

The Taboo Topic

Submitted By: Toni Nielson, Christen Trammell, Joel Salcedo, Bryce Bridge,
Jeanette Rodriguez, & Marvin Carter
California State University, Fullerton
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The U.S. has entered another period of social change. The alterations to contemporary social prohibitions are at the tip of the general population's tongue and the debate community would be remiss to neglect the opportunity to discuss some of the most exciting social politics of the last 30 years. Not since the 1970's has the US seen so much debate regarding the rights of its social polity. Don't forfeit the opportunity to enter the fray. It is in this spirit that I offer (based on the suggestion of Scott Elliot) the taboo topic paper.

Background of Prohibitions on the Body

The taboo topic area is functionally about control over the body, its desires, and the enactment of those desires. Foucault argues the beginning of the regulation of the body starts in eighteenth century Europe whereby codes for regulating the obscene and the indecent were normalized and entire regimes of knowledge are built to detail the nature of the normal and abnormal body¹. Regimes of science, medicine, and psychology bore witness to our bodily desires and actions by recording the body into texts which were used by the legal apparatus' of the time to construct codes of obscenity, decency, and morality for individuals, the family, and the body politic. "In the eighteenth century, sex became a 'police' matter – in the full and strict sense given the term at the time²." Social sciences required the proper body, which means improper bodies required study before they could be effectively altered. The disciplinary practices of regimes of body knowledge became the right hand of the legal system. From the eighteenth century to our modern time, social prohibition is a bifurcated establishment. On the one hand, sovereign government articulates the limits of the body/citizen as a representation the

¹ M. Foucault (1978). The History of Sexuality: An Introduction Vol. 1. New York: Vintage Books.

² Foucault, p. 24.

social body, and on the other hand, a grid of disciplinary communities determines the normal body and seek coercive acceptance of the perfect body in the name of the social body.

Others argue the United States legal relationship to the body really begins in the 19th century. According to Alan Hyde³, “the body did not exist as a subject of legal analysis until the early nineteenth century. In the early years of that century, a distinctively modern body takes shape in legal and popular culture, a body that represents an individuated, human spirit that is the person inside it, a person that controls that body but is not identical to it.” The nineteenth body is a natural body which means that some of the earliest regulations of the body are the expulsion of the unnatural bodies from society. The presumption of naturalness makes the body a physical unit marked with legible signs (Hyde, 1997). Those legible signs can be used to determine the inappropriate body. The body of the eighteenth century law is a perverse body needing to be discovered in order to be properly regulated, but the nineteenth century body is a discovered body already made legible.

The twentieth century body is probably the most relevant body for a couple of reasons. First, most of the laws of the twentieth century body are still with us, counted as the status quo. The body is the property of its owner, a commodity to be bought and sold, or the object of desire. The body represents the physical and material, but also the thoughts and desires bound in the body or more commonly known as the person or citizen. “In law (the body) has been seen as the only possible basis for the citizen’s responsibility to act and to choose.⁴” Citizens use the body as the mechanism for making choices. Democracy then is particularly important to the regulation of the body. “There is a close link between the rise of modern market democracy, and the dense rules and practice of manners, civility, body control, and deportment that separate the modern

³ A. Hyde (1997). Bodies of Law. New Jersey: Princeton University Press, p. 9.

⁴ M. Lock & J. Farquhar (2007). Beyond the body proper. Durham: Duke University Press, p. 2. Parentheses added by the author of the paper.

and medieval world as surely as attitude toward interest rates and market expectations⁵.”

Controlling our bodies makes concretely manifest the abstract concept of self-government and the law “becomes the form which shapes into harmonious unity the turbulent content of the subject’s appetites and inclinations⁶.” Tyranny is unnecessary when it is replaced with the subject’s self-identity via our ability to cast a vote in a democratic system. The law tames the body’s needs, desires, and passions into acceptable interactions with other bodies. We are not alone in our communities and the law determines the limits of our physical interactions with others and even our isolated actions which sometime spill over into the community.

Second, the twentieth century body is the least legible body inundated with postmodern logic confounding what was once the natural materiality of the body and the simple Cartesian divide between thoughts of body desires and material bodily enactments. The twentieth century body “coexists with other bodies that are represented in abstraction from their relations with others⁷.” The body in abstraction is an invitation for postmodernists to note that the body has always, already been a negotiated abstract. There is not a perfect body, only a series of imperfect, subjective bodies projected as the objective, perfect body. “(B)odies tend to indicate a world beyond themselves, but this movement beyond their own boundaries, a movement of boundary itself, appear(s) to be quite central to what bodies ‘are’⁸.” In the twentieth century, the body has become messy, less real and more performative. The postmodern concept of the body is not without problem. In pragmatic use, postmodern bodies have difficulty securing very modernist concepts of rights and using prohibitions, often shunned by the relativist, to protect subjects whose bodies have been pushed to the margins by their communities.

