

DOES TECHNOLOGY SPELL TROUBLE WITH A CAPITAL “T”? HUMAN DIGNITY AND PUBLIC POLICY

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In recent years, human dignity has attracted considerable attention as a policy standard. From bioethics and constitutional law to torts and the regulation of the Internet, human dignity has seemingly become the most salient touchstone for assessing current policy initiatives. Yet dignity is a slippery concept, as illustrated by the opening scene of the movie *Singin' in the Rain*.¹ Set at the premiere of a Monumental Pictures hit, the stars arrive in limousines and walk down a red carpet into the theater. While adoring fans “ooh” and “aah,” the screen celebrities grant brief interviews to a prominent gossip columnist. Don Lockwood, played by Gene Kelly, is asked to explain how he became a star. Lockwood responds with a speech in which he claims that he has always lived by a simple motto: “Dignity, Always Dignity.”

Lockwood then recounts episodes from his “privileged” upbringing, while the considerably less appealing reality of a hardscrabble childhood is depicted. For example, Lockwood claims to have started his career by performing “for Mom and Dad’s society friends,” as he is shown tap dancing in poolrooms to harmonica music and collecting thrown pennies from the floor. He talks of accompanying his parents to the theatre (“They brought me up on Shaw, Moliere—the finest of the classics”) as he is shown sneaking into B-movies. Playing fiddle in a three-man band in a smoky bar is labeled “rigorous musical training at the Conservatory of Fine Arts.” Similarly, “an apprenticeship at the most exclusive dramatics academy” is actually an amateur night audition with a slapstick vaudeville routine. The “dance concert tour at the finest symphonic halls in the country where audiences adored us” is a cross-country tour of obscure hamlets (including Dead Man’s Fang, Arizona, and

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1. *SINGIN' IN THE RAIN* (Metro Goldwyn Mayer 1952).

Coyoteville, New Mexico), during which Lockwood is regularly booed off the stage after tap dancing and fiddling.

Lockwood is “spinning” his origins, but the disparity between his words and objective reality implicates some of the difficulties in using human dignity as a meaningful policy standard. It goes too far to suggest that one man’s dignity is another man’s dishonor, but there are nonetheless broad areas of human existence on which there is little agreement about what behavior is dignified, let alone a consensus that dignity is the correct standard for judging conduct. Part I outlines some of the reasons for these difficulties. Part II considers the history of using dignity as a policy standard for regulating technology and innovation. Part III outlines several ways in which professional norms and forms of discourse undermine the possibility of using human dignity even in those areas where it has considerable saliency. Part IV offers a brief conclusion.

I. PROBLEMS WITH DEFINING HUMAN DIGNITY

Assessments of human dignity are quite subjective, with considerable variation temporally,² chronologically,³ geographically,⁴

2. See, e.g., *A BLAST FROM THE PAST* (New Line Cinema 1999):

Eve: Here ya go, one champagne cocktail.

Adam: Oh, thank you.

Eve: I thought only hookers drank those things—

Adam: Well, I know Mom sure likes ‘em.

3. Telling someone to “act your age” implies a broad array of expectations about age-appropriate (i.e., dignified) behavior. The New Testament makes a similar observation: “When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.” 1 *Corinthians* 13:11 (King James).

4. These variations help explain the appeal of Las Vegas, which explicitly advertises: “What happens here, stays here.” Theresa Howard, *Vegas Goes for Edgier Ads*, USA TODAY, Aug. 3, 2003, http://www.usatoday.com/money/advertising/adtrack/2003-08-03-Vegas_x.htm. See also Rochelle Riley, *Say Something—But What?—About Detroit*, DET. FREE PRESS, Apr. 18, 2003, 2003 WL 17679878 (“‘What happens here, stays here.’ It’s an ad for Las Vegas. And you know what it means. You can do things you wouldn’t want the Sunday School at home to know about.”).

The higher prevalence of violence in the South has been attributed to dignitary norms. See James D. Wright, *A Matter of Respect*, REASON, Feb. 1997, at 62.

Southerners and Northerners have different attitudes about violence—not across the board (as might be expected) but in certain specific areas, all of which seem linked to notions of honor and respect. Southerners, for example, are more likely to agree that violence is acceptable in defense of home and family and as a mechanism of social control, and they are especially likely to endorse violence as a response to insults and affronts, most of all when they involve women. This pattern suggests a culture in which honor threatened is honor lost and no response to the possible loss of honor is too extreme.

