

July 2004

Rhetoric, Public Reason and Bioethics: The President's Council on Bioethics and Human Cloning

M. Cathleen Kaveny

Boston College Law School, cathleen.kaveny@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Bioethics and Medical Ethics Commons](#), [Law and Society Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

M. Cathleen Kaveny. "Rhetoric, Public Reason and Bioethics: The President's Council on Bioethics and Human Cloning." *Journal of Law and Politics* 20, no.3 (2004): 489-503.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Rhetoric, Public Reason and Bioethics: The President's Council on Bioethics and Human Cloning

Human Cloning and Human Dignity: The Report of the President's Council on Bioethics (with a Foreword by Leon R. Kass, M.D., Chairman).
New York: Public Affairs (a member of the Perseus Book Group) 2002.

*M. Cathleen Kaveny**

I. INTRODUCTION

At the center of the cover of *Human Cloning and Human Dignity* stands a human fingerprint. In his foreword, Leon Kass comments on the significance of the image for the Report produced by the Commission he chairs:

The fingerprint has rich biological and moral significance. Made by a human hand, it exhibits our common humanity. Distinctively individuated, it signifies our unique personal identity. Left behind on objects we handle, it is a telltale sign of individual responsibility, sometimes of guilt. The advent of human cloning and other genetic technologies means that we human beings may soon be putting our hands on our own genetic endowment, in ways that will affect the humanity and identity of our children and our children's children. A novel responsibility is now upon us: to decide whether or not it is wise for us to grasp this awesome power over future generations, and if so, under what conditions. This book, *Human Cloning and Human Dignity: The Report of the President's Council on Bioethics*, seeks to equip us for that responsibility by making clear just what is at stake.¹

For the reasons that Kass proffers, the human fingerprint is indeed an appropriate symbol for the subject matter of the Report. It needs to be said, however, that the *particular image* of a fingerprint on its cover is an appropriate symbol for the *particular shape and manner* in which that subject

* M. Cathleen Kaveny is John P. Murphy Foundation Professor of Law and Professor of Theology at the University of Notre Dame.

¹ LEON KASS, *Foreword* to PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY, at XIII (2000).

matter is addressed within the Report. In its presentation, this particular fingerprint is both familiar and ominous in its appearance. It is traced in an eerie, fluorescent blue ink against a shiny, pitch-black background, conjuring images from *CSI* and other darkly glossy forensically-based crime dramas currently dominating the television airwaves. Like similar images flashed on the screen in such dramas, the image on the cover *moves* the observer by appealing to the emotions as well as the intellect, generating a full-bodied response to the subject matter that is generally not produced by abstract argument or analysis. This type of response can, however, be produced by words as well as images. The art of producing such a response was the focus of the ancient art of rhetoric, defined by Aristotle as the faculty of observing in any given case the available means of persuasion.² A key component of classical education, the study of rhetoric fell out of scholarly favor during the first half of the twentieth century. In the past twenty-five years, however, it has been the recipient of renewed interest from both literary critics and philosophers.³

Nonetheless, not many articles or books in contemporary public philosophy or bioethics would stand out for their rhetorical style. This does not mean, of course, that they are devoid of all rhetorical concern. Authors generally want to lead their readers to view the subject matter at hand in the same way that they do. Most philosophers and bioethicists tacitly assume that the only legitimate (and ideally, the only effective) grounds of persuasion are analysis and linear argument; they therefore structure their work according to the demands of a deliberate rhetorical minimalism. In contrast, *Human Cloning and Human Dignity* is not rhetorically minimalistic. It is in fact notable for the way in which it uses verbal imagery, sometimes drawn from literature, to persuade the reader to view the practice of human cloning from a particular vantage point.

More specifically, the Council's Report attempts to engage not only the reader's analytical abilities, but also her imagination and her emotions, to encourage her to respond in an integrated human way to what all of the members of the Council believe to be a broadly human question, not merely a technical or scientific one. Despite their different perspectives, in looking at human cloning, the Council members are united in seeing a problem that "touches fundamental aspects of our humanity."⁴ The ominous but familiar

² ARISTOTLE, THE "ART" OF RHETORIC 15 (G.P. Goold ed., John Henry Freese trans., Harv. Univ. Press 1994).

³ GEORGE A. KENNEDY, CLASSICAL RHETORIC & ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 293-96 (2d ed. 1999).