⁵ Hyde, p. 50

⁶ Hyde, p. 50

⁷ Hyde, p. 9

⁸ J. Butler (1993). Bodies that matter. New York: Routledge, p. ix.

The choice of the law, and the heart of the taboo topic, is “when to configure the body in relationship to others: to be seen, empathized with, touched, held, chastised, or killed; and when the body is represented as isolated, the home of a person existing separate from others⁹.” What does that sentence mean? It means the law must determine what is appropriate for bodies in the public, what is appropriate for bodies in the private, and what the distinction is between the public and the private, if there exists a distinction at all. We are here to ask: Should we do as we please with our body? If the answer is no, then where is the line between what we should do to/with our body and what we should not? Are those bodily prohibitions justified and by what standard?

Unique Educational Opportunities

Carpe Diem. Few topics are more difficult to address than sex and few topics have such serious consequences for our failure to address them. Parents have extreme difficulty broaching rudimentary sex education with their pubescent and pre-pubescent children¹⁰. Sexual partners are lost when approaching each other's sexual histories. “A recent nationwide study including married couples, reported approximately one of four women and one of five men surveyed had no knowledge of their partner's sexual history...Another survey showed a substantial percentage of respondents did not disclose “previous sexual risk factors to current sexual partners¹¹.”

Internet hookup websites, like Manhunt, and social networking sites, like Facebook and Myspace, provide people an increasingly wide array of potential sexual partners, even altering what we consider to be a sexual interaction. “Web-based chat rooms and discussion boards involving sexual topics are...extremely popular and widespread on the Internet. PlanetOut alone

⁹ Hyde, p. 9

¹⁰ G. C. Brock & R. P. Beazley (1995). Using the Health Belief Model to Explain Parents' Participation in Adolescents' At-home Sexuality Education Activities. *Journal of School Health.*, p. 124.

¹¹ D.J. Mack (1999). Cleansing the system: A fresh approach to liability for the negligent or fraudulent transmission of sexually transmitted diseases. *Toledo Law Review*, 30 U. Tol. L. Rev. 647.

has over forty chat rooms about gay sexuality and Salon's Table Talk has thousands of discussions about sexual pleasure¹².” These are only a few examples of countless websites designed to facilitate sexual content. Although society is clearly talking about sex, we continue to have our discussion in the faceless, nameless chat room using anonymous identities, like chunkylover53. “Negativity towards sexual communication is more common than any other type of antisexual behavior¹³.” When it comes to sex, we are taught from a very young age its best to speak in whispers or not at all. Our hushed approach isn't relegated to taboo sex; in reality, all sex is functionally taboo. The result of our inhibition is a generation of people who are sexually stupid and more likely to engage in unsafe sexual conduct risking the transmission of sexual diseases, unwanted pregnancy, and sexual violence¹⁴.

Will we be the same frozen community as our parents and their parents? Will sexual interactions continued to be described in terms of taboos or can we move to a world of responsibilities? The policy debate community has an opportunity to confront the fears of our contemporary communication by bringing our most taboo subjects out of the dark, private sphere and into public light. We must grapple with our bodily prohibitions. The topic offers a unique opportunity to develop our sexual communication skills and encourage an open responsibility over fear and silence.

Is this topic area only about sex? No. Although sexual taboos might be the sexiest part of the topic, they are far from the only piece of the topic area. The taboo topic is about prohibitions of the body, meaning prohibitions in terms of what we can do to/with our bodies. There are several controversial prohibitions involving the possession and use of drugs and the right to die.

¹² Albany Law Journal of Science & Technology (2004). BRIEF: Brief for Respondents in Ashcroft v. American Civil Liberties Union. 14 Alb. L.J. Sci. & Tech. 699.

