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In a Pod

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The conclusions presented by the National Bioethics Advisory Commission (NBAC or Commission) to President Clinton in its Report on human cloning[1] are neither dramatic nor surprising. They are the practical responses of Western thinkers to the questions spawned by the announcement in February 1997 that a sheep had been cloned. The NBAC Report is also, by design, a meditation upon culture. It addresses many of the central conundrums of the age in considering what cloning means, and in expressing an underlying apprehension of contemporary culture.

The conundrums include the comparative values of scientific discovery and social responsibility, of biological and social conceptions of personhood, of individualism and community, and of free choice and political regulation. The underlying apprehension, deeply ingrained in the nation's history, flows from the essentially contradictory demands of enduring, solidary community, and of unfettered individuality and choice. In mediating these demands, the NBAC Report resorts to an intellectual and practical compromise—one that is socially responsible and also protective of the freedoms of choice and action that are essential to autonomous individuality. Although ostensibly siding with community and social responsibility, the Report hedges its recommendations so as to protect freedom and choice. Ultimately, this compromise may prove more successful at masking the underlying apprehension than at balancing the consequences of apparently unending choice.

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1. CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997) [hereinafter NBAC REPORT].

As a social document, the NBAC Report reveals a society with an astonishing ability to assimilate the unimaginable, and to render unprecedented developments almost immediately routine. Relying on the most familiar tools of Western discourse (and thus presuming the subjection of both ends and means to "rational" criticism),[2] the NBAC Report concludes with a set of recommendations rendered almost inevitable by the Commission's approach. Yet, these recommendations, and the process through which they were reached, themselves constitute an important social statement, reflective of the responses of an age to some of its most pressing conflicts and dilemmas. The process is quite as significant as the recommendations. How the Commission arrived at, and justified, the six "conclusions and recommendations"[3] delineated in the final chapter reveals as much about the society and its understanding of cloning as do the immediate conclusions and recommendations.[4]

The NBAC Report is framed so that its significance as a statement of the nation's intellectual and scientific elite cannot be ignored. Immediately following the table of contents, two letters appear, one from the Commission's Chair, Dr. Harold Shapiro, to President Clinton, the second from President Clinton to the Chair. At the back of the report are three appendices. Two of these appendices list scholars, lawyers, scientists, and others who spoke before or wrote papers for the NBAC. The other appendix is a Glossary containing terms and definitions relevant to the "science" of cloning.[5] The letters transparently suggest the Report's social and political significance. The list of experts and thinkers indicates the sort of authority (that of theologians, doctors, lawyers, bioethicists and philosophers) on which the Report's conclusions rest. And the Glossary, which elaborates terms used primarily in the first substantive chapter of the Report, "The Science and Application of Cloning," appears to reinforce at the end of the Report what that chapter suggests at the beginning—that there is a scientific

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2. *See* Herbert Marcuse, *Industrialization and Capitalism in the Work of Max Weber, in* SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS 364 (Janet L. Dolgin et al. eds., 1977).

3. NBAC REPORT, *supra* note 1, at 108.

4. The NBAC concluded that human cloning at this time would be "morally unacceptable." *Id.* Thus, it recommended a continuation of the existing moratorium on the use of federal funds for cloning a child; a request to private parties to refrain from cloning humans; and promulgation of federal legislation prohibiting human cloning for a specified period of time (with a promise of review in the future). The Commission further concluded that prohibitions on human cloning should be framed to avoid interfering with "other important areas of scientific research"; that international cooperation on matters involving human cloning should be encouraged; that deliberation about the "ethical and social implications" of cloning should be continued; and that federal departments and agencies should work toward educating the public about genetics and areas of biomedical science, "especially where these affect important cultural practices, values, and beliefs." *Id.* at 109-10.

5. The NBAC Report also includes, at the beginning, a list of Commission members and their affiliations, the names of the Commission's staff, and a two paragraph Acknowledgment of those who testified before, wrote papers for, or assisted the Commission in its work. NBAC REPORT, *supra* note 1 (these documents are reproduced in an unpaginated part of the Report).

and technological reality, distinct from the moral process, that consists of objective facts to which moral process can be applied.

Each chapter after the introduction moves closer to articulating a set of conclusions that can, by the end, be framed as essentially unavoidable. The ground is laid in Chapter Two, in which the scientific story of cloning is told. Then, the NBAC Report considers, chapter by chapter, the religious, ethical, and public policy implications of cloning, as well as the responses to cloning by theologians, ethicists, and lawyers. In each of the last three chapters, the Report responds more and more actively to the evidence and opinions it presents, its own voice becoming increasingly evident.