⁴ PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY, at XL (2002).

quality of the fingerprint on the cover aptly symbolizes the Council's view of a society which accepts the practice of producing children through the cloning process, a practice which they unanimously reject. That ominous tone suffuses the discussion of other uses of cloned embryos, even though the Council was much more divided about the ultimate acceptability of such uses.

The first point of contention regarding the Report, therefore, will be about its rhetoric—its striking intermixture of style and substance. In the chapter on the “Historical Aspects of Cloning,” the Report includes a section entitled: “Human Cloning from Popular Literature to Public Policy: From *Brave New World* to Dolly.” The Report itself rightly notes, “the relevance or irrelevance of Huxley's vision to the dilemmas of the present is of course a matter of serious disagreement.”⁵ But it wrongly casts the linchpin disagreement exclusively in terms of the accuracy or inaccuracy of Huxley's *predictions* of a future in which science has run amok.

Science fiction is a form of literature, and it is not a social horoscope. While its setting is the imagined future, the issues it raises are in reality rooted in the author's own time and place. The more fundamental disputed question is whether, in addition to cost-benefit analysis and rights-talk, the insights of great works of literature (whether they are science fiction or another genre) are also relevant to our collective moral deliberations. As I suggest in more detail below, *Cloning and Human Dignity* is noteworthy for the affirmative response that it gives to this fundamental question.

II. CONTEXT

In August 2001, President George W. Bush announced his decision to allow the restricted use of federal funds for research involving stem cells obtained from human embryos.⁶ At the same time, he announced his intent to create a President's Council on Bioethics, to be chaired by Leon Kass. An eminent ethicist who had been dually trained as a medical doctor and a biologist, Kass had long taught “great books” through the Committee on Social Thought at the University of Chicago. The Council, whose other members were not named until November of that year,⁷ took up as its first

⁵ *Id.* at 27 (2002).

⁶ President Bush decided that federal funds could be used to support research on the approximately sixty stem cell lines already in existence, “where the life-and death-decision has already been made,” but that it could not be used to support research entailing the creation of new stem cell lines, which would involve the destruction of additional human embryos. See President George W. Bush, Remarks by the President on Stem Cell Research from Crawford, Tex. (Aug. 9, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html>).

⁷ They included: Elizabeth H. Blackburn, Department of Biochemistry and Biophysics, University of

project the topic of human cloning. In a certain respect, the choice of this topic was obvious. Since the appearance of Dolly the cloned sheep in 1997, the question of human cloning had received intense public and scholarly attention in the United States and abroad. In another respect, however, their efforts may have seemed redundant. Two substantial reports on cloning had already been produced by government bodies, one by the National Bioethics Advisory Commission soon after Dolly's appearance in 1997,⁸ and the other by the National Academy of Sciences in 2002.⁹ Was there any academic reason to devote scarce governmental resources to yet another report on the same topic?

Those academics already inclined to be suspicious of Washington power politics could note, for example, that the National Bioethics Advisory Commission had been constituted by President Clinton in 1995,¹⁰ and that President Bush had allowed its charter to lapse before putting in place his own President's Council on Bioethics.¹¹ Was the Bush Council's Report simply one more attempt by a victorious political party to "erase" the work product of the losing political party and substitute its own work product instead? One would have to be naive to suggest that party politics played no role, or even an insignificant role, in Bush's constitution of a new deliberative body on bioethics. Nonetheless, it is clear that the Report of the Bush Council is by no means academically redundant, since it framed its task very differently than did the Clinton Commission, in two important respects.

First, the Report produced by the Clinton Commission was narrowly

California-San Francisco; Stephen L. Carter, Yale Law School; Rebecca S. Dresser, Washington University School of Law and Washington University School of Medicine; Daniel W. Foster, Department of Internal Medicine, University of Texas Southwestern Medical School; Francis Fukuyama, Paul H. Nitze School of Advanced International Studies, Johns Hopkins University; Michael S. Gazzaniga, Center for Cognitive Neuroscience, Dartmouth College; Robert P. George, Department of Politics, Princeton University; Mary Ann Glendon, Harvard Law School; Alfonso Gómez-Lobo, Department of Philosophy, Georgetown University; William Hurlbut, Department of Biology, Stanford University; Charles Krauthammer, a prominent syndicated columnist; William F. May, an emeritus professor of ethics at Southern Methodist University; Paul McHugh, Department of Psychiatry, Johns Hopkins University School of Medicine; Gilbert C. Meilaender, Department of Theology, Valparaiso University; Janet D. Rowley, Pritzker School of Medicine, University of Chicago; Michael Sandel, Department of Government, Harvard University; James Q. Wilson, emeritus professor of management and public policy, University of California-Los Angeles. See Press Release, Office of the Press Secretary, President Names Members of Bioethics Council (Jan. 16, 2002) (*available at* <http://www.whitehouse.gov/news/releases/2002/01/20020116-9.html>).

