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Human Cloning and the Substantive Due Process Riddle

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HUMAN CLONING AND THE SUBSTANTIVE DUE PROCESS RIDDLE

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Substantive due process had a near-death experience as the "Lochner era"[1] came to an end. Community interest prevailed over theories of individual economic liberty rights. The substantive rights component of the Due Process Clause refocused upon personal liberties and found new life.

The inexorable tension between individual liberty and community decision making, however, remained. As a result, each new personal liberty claim made today requires a careful consideration of the competing interests of the individual and the community. The recent news of mammalian cloning, and the startling prospect of human cloning in the future, provides a useful opportunity to examine how this constitutional balance ought to be struck.[2] This Article will suggest a general approach to substantive due process analysis and show how the communal interest in defining and ordering the basic institution of the family should result in the denial of constitutional protection to human cloning.

I. CURRENT APPROACHES TO SUBSTANTIVE DUE PROCESS

The Supreme Court has struggled in its effort to articulate a basis for determining which personal liberties deserve constitutional protection under the rubric of substantive due process. This is so despite a line of modern cases spanning over thirty years, beginning with *Griswold v. Connecticut*[3] in 1965. Prior to *Griswold*, sporadic decisions

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1. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 567-86 (2d ed. 1988).

2. *See* Cloning Human Beings: Report and Recommendation of the National Bioethics Advisory Commission (June 1997) (raising the possibility that human cloning might one day be a candidate for inclusion in a due process right to procreate).

3. 381 U.S. 479 (1965).

striking down state laws appeared from time to time, sometimes invoking notions of basic personal liberties but without much development, or even discussion, of the constitutional logic underlying the decisions. A 1944 case, *Prince v. Massachusetts*,[4] spoke ambiguously of a "private realm of family life which the state cannot enter." *Meyer v. Nebraska* declared that liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[5] *Pierce v. Society of Sisters* vaguely pronounced: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[6] These cases only minimally advanced the analysis of substantive due process.[7]

One Justice notably attempted to explicate an approach to substantive due process four years prior to *Griswold*. Dissenting from the dismissal of an appeal as nonjusticiable in *Poe v. Ullman*,[8] Justice John Marshall Harlan wrote of the importance of the nation's values and traditions concerning individual liberty:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[9]

4. 321 U.S. 158, 166 (1944).

5. 262 U.S. 390, 399 (1923).

6. 268 U.S. 510, 535 (1925).

7. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) stated promisingly: "Marriage and procreation are fundamental" among the basic civil rights of man. But the Court turned away from the Due Process Clause and rested its holding invalidating a compulsory sterilization statute upon the inane ground that the law, by including thieves but exempting embezzlers, violated the Equal Protection Clause.

8. 367 U.S. 497 (1961).

9. *Id.* at 542.

Despite the fact that the Harlan opinion came in a case factually similar to *Griswold*, Harlan's ideas did not receive any attention in the majority opinion in *Griswold*. *Griswold* struck down a Connecticut statute that banned the use of contraceptives, including use by married couples. Repulsed by the thought of the police invading the "sacred precincts" of the marital bedroom to enforce such a law, Justice William O. Douglas wrote a brief opinion for the Court that did not securely ground the privacy it protected in any specific constitutional provision.

Instead, the opinion cited the penumbras of and emanations from the privacy rights specified in the Bill of Rights, naming, among others, the freedom from unreasonable search and seizure, freedom of speech, freedom from self-incrimination, and freedom from the forcible quartering of soldiers. Arguing from the existence of penumbras protecting privacy in other contexts, Douglas asserted that the marriage relationship lay "within the zone of privacy created by several fundamental constitutional guarantees."[10] The analysis ended with the observation that marriage was an institution "older than the Bill of Rights" that established "an association for . . . [a] noble purpose."[11] While *Griswold* reached a result that seemed right, just why it was right was unclear.