Id. To be sure, there are other explanations for the higher incidence of violence in the South; Professor Sheldon Hackney once suggested that “in the South, there’s just more

and culturally.⁵ Social class, religion, wealth, and the degree of industrialization matter as well.⁶ There is also a considerable degree of individual variation. Consider whether human dignity is enhanced, diminished, or unaffected by blue laws, capital punishment, cloning, decriminalization of drug possession, gay marriage, genetically-modified food, gun control, legalized prostitution, partial-birth abortion, physician-assisted suicide, prohibition of hate speech, school prayer, school vouchers, state lotteries, and three-strikes laws. Would Ted Kaczynski (the Unabomber), Ted Kennedy, Howard Dean, Zell Miller, George W. Bush, Ronald Reagan, and the Pope have the same answers to that question?

Even if people agree that human dignity is the appropriate standard for assessing policy initiatives, they are only likely to agree on what is dignified for matters at the extreme end of the policy distribution (e.g., incest, slavery, and cannibalism). On matters that fall closer to the mean (e.g., organ transplantation, cloning, affirmative action, tobacco regulation, church-state relationships, hate crimes, private gun ownership, and euthanasia), the preferences of individual citizens, groups, and nations vary tremendously.

These preference variations are exceedingly important, since actual behavior (including voting) maps neatly onto these expressed

folks who need killing." *Id.* at 64.

5. Cultural and religious variations in dignitary norms are most salient when insular, homogeneous communities interact with one another or with more heterogeneous communities. Some of the resulting conflicts have made their way to the Supreme Court. *See, e.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (striking down a school district created to exclusively serve a Hasidic Jewish community); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (addressing animal sacrifice by adherents of the Santeria religion to which neighbors had objected); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (involving sacramental peyote ingestion in the Native American Church); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (regarding saluting the flag in a public school); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding the bigamy prosecution of a member of the Mormon church). Such situations can also inspire movies. *See, e.g.*, *AN OFFICER AND A GENTLEMAN* (Paramount Pictures 1982); *WITNESS* (Paramount Pictures 1985); *ANIMAL HOUSE* (Universal Studios 1978); *CADDYSHACK* (Warner Bros. Studios 1980); *LITTLE BIG MAN* (Paramount Pictures 1970); *THE MAN WHO WOULD BE KING* (Warner Bros. Studios 1975).

6. *See* Timothy Sandefur, *Why Conservatives Oppose Progress*, *LIBERTY*, March 2001, at 47.

We today are scandalized that boys went on climbing in chimneys for nearly eighty years after the heart-rending poems which Blake wrote about them around 1790. . . . But the boys had been climbing for a hundred years before Blake without a line of protest from Addison or Gay or Dr. Johnson. . . . So today in China and India and other countries with few machines, life is brutal and laborious, and sensibility is unknown. . . . It was the engine, it was the horsepower which created consideration for the horse; and the Industrial Revolution which created our sensibility.

Id. (quoting Jacob Bronowski).

preferences. Given this diversity of preferences, and the inherent subjectivity of those preferences, it is unlikely that we, as a nation, will be able to settle on a single notion of human dignity, let alone be able to apply the resulting standard to a particular policy issue in a way that puts it permanently to rest.

Abortion provides a useful test case for these claims. Both sides believe with the utmost sincerity that human dignity is on their side. In the thirty-odd years since *Roe v. Wade*⁷ was decided, they have engaged one another repeatedly in the courts, legislatures, and media. Election campaigns have emphasized the candidate's views on judicial bypass procedures, parental consent, and partial birth abortions. Protest marches, boycotts, and demonstrations have been staged; lawsuits and counter-suits have been filed and litigated. The issue has been as thoroughly debated as any other subject in recent history. Yet neither side has been able to persuade the other that human dignity requires the result it advocates. The issue of abortion shows every indication of remaining unsettled for the indefinite future. The attempt by Justices Kennedy, O'Connor, and Souter to conclusively end the debate in *Planned Parenthood v. Casey* was a complete flop.⁸ To be sure, this outcome is not all that surprising when the best these three Justices could come up with was to assert it was all part of the "mystery of human life."⁹ Alternatively, the American public may have concluded that the Supreme Court had neither expertise nor authority to decide what issues were appropriately open to public debate.

The Civil War provides another test case for these claims. Almost 140 years after Lee surrendered, the United States remains sharply divided on the purpose and necessity of the war. In the North, the Civil War is viewed as being solely about (and therefore necessitated by) slavery, an institution widely viewed as the greatest affront to human dignity in the history of the United States. In the South, by contrast, the central issue is perceived to be a conflict between state and federal power, and is therefore widely known as the War of Northern Aggression.¹⁰ Recent attempts to remove Confederate flags

7. 410 U.S. 113 (1973).