Chapter Two ("The Science and Application of Cloning") presents facts about the science of cloning.[6] In general, the NBAC Report, commissioned by President Clinton expressly to consider the moral and social implications of cloning, shows a sophisticated awareness of the complicated connections between science and other aspects of the social world as it focuses on the social implications of the science and technology at issue. However, the science of cloning is described largely in isolation from any moral frame. Here the "facts" about cloning are presented in isolation from the recognition that science not only *has* social implications, but that it develops as part of a social universe—that science, in its creation, as much as in its implications, *is* a social and cultural matter, just as much as religion, ethics, and philosophy. In this chapter, therefore, the NBAC is less self-conscious, less concerned with its own implications and motivations, than elsewhere in the Report.[7]

Essentially ahistoric, Chapter Two details the decade or two of experimentation that preceded the production of Dolly, the cloned sheep. Yet, it seems relatively unconcerned with connecting that story to larger social, economic, and cultural processes. Thus, unavoidably, the chapter suggests that cloning can—and perhaps should—be described largely *apart from* its social implications. Further, it suggests that scientific development—unless, presumably, subjected to regulations such as those the Report itself recommends—occurs alongside, without being inexorably part of, social history. Moreover, the chapter suggests that science, while having consequences for human relationships, can itself exist independent of those relationships. These suggestions are peculiarly enhanced by the frequent pictorial representations that illustrate the presentation of the science of cloning. A series of simple line-drawings, depicting fertilization and other aspects of the reproductive process, complement (and in some part inevitably

6. As with many of the chapters in the NBAC Report, a footnote at the beginning of Chapter Two indicates that significant parts of the chapter were derived from commissioned papers. *Id.* at 13.

7. Although the separate chapters were in part authored by different people, the Report can be, and is here being, envisioned as a unified social document. Indeed, it so presents itself. The voice being analyzed here is thus that of the Report as a unified document, not that of its separate authors.

replace) the linear analysis of the text. Here, the Report seems to proclaim, are images of the *real thing*—which existed before and continue to exist apart from its social and moral implications.

This presentation has at least two important consequences for the vision presented in the NBAC Report as a whole. First, Chapter Two describes the unassailable scientific (and thus objective) ground on which the Commission's central recommendations rest. In concluding Chapter Two, the Report notes that "scientific uncertainty and medical risk" characterize the possibility of human cloning at this time.[8] That conclusion, framed as simple, objective fact, suggests that the Report will, as it does, recommend that for a period of years—until the risks can be re-evaluated—human cloning be prohibited if possible, and certainly discouraged.[9]

Second, the chapter limits the possibility of focusing on science and technology as social and moral phenomena—not just phenomena with implications for the social order. Thus, this chapter allows that science and technology develop within and hold consequences for society. However, it does not so readily allow that science and technology, like art, music, television, or religion, *are* the society and that, therefore, even in the sophisticated, scientific West, technological achievements are cultural artifacts. In fact, technological developments not only generate social change but are themselves generated and directed by social understandings. Moreover, the effects and uses of technological development derive from the larger social order at least as much as do technological artifacts.

The history of reproductive technology supports these claims. When *in vitro* fertilization, gamete transfer, and embryo cryopreservation appeared in the late 1970s and 1980s, society and law were clearly acknowledging, and even beginning to encourage, the transformation of the traditional nuclear family. In these decades, for instance, the law widely recognized adults within families as autonomous individuals who, much like business partners, were free to design the terms of their own relationships.

The new reproductive technologies confirmed, and further encouraged, the development of a new vision of family—an individualized, privatized family.[10] These technologies, although widely debated, have been accepted with astonishing speed and put to widespread use. Had these technologies appeared a half-century earlier, they might have languished or been put to entirely different uses. This is suggested dramatically by the history of artificial (or assisted)

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8. *Id.* at 34.

9. The NBAC Report recommends, among other things, that a moratorium on use of federal funds for human cloning be continued; that the private sector refrain from the use of human cloning; and that Congress be asked to enact legislation prohibiting human cloning for a three- to five-year period with congressional review. *Id.* at 109.

10. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (considering changes in the family law system across the past several decades).

insemination. The means to perform artificial insemination were known and available hundreds of years ago, and the technique was first used on humans well over a century ago. However, only in the decades surrounding World War II, as the first significant shifts away from the traditional nuclear family of the nineteenth century were becoming apparent, did artificial insemination begin to be widely used and quickly become a public cause *celebre*. Then, by the 1960s, as society and law acknowledged, and began broadly to support, changes refashioning the American family, most states passed legislation that regulated artificial insemination and declared the resulting children legitimate. Neil Postman provides a further example from a different social order. The Aztecs, who invented the wheel, restricted its use to children's toys. This remarkable limitation, suggests Postman, illustrates "the noninevitability of technology's infusing a culture with new ideas."[11]

Technology is developed or used by a society, or becomes problematic for a society, only as one aspect of larger social trends. By presenting the science of cloning as a set of objective facts, ontologically distinct from social and cultural process, the NBAC Report (although it clearly recognizes and seriously considers the moral *implications* of cloning) discourages recognizing the science of cloning as *itself* a moral matter, as itself part of a moral process.