⁸ NAT'L BIOETHICS ADVISORY COMM'N, *CLONING HUMAN BEINGS* (1997), *available at* <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning1/cloning.pdf>.

⁹ NAT'L ACAD. OF SCIENCES, *SCIENTIFIC AND MEDICAL ASPECTS OF HUMAN REPRODUCTIVE CLONING* (2002), *available at* <http://www.nap.edu/books/0309076374/html>.

¹⁰ President Clinton constituted the National Bioethics Advisory Commission by Executive Order. See Exec. Order No. 12,975, 60 Fed. Reg. 56,063 (Oct. 3, 1995).

¹¹ The charter of Clinton's National Bioethics Advisory Commission expired on October 3, 2001. See Exec. Order No. 13,137, 64 Fed. Reg. 50,733 (Sept. 15, 1999).

focused on the use of the cloning technique to produce a live baby, which would involve using the procedure of somatic cell nuclear transfer (the most common way to perform the cloning procedure) to generate a human embryo *in vitro*, and then the transfer of that embryo to the womb of a willing woman for gestation and birth.¹² The Bush Council extensively addresses this use of cloning, which it denominates as cloning-to-produce-children. Yet the Bush Council also considers a second use of cloning not treated in the Clinton Commission Report, which it calls cloning-for-biomedical research.¹³ Under this scenario, the procedure of somatic cell nuclear transfer is used to produce a live human embryo, which is then grown in the laboratory for several days, until it develops an inner cell mass containing embryonic stem cells. Unlike most human cells, stem cells are believed capable of becoming differentiated into any cell in the human body. Embryonic stem cells in particular are believed by biomedical researchers to hold great (but still uncertain) promise for studying and treating certain genetic diseases. Nonetheless, the use of such cells is highly controversial since the process of isolating them invariably destroys the embryo.

Second, the Clinton Commission Report and the Bush Council Report differ significantly in basic orientation with respect to the general topic of cloning. This difference, in my view, can be traced to the differences in the charges given in the executive orders creating the two bodies. The executive order forming the Clinton Commission makes it clear that their major task was to advise federal lawmakers about appropriate legislation, regulation, and policy regarding sensitive bioethical issues.¹⁴ Consequently, the chapters in

¹² Cloning is a type of asexual reproduction. Natural human reproduction, as occurring as a result of sexual intercourse, involves the combination of a sperm cell (with 23 chromosomes) and an egg cell (with 23 chromosomes) to form a human zygote (with a full complement of 46 chromosomes). Consequently, the genetic makeup of a new human normally includes material from both its mother and its father and is identical to the genetic makeup of neither. The genetic makeup of babies conceived through *in vitro* fertilization is similarly constituted; in their case, the sperm and the egg combine in a laboratory petri dish or test tube rather than in the mother's fallopian tube. In contrast, human cloning involves taking the nucleus from a donor's somatic cell, which has 46 chromosomes (only egg and sperm cells have 23 chromosomes), injecting it into an enucleated egg, and stimulating cell division (usually by the application of an electric current). The resulting embryo will have essentially the same genetic makeup of the donor of the somatic cell (a small amount of genetic material is contained in the mitochondria of the egg donor).

¹³ The Clinton Commission considered some of the relevant issues in conjunction with its second report. See NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH (1999), available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs.html>.

¹⁴ Section 4 of Executive Order 12,975, 60 Fed. Reg. 52,063 (Oct. 3, 1995), specifies:

(a) NBAC shall provide advice and make recommendations to the National Science and Technology Council and to other appropriate government entities regarding the following matters:

1. the appropriateness of departmental, agency, or other governmental programs, policies, assignments, missions, guidelines, and regulations as they relate to

the Clinton Report discussing various religious and secular perspectives on the morality of cloning are best viewed as the prolegomena to its key chapter, which focuses on making law and policy on a controversial subject in a pluralistic society.¹⁵ In contrast, the Executive Order creating the Bush Council provides a very different orientation for the discussion, calling upon the Council members to advise the President, and to initiate a national conversation, on the moral meaning and broad implications for our culture and the common good of emerging issues in biomedicine.¹⁶ The moral reflection in the Bush Council Report is not a necessary prolegomenon to policymaking; it is the heart and soul of the Council's concern. In contrast, the chapters on law and policy seem to be almost an appendix.