Over the years, more and more concrete examples of protected liberties accumulated—the right to marry interracially,[12] to abort a fetus prior to viability,[13] to raise one's own children despite their illegitimacy,[14] to have access to contraception,[15] to refuse life-sustaining medical treatment.[16] Yet the difficulties of justification persisted. A 1937 formulation—that freedoms are protectable if "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed"[17]—was acknowledged by the Court in a 1986 decision,[18] along with a 1977 formulation by Justice Powell asserting that fundamental liberties are those that are "deeply rooted in this Nation's history and tradition."[19] Subsequently, several

10. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
11. *Id.* at 486.
12. *See* Loving v. Virginia, 388 U.S. 1 (1967).
13. *See* Roe v. Wade, 410 U.S. 113 (1973).
14. *See* Stanley v. Illinois, 405 U.S. 645 (1972).
15. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
16. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).
17. Palko v. Connecticut, 302 U.S. 319, 325-27 (1937).
18. *See* Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986).
19. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

members of the Court emphasized the essential importance of a long-standing tradition in the nation's history to support any claim of liberty right.[20] Justice Scalia has insisted that no constitutionally protected liberty right can be recognized unless there is support in a tradition defined with the greatest degree of specificity possible.[21] Justices O'Connor and Kennedy joined Scalia's tradition-based analysis but argued for retaining the flexibility to define tradition at varying levels of generality.[22]

In a recent attempt to give primacy in substantive due process doctrine to the nation's traditions, Chief Justice Rehnquist, in a majority opinion upholding the constitutionality of Washington State's ban on assisted suicide,[23] asserted that the inquiry into tradition was the mandatory starting point for all substantive due process analysis and that this inquiry could go back centuries. Rehnquist's opinion searched out thirteenth century views on suicide in attempting to find the "Anglo-American common-law tradition" on point.[24] In an earlier case, Chief Justice Warren Burger had cited "millennia of moral teaching" from the Judeo-Christian tradition in reaching his conclusion on the constitutionality of antisodomy laws.[25] Blackstone's *Commentaries on the Laws of England* and other like works routinely appear in judicial opinions to confer or deny the stamp of historical tradition on liberty claims. Blackstone's work is particularly valuable, Rehnquist has asserted, because it "not only provided a definitive summary of the common law but was also a primary legal authority for 18th and 19th century American lawyers."[26]

20. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion).

21. *See id.* at 127 n.6. This seems a formula for rejecting most new liberty claims because new developments in a technologically oriented society rarely will have traditional forerunners. In the case of cloning, for example, if tradition is defined generally (for example, an American tradition favoring procreative choice) cloning arguably can be classified as a liberty right; if tradition is defined very specifically (for example, a tradition favoring procreation by means of cell cloning), no such tradition can be found, and cloning would have no chance of winning constitutional protection.

22. Chief Justice Rehnquist joined in the Scalia opinion; Justices O'Connor and Kennedy joined in all but footnote six.

23. *See* Washington v. Glucksberg, 117 S.Ct. 2258 (1997).

24. *Id.* at 2263.

25. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

26. *Glucksberg*, 117 S.Ct. at 2264.

II. SHORTCOMINGS OF HISTORY AND TRADITION-BASED ANALYSIS

There are several reasons for making history and tradition less central to substantive due process analysis. The principal problems are the following: (1) *Using history to yield up a definition of liberty falsely exaggerates the availability of clear guideposts from the past.* History can be a confusing patchwork of practices, sometimes in conflict with one another. Lincoln once spoke metaphorically of the two definitions of liberty at work in America in 1864:

> The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails today among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some as the advance of liberty, and bewailed by others as the destruction of all liberty.[27]

Those who chose emancipation, he concluded, repudiated "the wolf's dictionary."[28] Just as Lincoln chose his preferred definition, so too must modern judges exercise their discretion, informed by modern sensibilities, to determine which traditions to rely upon in defining liberty, and which to reject.

The history that is available to us is complex, contradictory, and incomplete. To assume that it will resolve all liberty claims is a false hope. When using history to determine which traditions to rely upon, it is incumbent upon the present-day judge to recognize the need to interpret its significance for our times, and to choose wisely from all that has gone before.

