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ARTICLES

CLONING AND POSITIVE LIBERTY

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INTRODUCTION

In February 1996, Scottish scientist Ian Walmut introduced the world to Dolly, a female sheep whose placid visage revealed absolutely no trace of her unique status as the world's first mammalian clone. The sudden revelation of Dolly's existence disquieted ordinary citizens and policy makers alike; if scientists can clone sheep, most people believed, they will soon be able to clone human beings. A virtually unanimous consensus quickly formed that any effort to produce a human child through the process of somatic cell nuclear transfer was not only wrong, but repulsive. Transfixed by nightmarish images from *Brave New World*[1] or *The Boys from Brazil*,[2] the American public called upon lawmakers to put a halt to the inexorable march of scientific "progress" in the area of human cloning. Responding to this outcry, President Clinton issued an immediate moratorium on the use of federal funds to support attempts to produce a child through somatic cell nuclear transfer, and gave the National Bioethics Advisory Commission three months to submit a report on the ethical and legal ramifications of human cloning.

Surprisingly, by the time the Commission issued the Report in June 1996,[3] the groundswell of public sentiment against human cloning had largely dissipated. The implications of Wilmut's discovery were quickly superceded on the editorial pages by other events. The consensus that human cloning could never

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1. ALDOUS HUXLEY, BRAVE NEW WORLD (1932).

2. THE BOYS FROM BRAZIL (ITC Films 1978).

3. *See* NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT & RECOMMENDATIONS (June 1997) [hereinafter CLONING REPORT].

be morally justified began to chip away, piece by piece. After the initial shock, American lawmakers slowly but surely folded cloning into the *laissez-faire* stance they have taken toward earlier benchmarks in the rapidly developing field of reproductive medicine, such as *in vitro* fertilization or the freezing of human embryos.

The Report contributes to the domestication of human cloning in both tone and substance. First, by attempting to translate the visceral antipathy that many persons express toward the possibility of human cloning into a set of rationally assessable objections, the Report saps that antipathy of much of its force.[4] Second, by prominently featuring the indisputably rare "hard cases" that some moralists have proposed as examples of when cloning might be justified, the Report makes it plausible for Americans to consider the ethical status of cloning as a matter of legitimate dispute. That, in turn, makes it easier to resist calls to institute broad legal prohibitions against cloning as unwarranted restrictions of human freedom, at least once the procedure has proven to be effective and physically safe for both the cloned child and the surrogate mother who carries it to term.

But what does proper respect for human freedom actually require of the law in the case of human cloning? Whose freedom is at stake? That of the parents or that of the child? The stance adopted by the United States toward regulation of reproductive technologies thus far has protected a nearly absolute negative freedom of adults to have their "own" child (*i.e.*, a child biologically related to oneself or one's partner), virtually unimpeded by anything but the limits of science. It has not, however, paid much attention to the positive freedom of the child to come into existence under conditions that will enable her to become an autonomous person of equal dignity with her parents, capable of deliberating upon and choosing a life-plan for herself. Nor has it paid sufficient attention to the fact that freedom has a social dimension; a culture which truly values autonomy must insure that the conditions of freedom are protected, promoted, and passed down to the next generation.

In this essay, I would like to suggest that the *laissez-faire* American attitude toward emerging reproductive technologies provides us with an inadequate model for regulating human cloning, precisely because it fails to attend to the developing autonomy of the child and the importance of a culture that sup-

4. On the moral force of such antipathy, see Leon Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, NEW REPUBLIC, June 2, 1997, at 17, *reprinted in* 32 VAL. U. L. REV. 679 (1998).

ports autonomy. Far from requiring us to refrain from imposing any restrictions upon human cloning, proper respect for human freedom may require us to set stringent legal limitations upon its use, perhaps even to ban it entirely. First, I will briefly sketch the broader context in which the debate about the legal status of cloning and the law will be situated, attempting to give some sense of how both the federal and state governments have treated some of the related issues the new reproductive technologies have raised in the area of medical research, ethics, and family law. I will also show how the advent of human cloning will exacerbate some of the problems already created by those technologies.

Second, drawing upon the work of the liberal legal philosopher Joseph Raz, I will attempt to make the case, at least in outline form, that cloning undermines the positive freedom of the children whom it brings into being. Furthermore, permitting the practice of human cloning, even on a comparatively limited basis, will erode essential cultural supports for the value of autonomy. On these grounds, I will suggest that liberal legal theory, properly understood, justifies measures designed to restrict or even to prevent the practice of human cloning, despite their interference with the negative liberty of those persons who wish to produce a child through somatic cell nuclear transfer.

I. SITUATING CLONING WITHIN THE AMERICAN LEGAL CONTEXT

The prospect of producing a human being by somatic cell nuclear transfer lies at the intersection of three areas of law: (1) federal and state law on the experimentation on human subjects; (2) federal and state regulation of the practices of fertility clinics, which are the likely sites of any successful efforts to clone a human being; and (3) family law, which is largely the province of the states, although the United States Supreme Court has interpreted the Constitution as protecting certain aspects of an individual's decisions regarding marriage and childbirth (*e.g.*, contraception, abortion). None of the three areas appears to be governed by a legal philosophy that is sufficiently coherent and sophisticated to deal with the problems likely to arise because of human cloning.

