Realbioethik

by R. Alta Charo

Back in the late 1990s, when cloning was about Dolly and not about stem cells, I had the privilege of attending an ancillary meeting of the International Association for Bioethics annual conference. Representatives of national bioethics commissions from around the world had gathered at this meeting to discuss the possibility of a global consensus position on reproductive cloning.

The conversation moved along predictable lines, with all agreeing that reproductive cloning was unsafe for now, and that even if it ever was safe, it was generally a distasteful idea. The reasons for finding it distasteful ranged from concerns about excessive parental egoism to disregard for children's expectation of uniqueness to a (mathematically unpersuasive) diminution in human genetic variation. Countering these arguments were, again, the predictable bows in the direction of personal autonomy in reproductive decision-making.

Although consensus was easily reached on the merits (or lack thereof) of reproductive cloning, proposals to harmonize national policies were more troublesome. While many countries had invested unfettered power in their national governments, the United States was faced with questions about federal versus state jurisdiction and about constitutional protections for reproductive choices. In addition, although many countries had the political freedom to craft compromise positions in the realm of human reproduction, U.S. politics was strongly influenced by the bitterly divisive abortion debate, a debate that had led pro-choice groups into extreme libertarian positions lest the principle of reproductive choice be undermined.

As I listened, I found myself thinking that any effort to harmonize national policies would depend less upon a consensus concerning the technology and more upon whether national legal and political cultures could be harmonized. And further, if we genuinely value diversity in national cultures, harmonization of diverse national policies would not only be difficult, it might not even be desirable.

I also wondered if the way to craft bioethics public policy or to predict the outcome of bioethics policy debates might be to start not with an ethical analysis of the technology itself but with a political analysis of the particular national or regional governmental setting. In other words, is it possible that sweeping political forces—historical, cultural, structural, legal—may overdetermine the outcome of bioethics public policy debates? This is not to suggest that analyzing the duties of parents or physicians, or the difference between withholding and withdrawing care, or the distributive justice questions underlying access to health care, is pointless; merely that such analyses are inadequate to justify what we ought to do or to explain why we will pick certain bioethics policies over others. Furthermore, ethical analysis, while relevant, does not represent a superior or more pure approach to public policy. Politics is not merely an irritating constraint that prevents us from doing what is right; it is rather an embodiment of other values best discussed in terms of political philosophy rather than moral philosophy, and these values, too, must guide our decisions.

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Unique histories yield unique phenomena. The antibiotechnology and antieuthanasia forces, though present in all countries, are particularly robust and influential in Germany because of its Nazi heritage. While eugenics was most certainly a phenomenon in the United States, it has far less hold on American politics because it was not part of a national trauma (although it is frequently cited by anti-choice activists because of its association with early birth control movements). One of the few areas in which the issue of eugenics has really had traction in the American national debate is in its intersection with racial equality, a phenomenon that itself reflects the unique history of the United States, in which slavery is our original sin.

Other factors are more economic or cultural than historical. In countries with national health care, for example, doctors are part of a system of service prioritization. As a result, they are part of the management team, and, along with economists, philosophers, and administrators, will form an alliance that decides which services are owed to patients and which are not.[1] In the United States, by contrast, physicians often work in fee-for-service settings, and they become allies with their patients in a consumerist demand for more patient autonomy in purchasing services. This is a phenomenon with obvious implications for fields of medicine that straddle the "disease" and "lifestyle" distinction, such as infertility treatment and cosmetic reconstruction. And, concomitantly, by characterizing themselves as purveyors of medical services rather than as arms of an overarching health care system, physicians in the United States also seem to feel freer to make claims of personal autonomy and conscience by de-

clining to sell their services to single women seeking infertility treatments, married women seeking contraception, or rape victims seeking the "morning after" pill.[2]