¹³ j. ince (2005). The politics of lust. Amherst: Prometheus Books, p. 156

¹⁴ ince, 2005

Euthanasia is a standard case of legal controversy. “Dying has become a crisis in contemporary America¹⁵.” The taboo topic could not skip over physician-assisted suicide and be complete. The controversy is divided down familiar abortion lines with proponents fighting for the right to die and opponents arguing freedom has limits. Despite the longevity of the debate, the US is not in any better place to respond to this moral quagmire than it was 10 years ago when the Supreme Court ruled on the issue; situations like the Shiavo case demonstrate our collective inability to determine if death, an inevitability, should be prohibited. Even in countries with legal assisted suicide, like the Netherlands, the controversy has not concluded. Instead, the choices have become more complex: Should terminally ill minors be given the right to voluntary euthanasia? Should minors be required to have parental consent before selecting assisted suicide as a medical option? Even without voluntary euthanasia, patients are permitted the right to refuse treatment, even when the clear consequence of refusing treatment is death¹⁶ which begs the question of the moral usefulness of this prohibition. Although the question of euthanasia seems simple in the case of relieving the pain of the terminally ill, the moral double-bind of determining what is a terminally ill disease in a world where medical breakthroughs happen daily complicate the issue. The taboo topic offers a unique opportunity to examine the very fabric of our collective morality: the choice of life.

We would like to conclude the unique educational opportunities section with a peak into the War on Drugs. The United States has entered a new phase of the War on Drugs brought to us by the Obama administration. Obama “expressed support for repealing the ban on federal funding for needle exchanges, an end to the disparity of sentencing for crack and powder

¹⁵ S. Lavi (Jan.1, 2008). How dying became a 'life crisis'. Daedalus, lexis

¹⁶ S.D. Smith (June 1, 2008). De-moralized: Glucksberg in the malaise. Michigan Law Review, lexis.

cocaine, and an expansion of drug courts for non-violent offenders¹⁷.” Although Obama does not want to spend federal funds raiding state approved medical marijuana facilities, he is not making any move to federally legalize medical marijuana or remove it from its Schedule 1 classification. Now is the perfect time for debate. Although the climate of drugs policy has shifted, the policies themselves have not. In summary, “despite the change in attitude in the US, medical marijuana remains illegal under federal law. Therefore, although the new policy has opened up doors to a large market, cannabinoid drug producers will continue facing barriers to entry and will be limited to a number of states in which they can freely sell their cannabinoid products¹⁸.” The taboo topic offers an opportunity to seize on the new drug climate in a way that can produce effective drug policy for the new era. The days of one-sided drug policy have come to a close which presents the debate community with a unique opportunity to suggest pragmatic drug policy with the potential to become law in the future.

Mainstream Options for Policy Change

Topical affirmatives would alter law to legalize a social interaction currently considered taboo or prohibited by federal law. Many of the topics are related to sexual regulations, considered the most substantial taboos of our time. Additional subject areas include the use and possession of drugs and the right to die. The harms areas are substantial. The solvency mechanisms are somewhat limited because the topic is functionally either (narrowly) a courts topic or (broadly) a legal topic. Limiting the solvency mechanism debate makes the topic much easier for the negative to get a grasp on and is a clear benefit of a legal topic. There are a number of answers to negative positions because the literature on the affirmative is deep and most of the areas of the topic have at least 10 years of debate about action at the federal level.

¹⁷ K. Morris (April 11, 2009). The USA shifts away from the "war on drugs". The Lancet, lexis.

¹⁸ Americas Pharma and Healthcare Insights (April 1, 2009). A Change In The Policy Regarding Medicinal Cannabis, lexis.

Policy Advantage Areas:

- Education
- Health
- Disease Prevention
- Economy
- Soft Power
- Modeling
- Rights
- Crime/Recidivism/Prison Crowding
- Social Movements

Critical Advantage Areas:

- Discipline/Biopolitics
- Identity Politics (Race, Class, Sex/Gender, Intersectionality)
- Medicalization
- Social Coercion
- Cartesian Duality

This topic is well suited for negative ground. Social prohibitions are deeply entrenched in the polity which makes disadvantages like politics very reasonable, that's probably obvious, and counter-plan options well developed. Core negative ground is specific and unique to social prohibition, but there is great generic ground with relation to rights debate. The best part of the topic is the relative ease of the case debate. It's been too long since a debater could easily say no to the affirmative case using topic literature. There are numerous reasons in topic literature to maintain social prohibitions.

Disadvantage Areas:

- Politics
- Terrorism via Religious Fundamentalism
- Movements
- Rights Malthus
- Fear of Crime
- Hegemony
- Judicial Activism
- Hollow Hope
- Federalism
- Social Backlash

Counter-Plan Areas:

- States
- Courts (dependent on the wording of the topic)
- United Nations
- Executive Order
- Decriminalization rather than constitutional protections or legalization
- There are a number of topic specific counter-plans grounded in each social prohibition, such as civil unions.