(2) *Historical traditions sometimes enshrine the nation's cultural stereotypes and prejudices.* Deferring too readily to historical practices and attitudes may suppress personal liberty, with sometimes profound effects on individual well being. A cautionary tale exists in the history of compulsory sterilization laws. In 1927, the U.S. Supreme Court in *Buck v. Bell*[29] permitted the State of Virginia to

27. Speech of April 18, 1864, *in* LINCOLN ON DEMOCRACY 320-21 (Mario M. Cuomo & Harold Holzer eds., 1990)).

28. *Id.*

29. 274 U.S. 200 (1927).

sterilize a young woman involuntarily committed to a mental institution. Justice Holmes seemed to reflect the prejudices of the time in upholding the power of the State to compel sterilization of the female plaintiff without her consent:

> It would be strange if [the public welfare] . . . could not call upon those who already sap the strength of the State for these . . . sacrifices . . . to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[30]

Ironically, Holmes himself had previously observed that the course of the law is influenced by "the prejudices which judges share with their fellow men."[31] It is our modern view of state-ordered sterilization, not the historical view, that leads us to see it as a denial of human dignity.[32]

Confining stereotypes have infected American traditions as well. An 1873 concurring opinion in the Supreme Court recited the belief that the "paramount destiny and mission of woman" was to "fulfil [sic] the noble and benign offices of wife and mother."[33] On this reasoning, women could be excluded from the practice of law, a profession they were presumably not destined to practice.

A passage from a modern opinion[34] 119 years later recognized the enduring nature of stereotypes about women, in the context of abortion:

> [A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, *however dominant that vision has been in the course of our history and our culture.* The destiny of the woman must be shaped to a large

30. *Id.* at 207.

31. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

32. Fifteen years later, the Court invalidated an Oklahoma statute that authorized sterilization of certain categories of criminals. Even though it recognized that the statute "involves one of the basic civil rights of man," the courts did not repudiate *Buck v. Bell*, but merely distinguished it factually. Skinner *ex rel.* Williamson v. Oklahoma, 316 U.S. 535, 542 (1942). It has taken a long time for the Court to reject *Buck v. Bell*. *See generally* Matter of Moe, 432 N.E.2d 712 (Mass. 1982) (referring to the "sordid" history of compulsory sterilization and the false premises underlying eugenic theory).

33. Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (Bradley, J. concurring).

34. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

> extent on her own conception of her spiritual imperatives and her place in society.[35]

This opinion did not bow to the cultural belief about women's destiny, but instead recognized the individual woman's right to choose to terminate a pregnancy.

A jurisprudence that makes liberty dependent upon traditional practices in culture or law fails to protect the nonconforming individual who does not satisfy cultural stereotypes. As Justice Robert Jackson observed in *West Virginia State Board of Education v. Barnette*, "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[36]

(3) *History does not always value liberty highly.* Blackstone may have been an impressive chronicler of the law of his times, but he is less impressive as a guide to the fundamental meaning of liberty in modern society. The rights of women, illegitimate children, and homosexuals would not have advanced much in the modern era if we relied upon Mr. Blackstone and his forebears for our understanding of human freedom.[37] A sober consideration of our history forces us to acknowledge that some traditions run contrary to fair notions of fundamental liberties. Bans on interracial marriage enjoyed a long cultural and legal tenure in America, before being ruled unconstitutional in 1967.[38] Unwed fathers and their "bastard" children have been treated poorly in history.[39] Yet the Supreme Court still found a way to keep an unwed father's relationship with his child intact in 1972, notwithstanding our unfavorable traditions and the objection of the State of Illinois.[40] These liberty rights concerning marriage and family relationships were declared despite traditional practices, not because of them.

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35. *Id.* at 852 (emphasis added).

36. 319 U.S. 624, 642 (1943).

37. *Blackstone's Commentaries on the Laws of England* recounted the inferior role of women, the disdain for illegitimate children, and the disgust with homosexuality that was reflected in the law of the time.

38. *See* Loving v. Virginia, 388 U.S. 1 (1967).

39. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (2d ed. 1987). Interestingly, the modern change in attitudes is reflected in a shift in West's key number classification. The Decennial digests up to 1976 used the term "bastards"; from 1976 to 1981, the term was changed to "illegitimate children"; and from 1981 on, the term became "children out-of-wedlock." *See* John Doyle, *Westlaw and the American Digest Classification Scheme*, 84 LAW LIB. J. 229, 247 n.50 (1992).

40. *See* Stanley v. Illinois, 405 U.S. 645 (1972).

Making constitutional "liberty" hinge on the support of historical tradition excludes liberties that have long been denied, on the perverse logic that if they have always been denied, they must continue so to be, no matter how unjust the denial has been. There are times when we are well advised to depart from tradition and turn away from historical practices that are embarrassing, wrongheaded, or even shameful. To do so, we need a substantive due process doctrine that allows us to bring to bear our contemporary understanding of the liberties that are essential to modern man. We should consult our historic traditions, but not be immobilized by them.

