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Cloning and Commodification

transcribed remarks of
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I'm echoing the chorus of thanks to the *Hastings Law Journal*. The journal has done a beautiful job and we have all been made to feel like visiting VIPs, so thank you very much, well done.

As my ex-colleague Alex Capron mentioned, I've been thinking about commodification for some time, but I haven't thought enough about the science of cloning. I learned a lot about the science from the committee report, which was a beautiful job, and also from the other speakers today. I do have the benefit of that, but I hope to learn more in the future. There are two important things I said in all this discussion about commodification—perhaps these are the only two things you need to know. One is that it's a complicated issue full of double binds and dependant on nuanced evaluation; it's not reducible to sound bites. The second thing is, and maybe this is the more important discussion for today: a mere gut response, as in, "commodification, ugh" isn't a good enough reason to resist it. The reason I got started writing about commodification is that I thought, we could say things other than "I hate this, ugh." We need to have a better response than "ugh." So I'm joining the chorus against Dr. Kass' article, which I haven't read, but people here have made sound awful. I'm adding, provisionally, awaiting my reading of it, that I deplore his being able to stack the committee that will now make pronouncements in our name. I suspect that the dissent from people like those in this room is going to be very important, and that now is not the time to be silent.

Commodification and commercialization is basically the topic I'm going to talk about a little bit, as well as the notion that regulation can be thought of as incomplete commodification. The concept of commodification is related to commercialization. The concept posits that there is some kind of strong distinction, ethically, culturally, or morally, between a donative system where you give things, and a profit and exchange system where you have economic exchange and profit. There are two issues. One is, what is the ethical support for

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each of these systems, and two, can they actually be held apart in practice, even if we have an ethical distinction between a donative system and an exchange system? In exchange systems, which I think of as pure commodification and commercialization, the infrastructure that holds sway is the infrastructure of the functioning market—that is, property and contract law. I used to theorize property, and now I theorize contract, but they're interrelated. They each have their own limitations, but if you are a theorist who believes the market is the only way to think about justice, then you think that property as entitlement and contract as transfer exhaust the theory of justice. The late, great Robert Nozick did think that, and for good reason, as he was a market theorist. So, if some things become part of a commercial structure and become subject to property and contract, that can create the implicit propertization of things that were formerly non-property. This is what has happened to eggs, for example. They were pretty clearly non-property at the time I was writing, some of the first of my work on commodification, and now they've become fairly well-propertized, just through the prospect of entering a market.

The objections to commodification are primarily objections to giving market status to some object that is important to human beings. These objects are usually things close to personhood and things we think of maybe as internal to personhood or as constitutive of personhood, rather than things that can be thought of as external. Here I'm borrowing from a long Kantian legacy—that's one way to theorize it, though not the only one. What exactly is important about non-market status? What exactly is it about being not of the market? Here is where the theory should go deeper. It's possible that what makes people upset about market status for things that are self-constitutive or related to personhood is that there are monetary equivalents, and not that there are actual transactions. It's possible that merely thinking about something as a transaction is objectionable, and I call this market rhetoric. The people at Chicago starting with Nobel Laureate Gary Becker have pursued this rhetoric to great depths in applying it to families. The monetary equivalents could be in thought (market rhetoric) rather than in action (actual markets). Or we could be merely objecting to fungibility—that is, the idea that something has become standardized and more like a product which has the same indicia in all its instantiations and is not unique enough. If we want to call that commodification, even if there is no money, that's a different way of thinking about commodification than if there is money involved. So there are some nuances on what's involved in commodification, and I think they are important in trying to apply this concept to cloning.

I do want to say here, and maybe this is my main point, that commodification is both liberating and threatening in many circumstances, and that it's often impossible to brand it as one or the other. Markets are experienced as liberating. Not to have everything dependent on social status was experienced as liberating, and there are a lot of countries in the world that experienced transition to markets as liberating, and people who weren't able to buy things because of race or class still experience markets as liberating. Some say the Internet is liberating because nobody can tell who you are when you're on the Internet. So, because commodification is both liberating and threatening, there are recurrent arguments on both sides. Make people free to have children and you're enhancing their autonomy and personhood, or make people more market-oriented in self-conception and you're diminishing their autonomy and personhood. So we had people who argued diminishing autonomy and personhood, because people are becoming market-oriented in self conception, but we had other people who argued we're going to become free to have children which is really important to us, thereby enhancing our autonomy and selfhood. I think that the duality of these arguments is not going to go away. There's no self-evident answer.