With Chapter Three, the NBAC Report begins the task of assessing the religious, ethical, and policy implications of the facts presented in Chapter Two. Chapter Three ("Religious Perspectives") serves a number of ends. It grounds the Report's larger assessment on the diverse proclamations and assumptions of religious thinkers about a set of essential "categories such as 'nature,' 'reason,' 'basic human values,' and 'family values.'"[12] However, each claim is the product of a particularistic tradition, so none of them need direct the Report's conclusions. By invoking a wide assortment of theological voices (all within the Western tradition), the Report establishes that no one such voice can be allowed to speak exclusively and definitively within the public arena. Yet, by invoking sacred tradition, the Report situates its efforts within a greater American civil religion that demands mention of divine direction in all important endeavors.

In the discussion of the ethical implications of cloning in Chapter Four ("Ethical Considerations"), the voice of the Commission begins to emerge more openly. Because ethical considerations, as presented in Chapter Four, are not specifically grounded in particularistic traditions, they arguably speak to and for everyone. The NBAC Report, while able (indeed compelled) to separate itself from the implications of specific religious considerations in Chapter Three, and from the facts of the scientific enterprise described in Chapter Two, must now respond expressly to the opinions delineated. To remain silent would be to side with amorality. However, as the Report notes, secular ethics, not grounded in a

11. NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 24 (1994).
12. NBAC REPORT, *supra* note 1, at 39.

religious tradition replete with sacred sources and the security of an ultimate, divine authority, invites endless debate.[13] Thus, the Report debates the ethicists and presents them debating one another. So, for example, some argue that cloning would replace the love, nurture, and loyalty that now anchor familial relationships with "vanity, narcissism and avarice."[14] Others, however, the Report informs, attribute the decline of moral values to a host of other sources, while still others argue that "people can, and do, adapt in socially redeeming ways, to new technologies."[15] One bioethicist concludes that, "repugnance [as] the emotional bearer of deep wisdom," should be respected, and human cloning should therefore be prohibited.[16] A second bioethicist argues in response, however, that "moral intuition" should not guide public policy.[17]

From this debate, a central social contradiction emerges that frames and justifies the NBAC Report's conclusions and recommendations. This contradiction, present at the nation's founding and intertwined through most of its social and economic history, is between communal solidarity and personal autonomy. Thus, community (including, among others, familial, religious, and national communities), as well as responsibility for community, are posed against individualism, liberty, and the right to choose without constraint. Among the two sets of values, the right to personal autonomy has seemed clearly to predominate in the American experience. It was central to the Enlightenment's calls to freedom and was securely anchored in economic process through the unrelenting demands of the capitalist enterprise for liberty from social restraint. Yet, despite economic and industrial history, Americans have been reluctant to relinquish completely the effort to sustain communal connection. So families, for example, long defined in express contrast to the world of the marketplace, have been valued as enduring, loyal communities.

Cloning, which represents reproduction without need of connection, suggests the absolute disruption of responsible connection far more forcibly than do even the new reproductive technologies. Moreover, and ironically, although the right to clone human beings is defended through appeals to the value of liberty and choice, cloning itself could result in "a diminished sense of individuality and personal autonomy" for children produced through cloning.[18] So, unavoidably, the debate about cloning underscores the differences and comparative advantages of liberty and social responsibility. Ironically, these matters have now also become a matter of choice. Thus, the Report considers five aspects of "personal autonomy and freedom of inquiry." Against each argument in favor of autonomy

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13. *Id.* at 64.
14. *Id.* at 71.
15. *Id.*
16. *Id.* (quoting Leon Kass, testimony before the Commission on March 13, 1997).
17. *Id.* (quoting Ruth Macklin, testimony before the Commission on March 14, 1997).
18. *Id.* at 63.

and freedom, counterposing arguments in favor of social responsibility, communal values, and the risks of unrestrained choice are given.[19] Thus, the Report identifies itself firmly with the voice of responsibility as a reasonable limit on untrammeled freedom.

