownership. Thus, it may be possible that the guardian only releases custody of the twins by drawing a contract between the three of them, outsourcing the division of decision making power to an outside party. In this case the dominant twin would be forced to yield a portion of his decision making power by agreeing to the terms set forth by the caretaker, when they are under his guardianship.

Why can't we simply accept a 50/50 division of ownership within the body of a conjoined twin? Sidestepping the arbitrariness of 50/50 as the division of choice, we must first ask how such a partition comes to be. Before something can be divided it must first be completely owned. Therefore, the root question is, who had the original ownership, and thus the right to settle on such division?

It may also be noteworthy that, if for some reason the second twin was to have no means of making his opinions known, then his desires cannot be of any moment. Thus, if an outsider were to make the complaint that the actions of the dominant twin were in opposition to the submissive twin, he would have no way of demonstrating that; there could not be any evidence to support such a claim. Indeed, it is a moot point to believe an outside party can even understand the desires of the mute. In this case, the silent twin would simply be at the mercy of his dominant sibling.

Let us propose that the dominant twin commits a theft. How should we reach a verdict on punishment or restitution when it would involve penalizing an innocent party? First, the legal theoretician must ask whether the submissive twin is guilty of aiding and abetting. If yes, then the conclusion is simple: both may properly be punished. But, if the weaker twin is entirely innocent, this smacks of injustice. If both are guilty, but to different degrees, how could such punishment or restitution be divided among the two parties? Is it possible for the conjoined twins to pay in proportion to their separate contribution to the crime? For example, a monetary penalty may be divided among various bank accounts. Of course, it would be difficult to determine how a submissive twin could have access to his own money if he is physically unable to provide information and sign

³ Suppose the dominant twin controls the body inhabited by both of them 60%, and the weak brother 40%. Then, it would appear they would be like a stock company, where the former owns the larger share, and the latter the smaller.

documentation. It may be possible for punishment to be constructed in such a way that it is aimed at the dominant twin while providing as much comfort as possible to the innocent, submissive twin.

Questions like these may likely proceed *ad infinitum*, or we may accept that the division of restitution and punishment cannot be adequately resolved. Quite possibly, conjoined twins, though not more aggressive than other individuals,⁴ may carry a higher probability of forfeited restitution. If so, they may find it in their interest to carry with them added property insurance before entering into private property agreements. Since the purpose of all restitution is to make the victim whole again,⁵ we cannot accept that aggression involving conjoined twins be overlooked or discarded based solely upon their birth defect (like that of appeals made in defense of insanity⁶). Private arbitration companies do not have this luxury since they would not likely be willing to compensate victims for their loss. Likewise, at least in the libertarian society, courts may not subsidize the victim via aggression against the taxpayer. Thus, it is likely that in the free society conjoined twins, would compensate any potential victims by carrying with them added property insurance

Conjoined twins constitute a miniscule proportion of the population. We have discussed their punishment for wrong doing, not because we think this is a realistic problem that must be addressed. Rather, we have attempted to wrestle with the challenge of private property rights, and, sometimes, as in this case, it takes an unusual to better shed light on such difficult considerations.

III. A real life example⁷

Four year old Tatiana and Krista of Vernon, B.C., Canada, are not just conjoined, but are also “craniopagus, sharing a skull and also a bridge between each girl’s thalamus, a part of the brain that processes and relays sensory information to other parts of the brain. Or perhaps in this case, to both brains. There is evidence that they can see through each other’s eyes and perhaps share each other’s unspoken thoughts.”

⁴ It is difficult to contemplate such people engaging in physically aggressive behavior, given their physical limitations, but these would not at all preclude them from engaging in white collar crime.

⁵ See Kinsella, 1996, 1997; Rothbard, 1977, Whitehead and Block, 2003.

⁶ However, on this question see Szasz, 1961, 1963, 1979.

⁷ This section relies heavily on McQueen, 2010. All quotes in this section emanate from that publication.