III. CONTENTS AND RECOMMENDATIONS

The Bush Council Report contains seven chapters. Chapter One gives an overview of the topic, situating human cloning within its context as a potential form of human reproduction and as a tool of biomedical research.

bioethical issues arising from research on human biology and behavior; and
 2. applications, including the clinical applications, of that research.
 (b) NBAC shall identify broad principles to govern the ethical conduct of research, citing specific projects only as illustrations for such principles.
 (c) NBAC shall not be responsible for the review and approval of specific projects.
 (d) In addition to responding to requests for advice and recommendations from the National Science and Technology Council, NBAC also may accept suggestions of issues for consideration from both the Congress and the public. NBAC also may identify other bioethical issues for the purpose of providing advice and recommendations, subject to the approval of the National Science and Technology Council.

¹⁵ I argue elsewhere that a major flaw of the Clinton Commission Report is its uncritical reliance on a particular form of liberal legal theory in its approach to this question. Other forms of liberal legal theory might have yielded a different approach, not to mention non-liberal legal theories that also value autonomy. See M. Cathleen Kaveny, *The NBAC Report on Cloning: A Case Study in Religion, Public Policy, and Bioethics*, in *FAITH AT THE FRONTIERS* (David Guinn ed.) (forthcoming).

¹⁶ Section 2(a) of Executive Order 13,237, 66 Fed. Reg. 59,851 (Nov. 28, 2001), states:

The Council shall advise the President on bioethical issues that may emerge as a consequence of advances in biomedical science and technology. In connection with its advisory role, the mission of the Council includes the following functions:

1. to undertake fundamental inquiry into the human and moral significance of developments in biomedical and behavioral science and technology;
2. to explore specific ethical and policy questions related to these developments;
3. to provide a forum for a national discussion of bioethical issues;
4. to facilitate a greater understanding of bioethical issues; and
5. to explore possibilities for useful international collaboration on bioethical issues.

Chapter Two examines the history of the debate over human cloning, which emerged as a topic of reflection and debate among moralists and novelists long before the development of technology able to produce a human clone seemed as imminent as it does to us now. Chapter Three is devoted to the development of “fair and accurate terminology,”¹⁷ admonishing the reader about the importance of the “careful use of names”¹⁸ and justifying the Council’s choice to analyze its subject matter in terms of the categories “cloning-to-produce-children” and “cloning-for-biomedical research.” Chapter Four gives the scientific background of cloning; its account is generally clear, but in my view, slightly less accessible to the nonspecialist than the parallel chapter in the Clinton Commission Report. Chapters Five and Six constitute the core of the Bush Council Report. The fifth chapter is devoted to the ethics of cloning-to-produce children, and the sixth is devoted to cloning-for-biomedical-research. Both chapters present the arguments for and against cloning in a vigorous and spirited way. Chapter Seven outlines the various public policy options, while Chapter Eight develops in more detail the two policy options adopted by various members of the Council. An appendix to the Report includes personal statements submitted by fourteen of the eighteen council members.¹⁹ The Report also includes an executive summary, a glossary of terms, and a bibliography.

No one could accuse the Council of attempting to paper over differences of opinion, in theory or in practice. In fact, one could say that Council members courted such differences. Only after evaluating the strongest arguments in favor of cloning-to-produce children (some of which had been developed in the Clinton Commission Report) did the Council unanimously find that practice to be morally unacceptable. In addition to the obvious problem of safety (which was the linchpin of the Clinton Commission’s advocacy of a prohibition against cloning-to-produce-children), the Council identifies several other moral factors which, in its view, militate against producing a child through somatic cell nuclear transfer. They include potential problems of identity and individuality facing the cloned child; concern that the practice of human cloning would treat children like “products” subject to parental control rather than “gifts” whom their parents owe unconditional acceptance; the prospect of a new eugenics (including the possibility that cloning would be used to perpetuate favored genotypes or genetically enhanced individuals); the confusion of familial relations (e.g., an adult could be both the genetic

¹⁷ PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 4, at XLII.

¹⁸ *Id.* at 41.