A. *Experimentation*

In order to produce a human clone, scientists must produce a human embryo *in vitro* using the techniques of somatic cell nuclear transfer, implant that embryo in a surrogate mother, and bring the pregnancy successfully to term. The techniques

involved in this process arguably involve experimentation on human embryos, and later, on human fetuses. Largely for political reasons, neither federal nor state law has developed provisions that adequately address the ethical and practical issues arising out of such experimentation.

At the federal level, the effort to grapple with the ethics of fetal research was stymied for political reasons. In 1994, the National Institutes of Health ("NIH") issued a controversial report on that question, which recommended that some types of such research be both permitted and federally funded, while other types be prohibited outright by federal law.[5] In response to the controversy, Congress chose political expediency over moral coherence to guide American policy on embryo research. No form of embryo research, even that deemed most troublesome by the NIH panel, is prohibited by federal law. At the same time, no research, even that judged to be most promising by the panel, is subsidized by federal funding. No side in the polarized American debate over abortion and the status of the fetus can claim absolute victory; yet each can claim an absolute rule as its political spoils. A few years later, Congress folded cloning into this fragile political compromise, explicitly incorporating research in that area into its ban on the use of federal funds to support research on human embryos.[6]

By and large, state law does not fill the regulatory gap. Only a minority of states have enacted laws restricting experimentation on the unborn; in some of these, the relevant restrictions are designed to protect fetuses destined for abortion and do not apply to human embryos, especially before implantation. In short, American researchers determined to perfect the techniques of somatic cell nuclear transfer on human cells *in vitro* would not face significant impediments from either federal or state law, provided that they are able to obtain private funding for their efforts.

But what about the next step? Once the technique for creating a cloned embryo is perfected, what legal strictures will deter a determined researcher from implanting that embryo in a willing surrogate mother for gestation, provided that she is willing to abort at the first sign of trouble? Again, state and federal law include no explicit provisions governing this possibility. It is

5. *See* AD HOC GROUP OF CONSULTANTS TO THE ADVISORY COMM. TO THE DIR., NAT'L INST. OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL (1994).

6. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, § 513(a), 111 Stat. 1467 (1997).

arguable that such an attempt would trigger the federal provisions governing research on human subjects. More specifically, one might argue that the gestational mother would count as such a subject; it is less clear that the cloned fetus would qualify, since the "experimentation" in question took place before implantation.[7] In any event, cautious researchers likewise would be able to sidestep these provisions, simply by ensuring that these experiments are not directly or indirectly subsidized with federal monies. The federal guidelines for research on human subjects do not apply across the board, but only to recipients of federal funding. Not surprisingly, most state laws governing the protection of human research subjects are not onerous; many states do not even have such laws; many of those that do are not obviously applicable in this situation.

Assuming that some researchers take the foregoing initial and intermediate steps toward the birth of a human clone, what law will prevent them from taking the last step and asking the surrogate mother to carry the fetus to term? It is only this last step that is the focus of the National Bioethics Advisory Commission's three major recommendations for public policy on cloning. The Commission called for a continued ban on federal funding of attempts to "create a child by somatic cell nuclear transfer"; it also called upon researchers and clinicians not covered by the ban to comply with its spirit through a voluntary moratorium. Finally, the Commission encouraged Congress to enact federal legislation (with a sunset clause) prohibiting all attempts to "create a child" through the cloning process, no matter whether the funding for such efforts was public or private.[8]

On its face, the activity targeted for prohibition by the Commission does not include either the creation and cultivation of a cloned human embryo *in vitro* or the gestation of a cloned human fetus in a surrogate mother, provided that the clone is aborted before birth. The Commission explicitly carved the first stage of the cloning process out of its sphere of concern on the grounds that the topic had already been considered by the NIH Panel on Human Embryo Research; it remained strangely silent about the second stage of the process. Yet a moment's reflection reveals that any serious legislative efforts to prevent the birth of the cloned child will need to focus its attention on earlier benchmarks in the cloning process. First, perfection of the tech-

7. *See* 45 C.F.R. §§ 46.101-.124, 46.203 (1998) (defining fetus as "the product of conception *from the time of implantation* . . . ." (emphasis added)).

8. *See* CLONING REPORT, *supra* note 3, at iii-iv (Executive Summary) (June 1997) <http://bioethics.gov/pubs/executive.pdf>.

niques of human cloning *in vitro* is likely to create a virtually irresistible temptation to bring them to fruition by transferring the embryo to a woman's womb for gestation. Second, after such a transfer is made, those directing the experiment lose a substantial amount of control over the outcome; it is virtually unthinkable that any court would enforce a contractual provision requiring the surrogate mother to have an abortion against her will. Consequently, once the *in vitro* techniques for cloning have been perfected, the only reliable way to prevent the birth of a clone will be to prohibit its transfer to a woman's womb. It is therefore even more surprising that the Report did not adopt a broader focus of concern, perhaps defining its prohibited activity as "the attempt to transfer a human embryo created by somatic cell nuclear transfer to a woman's womb for gestation."