Critique Areas:

- Foucault
- Nihilism
- A number of different feminisms (Butler, Mohanty, Haraway, Queer theory, McKinnon, etc.)
- Identity Politics (Race, Class, Gender, Religion)
- Social Coercion
- Psychoanalysis
- Postmodernist Critiques of the Mind/Body Split
- Cultural Imperialism & various rights critiques

Topic Wording & Topic Specific Controversies

Prostitution: Prostitution is known as the world's oldest profession, so what makes this topic so taboo? History continually condemns the prostitute as a moral evil and a criminal. Criminalization makes most aspects of prostitution and prostitution-related activities illegal¹⁹. Unfortunately, prostitution is a somewhat nebulous legal term that is not outright illegal in all US states, for example Nevada. Prostitution is generally considered "the giving or receiving the body for sexual intercourse for hire."²⁰ Not all forms of prostitution are equal. Scholars note several types of prostitution which span the range from criminalized to arguable legal: street workers, massage parlors, brothels, escorts, call girls, and profession dominance (S&M or bondage

¹⁹ C.R. Miller & N. Haltiwanger (2004). Prostitution and The Legalization/Decriminalization Debate. The Georgetown Journal of Gender and the Law, 5 Geo. J. Gender & L. 207.

²⁰ C.R. Miller, et al. 2004

oriented workers)²¹. Prostitution definitions and legality are debatable, but street-based sex work is clearly illegal in all states in the US. In terms of literature, the concepts are interchangeable, but in the context of the law, street-based sex work is the more substantial taboo. A street-based sex worker will engage in the same acts for \$100 as an escort will for \$4000; the difference seems to be one of class.

Sex & Minors: As noted earlier, parents have a difficult time engaging in “the talk” with their children. The result of this fear is that sex education falls in the lap of secondary educators. Sex education is controversial topic. The Bush administration invested heavily in abstinence-only sex education, and although that administration has exited abstinence-only funding has not. Obama has a history of supporting abstinence-only in a larger package of sex education²². Abstinence-only education is “limited to teaching that a monogamous, marital, heterosexual relationship is the "expected standard of human activity" that sex outside such a relationship will be physically and psychologically harmful²³.” Proponents of abstinence-only argue it teaches American youth a healthy respect for sex while leaving the work of teaching actual sex education to parents. Opponents are not as rosy arguing abstinence-only is anti-educational; “it deprives students of the knowledge necessary to manage their own sexual health²⁴.” Possibly the largest indication of the failure of abstinence-only education are teen pregnancy statistics which indicate the US is higher than any other industrialized country and 8 times comprehensive sex education countries like the Netherlands²⁵.

²¹ S.E. Thompson (2000). Prostitution-A Choice Ignored. *Women's Rights Law Reporter*, 21 *Women's Rights L. Rep.* 217.

²² R. Stein & D. St. George (March 19, 2009). Teenage Birthrate Increases For Second Consecutive Year. *The Washington Post*, p. A01.

²³ H.G. Beh & M. Diamond (2006). Children and education: The failure of abstinence-only educations: Minors have a right to honest talk about sex. *Columbia Journal of Gender and Law*, 15 *Colum. J. Gender & L.* 12.

²⁴ H.G. Beh & M. Diamond, 2006

²⁵ A. Schwarz (2007). Comprehensive Sex Education: Why America's Youth Deserve the Truth about Sex. *Hamline Journal of Public Law & Policy*, 29 *Hamline J. Pub. L. & Pol'y* 115.

Sex in relationship to minors falls into several categories from child pornography laws (handled below) to rape law. Even presuming sexual consent is possible for a minor may require calling into question statutory rape laws. Statutory rape is not a consistent legal term. Many states use legal terms to describe unlawful sexual penetration based on a lack of sexual consent, but even these terms vary. The age of consent reflects the legal age in which a person can engage in consensual relations. Unfortunately, even this phrase is not consistently applied across state law. In general, the age of consent varies from 14-18 in all states in the USA with over half the states adopting the age of “16” as the legal age of consent²⁶. The controversy of statutory rape laws lies directly in the outdated nature of law. Some scholars argue there is no legal age of consent for a minor; all minors, particularly girls, are incapable of consent and the modern spin on consent allows 37 year old Joey Buttafuoco’s to take advantage of 16 year old Amy Fisher’s while only receiving the minimum sentence²⁷. Other scholars argue although statutory rape laws are written in gender-neutral terms, they are enacted in ways that leave boy-children unprotected. “(S)tatutory rape laws are not equally enforced against female offenders, nor have such laws been crafted to address male victimization”; the result is boy victims paying child support to their rapists²⁸. These laws are badly in need of reform.