Their story is depicted in the documentary *Twins Who Share a Brain*.⁸ Among the responses it engendered was a debate on the British student chat site *The Student Room*; the topic: “Conjoined twins sharing a brain—one person or two?”⁹ But, it is clear that if there is only one person, here, then the problems raised above do not arise. Rather, then, there would be only one individual, who could call upon two separate bodies; however, with but one consciousness, guilt for any crime would be easy to assess.

But, in this case, it is clear that there are two separate personalities and differential sharing of the bodily functions. “Krista is the larger and stronger. Tatiana, while smaller, is the work horse. Her heart does much of the pumping, her kidneys and liver do most of the filtering. “Krista is my bully. I think she always will be,” . . . “But [lately] Tati has taken a lot of the authority,” . . . “If you’re going to be mean to me, I’m going to stop being nice.’ [Tati] is not as laid back as she was before. It’s a good thing.”

If, later on in life the two of them commit a crime, and if their development continues along paths already taken, then Krista will be the dominant twin, and Tatiana the weaker one. Assuming this, Krista will be more than proportionately responsible for the offense, and thus will have to pay more heavily to compensate the victim.

But, will not this be unfair to Tatiana? After all, the criminal enterprise, we may posit, was instigated by the bullying of Krista, and Tatiana was herself either totally or at least partially innocent.

IV. Analogies

Sometimes vexing challenges such as this one may best be dealt with in a round about manner, through analogy, not directly. What analogy can we call upon to uncover the rights involved in such a scenario?

One possibility is the case of the shield (Block, 2010, forthcoming). A grabs B, and while hiding behind B, A starts to shoot C. Both B are C and entirely innocent; A is the criminal, the only criminal, at least so far. However, both B and C are also armed. (We preclude the possibility of B turning around and firing at A.) May C attempt to gun down A, when the only way he can do so is by first putting a hole in B? If B sees C discharge his weapon at A (which means at B, too), may B fire at C? In other words, of the two innocent parties, B and C, given then one of them must die, which one

⁸www.google.ca/#hl=en&source=hp&biw=1276&bih=818&q=twins+who+share+a+brain+documentary&aq=1&aqi=g3g-m6&aql=&oq=Twins+Who+Share+a+Brain&fp=2598ceb4b9e9f81d

⁹ www.thestudentroom.co.uk/showthread.php?t=1283558

shall it be? Note the analogy to the strong and weak twin case. A represents the dominant twin, B the subservient one, and C the innocent victim A. In Block's (2010, forthcoming) view, C has the right to plug B, and B has not such reciprocal right to do the same to C. Why? This is due to "negative homesteading": the *first* victim of the heinous A was B, not C. Just as in the case of positive homesteading, it is a matter of first come, first served. The initial person to mix his labor with the land,¹⁰ is the rightful owner of it. But the same applies to the negative homesteading case. The first individual to experience the misery, must keep it to himself. He may not pawn it off on others.

This is not the time or place to determine if this theory is true or not. Instead, we apply it to the conjoined twin scenario. If this analysis is correct, then when the dominant twin in effect forces his weaker sibling into a criminal act, and he (they) are caught, recompense must come from both of the twins, even though the subservient one is only partially guilty, or, in the extreme, not culpable at all.

Another analogous scenario is "missile." Here, the quintessential big bad strong guy A, physically lifts up smaller lighter weaker B, and hurls B at C, with such force that if there is any contact between B and C, both will perish. Again both B and C are armed, but B cannot turn his weapon on A, and nullify the entire example. So, who, in this case, B or C, would be justified in shooting the other, so as to prevent the fatal collision between them, created by A? Using the same negative homesteading theory, we once again side with C. He is the *second* victim of A, not the first, who, in this case is also B. The implications for the conjoined twins case are the same: the weaker sibling is the *first* victim of his stronger brother, and, thus, even if entirely innocent, must be forced to bear some of the burden in compensating the victim of his brother, C, who is only the *second* victim.