Congress did not accede to the Commission's request to prohibit attempts to create a child through somatic cell nuclear transfer. Although several anti-cloning bills were introduced, including some that were far more restrictive than the Commission's own proposals, none were passed. In response to the brief resurgence of public sentiment against cloning caused by Richard Seed's announcement of his quickly discredited plans to institute a broad program of human cloning, the federal Food and Drug Administration ("FDA") asserted its jurisdiction over the "safety and efficacy" of attempts to produce a live-born human being through the cloning process, just as it had earlier asserted jurisdiction over gene therapy.[9] While the statutory basis of the FDA's authority to take this step is rather unclear, its pragmatic value is clearly evident.[10] In essence, the FDA accomplished indirectly the goals that the Commission had requested that Congress achieve directly, thereby deflecting the call for more restrictive legislation.

B. *Fertility Clinics*

The second aspect of the law likely to be implicated by the prospect of cloning is evident when we consider which parties are likely to make cloning available to the general public. Fertility clinics, of course, are the obvious candidates to do so. Once equipped to perform the technique of somatic cell nuclear transfer, they can add it to the array of services they already offer to

9. *See* Rick Weiss, *Human Clone Research Will Be Regulated: FDA Asserts It Has Statutory Authority to Regulate Attempts at Human Cloning*, WASH. POST, Jan. 20, 1998, at A1.

10. *See* David Kessler et al., *Regulation of Somatic Cell Therapy and Gene Therapy by the Food and Drug Administration*, 329 NEW ENG. J. MED. 1169 (1993).

infertile couples and individuals, which include not only artificial insemination with a husband or donor's sperm, egg donation, *in vitro* fertilization using spouse or donor gametes, and increasingly, genetic screening and selective implantation.

However, neither federal nor state lawmakers have kept up with the quickly evolving techniques of artificial reproduction, or the established procedures governing the record-keeping or safety practices of the fertility industry. In 1992, Congress passed the Fertility Clinic Success Rate and Certification Act,[11] which imposes success rate reporting requirements, not substantive standards of quality, on fertility clinics. While the Act requires the Department of Health and Human Services ("DHHS") to develop a model program for states to use in certifying laboratories using human embryos, as of January 1999, no such program has been unveiled. The legal situation is not significantly more developed on the state level. Few states impose their own regulations on fertility clinics; most have been slow to exercise much control over the circumstances under which artificial insemination (donor), egg donation, *in vitro* fertilization, embryo screening for genetic defects, and surrogate motherhood are practiced.[12] Consequently, there are few monitoring or regulatory procedures in place capable of deterring an enterprising fertility clinic from discretely adding cloning to the array of services it offers.

C. *Family Law*

The third legal realm where the prospect of human cloning poses special challenges is family law, which is largely the province of the states. Here again, the most reliable indication of how they would deal with cloning's potential to alter the traditional family structure is to look at how they have addressed the new familial relationships made possible by reproductive technologies already available to the public. In the vast majority of these cases, the fundamental issue is not whether any such technologies should be unavailable in a particular situation or range of situations, but rather how to sort through the claims of those involved in the creation of the child in order to determine who are the "natural parents."

Many states have adopted laws stating that in the case of a married woman who gives birth to a child conceived by artificial insemination with donated sperm with the consent of her hus-

11. 42 U.S.C. §§ 263a-1 to a-7 (1994).

12. *See* Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823 (1997).

band, the husband, not the sperm donor, should be considered the child's natural father. Unfortunately, most have not kept up with the new permutations in biological parenthood made possible in recent years, such as surrogate motherhood, gestational surrogacy, egg donation, or embryo donation. Nor have they kept up with the increasing variety of persons who may seek to use them, including single people and same-sex couples. Only two states (North Dakota and Virginia) have enacted a version of the Uniform Status of Children of Assisted Conception Act, which attempts to sort through some basic questions of parental rights and responsibilities with respect to children born as a result of the new reproductive technologies.[13] Because state legislators are reluctant to take a stand on such sensitive and controversial practices, the persons using them frequently do so without certainty about the legal status of their relationship with the child they are about to bring into existence. In some instances, relationships between those seeking to rear the child and those providing gametes or gestational services may deteriorate, forcing the courts to intervene to settle the matter.[14]

As reproductive technology has progressed, the number of persons potentially involved in the creation of one child has expanded. When most of us think of cloning, we think of the concentration of parenthood in one individual: the "template" whose nuclear DNA provides most of the genetic pattern for the clone. However, it is also important to recognize that cloning exacerbates the fissure of parental relationships already begun by existing technologies. More specifically, at least eight persons can potentially be involved in the creation of a human clone: (1) the initiator of the cloning process; (2) the template; (3) - (4) the parents of the template, who will also be the clone's genetic parents (leaving aside the mitochondrial DNA); (5) the donor of the enucleated egg that is fused with the template's nucleus (who contributes the mitochondrial DNA); (6) the gestational surrogate; and (7) - (8) the rearing parents.