8. 505 U.S. 833, 867 (1994) ("the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.").

9. *Id.* at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

10. See Walter E. Williams, *The Civil War's Tragic Legacy*, IDEAS ON LIBERTY, Jan. 1999, <http://www.fee.org/vnews.php?nid=4231>.

from state capitols or change state flags which incorporate Confederate symbols were viewed by many Southerners as a direct assault on their heritage and their dignity.¹¹ To this day, Maryland's state song is based on a poem intended to push Maryland into the Confederacy—not that the residents of Baltimore needed much encouragement.¹² The first stanza of the song refers to Abraham Lincoln as a despot, and the last verse proclaims that Maryland "spurns the Northern scum."¹³ All attempts to change the state song to something less offensive to the dignity of "Northern scum" have proven unsuccessful.¹⁴

In short, although there is unanimity of opinion on a handful of issues, perspective matters when it comes to human dignity.¹⁵ Subsidiarity offers one way out of this box, as local decisions are much more likely to reflect majoritarian local preferences—particularly where exit is an option.¹⁶ Yet subsidiarity encourages the development of local variation, and local variation places unbearable pressure on the claim that there is a single coherent notion of human dignity separate from the idiosyncratic preferences of those writing and enforcing the rules.¹⁷

11. For a brief description of the controversy regarding the proposed removal or relocation of Confederate flags in Georgia and South Carolina, see *Marchers Want Confederate Flag to Fly Again in Alabama*, CNN.com (March 4, 2000), at <http://www.cnn.com/2000/US/03/04/confederate.rally/>.

12. See William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L. REV. 927, 928-29 (1997) (recounting support for the Confederacy in Baltimore).

13. MD. CODE ANN., EMBLEMS § 13.307 (1999).

14. David Snyder, *A Renewed Effort to Rewrite Controversial State Song*, WASH. POST, Jan. 24, 2002, at T9.

15. See Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 307 (1987).

[P]erspective does matter. . . . A TV interviewer was interviewing Ken, a/k/a "the Snake," Stabler, one of the NFL's premier "free spirits," formerly quarterback for the Oakland Raiders and New Orleans Saints. The interviewer read the passage from Jack London: "I would rather be ashes than dust. I would rather that my spark burn out in a brilliant blaze that it should be stifled by dry rot. I would rather be a superb meteor than a sleepy permanent planet." Then he asked: "What message do you think London was trying to convey?" "Throw deep," said Stabler.

Id.

16. See Mark Steyn, *Gettin' with the Beat*, NATIONAL REVIEW, Nov. 24, 2003, at 56 ("The fact that there's somewhere else to go is the ultimate limitation on government. Borders give people choices—and, to put in a bumper sticker, 'I'm Pro-Choice and I Vote with My Feet.'") Admittedly, some people may prefer to fight than switch, but their exercise of "voice" helps make both process and outcome more transparent and representative. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

17. *The Simpsons* provides a compelling example of the phenomenon. Jebediah

The subjectivity of human dignity as a policy standard is compounded by the variability between first- and third-party assessments of dignity. What I consider to be dignified behavior may not comport with your expectations. Worse still, even if I respect your assessment of your own dignity, I may be reluctant to embrace legislation or regulation that reflects that assessment for symbolic or instrumental reasons. Indeed, one might well select a default rule inconsistent with widespread preferences in order to force individuals to conclusively reveal their actual preferences.

The disputes that periodically erupt over end-of-life care surface these tensions. Most Americans do not wish to receive certain forms of end-of-life care, yet non-treatment has not become the legislatively-mandated default rule.¹⁸ Indeed, some states require “clear and convincing proof” that an individual wishes to terminate treatment, when the opposite approach (i.e., requiring clear and convincing proof to continue treatment) would be more faithful to the actual distribution of preferences regarding end-of-life care in the population.¹⁹ Why then have legislators adopted a default rule favoring treatment? One possibility is that they might have believed that the consequences of erroneous over-treatment are less significant than the consequences of erroneous under-treatment. Alternatively, they might have believed that a default rule mandating non-treatment would undermine society’s general commitment to the sanctity of human life. It is not necessary to differentiate between these two possibilities to conclude that first- and third-party assessments of the requirements of human dignity are likely to differ, both frequently

Springfield and his partner Shelbyville Manhattan have just led a group of pioneers across the country to start a new community. As they survey a beautiful valley, the following conversation ensues:

Jebediah: “People, our search is over. On this site we shall build a new town, where we can worship freely, govern justly, and grow vast fields of hemp for making rope and blankets.”

Shelbyville: “Yes, and marry our cousins.”