¹⁹ Stephen Carter, Francis Fukuyama, and Mary Ann Glendon did not submit statements. The chairman, Leon Kass, also did not submit a personal statement, but wrote a foreword to the entire Report.

twin and social parent of a cloned child); and broader, unknown effects on society as a whole, including the way adults look at the next generation.²⁰

In contrast, the diverging opinions expressed by the Council regarding the morality of cloning-for-biomedical research were more than theoretical; on this question, Council members were actually deeply divided. Several members of the Council maintain that such cloning is morally impermissible, because it would result in the destruction of the human embryo, whom they believe deserves respect as a member of the human community from the moment of fertilization. Distinct concerns (which some members believe would justify a ban even apart from a high assessment of the status and rights of the embryo) include the exploitation of nascent human life (indisputably the “seeds” of the next generation), the exploitation of women as egg donors, and the increased likelihood that cloning-to-produce children would occur as a result of the acceptance of the practice of cloning-for-biomedical research.

A second group of Council members believes that such cloning was morally permissible, because “it may offer uniquely useful ways of investigating and possibly treating many chronic debilitating diseases and disabilities, providing aid and relief to millions.”²¹ At the same time, these members recognize the moral hazards involved in such research, including those centered around the early human embryo. Arguing that the embryo has a moral status intermediate between a mere clump of cells and a human person, they contend that careful regulation can insure an appropriate level of respect and provide protection against some of the other concerns raised by those who oppose cloning-for-biomedical research (e.g., regulation limiting research to embryos no more than fourteen days old). Moreover, there were several Council members who supported such research without great ethical qualms; from their perspective, it “presents no special moral problems, and therefore should be endorsed with enthusiasm as a potential new means of gaining knowledge to serve humankind.”²²

Not surprisingly, the judgment of the Council on matters of policy replicated the divisions regarding moral matters. The members were unanimous in supporting a permanent ban on cloning-to-produce children. With respect to cloning-for-biomedical-research, ten members voted in favor of a four-year moratorium, which would give the country time to debate the issue further and explore the usefulness of adult stem cells with more thoroughness. Seven members believed cloning-for-biomedical-research

²⁰ PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 4, at XLVII to L, 96-128.

²¹ *Id.* at LI.

²² *Id.* at LIII.

should be allowed to proceed, subject to stringent regulatory oversight. The Report straightforwardly admits that when they considered each class of cloning independently, the Council members were evenly divided between those who would permit cloning-for-biomedical-research now (seven members) and those who would ban it now (seven members). Initially, only three members favored a moratorium on cloning-for-biomedical-research. Clearly, they must have been joined by seven members who would have preferred to have supported an outright ban.²³ Why? The Report does not explicitly say, but the reader can infer that Council members feared a *three-way* split of opinion on the topic would dilute the Council's moral and political influence, rendering it less likely that any restrictive legislation, even pertaining to cloning-to-produce-children, would be passed based on its recommendations.

IV. MORAL ARGUMENT AND PUBLIC REASON

In his groundbreaking book *After Virtue*²⁴, the philosopher Alasdair MacIntyre observed the breakdown in the possibility for moral reasoning in contemporary American culture. Taking seemingly impassible debates over abortion, capital punishment, and affirmative action as his examples, he observes how the inability to resolve contesting rights claims results in widespread functional emotivism regarding ethical matters.²⁵ Most people, that is, treat ethical claims (their own and others') as an expression of a deeply held irrational *feeling* about a particular act or practice, rather than as an intellectually defensible moral judgment about the matter under discussion.

The problem identified by MacIntyre, however, is not limited to popular opinion; it can also be observed in many of the anthologies used to teach special ethics, particularly medical ethics, in undergraduate courses. While most anthologies make an effort to include academic articles presenting "both sides" of controversial issues, all too frequently the selected articles "talk past" one another. For example, one academic article will focus on the *morality* of abortion, while another will focus upon its appropriate *legal* status in a pluralistic society such as our own. I would not be surprised if many students come out of such courses further convinced of the improbability of sustained, reasoned discussion about the most neuralgic questions of morality and public policy.

²³ *Id.* at 228.

²⁴ ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1981).

²⁵ *Id.* at 6-21.

In welcome contrast, the Report incorporates a sustained and pointed discussion and debate about the morality of human cloning. The passages advocating differing positions do not talk past each other; in fact, the Council members go to great lengths to address one another's strongest points. In his foreword, Leon Kass admits: "On several crucial matters, we have in fact reached consensus. But where we have not, the Council has eagerly agreed to allow each side to make its own best case, and not only out of politeness for difference. For it is clear to all of us that each side in the debate has something vital to defend, not only for itself *but for everyone*."²⁶

In my view, the Report will be a valuable addition not only to courses in bioethics, but also to graduate seminars focusing on contemporary political philosophy, for three reasons. First, there is no attempt on the part of either side to distract attention from the costs of their position by changing the subject; no one pretends that it is possible "to have it all." Those in favor of cloning-for-biomedical-research recognize and attempt to grapple with the potential dangers of using "the seeds of the next generation" as scientific raw material. Those opposed to such cloning do not pretend that it might not have great benefits in preventing or curing certain diseases.