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13. *See* Uniform Status of Children of Assisted Conception Act, N.D. CENT. CODE §§ 14-18-01 to -07 (1997); Status of Children of Assisted Conception, VA. CODE ANN. §§ 20-156 to -165 (1995).

14. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (involving a dispute between a married couple (the natural mother and natural father) and the surrogate mother, who bore their fertilized embryo to term); *In Re* Baby M, 537 A.2d 1227 (N.J. 1988) (involving the question of who has "parental rights," as between a natural mother, natural father, and his wife, where the natural mother was artificially inseminated with sperm from the natural father, according to the terms of a surrogacy contract).

Will any of these individuals have a right to produce a child through the cloning process? Conversely, will any of them have a right to prevent the creation of a clone to whom they stand in some relationship? Who counts as the natural parents of the clone? Once cloning becomes a scientific reality, the law will need to answer these questions in order to give shape to cloning's social reality. As the recent writings of legal theorist John Robertson demonstrate, making room for cloning may require liberal legal theorists to modify substantially their theories of reproductive freedom. More specifically, in his previous writings, Robertson, like other liberal theorists, has placed two elements at the center of his theory: (1) the identification of reproductive freedom's core concern with the creation of a child to whom one has a genetic tie; and (2) the paramount importance of an individual's right to negative reproductive freedom (*i.e.*, not to bring into being a child with whom one has a genetic connection).[15]

For Robertson and other liberal theorists, an individual's right to make use of contraception and abortion to avoid bringing a child into the world to whom he or she has a genetic tie is virtually paramount; it regularly trumps positive reproductive liberty.[16] According to Robertson, a man should be able to prevent his former wife from implanting and carrying to term frozen embryos conceived *in vitro* with his sperm, since her right to bodily integrity is not involved in this decision. Conversely, she may prevent him from hiring a surrogate mother to carry the embryos until birth.[17]

At the same time, in order to defend the importance of positive reproductive liberty, Robertson emphasizes the strong desire that many people have for a child who is biologically related to them. In many of his writings, he argues that it is this biological connection, this genetic connection, that is the essence of reproduction; it is something for which adoption cannot serve as a substitute.[18] Because many persons view the creation of a parent-child relationship as an essential part of their plan for their own lives, Robertson argues that the right to do so is a protected aspect of human autonomy. By extension, he contends that persons who are unable to reproduce naturally have a positive right

15. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE 22-23 (1994).

16. Robertson, of course, does not recognize a man's right to force a woman carrying his child to have an abortion against her will. This position can be justified, not because her positive right to have a child trumps his negative right to refrain from so doing, but because a forced abortion would be a gross invasion of her bodily integrity.

17. *See* Robertson, *supra* note 15, at 28-29.

18. *See id.* at 22.

to avail themselves of new techniques in reproductive technology in order to have a child who is genetically related to them. Since it takes the gametes of two individuals to produce a child, this right includes the choice to use the gametes of individuals willing to allow them to be used for that purpose.[19]

According to Robertson, virtually all forms of cloning can be brought within the ambit of reproductive freedom.[20] However, in order to make his case, he is forced to abandon, or at least to radically qualify, the two elements of a liberal approach to reproductive freedom outlined above. Robertson suggests, for example, that an individual should be able to clone herself without obtaining the consent of her parents, despite the fact that they will also be the genetic parents of the clone (leaving aside the contribution made by the small amount of DNA contained in the mitochondria).[21] Furthermore, he believes that parents of a minor child should be able to clone that child, despite the fact that she is unable to give a legally valid consent to the procedure.[22] The only absolute limit he is willing to place on cloning would prevent persons from initiating the cloning process without making the commitment to rear the resulting child to adulthood.[23]

In both of these examples, Robertson takes positions in great tension with the basic premises of his own defense of reproductive liberty. Giving priority to negative reproductive freedom should mean that persons will be able to veto cloning procedures that would place them in parental or quasi-parental relationships with cloned children without their consent. More specifically, it would suggest that an individual should be required to seek the consent of her own biological parents before cloning herself, because her parents would also be the genetic parents of the clone (leaving aside, of course, the contribution made by the mitochondrial DNA). Their negative right to prevent the creation of a child to whom they are the genetic parents should take precedence over their first child's desire to clone herself.

Robertson can reply that the negative reproductive liberty of the parents of the template is not affected, because they will not be charged with responsibility for raising the child. However, such a response clearly abandons an understanding of the right

19. *See* John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 240-43 (1995).

20. *See* John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1388-403 (1998).

21. *See id.* at 1448-49.

22. *See id.* at 1446.

23. *See id.* at 1442-43.

to reproduce that focuses on the genetic connection between parent and child, substituting in its stead the nurturing of a child to adulthood. Moreover, if taken seriously, it may require substantial alterations in other elements of Robertson's position. For example, if the right to rear a child is made the keystone of positive reproductive liberty, the focus of his efforts should be upon insuring access to adoption, rather than insuring access to new reproductive technologies.