However, in presenting itself as another, though arguably privileged, voice, the NBAC Report establishes a cautious, reasonable tone—the tone of balance. Through the process of delimiting, and then responding to, the claims of secular ethicists about human cloning, the NBAC's own conclusions emerge. Against concern for the preservation of liberty and choice, the Report responds with cautious, though apparently weightier, concern for "important social values" and "current risks of physical harm to children associated with somatic cell nuclear transplantation cloning."[20] The chapter concludes by reaffirming the search for cautious balance with a call for "further public deliberation" regarding the "[m]any important issues remain[ing] unresolved."[21] This caution, predicated largely on uncertainty about the consequences of human cloning, constitutes the Report's core response. "[T]he ethics of policy making," the Report declares in summarizing this chapter, "must strike a balance between the values we, as a society, wish to reflect and the freedom of individual choice and any liberties we propose to limit."[22]

The theme of balance is carried forward into Chapter Five ("Legal and Policy Considerations"). Law and policy provide the Report an anchor for its conclusions, that, implicit in the previous chapter, are stated explicitly here.

Within the American tradition, ethical claims can always be countered with contrary claims. Therefore, they are essentially ungrounded. Conclusions about the law, however, can be anchored, at least in theory, in the force of precedent or in the dictates of constitutional interpretation. Thus, law and policy can be separated from the moral process. Alternatively, it becomes possible to invoke determinative ethical concerns and to effect ethical ends by connecting those concerns and those ends to a history of concrete decision-making and jurisprudential proclamations. Here, ethical conclusions can be rendered concrete, despite opposing ethical concerns, *because* the law has previously done something similar to the thing being proposed.

In Chapter Five, the NBAC Report, while acknowledging the uncertain implications of constitutional jurisprudence for the future of human cloning,[23] concludes that, even were the right to clone, much like the right to procreate, recognized as a protected constitutional right, compelling arguments against the

19. *Id.* at 76-82.
20. *Id.* at 63.
21. *Id.* at 83.
22. *Id.* at 63.
23. *Id.* at 95.

practice would still be entitled to their day in court.[24] Thus, again, the Report, in making its conclusions explicit, relies on "balance" as its central operative principle. The outlined "Policy Options"[25]—which largely parallel the Report's final conclusions and recommendations delineated in the next and final chapter—are described as representing "the Commission's view of American traditions regarding limitations on individual actions in the name of the common good."[26]

In Chapter Six ("Recommendations of the Commission") the Report, sustaining the tone of moral balance, proclaims its core conclusion: "there should be imposed a period of time in which no attempt is made to create a child using somatic cell nuclear transfer."[27] That conclusion, presented as balancing the "myriad beneficial applications of this new technology . . . against its more questionable uses,"[28] would permit the use of cloning for purposes other than the creation of a child. Finally, in justifying this conclusion, the Report identifies a central, indeed a determinative, harm to which the "questionable uses" of cloning might lead—harm, both physical and psychological, to children produced through cloning.[29] With regard to the physical risk, the Report found "virtually all people agree" in finding it enough to "justify a prohibition at this time" on human cloning.[30] The NBAC Report further explains:

> At present, the use of this technique to create a child would be a premature experiment that exposes the developing child to unacceptable risks. This in itself is sufficient to justify a prohibition on cloning human beings at this time, even if such efforts were to be characterized as the exercise of a fundamental right to attempt to procreate.[31]

Thus, relying on the sort of balancing that almost alone can appear to resolve ethical debate in the modern world, and that has been institutionalized in American constitutional jurisprudence, the Report invokes social responsibility to future children to recommend that for the present human cloning be banned.

In a society more and more entranced by the illusion of unending choice, but dissatisfied with any particular choice, the allure of untrammeled freedom and unending options is met by calls for social responsibility and communal solidarity. The National Bioethics Advisory Commission, in effect asked to

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24. *Id.*

25. These "options" include the following: continuation of the existing moratorium on federal funding for human cloning; appealing to the private sector to refrain from human cloning; extending through legislation protection to all persons involved in human research; promulgating federal legislation banning human cloning with a "sunset provision" that would ensure review of the matter at a specific point in the future; and cooperating with other countries in the effort effectively to regulate human cloning. *Id.* at 95-103.

26. *Id.* at 87.

27. *Id.* at 108.

28. *Id.* at 107.

29. *Id.*

30. *Id.*

31. *Id.* at 108.

choose between two sets of social values, each basic to the American psyche, responded by balancing each against the other. In making its choice, the Commission appears to have reached a resolution that, because defined as temporary, need not ultimately sacrifice autonomy to responsibility or individuality to community. But, that resolution may be essentially illusory. Because grounded in notions of choice, autonomous individuality may yet prevail as, in the American experience, it has usually prevailed.