III. A SYNTHESIS OF VALUES, A BALANCING TEST, AND A REASONABLE ROLE FOR HISTORY

The elements of a workable substantive due process approach are scattered in various analyses offered over the course of a generation. While Justice Harlan was surely right that no simple formula readily suggests itself, we are at a point where we can extract the most useful ideas from the long debate over substantive due process and identify a set of values that underlie constitutional liberty rights. The cluster of values forming the basis for a jurisprudence of substantive liberty appear to include:

- Privacy in its classic sense of freedom from intrusive prying into one's personal life, and from public disclosure of personal matters;
- autonomy in directing one's own life and making key life choices;
- self-expression in matters that implicate one's deepest moral, religious, and philosophical values;
- intimacy in relationships with others that fulfill the human need for love and trust;
- preservation of the dignity of the individual, including respect for the right to bodily integrity and to treatment in accord with widely shared notions of human decency; and
- respect for the institution and functioning of the family.

Substantive due process cases often reflect a mix of these elements that strengthens the liberty claim involved. Privacy for highly

personal matters, for example, was a key element in *Griswold*.[41] Enforcement of a ban on contraceptive use conjured up images of police inspection of marital bedrooms, an intolerable invasion of privacy in the classic sense of that term. Such an inspection would also violate widely shared notions of basic human decency. Moreover, the State's interference in the sexual aspects of the marital relationship denies respect for the partners' expression of personal intimacy. Because marriage is the institution upon which the family traditionally is based, the State's contraceptive ban also interfered with the functioning of the family as an independent, self-governing entity. Finally, the use of contraceptives is part of the marital couple's decision not to have a child, an exercise of their autonomy in making key life choices.

These values should be the starting point for analyzing constitutional liberty claims under the Due Process Clause, but they are not sufficient unto themselves. The substantive due process riddle requires a resolution, in each instance, of the tension between community interests in regulation or prohibition of an activity and the individual's desire to engage in it. Communal interests are now brought in, obliquely, by means of the search for a relevant tradition in history, or directly, after a liberty interest is found, in the search for compelling state interests to overcome it.

A better methodology would ask the communal interest question directly, when the liberty interest itself is to be decided, with communal interests identified and weighed against the individual interests. Traditions supporting, opposed to, or significantly related to the liberty or the communal interests would be relevant to the balancing that must be done. Historical practices that are odious now—like the involuntary sterilization of disfavored classes—would also help to shed light on claimed liberty interests. Lessons from history demonstrating the wrong way of doing things are often as instructive as the teachings of our more virtuous traditions.

IV. APPLICATION TO PROCREATIONAL LIBERTY CLAIMS GENERALLY AND TO CLONING SPECIFICALLY

Procreational liberty has a strong claim to protection under the Due Process Clause. Two decades before *Griswold*, the Supreme Court termed involuntary sterilization a deprivation of one of man's

41. 381 U.S. 479 (1965).

"basic civil rights," but did not rule it a due process violation.[42] Post-*Griswold* cases have protected the right to choose *not* to procreate through contraception or abortion.[43] A much quoted dictum in 1972 declared, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[44] Strongly implied in these decisions is the right to decide in favor of procreation, not just against it.

Analyzing the issue in terms of the values previously identified, a right to procreate by natural means seems to merit constitutional protection. Normal sexual reproduction requires the privacy of intimate relationship; involves the central life choice of having a child and becoming a parent; constitutes self-expression in sexual experience; and represents a decision by the family unit that is central to the functioning of the family as a societal institution. Our traditions support this claim, and the unfortunate American practice of eugenic sterilization in the first part of the twentieth century[45] lends added weight to the argument for noninterference by the State.

When procreation takes unusual twists and turns, however, the analysis can change. Even procreation via sexual reproduction has its limits: A statutory rapist is not entitled to procreate with his victim.[46] Producing new people by clonal techniques may create some unusual and even bizarre possibilities: multiple clones of evil doers, humans produced with no genetic material from a male, clones of the dead, people created for spare parts. But, unusual scenarios aside, it is possible to envision ordinary couples attempting to have children through clonal techniques for the same reasons other couples have children. Can they claim a constitutional procreational liberty to clone?