It is equally difficult for Robertson to defend the view that parents should be able to clone their minor children without modifying his commitment to the two elements of reproductive liberty outlined above. If the essence of reproduction is the creation of a child with whom one has a genetic tie, it would be fair to conclude that cloning entails an innovative form of (asexual) reproduction of the individual who serves as the template. The priority of negative reproductive liberty would preclude parents from cloning their minor child, who is by definition unable to give a legally effective consent to the procedure. If parents should not be able to force a girl child to take on an unwanted parental role by preventing her from obtaining an abortion, surely they should not be able to foist upon her an innovative "parental" relationship by using her as a template for the creation of a clone.

Robertson has several potential responses to this charge, all of which generate some type of inconsistency in his position. First, he might deny that the relationship between the template and the clone is truly a reproductive one; instead, he might claim that they are genetic siblings rather than parent and child. The reproductive liberty involved in this scenario is that of the template's parents, who want another child who is genetically related to them. This position, however, is difficult to reconcile with the stance Robertson takes on the individual who wishes to clone herself. If cloning is not reproductive activity, it is hard to see why that individual has any right based on reproductive liberty to clone herself. Furthermore, on this view, it is not clear why the parents of such an individual would not have an unambiguous negative reproductive right to prevent her from doing so.

In the end, Robertson seems to grant his imprimatur to any arrangement in which an adult brings into being a child whom she is willing to raise. In order to accommodate cloning, the central meaning of reproductive freedom has been altered; disconnected from all the boundaries set by natural motherhood and fatherhood, it has now become a very general liberty to cause the generation of a new human life. The essence of that liberty is not the creation of a child with whom one has a genetic tie; on

Robertson's view, an individual may legitimately desire to raise a clone of a person to whom she has no such tie. It is not merely the right to rear a child, which would be satisfied by more extensive adoption and foster parent policies. Instead, the focus of this view of reproductive liberty has become the creation of children who possess the genetic makeup desired by their parents. They are literally "children of choice."

More generally, the accommodation of cloning alters the balance between negative and positive liberty characteristic of liberal political thought. Positive reproductive liberty takes on an increasingly expansive role, because the options available to individuals seeking to have children are so much greater. One is no longer choosing simply whether to have children, but how to have them, as well as which children to have. Furthermore, the value of any act taken in the name of positive reproductive liberty is increasingly determined with reference to the goal that it is designed to facilitate: the birth of a child in accordance with the parents' desires.

At the same time, negative reproductive liberty shrinks in importance as the expansion in options forces it to diffuse its concern. What was once, in the age before reproductive technology, a unified negative right not to become a biological or social parent, has now become a compilation of fragmented negative rights: the right not to initiate the cloning process, the right not to be a template, the right not to be the genetic parents of a template, and the right not to shoulder the responsibility of rearing the clone to adulthood. Apart from the last right, it is likely that the one small piece of the fragmented negative right not to reproduce will carry very little weight against the substantial desire of parents to create and raise a child of their choice. When faced with the argument that one person's decision to initiate the cloning process will violate the negative reproductive rights of another, an advocate of cloning can simply respond by playing a sort of shell game, focusing attention on the aspects of negative reproductive liberty not threatened in this particular case. On this view the negative reproductive liberty of the parents of an adult who chooses to clone herself would not be threatened, because they will not be responsible for raising the clone. Similarly, the negative reproductive liberty of the child who is cloned by her parents is not at issue because she is not the genetic mother of the clone. The shell game continues.

II. CLONING AND POSITIVE FREEDOM

In its Report, the National Bioethics Advisory Commission approaches the issue of how to regulate human cloning with the presuppositions supplied by liberal legal theory. More specifically, the Commission maintains that human cloning should be prohibited outright as long as there remains a significant risk of physical harm to the cloned child or the woman who carries it to term. Once that risk is overcome, however, the Commission expressed significant doubts about the acceptability of such prohibitions, questioning whether the reproductive liberty of those who seek to create a child through the cloning process should be compromised on the basis of such "speculative" harms as risk of psychological damage to the child and erosion of our commitment to cultural ideals such as individuality.[24]

The thrust of the Commission's position on cloning and the law seems to be consistent with the liberal harm principle, which holds that the law (particularly the criminal law) should not prohibit actions that do not wrongfully cause harm to the interests of others.[25] Clearly, key questions which must be answered by any exponent of this principle include: (1) what counts as "harm"; and (2) how direct the causal connection must be between the act in question and the harm it brings about before the act can be prohibited. In its own approach to these questions, the Commission seems to be endorsing a strict version of the harm principle. More specifically, it appears to define "harm" as properly including only tangible, physical damage to the child or mother. Furthermore, it seems to require a close causal connection between the act and the alleged harm before legitimating legal restrictions against cloning.

It is possible to criticize the Commission's jurisprudence by arguing for a broader range of permissible answers to these two questions. One might contend that threats to a cloned child's psychological well-being and sense of individuality do indeed count as harms, as do the erosion of cultural commitments such as the conviction that children are persons whose fundamental dignity is independent of the degree to which they satisfy the expectations of those who brought them into existence. Simi-

24. *See* CLONING REPORT, *supra* note 3, at 87 (ch.5: Legal and Policy Considerations) (June 1997) <http://bioethics.gov/pubs/chapter5.pdf>.