There are structural forces in play as well. These include not only the difference between national and federal systems (which accounts in part for the variations in embryo research policies among states in Australia and the United States, as contrasted with the more monolithic policies of the United Kingdom, Korea, and France), but also the difference between representative and parliamentary systems. Parliamentary systems insulate individuals from the vagaries of intensely local popular votes by embedding them in party lists set by party leaders and in an electorate that votes predominantly by party rather than by individual personality. Imagine, for example, the reactions to the Terri Schiavo case if individual members of the House of Representatives did not fear the ten-second spot ("And he voted to kill poor Terri Schiavo") in the next election cycle. And this need for each politician to play to a particular segment of the electorate rather than to his party's leadership is magnified in settings that require primaries. Consider, for example, U.S. presidential campaigns, where primaries force upon candidates the Hobson's choice of playing to their extremes (to capture the base, which is the only group bothering to vote at this stage) or playing to the center (so that if they survive the primaries, they are well positioned to capture the swing votes in the general election). One reason the stem cell research funding debate was so potent in the 2004 elections was that, having captured a prominent share of public awareness, it highlighted the degree to which the Bush administration had chosen to play to its extremes.[3]

Legally, the presence of a bill of rights sets American jurisprudence and bioethics public policy debates apart from those in other countries. Even where there are good reasons for governmental restrictions on a technology, the bill of rights and its penumbra gives individuals a claim that, in certain areas, restrictions must meet a far more stringent test of justification. The result is a legal system that specifically favors the individual over the collective, the dissenter over the majority, and the eccentric over the conformist, at least with respect to such things as free speech, reproductive choice, and other fundamental rights. In a sense, this is an approach that favors intergenerational concerns, such as the long-term viability of peaceful regime change, over intragenerational concerns, such as the most efficient or popular legal ordering for this time.[4] And in the 2003 Supreme Court case of *Lawrence v. Texas*, in which a Texas antisodomy statute was challenged as unconstitutional, Justice Kennedy went even further, declaring that the fact that "a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," and therefore that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life."[5] This was a profound statement in favor of moral libertarianism, denying the very existence of a legitimate role for the government in directing purely personal, intimate behaviors on the basis of prevalent moral codes. Without question, if this position was widely adopted in other cases and political debates, it would profoundly differentiate the United States from more communitarian forms of government.

And at a still deeper level, our solutions to bioethics dilemmas are answered by reference to political philosophy as well as politics. The pre- and postenlightenment debate over moral relativism is at the heart of Kennedy's cry for governmental restraint in morals regulation. And the enlightenment highlighted other fundamental differences in political approach: logic versus faith in reasoning through dilemmas; optimism versus pessimism regarding the improvability (though not perfectability) of the human condition; and embracing versus resisting the serendipitous changes wrought by economics, technology, and science.[6]

We may write reams of articles, and chatter for hours on CNN, and issue shelves of national bioethics commission reports all focused on the details of the technologies—Does cloning risk too much harm to offspring? Will germline engineering create an irreversible and regrettable alteration in our evolutionary path? What is medical futility? But in the end, it is the politics we are debating more often than the bioethics, and it may well be that sweeping political forces will determine the policy outcomes more than the merits of the individual arguments. Although we acknowledge this from time to time, we rarely focus on it as our primary means of argument. Our conversations would be more honest, more articulate, and more effective if we were to embrace this rather than bury it, in the vain hope that bioethics can somehow be above politics. Aristotle wrote that "man is naturally a political animal." So too the bioethicist, and we ought to recognize it.

1. R.A. Charo, "Le Penible Valse Hesitation: Fetal Tissue Research Review, and the Use of Bioethics Commissions in France and the United States," in *Society's Choices: Social and Ethical Decision Making in Biomedicine,* ed. R. Bulger et al. (Washington, D.C.: National Academy Press, 1995), 477-500.

2. R.A. Charo, "The Celestial Fire of Conscience," *New England Journal of Medicine* 352, no. 24 (2005): 2741-2743.

3. R. Brownstein, "On Filibuster and Stem Cells, GOP Bears Pain of Compromise," *Los Angeles Times*, 30 May 2005.

4. R.A. Charo, "Principe de precaution, bioethique, et role des conseils publics d'ethique," in *Les Cahiers du Comite Consultatif National d'Ethique pour les Sciences de la Vie et de la Sante* (Paris: Comite Consultatif National d'Ethique pour les Sciences de la Vie et de la Sante, 2000), 27-29.

5. *Lawrence v. Texas*, 539 U.S. 558 (2003).

6. R.A. Charo, "Passing on the Right: Conservative Bioethics is Closer Than It Appears" 32, no. 2 *Journal of Law, Medicine and Ethics* (2004): 307-320.