Pornography: “Pornography is the depiction of sexual behavior that is intended to arouse sexual excitement in its audience” and is legally regulated by obscenity standards²⁹. Pornography has a history of controversy from the Flint trial to the number of feminists who have sought to ban outright all pornography. According to Andrea Dworkin, “Pornography creates bigotry and

²⁶ Sex Laws.org (Access April 12, 2009). “What is Statutory Rape?” , http://www.sexlaws.org/what_is_statutory_rape

²⁷ M. Oberman (2004). Turning girls into women: Re-evaluating modern statutory rape laws. DePaul Journal of Health Care Law, 8 DePaul J. Health Care L. 109.

²⁸ R. Jones (2002). Inequality from gender-neutral laws: Why must male victims of statutory rape pay child support for children resulting from their victimization? Georgia Law Review, 36 Ga. L. Rev. 411

²⁹ Free Dictionary (2009) “Pornography”,

hostility and aggression towards all women, targets all women, without exception. Pornography is the suppression of us through sexual exploitation and abuse, so that we have no real means to achieve civil equality; and the issue here is simple, it is not complex. People are being hurt, and you can help them or you can help those who are hurting them. We need civil rights legislation, legislation that recognizes pornography as a violation of the civil rights of women³⁰.”

The concept of obscenity is difficult to ascertain legally and often falls under the “I know it, when I see it” community standard. Internet pornography was given the broadest of First Amendment rights in *Reno v. ACLU*. The Court rejected the states argument that protecting children justified significant intrusions into First Amendment. “Although the Court recognized a compelling interest in protecting minors from potentially harmful material on the Internet, it held that “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship³¹.” The Internet differs from other media due to the interactive nature of the technology. No other media offers a similar basis for comparison.

The most contemporary pornography controversy is based on virtual pornography, particularly virtual child pornography. The internet has complicated our world and since it also offers hundreds of thousands of sex websites, it cannot be surprising the internet complicated the pornography debate. Child pornography represents an exception to the First Amendment that is well supported by the Supreme Court. In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down regulations on virtual child pornography³². Since the high Courts ruling, Congress

³⁰ A. Dworkin (1986) Pornography is a civil rights issue. Letters from a war zone. <http://www.nostatusquo.com/ACLU/dworkin/WarZoneChaptIVF1.html>

³¹ K.L. Rappaport (1998). In the Wake of *Reno v. ACLU*: The Continued Struggle in Western Constitutional Democracies with Internet Censorship and Freedom of Speech Online. *The American University International Law Review*, 13 Am. U. Int'l L. Rev. 765.

³² B.G. Slocum (2004). Virtual Child Pornography: Does it mean the end of the child pornography exception to the First Amendment? *Albany Law Journal of Science & Technology*, 14 Alb. L.J. Sci. & Tech. 637

scrambled to pass the PROTECT ACT. This act has yet to be scrutinized by the Court; if it was struck down, Congress would have no way to regulate virtual child pornography.

Medical Marijuana: Since the passing of the Marihuana Tax Act of 1937, which led to the criminalization of cannabis through the Federal Bureau of Narcotics, the federal government has refused to allow states their own policy on medical marijuana. California passed Proposition 215 in 1996 that legalized the medical use of marijuana, but the federal government reacted and refused to acknowledge its medical benefits by referring to it as a Schedule 1 substance, meaning it has high potential to be abused and offers no medicinal purposes. Accordingly, as state law in states like California and Alaska allow for the medical use of marijuana, the federal government still opposes it and has made attempts at dismantling medical marijuana shops by seizing their assets in spontaneous raids. Since the Gonzales v. Raich Case (previously Ashcroft v. Raich) on June 6, 2005, the Supreme Court ruled that under the Commerce Clause of the US constitution Congress may ban the use of cannabis even where states approved it for medical purposes. This means that patients now have lost any incentive to register as a medical marijuana patient putting them in a double bind risk of persecution due to the systematic function of self-incrimination. Marijuana remains illegal in all fifty states with exceptions in some states for medical use. Overturning Gonzales v Raich would lead to redefining the powers of Congress as outlined in the Constitution. Currently Congressional power is defined broadly and when it is defined too in a broad manner, it infringes on state rights. When the Supreme Court overturned the decision made by the ninth circuit court of appeals, it upheld the DEA as a Constitutional entity and infringed on the already existing California state laws regarding the use of medical marijuana. Overturning the case would lead to establishing what the constitution means when it refers to Congress' ability to "regulate commerce." It would allow the cultivation and possession of

Marijuana and would reaffirm the states right to experimentation as stated in Justice O'Connor's dissent. It may also deem the DEA an unconstitutional entity.