25. Liberal legal theorists trace the roots of the harm principle to John Stuart Mill's *On Liberty*. *See* John Stuart Mill, *On Liberty*, *in* ESSAYS ON POLITICS AND SOCIETY 213 (J.M. Robson ed., 1977). The most comprehensive contemporary effort to work through the implications of the harm principle is Joel Feinberg's four-volume work, *The Moral Limits of the Criminal Law* (1984-1988).

larly, one could say that the requisite causal connection between the act and the alleged harm can vary depending upon the gravity of the harm, the likelihood that it will occur, and the importance of the act to the agents performing it.

Depending upon the breadth its definition of harm and the stringency of its causality requirements, a legal theory pressing these arguments might move beyond the generally recognized scope of liberalism. For example, many liberal legal theorists would not consider the moral corruption that a person could cause to her own character by cloning herself *(e.g.,* increasing her selfishness) to be the sort of harm that justifies a legal prohibition in and of itself. They would view a position advocating restrictions on that basis as an unacceptable form of "legal moralism," which does not sufficiently respect human autonomy on two counts. First, by preventing competent adults from voluntarily engaging in behavior whose unacceptable consequences fall only upon themselves, the position evinces an unacceptable form of paternalism. Second, by counting moral corruption as a harm in and of itself, it makes a mistake in categorization. Moral corruption, provided that it is done by leading rather than forcing the will, changes one's interests; it does not set them back.[26]

There is a second way to challenge the Commission's application of liberal legal theory to the question of cloning, which does not involve setting other values (such as the need to preserve moral character or the need to prevent harm) in opposition to freedom. Instead, it involves probing the value of freedom even more deeply. In his important book, *The Morality of Freedom,*[27] the liberal legal philosopher Joseph Raz argues that the ultimate meaning of human freedom is positive, not negative. It allows persons to forge their own identities by choosing among a number of incompatible life-plans of incomparable value. In his view, human freedom is important, not because it is impossible to form a judgment that a particular form of life is virtuous or vicious (moral skepticism), but because there exist a number of virtuous forms of life, which cannot all be pursued simultaneously (value pluralism). Negative freedom (*i.e.,* freedom from constraint) is important only insofar as it serves positive freedom, the ability of an individual to forge her own unique identity by working out a morally worthwhile plan for her life.

Raz acknowledges, of course, that one human being cannot exercise autonomy on behalf of another, nor compel her to exercise her own autonomy. However, human beings can help pro-

26. *See, e.g.,* JOEL FEINBERG, HARM TO OTHERS 35, 65-70 (1984).
27. JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

vide each other with the conditions that are necessary for the exercise of autonomy. These include: (1) the mental capacities to exercise autonomy, both intellectual and psychological; (2) independence, understood as the absence of coercion or manipulation; and (3) a range of morally worthwhile options from which to choose.[28] He maintains that the task of the government is not only to insure the second condition, but also to provide its citizens with the first and the third as well. The tools of the legal system can be used to insure that the conditions of autonomy are provided to all member of the society.[29]

Drawing upon Raz's analysis of the centrality of positive freedom, it is possible to contend that the problem with cloning is that it threatens to undermine, if not entirely erode, the conditions of autonomy for the child born of that procedure. With respect to the first condition, regarding mental capacities, we can ask how it will affect a child psychologically to know that she does not have two biological parents, but only one progenitor. Is it likely that such knowledge will affect her sense of dignity and uniqueness in a way that will interfere with her ability to understand herself as an autonomous person who is charged with responsibility for creating her own future?

With respect to the second condition, is it not at least possible that in many cases, cloning is likely to have manipulative effects upon the child who results from it? A child who has the same genetic makeup as a template who is even a year or two further down life's path may very well believe that her task is to follow in that person's footsteps—or to turn their backs entirely on them. She may pursue some options and rule out others, solely on the basis of the choices made by her template. However, there is an obvious objection to this line of analysis. What, we might ask, is the difference between a child who plans her life in response to that of a template and the more common scenario where a child plans her life in relation to the model provided by a family member or friend? I believe there are two crucial differences. First, there is the strength of the expectations focused on the child from the very beginning of her existence. The initiators of the cloning process bring a child into this world with the intention that her genetic makeup be virtually identical to that of the template whom they have chosen for that role. They are likely to be disappointed, or at least surprised, by any deviation. Second, there is the pull of the model itself on the imagination of the child. The very fact that parents and other role models

28. *See id.* at 369-78.
29. *See id.* at 415-16.

look substantially different from a naturally born child symbolically creates room for her to make a choice about how to respond to their way of life. In contrast, from a physical perspective, the template is an older version of the clone. It is a strong possibility that the similarity in appearance may convince the child that the path of her future life is a foregone conclusion, or at least greatly limited in the options it makes available to her.