I think though, that application of the notion of commodification to ideas of cloning is not that easy. I think, for example, that with contract pregnancy, it's easier. Contract pregnancy is called "baby-selling," unless it's called commercial surrogacy. I have never seen a viable difference between the two because I don't think the identity of the sperm donor changes the nature of the transaction from a sale to something else. So that issue has seemed easy to me, although perhaps that's controversial. I think with cloning it's a little harder because there's no actual sale of a baby, or even something that looks like the sale of a baby. There are things which might be troublesome from the point of view of fungibility, objectification, or particularly from the point of view of whether the donor economy is what's really going on. I'm going to come to that later, but (at least to me) cloning doesn't look the same as commercial surrogacy looks.

Which brings me to incomplete commodification and thinking of regulation as incomplete commodification. Now, I think there's an awful lot of incomplete commodification in the world. I think a lot of things that people think of as being market transactions are not fully commodified, as in not fully laissez-faire property and contract, but have a lot of other kinds of protections built in to protect human beings in their self-constitution in various ways. I think one reason we have regulation like that is to preserve the non-market aspects of being human. But what are we going to attack when we try to use a regime of incomplete commodification? One thing to do is to attack

the indicia of commodification by saying I don't want to see market exchange, I just want to see gift. Or you can say I don't want to see market rhetoric so let's please not talk about exchange transactions, transaction costs, demand curves, and ownership. Instead, let's talk about this in a different rhetoric. You can be attacking fungibility, asking to please preserve uniqueness, and to avoid thinking that this is standardized. So there's a lot of things that can be attacked. I think a basic issue is whether we're doing this just for rhetoric or symbolism, or whether there is some other goal in mind, and I think that an awful lot of anti-commodification has to do with the symbolism and the rhetoric.

Why do we care about this? Why do we care about asking people not to talk like Richard Posner and Gary Becker? They have a first amendment right to do it; I'm not saying they don't, but why do we wish they wouldn't? Why do we wish Posner hadn't written a book called "Sex and Reason" which says that sex is only an economic activity and all our choices about sexuality are merely disguised choices about maximizing our profits? Why do we wish he hadn't done that, why do we care? (Maybe I shouldn't say we; why do I or some of us wish he hadn't done that?) First and foremost, I think we care about this because we like our legal system to make a commitment to an ideal—even if we're imperfect. We want the legal system to make a commitment to an ideal of noncommodification of love, family, and other commitments close to ourselves. And, secondarily, there are these ideas about slippery slopes. Some people think if we start talking about children as things we own, and about one as being fungible with the other, and we expect them to maximize our pleasure in life, we might start actually trading them some day. So, when Gary Becker got the Nobel Prize, we thought (if we're slippery slope-ists) this is going to make us closer some day to actually buying and selling children. But I think those two reasons why we should care are two different arguments. One is that we think empirically in practice we're going to slide down the slope, but the other is, even if we never slide down the slope, we think our legal system should be expressive and should say something about our ideal, even if we can't live up to it. We can't live up to our ideal of freedom of speech or equal justice, but we think there should be an equal protection clause. In a way, the reason we couldn't get the Equal Rights Amendment passed was because we needed it so much. Some of us thought it would be a good idea to have it just to say, "this is what we care about." So, desire for expressive commitment is part of the reason for anti-commodification regulation, and the rest of it might be this slippery slope idea, which I'm not at all sure about. I never have been. There could be a really stubborn commitment to the core of non-market humanity such that however much selling of

kids goes on, we might stubbornly resist actually ever thinking about kids as market commodities. I don't know how to test that. I don't know whether it's true or not true.

How does all this apply to cloning? Here my thoughts are tentative. How would regulation recognize the non-market status of women, of children, of biological genetic components? One thing regulation can do is improve safety, as we've been talking about. That seems like the easiest argument. Now the safety argument could be totally a market argument; it could be just the usual limits on property and contract. After all, in contract we don't let people defraud people, we don't let them tell lies about their product; we have consumer protection. In property we delimit entitlements so that we don't injure other people; we don't create nuisances, and so on. We could just have the usual limits on property and contract, or we could, with the safety regulation, be trying to achieve some recognition of non-market status. Here I think the problems with the non-regulation of IVF are really instructive. In spite of people's commitment to informed consent as an ideal, it turns out we have this industry that plays on people's hopes and takes them for lots of money, yet doesn't ever have to disclose how unsuccessful it is, how much pain there is, and how much women get hurt by it. On balance, if you're a utilitarian, the fact that some people can get access to this because they really want it, and they send emails to Mr. Eibert, and the fact that the other people get hurt (because their hopes have been dashed and they could have adopted ten years ago but they went through all this and suffered) could well cause you to find the balance tilting toward banning or heavily regulating these commercial fertility firms. That's the sort of thing which could be regulated for either non-market status reasons or possibly for market hygiene reasons; that is, we could regulate to express with an incomplete commodification a commitment to the nonmarket status of procreation and children, or we could regulate simply so consumers can be informed and get what they pay for. I was also interested in Alex Capron's statement that "procreation becomes manufactured." That's a nice slogan. It makes me think, "Is the problem with cloning that we have an exchange and a commercial profit-making industry, or is it something else?" When we say procreation becomes manufactured, it looks like it's something else. It looks like he's worried about standardization or fungibility. But maybe not. Maybe if only one unit is manufactured then it wouldn't be fungible, it would not be an exchange transaction, and money need not have anything to do with it.