Schedule IV Drugs: According to the Drug Enforcement Agency, possession of Schedule IV drugs is required to be accompanied by a prescription except when dispensed directly by a practitioner³³. A patient may use Schedule IV drugs only when prescribed to that individual. Doctors, dentists and pharmacists are authorized under the Misuse of Drugs Regulations 2001 to possess, supply and compound controlled drugs in Schedules 4. They may only supply controlled drugs to those who may lawfully possess them, including patients for whom a drug is prescribed. Some examples of Schedule IV drugs are Xanax, Valium, Deprol, and Reactivan.

Body Modification: Modification of the human body can take several forms from aesthetic (clothing, tattoos, or piercings) to surgical (genital alterations, breast removal). This category most notably accounts for transgender populations who are seeking hormone therapy or surgical change to their genitals and breasts. Not all transgender peoples seek body modification, but those who do confront substantial legal difficulty. In order for transgender people to receive any legal rights in the current system, they "are held to even higher sexist standards than are non-transgender people" which require them to tell the story of hyper-masculinity or hyper-femininity to doctors, courts, and agencies³⁴. Most legal protection for sex discrimination either explicitly bar trans coverage, the Americans with Disabilities Act, or the courts ruled, in *Price Waterhouse v. Hopkins*, to not include trans populations³⁵. Some states refuse to change sex

³³ Drug Enforcement Agency. "The Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (a), (b), and (d), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (Sec. 301 et seq.) of this title." <http://www.usdoj.gov/dea/pubs/csa/829.htm#b>

³⁴ D. Vade (2005). Expanding gender and expanding the law: Toward a social and legal conceptualization of gender that is more inclusive of transgender people. *Michigan Journal of Gender & Law*, 11 Mich. J. Gender & L. 253.

³⁵ D. Spade (2003). Resisting Medicine, Re/modeling Gender. *Berkeley Women's Law Journal*, 18 Berkeley Women's L.J. 15.

assignment on the birth certificate even post-operations³⁶. Lack of protections means even using the bathroom can be a dangerous proposition.

Genital or sexual modifications constitute one type of body modification, but other topical affirmatives may discuss modifications such as tattoos and piercing. Body modification such as piercing and tattoos are incredibly popular, particularly with young adults. Despite the popularity, “body modification has been largely unregulated. States have only recently begun enacting regulations; since 1998, approximately thirty-six states have changed their body art legislation... Even though regulations exist, most states do not require a "specific curriculum, training, or mandatory continuing-education [programs]" to perform body modification.³⁷”

Marriage: Since Massachusetts ushered in the first state-sanctioned marriage application in 2004, gay marriage is the controversy at the fore front of social policy³⁸. Either states are legalizing gay marriage or banning it. Every major election comes with an assault of gay and lesbian issues: marriage, unions, adoption, hate crimes legislation, and employment protections. The topic is imminent, but clearly unresolved. The debate California is an excellent example of the controversial and unresolved nature of gay marriage. It begins in 2000 with Proposition 22, a ballot measure that passed by a substantial margin, resulting in the definition of marriage as an exclusive union between and man and woman. In 2004, San Francisco Mayor Gavin Newsom fed up with the nature of Prop 22 decided the city of San Francisco would issue same-sex marriage licenses, but Mayor Newsom was acting in clear defiance of the law subsequently the California Supreme Court declared the marriages void. As if the situation was not already

³⁶ P. Currah (2003). The Transgender Rights Imaginary. The Georgetown Journal of Gender and the Law, 4 Geo. J. Gender & L. 705.

³⁷ K. Egan (2007). Morality-based legislation is alive and well: Why the law permits consent to body modification but not sadomasochistic sex. Albany Law Review, 70 Alb. L. Rev. 1615.