Certainly some of the values of substantive due process fit: The participants are making a central life choice and a key family decision. Other elements are not present, however, including the privacy values associated with the intimacy of sexual reproduction and the value of

42. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

43. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883 (1992); Eisenstadt v. Baird, 405 U.S. 438 (1972).

44. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Other courts have assumed the right exists. *See, e.g., In re* Baby M., 537 A.2d 1227 (N.J. 1988); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Coe v. County of Cook, No. 96C2636 1997 WL 797662 (N.D. Ill. Dec. 24, 1997).

45. *See* Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMM. 331 (1985).

46. *See* Pena v. Mattox, 84 F.3d 894 (7th Cir. 1996).

self-expression through human sexuality. Because human cloning is unprecedented, it does not have the endorsement of tradition. It is possible to argue, however, that private decisionmaking about having children is within our traditions, and that this should be the relevant tradition. In this view, the means used to procreate, whether sexual or asexual, are not significant.

I reject this argument, but not because cloning is a different or untraditional way to achieve the goal of reproduction. The real objection to cloning lies in the community interests that counter the individual desire to reproduce. Cloning is more than a variant on coital reproduction. It is an unprecedented form of creation, one that challenges some basic ideas about family, offspring, and human individuality. These are foundational community concepts, and it seems unsound to permit individual liberty values to preclude the community from defining its basic social institutions. The community may choose to alter or adjust its foundational ideas (for example, by expanding the notion of marriage to include same-sex partners). But it should have the choice not to do so. The example of polygamy is useful: A community should be able to define marriage as nonpolygamous in its effort to structure and order the foundational institution of marriage.[47]

There have been several commentators who have argued that cloning offends fundamental notions of human dignity by commodifying children, making them into designed products, and increasing the chance that they will be treated as objects, not as persons.[48] I would add to these concerns cloning's potential to affect fundamentally the structure and experience of family life, making determination of its status more appropriate for communal rather than individual decision.

It is important to acknowledge at the outset that a human clone would be born as an infant delivered from the womb; he would not become the same person as the one whose DNA he shares. Differences will be produced by differences in environment, in brain development after birth, in home experiences, in parenting, in education, and in the unique events affecting the individual that occur in the community, the culture, and the world in which the clone grows to

47. One U.S. Court of Appeals has rebuffed a challenge to Utah's ban on polygamy. *See* Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985). The community's power must yield on those occasions when its definitions are contrary to preeminent constitutional commitments, as a ban on interracial marriage contradicts the constitutional commitment to equality.

48. See arguments summarized in Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission, 49-51, 72-74 (1997).

maturity. All of these influences will produce a person with an entirely distinct life, and with a unique mental outlook on that life.[49]

All this may be true, yet cloning still presents structural shifts in family life. It confuses the intergenerational structure of the family. A husband and wife who wish to have a child, and clone the husband to create one, will be raising the husband's genetic twin: his sibling (separated by many years), not his child. Definitions of motherhood, fatherhood, and extended family would be unclear in their application to cloning.

Cloning would be an experiment, performed upon the family and upon children. It might have a destructive effect on the most basic of family functions, that of childrearing. It is in the family setting that humans develop their basic sense of self-identity, of individuality, and of self-esteem. "The self is the construct through which individuals organize their knowledge of their own unique nature and distinctiveness. A sense of self relies upon the notions that one is separate from others and that one has a stable, permanent identity."[50] A sense of uniqueness is threatened by the clone's knowledge that he is the genetic duplicate of another and by the actions of parents, siblings, relatives, teachers, and friends, who will focus on the clone's unusual genetic status.[51] The child may not readily comprehend or credit reassurances of difference between himself and his donor, especially if significant others in his environment repeatedly insist on the identification of clone/donor similarities.

An expert on natural human twinning has observed: "When self is part of another and another is part of self, self-identity is fragile. . . . Having a double is a condition one is inclined to resent because it is a negation of selfhood. The core of this resentment is that no one wants

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49. *See id.* at 32, 33.

50. WILLIAM DAMON, SOCIAL AND PERSONALITY DEVELOPMENT 98 (1983).

51. Natural twins now are adversely affected by the perception of others that they are not distinct individuals. As one twin put it, "No one knew *I* existed, it was *us*." Mari Siemon, *The Separation-Individuation Process in Adult Twins*, 34 AM. J. PSYCHOTHERAPY 387, 388 (1980). Siemon also notes, "The intensity with which twins identify with each other is affected by the degree to which they resemble one another." *Id.* at 389.