So what's the problem? Is the problem merely that the clone comes into being in some way which seems unduly objectified? That's unclear to me. There's another slippery slope or at least a

continuum here. As some of you know, for the Catholic Church, sex is objectified and therefore wrong unless you procreate in the normal manner. I don't think they go so far as to say you must use the missionary position, but they go pretty far toward thinking how you have to do it, because everything else has this aura about it of not being quite natural or right. So I think something like this might be what's behind the "procreation becoming manufactured" argument, and what's wrong with that needs some further thought. It's not about the fact that we have exchange and commercial profit, it's about something else, and maybe that something else is a concern about fungibility, or lack of uniqueness. But if it's something other than that, like somehow we use a process which isn't a process that seems natural, that's something that needs some underlying questioning.

Another thing regulation can do is forthrightly put limits on profit, and that's an incomplete commodification in a sense. It says, this is an industry that we don't want governed by the full laws of capitalism; it isn't just about supply and demand, it's about something else that we care about. That is the way we treat adoption, or the way we try to. In other words, there would be a full-blown contract pregnancy industry, I'm sure, if we allowed that, because there really is demand out there for babies, especially certain types of babies. There are other things that have limits on profit too. Rent control is one, and there are lots of others. So we can openly put limits on profit and that creates an incomplete commodification in a sense. There are also these selective prohibitions—"you can do this but not that." As justification for selective prohibition you can fall back on safety but another reason for them relates to rhetoric or symbolism.

And then finally there's this thing that bothers me about trying to keep apart exchange transactions and donative transactions, to which this whole notion of commodification is related. The problem is that a lot of these high-tech processes, and not just ones for reproduction, have run into the issue that because it's more ideologically pure to be a donor we see a donor at the beginning of the chain and we have profit at the end. We have egg "donors," but then we have profit-makers as the "donation" goes through the system. It's no accident that the *Moore* case has made it into all the property books: the man was an unwitting donor of his cells, while the doctors, the hospital, and the university made big, big bucks through propertization. Moore never saw any of it because the court objected to its being called property. (The court did at least suggest that it could be called a tort.) So we have egg donors, we have womb service donors, we have cell donors, and all of these donors could end up being cheated by incomplete commodification because people later on in the chain are making all the money and the donors are not

getting any of it. This is another one of those double-edged swords. You either go all the way to commodification and pay the people who started out, or you can go all the way to non-commodification and not pay anybody or you can start limiting the profit further down the chain. This is a complicated issue. Nobody today has mentioned it. Maybe it comes later on in regulation, but I really think this is what should be thought about with regulation.

I'm going to conclude by talking about some types of recurrent anti-regulation arguments. They've been recurrent today, they're recurrent in the committee report, and they're interesting. I think they should be questioned, but that doesn't mean they have no weight. First of all, I will divide the arguments against regulation into two types. The first arguments are ideal arguments of principle, and the second are the non-ideal arguments having to do with our situation. These non-ideal arguments are pragmatic and consequentialist: what will happen if in our current circumstances we try to ban this or we try to carry out these procedures? The lawyers make this second argument. They say, all right, here we are and we have to get from here to somewhere else. We have to really take into account where we are now, all the cultural conditions, all the political conditions, all the things that are lacking with the factual picture. The ethicists and people of principle make the first argument—that is they say if we had an ideal world, how could we think about this? The first principles, the recurring ones, seem to be either religion or Kantian personhood; those are the ones that recur. The religious arguments per se are supposed to be constitutionally illegitimate, but they're the most important to many of our people, and I think, therefore, at least we should take seriously that they are the most important arguments to many of our people. The Kantian argument is preferred by secular ethicists; it emphasizes respect for personhood, saying that if something is a person it's not an object, and we have to treat it as an end not a means. The Kantian argument cuts both ways. Respect for personhood may mean that all technological opportunities for reproduction and the opportunity to spend your money in the market should be allowed. Kant thought that property should extend to the furthest reaches of all objects in the universe so that we could express our personhood. On the other hand, we could say that it limits personhood and self-constitution to let these things get placed partway in the object realm. So I think we can't get there from here on the ideal argument. It cuts both ways or is undecidable in the abstract. That's my personal opinion, but I'm a lawyer.