Finally, there is good reason to fear that children who are produced through the cloning process may not have as wide an array of options as those available to similarly situated children who were conceived naturally. The most crucial options made available to children come from their parents; the successful pursuit of many life plans requires a solid foundation in early childhood training. Most children discover their own talents and interests simultaneously with their parents, who adjust the options they make available to their children accordingly. Parents may have hopes for their children to become doctors, scientists, musicians, or Olympic athletes. Yet parents have no real reliance interest in the fulfillment of these hopes; they are frequently forced to defer to their child's own assessment of her interests and talents. In contrast, parents who decide to produce and raise a clone of an individual who has already demonstrated achievement in a particular area may believe that they know their child's aptitudes and interests better than the child knows herself. Certain that their child has the same abilities of the great musician who was her template, they may be less likely to defer to her own desire to pursue mathematics. Moreover, parents of a clone may believe they have a vested interest in having a child whose life conforms to their standards for acceptable performance. After all, it is inevitable that the decision to engage the cloning process, as well as the choice of a specific template, will create specific expectations in the parent, which they believe are justified by the genetic makeup of their child.

Human beings are not born autonomous; they grow to become so, with care, training, and more than a little luck. At least in the United States, about one-fourth of a person's life is spent as a minor, under the guardianship and direction of her parents. Do the circumstances under which a child is created affect her chances for becoming an autonomous adult? Will children who are clones be less likely to be given the conditions of freedom than those conceived in other ways? In its ethical analysis of cloning, the National Bioethics Advisory Commission addressed several issues bearing upon this question, such as whether parents who raise a child produced through cloning are likely to view that child as an object of their own creation and

therefore inferior in dignity to them. Nonetheless, in framing the question of whether cloning can be legally prohibited (after it has proven to be physically safe and effective), the Commission did not present these considerations as arising out of a commitment to liberty, but as arrayed against it. Astonishingly, the only parties presented as truly having liberty interests at stake in the decision whether to prohibit cloning are the adults who desire to create a child.[30]

One might respond that our society does not regulate the decisions of individuals to have children according to whether or not they are likely to raise them to be capable, autonomous adults. We do not license parents before allowing them to have children the natural way, despite the fact that many are incapable of raising offspring who will flourish in a society that places high regard on human freedom. Why should we suddenly concern ourselves with this question when confronted with a new reproductive technology such as cloning? A full answer to this question is beyond the scope of this essay, but a couple of considerations may be offered as a partial response. First, we may very well want to recognize a moral duty on the part of individuals to have children only under circumstances in which they believe they can raise children to be autonomous adults. Simply put, parents have a duty to furnish their children with the basic conditions of autonomy. Among other things, this duty would require parents to control their own ego investments in their children's lives, so as not to impede their ability to enable the children to forge their own identities.

Second, it is appropriate for the civil law to enforce this parental duty, just as it does other duties to provide food and shelter, so long as it can do so without infringing upon other important values. For example, the law should not enforce this duty by preventing certain persons from marrying and having sexual relations, because these activities have an immense value to those engaging in them that is distinct from the children that can result from them. Nor should the law enforce it by compelling some persons to use contraception or undergo abortions, because such measures would invade their bodily integrity and privacy. Furthermore, it goes without saying that any effort to prevent some individuals from becoming parents while encouraging others to assume that role risks making the sort of unjustly discriminatory judgments among persons that have been all too frequent in American and global history.

30. *See* CLONING REPORT, *supra* note 3, at 87 (ch.5: Legal and Policy Considerations) (June 1997) <http://bioethics.gov/pubs/chapter5.pdf>.

However, none of these dangers is involved if American lawmakers decide that *no one* should be allowed to create a child through somatic cell nuclear transfer. A global prohibition against human cloning would not raise problems of invidious discrimination, either in intent or in effect. Furthermore, it would involve no interference with the sexual activities or the bodily integrity of persons of reproductive age. It would simply rule out a particular means of creating new life that has been judged to provide an inauspicious beginning to the process of nurturing new human persons to adulthood. Such a conclusion would likely be grounded on two practical judgments. First, apart from the few hard cases noted in the Report, one could reasonably conclude that motivations of many of those who would want to obtain a child through cloning probably would be inconsistent with the character traits necessary to raise a healthy, independent child. Second, key aspects of the cloning process, including the fact that the clone's genetic makeup is deliberately modeled on a template chosen by the parents, would feed into these undesirable character traits, making the parents less willing to recognize and temper their own egocentric qualities in raising the child.

What, then, of the reproductive liberty of those who wish to become parents through the use of cloning? Raz's work offers a helpful perspective on this question as well. While individuals have an autonomy-based claim of access to an array of morally valuable options through which to work out and express their own identity, he maintains that they do not have a right to pursue any particular option. This consideration is more decisive in cases where the individuals have not taken any steps in reliance on the existence of the option before it is foreclosed by governmental decisionmaking.[31] Clearly, at this point in time, no one can have relied on the availability of human cloning in planning their reproductive decisions.

Moreover, according to Raz, the ultimate worth of autonomy is found in the fact that it makes possible a freely chosen, morally worthwhile life; consequently, no one has a claim to pursue a morally unacceptable option.[32] To the extent that cloning unreasonably threatens the capacities for autonomy of the children it brings into existence, it is morally unacceptable. Consequently, it is highly doubtful that individuals have a right grounded in reproductive liberty to obtain a child through somatic cell nuclear transfer.