Second, the Council emphasizes that responsibility for moral discernment with respect to emerging issues of bioethics falls upon all citizens in our democratic republic; that responsibility cannot and should not be completely relegated to "academic experts" in either bioethics or in science.²⁷ At stake in the questions whether or not to go forward with cloning-to-produce-children and/or cloning-for-biomedical-research are matters of broad human concern. In the end, technical expertise in science, bioethics, or any other academic discipline will not provide us with answers to these questions, no matter how helpful it may be in an ancillary way. In the end, we need to draw upon broad

²⁶ PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, at XIX. In this context, the controversy that erupted in March 2004 when the President decided not to reappoint two members of the Council, both of whom supported cloning-for-biomedical-research, was particularly unfortunate. Critics charged that the decision was politically motivated, in order to create a Council that more uniformly reflected the President's own views on the status of the human embryo. Kass vigorously denied the charge. Even if the criticisms of the personnel changes should turn out in the end to be unfounded, the controversy itself will inevitably contribute to public cynicism about the possibility of good faith debate about neuralgic issues of morality and law. See, e.g., Elizabeth H. Blackburn (one of the Council members whose term was not renewed), *A "Full Range" of Bioethical Views Just Got Narrower*, WASH. POST, Mar. 7, 2004, at B2; Leon Kass, *We Don't Play Politics with Science*, WASH. POST, Mar. 3, 2004, at A27.

²⁷ For the President's Council on Bioethics, 'bioethics' refers to the broad domain or subject matter, rather than to a specialized methodological or academic approach. It is a Council *on* Bioethics, not a council *of* bioethicists. Council Members come to the domain of bioethics not as 'experts' but simply as thoughtful human beings who recognize the supreme importance of the issues arising at the many junctions between biology, biotechnology, and life as humanly lived." PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, at XVII.

and deep practical wisdom, a type of “expertise” in humanity, so to speak. A crucial presupposition of democratic society is that practical wisdom is not the exclusive province of those with technical expertise.

Third, the Report might usefully serve as a case study in the debate over “public reason” begun by John Rawls in his book *Political Liberalism*.²⁸ That debate centers on the extent to which citizens morally ought to introduce religious beliefs or other elements of their worldview that are not universally shared into debates about law and policy in a pluralistic democratic republic such as the United States.²⁹ The call for self-censorship regarding the source of one’s politics is by no means uncontroversial; Michael Perry has argued that it is deeply unfair to religious believers, and I myself have argued that it is unlikely to further either civic respect or civic peace, which seem to be the two basic goals advanced by those advocating such self-censorship.³⁰

Thus far, however, the cases both for and against the restraints of “public reason” are highly abstract and theoretical.³¹ We have few good examples of a highly important debate being conducted according to the canons of “public reason.” What would such a debate look like? Would it inevitably be narrow and constrained, drawing upon the arid language of cost-benefit analysis and the abstract vocabulary of rights talk? Would there be any way to invoke the

²⁸ JOHN RAWLS, *POLITICAL LIBERALISM* (1993). He modifies his approach in John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 768 (1997).

²⁹ MICHAEL PERRY, *MORALITY, POLITICS, AND LAW* (1988); and MICHAEL PERRY, *LOVE & POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991). Other key books in the debate include KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); See also John Finniss, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361. An important anthology is *RELIGION AND CONTEMPORARY LIBERALISM* (Paul J. Weithman ed., 1997). Michael Perry also organized a conference on the topic, the papers for which were published in Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 217 (2001). The debate is about moral obligations, not legal restrictions: no one has suggested that a legal restriction on the political speech of religious believers would be consistent with the First Amendment to the Constitution.

³⁰ M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 WAKE FOREST L. REV. 423 (2001).