³⁸ Time Magazine (May 22, 2008). A brief history of: Gay Marriage.
<http://www.time.com/time/magazine/article/0,9171,1808617,00.html>

complex enough, a piece of legislation was entered into the California Assembly to legalize same-sex marriage, but was thwarted by Governor Schwarzenegger who vetoed AB 43 on the grounds that it violated Proposition 22. Enter the California courts, on May 15, 2008, the Supreme Court struck down California's existing statutes limiting marriage to opposite-sex couples in a 4-3 ruling³⁹. Gay marriage was legal for slightly less than 4 months before the passage of Proposition 8, an amendment to the California constitution banning gay marriage. Now gay marriage is back in the courts contesting the constitutionality of Proposition 8 with thousands of legal marriages in limbo⁴⁰. The California debate is a microcosm of the larger gay marriage struggle. It's a complex, controversial topic. The addition of new state laws in every election and constantly changing court ruling make the topic even more difficult to navigate than it is right now. "Recent victories for gay-marriage advocates in Iowa, Vermont and Washington, D.C., show the changes that a fired-up constituency can help enact"⁴¹. Although, there are important victories for gay rights, the debate community cannot conclude the debate over gay has concluded given 29 states have constitutional amendments restricting marriage to a man and a woman⁴². Now is a pivotal time for the gay community and the marriage debate.

Physician-Assisted Suicide (PAS) or Euthanasia: Although voluntary euthanasia is illegal in the United States, there are a number of steps that have arisen in the last 15 year to legalize this highly controversial process. Laws in the United States create a distinction between active and passive practices of euthanasia. Active euthanasia, also known as assisted suicide, is prohibited. Oregon and Washington are the only states to legalize physician assisted suicide;

³⁹ M. Dolan (May 16, 2008). California Supreme Court overturns gay marriage ban. LA Times, <http://www.latimes.com/news/local/la-me-gaymarriage16-2008may16,0,6182317.story>

⁴⁰ McClatchy – Tribune Business News (Nov. 19, 2008). Court should act soon on Prop. 8, lexis.

⁴¹ J. Alston (April 20, 2009). Gay-pride grenade. Newsweek, Vol. 153 #16, p. 57.

⁴² The Economist (April 11, 2009). Wedding season. lexis

whereas, 36 states and DC have made the process explicitly illegal⁴³. Two Supreme Court decisions are the focal points of federal law on the right to assisted suicide. In *Vacco v. Quill*, the Supreme Court ruled terminally ill patient does not have a constitutionally protected right to euthanasia. The Supreme Court in their unanimous 9-0 decision argued that there was a difference between withdrawal of treatment and physician assisted suicide. Their position was that allowing this type of euthanasia would encourage terminally and mentally ill people to end their lives. The Courts decision was seen as preserving life as well as medical ethics.⁴⁴ *Quill* invokes the common distinction administering “a lethal drug, which is a form of "killing," and refusing treatment, which merely amounts to ‘letting die’⁴⁵.” Two essential legal doctrines emanate from this case: 1. the causation rationale, and 2. the intent rationale. According the *Quill* majority opinion on the causation rationale, “[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.⁴⁶” The intent rationale argues in physician-assisted suicide the intent is to kill the patient which is distinct from the side-effect of death when a patient refuses treatment⁴⁷. These two arguments have become the moral backbones prohibiting euthanasia and make the *Quill* case the pre-eminent moral ruling on the subject.

Core Affirmative Literature

Prostitution

- L. Kuo (2002). Prostitution Policy: Revolutionizing Practice Through A Gendered Perspective. New York: New York University Press.

⁴³ K. Green (2003). Physician-Assisted Suicide and Euthanasia: Safeguarding against the slippery slope - the Netherlands verse the United States. *Indiana International & Comparative Law Review*, 13 *Ind. Int'l & Comp. L. Rev.* 639.

⁴⁴ Oyez http://www.oyez.org/cases/1990-1999/1996/1996_95_1858

⁴⁵ S.D. Smith (June 1, 2008). De-moralized: Glucksberg in the malaise. *Michigan Law Review*, lexis.

⁴⁶ *Vacco v. Quill*, (1997) 521 U.S. 793, 801.

⁴⁷ S.D. Smith (June 1, 2008). De-moralized: Glucksberg in the malaise. *Michigan Law Review*, lexis.

- C.R. Miller & N. Haltiwanger (2004). Prostitution and The Legalization/Decriminalization Debate. *The Georgetown Journal of Gender and the Law*, 5 Geo. J. Gender & L. 207.
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Potential Topic Resolutions