I want to mention four of the non-ideal and the circumstantial arguments that keep recurring. The first one I call Why pick on me? I wish I had a good slide with this. Why pick on me, I'm just the latest in a chain of non-ideal practices, and you haven't picked on the early

ones. What about commodification of youth and beauty? What about cosmetic surgery? We haven't moved to ban those. We haven't moved to provide them for poor people. We have let the market call forth a great flourishing of commodified youth and beauty, and so on and so on. That's the why pick on me argument. I've seen that one quite a bit in this debate, and I'm sure that you have too.

The second argument that I see a lot is Money will out anyway, so let's be honest. There's an inexorable power of demand with money behind it and no matter what you do, if there's demand and people have money, there will be these clinics and cloned humans. There will be all this stuff whether you like it or not and therefore you should legalize it. Think of prostitution or campaign contributions. Money will out and let's be honest. I think Richard Posner is one of the main people on this, but you hear it a lot. Two things about this: if you prohibit something when there's a lot of demand and money to pay for it, there will be a black market. This is terrible; it's very inefficient if you're an economist. If you're not an economist, you say things like, "the mafia will run it." Drug regulation—there's another example. There will be a black market, and the mafia will run it, the money will out. The Posners of the world are consistent; some of the rest of us aren't. They say, look, there should be drug legalization and prostitution legalization as well as legalization of all this other stuff. But I guess he's against cloning, so maybe he's not so consistent. The second thing is if you try to ban something and there's demand for it, and money behind it, there will be this sliding that Alex Capron talked about. Therapeutic research will be used for reproductive cloning and you just can't hold it apart in practice because there's demand and there's money and it will happen. That's the second part of the money will out argument—regulations will be evaded and bent to serve the demand as long as there is money behind it.

The third argument is that the normal method of reproduction is pretty non-ideal too. There are dangers with sexual reproduction, there are bad reasons that people have children, and there are bad ways they treat their children (they are abusive, they neglect them, they have them for stupid reasons). I guess this relates to number one, why pick on me. We have a long chain of other methods of reproduction including surrogacy and IVF—but we also have regular sex which is pretty non-ideal. People give their children HIV, people abuse them, people give them cocaine addictions—not just Tay-Sachs disease.

Number four is that if you regulate something, you might exacerbate the divide between rich and poor, the double bind. I don't know which way this cuts with cloning. It's true that only rich people

are going to purchase cloning and that only rich people do purchase surrogacy, IVF, and cosmetic surgery. Even adoption costs a bundle. So the question is, what should we do with the argument, only rich people can do X? Here's another regulatory alternative—if you can't lick 'em, join 'em. That's the alternative of charging large license fees or taxes. If you believe number two, which is that money is going to come anyway, if you believe the real ever-increasing class divide, and if you think the demand is intractable—you give up on trying to prevent commercialization, but you charge a large license fee or a tax and you earmark it for those who can't afford the treatment or who need the education or whatever. That's tobacco, that's the California lottery, that's lots of things. So that's an alternative, too, which I think should be thought about here, at least when that argument is raised.

I'm going to conclude with a list of problems (I must be an ethicist at heart!). One, there are liberation arguments on both sides, so there's indeterminacy. Two, there's this problem of blurring of the language of gift and exchange or the regimes of gift and exchange because we have donors at the beginning and profits at the end—sometimes unwittingly, but when it does become witting there's an increase in cynicism, I must say. Next, is it too late because of earlier practices? How far gone are we? Are we so commodified that we should just give up thinking about it, and if not, where do we start if we can't start with the latest practice? And then, here's one that I think should be thought about and hasn't been thought about enough even yet, how much should we take as a given people's attachment to their own genetic material? Should we really interpret our Constitution as guaranteeing the right to a biological family? I mean it's one thing to say there's a right to a family, but is that a right to a biological family versus adoption or mixed practices, or some other ways that people create families? I know that it's true that people are attached to their genetic material, but just to speak personally, I've known people who have tried IVF and failed after great suffering and ended up adopting. They then found out belatedly that caring for an adopted child results in as much caring as anybody can give and as full an experience of family as anybody can have. It would be wonderful if people knew that more than they now do, although many people do know it. My final thought is that we lawyers worry about the problem of policing. Whatever you try and pass, whatever kind of regulation it is, you have to think carefully about how it's going to be policed. Obviously there's been a lot of ridicule about investigating what's going on in the bedroom, but from a policing point of view, there's nobody looking into the bedroom. When birth control in the bedroom was prohibited, the prohibition was widely violated. If you care about this issue, you have to write any regulation in such a way

that people can investigate what's happening. If you believe that every statute degenerates into industry capture because of the inexorable power of money, then you have a very serious problem about how to regulate something without having it degenerate into the demand of the market. That's the problem that I leave you with, but I think it should be thought about seriously.

Thank you.