³¹ Rawls himself has twice attempted to make his proposals more concrete by tying them to particular debates. Neither attempt was particularly successful, in my view, because he focused on the “bottom line” position being defended, rather than the nature of the arguments put forward on its behalf. In a footnote in *Political Liberalism*, he implied that those who argued that abortion should be impermissible during the first trimester were violating the canons of public reason. JOHN RAWLS, *POLITICAL LIBERALISM* 243 n.32 (1993). After heavy criticism, he minimized the status of this example in his article in the *University of Chicago Law Review*, stating that the footnote merely expressed his opinion, and was not intended as an argument about the nature of public reason. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 798 n.80. Nonetheless, he made a similarly abbreviated and controversial claim about arguments against gay marriage, implying that arguments meeting the constraints of public reason could not support a position limiting marriage to heterosexual couples. *Id.* at 788 n.60. The requirements of “public reason” are clearly no more than a thin veil for politically motivated censorship once they are used to rule out positions themselves, rather than constrain the arguments used to support those positions.

depth and texture of the rich and diverse traditions of moral reflection that are the heritage of the American experience? Would there be a way to forge a common vocabulary for substantive moral reflection, or would the discussion inevitably focus on procedural issues, hammering out fair decision-making procedures among moral strangers?

Human Cloning and Human Dignity exemplifies the possibility of conducting a sustained and vigorous argument about a controversial moral issue that is simultaneously public and substantively rich. Although several members of the Commission are well-known for their commitment to a religious worldview, no specifically religious arguments are proffered for or against either type of cloning considered in the Report. At the same time, the considerations adduced go beyond the typical utilitarian or rights-based justifications of policy analysis in a pluralistic society. Particularly interesting is the discussion of parental responsibilities to children and the manner in which the practice of cloning can occlude clear recognition of those responsibilities. The Council argues that successful child-rearing requires parents to accept their children as “gifts” and “blessings,” rather than seeing them as “products” of our own desires. If we see children as products designed to our own specifications, we are unlikely to see them as beings equal in dignity with ourselves. Because it allows parents to specify the entire genetic makeup of their child, the Council fears that cloning is more akin to “making” a child in accordance with standards of production than “begetting” a child as a mysterious blessing and responsibility.

The terms “gifts” and “blessings,” as well as the contrast between “making” and “begetting,” are dense in meaning; they draw upon and point back to a wide range of literary texts and social practices, both religious and non-religious. They evoke an affective as well as an intellectual response on the part of the reader, encouraging him or her to adopt a particular existential stance toward the subject matter they are being invoked to describe. The Report, in my view, achieves its objective of combining public accessibility and richness by expanding the relevant texts and modes of persuasion beyond those customarily relied upon in contemporary philosophy and political theory. The insights available from literature are equally important to the Council, as evident from the recent publication of *Being Human: Readings from the President's Council of Bioethics*.³² The volume includes excerpts from *Gulliver's Travels*, *Peter Pan*, and *War and Peace*, as well as selections from the Bible and classical philosophy.

Rooted in a particular tradition, these texts nonetheless have an

³² See PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, at 110-13.

intelligibility that transcends their initial audience. As the theologian David Tracy has argued, texts such as these are “classics”; they are simultaneously firmly grounded in their own time and place, yet able to exert an intellectually and existentially compelling claim for consideration and reinterpretation by those of us living in other times and places. “When the text is a classic,” writes Tracy, “I am also recognizing that its ‘excess of meaning’ both demands constant interpretation and bears a certain kind of timelessness—namely the timelessness of a classic expression rooted in its own historical time and calling to my own historicity.”³³

The “public reason” debate has largely been conducted with the assumption that the particularity of the sources used by a conversation partner is inevitably incompatible with broad intelligibility. In other words, it has generally equated particularity with insularity. Tracy’s reflections on the nature of a “classic” calls these assumptions into question, suggesting ways in which deep insight into the human condition may be historically and culturally particular yet capable of touching the minds and hearts of persons from other times and places. *Human Cloning and Human Dignity* provides an example of what conversation about a controverted moral issue might look like that is both public and rich, because it tacitly draws upon the same understanding of a “classic” that David Tracy articulates. Consequently, it is worthy of sustained attention by theorists of “public reason.”

V. JURISPRUDENCE AND POLICY

Despite the fact that the Report emphasizes its commitment to exploring the full *moral* implications of human cloning, it devotes very little time to jurisprudential issues, which are centrally concerned with the *morality* of lawmaking. Unfortunately, for this reason, the two chapters on public policy are the least academically satisfying portion of the Report. The introductory paragraph to Chapter Seven, which outlines a variety of policy options, begins in a promising way by raising the relevant jurisprudential questions. It notes, for example, that “[w]hether and how the law should address any given morally charged topic is often a debatable matter, requiring careful study and prudent judgment. Not everything that is morally defensible should be encouraged by public policy; not everything that is morally troubling should be legally proscribed.”³⁴ Nonetheless, despite this promising beginning, the chapter includes almost no nuanced and sustained analysis of the morally

³³ DAVID TRACY, *THE ANALOGICAL IMAGINATION* 102 (1981).