Let us consider a third analogy, but before we do, we do well to reiterate Hoppe's (2006, 197), important comment: "Two individuals cannot be the exclusive owner of one and the same thing at the same time." In fractional reserve banking (frb), this is exactly what, purportedly, occurs.¹¹ In

¹⁰ Block, 1990, 2002A, 2002B; Block and Yeatts, 1999-2000; Block vs Epstein, 2005; Bylund, n.d.; Hoppe, 1993, 2011; Kinsella, 2003, 2006; Locke, 1948; Paul, 1987; Rothbard, 1973, 32; Rozeff, 2005.

¹¹ For the libertarian case against fractional reserve banking, see Bagus, 2003; Bagus, Howden and Block, forthcoming; Barnett and Block, 2005, 2008, 2009; Baxendale, 2010; Block, 2008; Block and Caplan, 2008; Block and Garschina, 1996; Block and Humphries, 2008; Block and Posner, 2008; Davidson, 2008; Davidson and Block, unpublished; Hanke, 2008; Hoppe, 1994; Hoppe, Hulsmann and Block, 1998; Huerta de Soto, 1995, 1998, 2001, 2006, 2010; Hulsmann, 1996, 2000, 2002a, 2002b, 2003, 2008; Murphy, 2010;

this case, A deposits \$100 in B's bank. In return, B gives A a demand deposit for this amount of money. This means that A can call upon B at any time to honor his check for that \$100. But B, a fractional reserve banker, turns around and lends \$90 of this money to C, keeping a reserve of \$10 in his coffers, as against the time he, B, is called upon to pay his outstanding debts. B lends C this \$90, also, for simplicity, in terms of a demand deposit. Now, C, also, can come to B at any time of his choosing and ask for, nay, require, that he be paid any amount up to that sum. B's outstanding debts from this transaction are now \$190. Thus, we have a "refutation" of Hoppe's keen insight: A and C both own \$90 at the same time (forgetting for the moment, that reserve of \$10). It is not at all the case that A and C each own half of this \$90, namely, \$45 each. No, very much to the contrary, there are each, A and C, the legal owners of the entire \$90, a veritable logical contradiction.

We shall for the purposes of the present paper assume that the libertarian critique of frb is entirely correct. Our task, here, is a more limited one: to apply lessons from this third analogous situation to the case of the twins. So, when the inevitable occurs, and both A and C show up at B's doorstep, each demanding their rightful and legal \$90 (or \$100, in A's case), which one of them should be paid? After all, this scenario started out with A in sole possession of the funds. Assuming he was initially the rightful owner, there does not appear to be any reason why the money should not be given to him. Thus, this conundrum is relatively easy to answer: B should give the overlapping money to A, not C.

Where does this lead us? Just as two different people cannot possibly fully own any one thing, they cannot, either, fully control one body. If there are really two consciousnesses inhabiting but one body, they can at most be partners in its management. At this point we enter the realm of multiple personalities, who are fighting over control over the one body they both claim, and it is here we must make our exit, as the realm of psychology is a bit beyond the expertise of either of the present authors.¹²

V. Conclusion

In conclusion, the authors have endeavored to demonstrate how property disputes as extreme as conjoined twins can still be governed within the realm of the libertarian nonaggression principle and its logical extensions:

North, 2009; Polleit, 2010; Reisman, 1996, 2009; Rothbard, 1975; 1990, 1991, 1993; Salerno, 2010.

¹² For an important contribution to this endeavor, see the entire issue of *Journal of Medicine and Philosophy*, 2(2), which consists of: Delkeskamp, 1977; Erde, 1977; Engelhardt, 1977; Puccetti, 1977; Shaffer, 1977 Sperry, 1997A, 1997B.

rights to homestead and negative rights. We fully acknowledge that the present paper does not definitively answer all such questions in this highly complex field. But, the perfect is the enemy of the good: we have to start somewhere.

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