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31. *See* RAZ, *supra* note 27, at 410.
32. *See id.* at 378-81.

Raz's analysis in *The Morality of Freedom* also invites us to look at another aspect of the relationship between law and liberty that is given short shrift by the Commission. While the Report explicitly acknowledges that the American people are highly committed to the value of individual liberty, it generally depicts this commitment as issuing in legal policies that leave persons free to make important life choices as they see fit. Its analysis fails to pay sufficient attention to the fact that a person's ability to lead an autonomous life largely depends upon her being situated in a culture that values human autonomy and supports the conditions for the exercise of that autonomy. In contrast with the Commission, Raz recognizes that the individual's exercise of liberty largely depends on a supportive social and institutional context; he therefore acknowledges that one task of the government is to foster the necessary cultural underpinnings of human freedom, through legislative means if necessary.[33]

While Raz recognizes that positive law can influence culture, it would have been fruitful for him to explore the ways it does so in more depth. As James Boyd White has recognized, law has a constitutive function as well as a regulatory one; it not only informs people what they may do or not do with respect to a given issue, it provides the conceptual and imaginative framework in which they consider the question in the first place.[34] Furthermore, a law, particularly one pertaining to a highly controversial topic embodying a number of conflicting values, can have a symbolic function that extends far beyond its actual reach in its influence on the moral sensibilities of the people. One needs only to think of the Civil Rights Act[35] or the Americans with Disabilities Act[36] to recognize that even one piece of legislation can powerfully encapsulate and transmit to the population a vision of how we should live our lives together. In certain circumstances, the *lack* of law pertaining to a particular practice can also function symbolically to convey a community's attitude

33. In an effort to reconcile his view of freedom with the liberal harm principle, Raz argues that governments should support autonomy by non-coercive means (*e.g.*, subsides or rewards) unless coercive measures are necessary to prevent harm. However, he observes that "one can harm another by denying him what is due to him." *Id.* at 416. Since parents arguably have a duty to provide their children with the conditions of autonomy, coercive measures are not ruled out if necessary to enforce that duty and if appropriate in other respects.

34. *See* JAMES BOYD WHITE, HERACLES' BOW 28-48 (1985).

35. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

36. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

toward that practice. While both liberal and non-liberal legal theorists recognize that not everything that is immoral should be subject to legal prohibition, many lay persons take the legal status of an act to be a fairly reliable indicator of its moral status, at least according to the canons of public morality.[37] The fact that a type of behavior is not prohibited indicates at the very least that it is not a violation of the requirements of justice.

While cloning is not likely to be widely practiced, at least for the foreseeable future, the fact that it is known to be done at all will exert its grasp on the minds and hearts of more people than those directly involved in the procedure. If it proceeds without opposition, the practice of human cloning will alter our general understanding of the nature and purpose of the parent-child relationship. If cloning is perceived to be an appropriate method of having a child, then the values it fosters are likely to be viewed as consistent with virtuous parenthood in the vast majority of cases in which parents decide to have their children the "old-fashioned" way.

CONCLUSION

The basic problem with cloning is not that the morally troubling egocentric motivations feared to prompt many people to avail themselves of the cloning process are extraordinarily reprehensible, or even that they are unique to them. Precisely the opposite is the case. It is that these motivations can be found in the heart of every human being who chooses to take on the wonderful and terrifying vocation of parenthood. Each is a mixture of good and bad, of altruism and selfishness; the decision to have and raise a child is fueled by an admixture of concerns. All parents have specific dreams for their children; most wish them success and happiness that surpasses their own.

Yet from the very beginning, a naturally born newborn child constitutes a mystery to her parents; as her temperament, gifts, and flaws manifest themselves over time, her parents are forced over and over again to recognize that she is an independent individual who will want to choose her own plan of life, not to slip

37. An example of this phenomenon is the number of Americans confronted with the Clinton scandal who considered adultery a purely private matter not subject to public opprobrium. A liberal legal theorist could consistently hold both that adultery should not be subject to *criminal* prohibition and that it is a violation of *public* morality (*e.g.*, a breach of a publicly made marriage promise whose fulfillment is important to the community at large as well as to the children born from the marriage).

meekly (even if happily) into the plans laid out for her by her parents.

This lesson is essential for parents raising children in a liberty-loving society to learn; it is a necessary condition for raising the next generation of autonomous citizens and perpetuating a culture that values individual freedom. Needless to say, it is harder for some to come to grips with this lesson than it is for others. The basic danger involved in legalizing cloning is the symbolic message that it will send to everyone who has children.[38] By allowing some parents to choose to create a child who meets their specifications, whose biological and temperamental makeup is in some significant sense test-driven or pre-lived, the law will erode social support for the delicate goal of encouraging parents not only to pass on their values to their children, but also to provide them with the intellectual tools, the range of options, and the freedom from manipulation that will allow them to make those values truly their own. It will inevitably teach all parents that they do not need to resist their understandable temptations to conform their children to their own expectations. In a society that cherishes autonomy, that is dangerous pedagogy indeed.

38. Needless to say, many of these same dangers are involved in questions of genetic manipulation.