³⁴ PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 4, at 173.

appropriate relationship between morality and law in the case of human cloning.

This lacuna is unfortunate, because it marks a lost opportunity for an important conversation. Following in the tradition of John Stuart Mill, many liberal legal theorists have argued that it is immoral for the state to use criminal prohibitions to deter an act that does not harm another person in a more-or-less tangible way. According to Joel Feinberg, one of the most rigorous and influential of such theorists, acts that are harmful to another person's moral character, or that in the aggregate result in a morally inferior social ethos, should not be prohibited, especially with the harsh sanctions of the criminal law. In my view, by resting its judgment that human cloning-to-produce-children could legitimately be prohibited upon the high potential for physical harm (and expressing skepticism about the legitimacy of prohibiting such cloning on other grounds),³⁵ the Clinton Commission tacitly relied on a liberal legal theory very similar to Feinberg's.³⁶ Furthermore, the Clinton Commission suggested that, should reproductive cloning ever be deemed safe and effective, it might very well be protected by a constitutional right to privacy, which it interpreted not only to cover a woman's negative right to be free of the burdens of childbearing, but also as possibly to include a positive right to have a child, with technological assistance if necessary.³⁷

But the jurisprudential arguments of the Clinton Commission are far from unassailable.³⁸ There are other legal theories which place a high value on human freedom, but which also emphasize the positive steps that a society must take in order to promote and protect autonomy rather than merely focusing upon the negative requirements harm principle. Joseph Raz, for example, has argued that the exercise of human autonomy has three fundamental requirements, which must be protected and nurtured by society as a whole: 1) the raw mental capacity to make and carry out choices; 2) freedom from attempts at manipulation as well as coercion on the part of other people; and 3) a range of morally worthwhile choices from which to choose.³⁹ One could make a strong argument that a society that values liberty will legally prohibit cloning-to-produce children because it threatens to undermine all three of Raz's criteria for the exercise of human autonomy. Even if such cloning were proven to be physically safe (and thus the first criteria were eliminated from consideration), the second and third criteria would still justify

³⁵ See NATIONAL BIOETHICS ADVISORY COMM'N, *supra* note 8, at 87 (summary).

³⁶ See Kaveny, *supra* note 15.

³⁷ See NATIONAL BIOETHICS ADVISORY COMM'N, *supra* note 8, at 93-95.

³⁸ See Kaveny, *supra* note 15.

³⁹ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369-99 (1986).

a legal prohibition.

Moreover, the constitutional interpretation of the Clinton Commission would also have been worthy of explicit consideration and challenge by the Bush Council. The Supreme Court has never given constitutional protection to a positive right to reproductive liberty⁴⁰; one can make a strong case that the Court should not interpret the right to privacy (which is based in bodily integrity) so broadly as to include a right to produce a cloned child in a laboratory.

In short, the chapters of the Report devoted to policy and law are far less intellectually well-developed than they ideally would have been. The focus of these chapters is almost entirely functional; they are devoted almost exclusively to considering what scheme of law and policy would be most effective in implementing the moral conclusions regarding cloning that were reached earlier in the Report. Almost no consideration is given to the additional moral issues raised by the prospect of implementing moral judgments using the coercive force of law, in a pluralistic society in general and in our constitutional democracy in particular.

VI. CONCLUSION

Notwithstanding the gaps in its jurisprudential analysis, however, *Human Cloning and Human Dignity* is a fine document. Despite the rigor and care with which the arguments for and against human cloning are presented, its most important contribution lies in its general form, not in its particular substance. The Report exemplifies the possibility of sustained and vigorous moral discourse about a controversial issue, a discourse that is both deeply textured and capable of resonating with persons coming from a variety of religious and ethical perspectives. It thereby gives our democratic, pluralistic society grounds to hope in the possibility of a common conversation, not only in the realm of bioethics, but also with respect to other ethical challenges confronting our nation.

⁴⁰ The Clinton Commission relies upon a lone district court case, *Lifchez v. Hartigan*, 735 F.Supp. 1361 (N.D. Ill. 1990), *aff'd without opinion sub nom.* *Scholberg v. Lifchez*, 914 F.2d 260 (7th Cir. 1990).