Clones might also perceive the negative feelings that many people in society have about cloning. Leon Kass has written of the feeling of revulsion toward cloning as a bizarre aberration from the norm of human creation. Leon Kass, *The Wisdom of Repugnance*, NEW REPUBLIC, June 2, 1997 at 17. The revulsion of society could affect the cloned child's sense of self-esteem in a profound way, especially because the source of revulsion resides in the lifelong and immutable facts of her creation and genetic makeup.

to be an image of another. Each person wants to be an original."[52] A clone is a physical replica of someone else, and if that someone else is also his nurturing parent, the potential for complications in identity formation is apparent. As Paul Ramsey noted early in the debate over human cloning, "Growing up as a twin is difficult enough anyway; one's struggle for selfhood and identity must be against the very human being for which no doubt there is also the greatest sympathy. Who then would want to be the son or daughter of his twin?"[53]

A related problem is that the child identified as a clone will be burdened with the expectation that his path in life has been established by his DNA donor. Parents who have chosen the entire genetic makeup of a child may be likely, consciously or unconsciously, to communicate more detailed expectations for the child than they would for a child produced through the normal "genetic lottery." This sort of programming for an expected future has been conceptualized by one commentator as an infringement of "the child's right to an open future."[54]

Further difficulties and confusion would attend the raising of cloned siblings.[55] Identical siblings could be created either from multiple cloning of one adult or from the cloning of an existing child. The creation of identical twins (or triplets, quadruplets, etc.), separated by some period of years but growing up together, raises more complex questions about the effect of such an arrangement on the development of human identity, sense of self-worth, and individuality.[56] An existing child may sense that her place in the family is threatened by a newborn clone. A perception of parental preference for one's younger sister might be infinitely more confusing and distressing than in the ordinary sibling situation if that sister is a physical replica. The older child may feel that she is being *replaced* by a newer and more appealing version of herself. Moreover, normal anger at a clonal sibling might feel much more troubling if that sibling is seen as a duplicate of oneself. Reliance on rational explanations to persuade the first child of her uniqueness are of doubtful efficacy, first, because

52. *See* Siemon, *supra* note 49, at 387, 391.

53. PAUL RAMSEY, FABRICATED MAN 71-72 (1970).

54. Dena S. Davis, *What's Wrong with Cloning?*, 38 JURIMETRICS 83 (1997) (describing Joel Feinberg's notion of an open future and applying it to cloning).

55. For further elaboration of this point, see Stephen A. Newman, *Human Cloning and the Family: Reflections on Cloning Existing Children*, 13 N.Y.L. SCH. J. HUM. RTS. 523 (1997).

56. This also raises a further ethical problem: Is it proper to duplicate the genome of an existing person—in this case that of a child—without that person's consent?

children's rational powers are not fully developed, and second, because inevitably they, like adults, will be deeply affected by what their senses tell them.

Troubling changes in the parental role accompany cloning as well. Parental control over a child's destiny is limited by the well-known and accepted facts of genetic mixing: One simply cannot have any idea what the offspring from the blend of genomes of mother and father will be like. Cloning expands parental control to an unprecedented extent, as parents determine the child's entire genetic heritage. The temptation is there to continue to exercise inordinate control, perhaps based on a parental belief that a child made in one's own image is one whose needs and desires are known, and so need not be genuinely explored and discovered. Whatever the effects of this degree of control, it is incontestably a feature of cloning's restructuring of the relationship between the generations.

V. CONCLUSION

Determining the meaning of liberty in the Due Process Clause requires a balance between individual freedom and community decision making. Liberty values cannot be found simply by resort to history and tradition: Traditions conflict, historical practices sometimes perpetuate stereotypes and prejudices, and often enough, liberty is disfavored and devalued in history. It is essential that we consider contemporary understandings of liberty. It is also essential that we be sensitive to the needs of the community that may justify restrictions on what the individual may do.

Applying this reasoning to human cloning leads to the exclusion of cloning from any fundamental right to procreate. Cloning would affect foundational societal concepts centering on the family and child rearing. It could very negatively affect child development in its central aspects: securing one's place in the family, developing a sense of self-worth, and establishing an individual identity. The community has vital interests in defining the basic institution of the family and in fostering the performance of its most critical function, human development. Because of the overriding importance of these interests, cloning must be submitted to community decisionmaking.