- The United States Federal Government should constitutionally protect one or more of the following: transgender operations, marriage between two consenting adults regardless of gender, polygamy, prostitution, pornography, possession and/or use of medical marijuana, possession and/or use of Schedule IV drugs, voluntary physician-assisted suicide.
- The United States Federal Government should substantially narrow federal law in the area of one or more of the following: body modification, marriage between two consenting adults, prostitution, medical marijuana, pornography, voluntary physician-assisted suicide, statutory rape.
- The United States Federal Government should substantially increase federal regulation in the area of one or more of the following: body modification, marriage between two consenting adults, prostitution, medical marijuana, pornography, voluntary physician-assisted suicide, condoms distribution in secondary schools, statutory rape.
- The United States Federal Government should legalize one or more of the following: marriage between two consenting adults regardless of sex or familial relationship, prostitution, polygamy, voluntary physician-assisted suicide,
- The United States Federal Government should overturn one or more of the following: the Defense of Marriage Act; Gonzales v. Raich; Vacco v. Quill; Price Waterhouse v. Hopkins; Reno v. ACLU; abstinence-only sex education funding.
- The United States Federal Government should substantially increase statutory protection for one or more of the following sexual minorities: gays/lesbians/bisexuals; transsexuals; polygamists; prostitutes; statutory rape victims.

Authors Recommendation

It is the recommendation of the authors that this topic be added to the topic area ballot.

The authors recommend a legal topic including both court rulings and important Congressional law. Both the US Courts and Congress have weighed in to limit control over individual bodies based on social prohibition. Some of the most substantial law on parts of this topic has no Supreme Court precedent which prevents the resolution from limiting itself to court holdings alone.

The authors recommend a topic that is flexible in design providing affirmative ground that both legalizes current prohibitions, but also provides optional room to clarify and therefore strengthen law regarding social taboo. If a the fear of a bidirectional topic is too large for those concerned about negative ground, then the authors recommend a topic to legalize current social prohibitions. Negation oriented resolutions, such as the agriculture reform or courts topics, make securing negative ground very difficult when the topic removes instead of establishing law. The authors prefer the extension of rights to the elimination of discriminatory law.

Finally, the topic could be narrowed exclusively to sexual taboos eliminating areas relating to control over the body that broaden the topic into large bodies of literature. The most narrow version of the topic still captures the unique educational benefits of a contemporary rights topic without extraneous literature on narcotics and euthanasia.

Frequently Raised Concerns

Isn't it time for a foreign topic? Although often the pendulum of debate swings between foreign and domestic, it is not uncommon to have 2 domestic topics or foreign topics back-to-back. The treaties topic, clearly international in scope, was followed with the EU topic. Recent debate on the Middle East topic reminds us the expansive nature of a foreign topic and the ground problems that can develop from the desire to list entire countries in the topic for debate. Each country was its own topic area and the literature was near impossible for small schools, and even large schools, to keep up. Singular country topics, such as Russia, run the risk of being high school topic repeat. And none of the suggested foreign topics are as timely or meaningful to the current social trends in the US ushered in by Obama and a glimpse of a liberal era after the long days of the Bush administration as parts of the taboo topic.

Is the negative ground good? Oh yeah. The negative ground is great for conservative and liberal debaters alike; this is a controversial topic. The affirmative will need to rise to the challenge to defend against strong politics scenarios and fantastic social regulation critiques. A better question is: Can the affirmative survive the politics debate? Yes. The uniqueness at the state level makes some of the rights areas arguably more a matter of time than political will. Additionally, the lobbyist evidence will be very detailed, particularly in libertarian factions of the Republicans and social conservatives of the Democrats. Also, rights topics change the impact calculus to require comparison of qualitative and quantitative impacts. The impact debates will be sweet.

What about conservative debaters who don't want to overturn these social taboos? Topic wording like increasing protection, narrowing federal law, or substantially increase federal regulation make conservative topic interpretation simple. There's no reason a debater needs to eliminate statutory rape laws or legalize genital flowering; in fact, under the federal regulation wording, it would be topical to narrow marriage to an exclusively heterosexual institution. Additionally, we are all interested in the body. "One thing that unites political commentators of the Right and the Left is their desire for the body."⁴⁸ All human beings desire physical contact and bodily freedom; the distinction between the conservative and the liberal is the scope of regulations and protections, not the existence of them.

Isn't this topic just too personal for discussion? The topic is certainly about private actions. In words of Dr. Bernie Zilbergeld, "I have yet to meet a man or woman who I think is totally comfortable with sex, and that of course includes myself. We all seem to have hang-ups of one kind or another"⁴⁹. "As a community, "we 'other Victorians' are all in the same boat"⁵⁰.

⁴⁸ Hyde, p. 9.

⁴⁹ ince, p. 9.

Although the topic is hoists discussion onto private actions, those same actions are governed by the public. The body is one of the few things everyone in the debate community shares. We all have a stake in our bodies. The concept of the social body is based on our collective stake in prohibitions, desires, norms, and taboos on the individual body.

The authors would like to thank you for consideration of this topic area.

⁵⁰ Foucault, p. 2.