Jebediah: “What are you talking about, Shelbyville? Why would we want to marry our cousins?”

Shelbyville: “Cause they’re so attractive. I thought that was the whole point of this journey.”

Jebediah: “Absolutely not.”

Shelbyville: “I tell you I won’t live in a town that robs men of the right to marry their cousins.”

Jebediah: “Well then, we’ll form our own town. Who will come and live a life devoted to chastity, abstinence, and a flavorless mush I call rootmarm?”

The Simpsons: Lemon of Troy (FOX television broadcast, May 14, 1995).

18. See James Lindgren, *Death by Default*, 56 LAW & CONTEMP. PROBS. 185 (Summer 1993).

19. See *id.* at 191. See also *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261 (1990).

and systematically.

More importantly, variation between first- and third-party assessments of dignity can have real consequences. Consider the Franklin Delano Roosevelt Memorial in Washington, D.C., located just off the Mall next to the Tidal Basin.²⁰ Situated in a park filled with waterfalls and reflecting pools, the memorial itself is composed of four outdoor galleries, one for each term of Roosevelt's presidency, the progress of which "is recorded in bronze bas-relief, sculptured figures, and quotations from [President Roosevelt's] speeches and messages carved in walls of carnelian granite."²¹ Since its opening in 1997, the memorial has drawn millions of visitors each year and is widely perceived as a stunning tribute to President Roosevelt and his accomplishments.²²

Unfortunately, the memorial President Roosevelt actually wanted was much more modest. He told Supreme Court Justice Felix Frankfurter that the only memorial he wanted was a plain desk-sized block of stone, bearing the simple inscription "In Memory of Franklin Delano Roosevelt," to be placed in a grassy spot near the front of the National Archives.²³ In accordance with President Roosevelt's wishes, a plain three- by six-foot block of unornamented marble sits in that location, ignored and virtually unnoticed,²⁴ while the \$48,000,000 memorial he did not want receives millions of tourists annually.²⁵ The symbolic utility of the monument Roosevelt did not

20. National Park Service, *Franklin Delano Roosevelt Memorial Home Page*, at <http://www.nps.gov/fdrm/home.htm> (last modified July 11, 2002).

21. Robert Dallek, *The Franklin D. Roosevelt Memorial, Washington D.C.*, in *AMERICAN PLACES: ENCOUNTERS WITH HISTORY* 73 (William E. Leuchtenburg ed., 2000), available at http://www.oup-usa.org/sc/019513026X/019513026X_07.pdf.

22. See *id.* at 67-68. Not everyone agrees with this assessment. See, e.g., Michael Valdez Moses, *A Rendezvous with Destiny*, REASON, Apr. 2001, at 52, 53 ("In short, the memorial casually symbolizes federal bloat at the end of the century.").

23. See Dallek, *supra* note 21, at 71.

24. My office at the Federal Trade Commission is directly opposite the National Archives, and I've walked past the simple memorial hundreds of times without ever noticing it. I stopped to look at it for the first time while working on this article. Not surprisingly, this memorial is not even mentioned in most guidebooks to Washington, D.C.

25. See Dallek, *supra* note 21, at 72. Interestingly, the "official" FDR memorial also deviates from President Roosevelt's life in three other material respects. The original memorial did not show President Roosevelt in a wheelchair, although it did include a statue of him in a regular chair with two tiny wheels virtually hidden under a cloak. Disability rights activists were unsatisfied, and successfully lobbied to have a statue of President Roosevelt in a wheelchair added, even though he never appeared in public in one nor permitted the taking of photographs showing him in a wheelchair. Similarly, the statue of Eleanor Roosevelt omits her trademark fox fur and President Roosevelt is shown without his trademark cigarette holder.

Jackson Pollock, Robert Johnson, and Edward R. Murrow received similar treatment

want—and the shortcomings of the memorial he had requested—became clear to me when I showed a visiting colleague the monument in front of the National Archives during the height of tourist season in June 2003. A family of curious tourists joined us to read the small bronze plaque that describes President Roosevelt’s wishes for his own memorial. After looking at the explanation and memorial for about five seconds, one person pronounced it “boring” and expressed interest in getting ice cream.

If we are prepared (and even enthusiastic, in some cases) to privilege third-party assessments of dignity despite the existence of crystal-clear evidence of first-party wishes, how much more likely is it that we will do so when the evidence of first-party wishes is less obvious—if it is available at all? Thus, before we can assess the consequences that should flow from an assertion of human dignity, we must decide whose assessment of that dignity actually counts. Relying primarily on third-party assessments will lead to the paradoxical effect of undermining dignity by privileging the opinions of elites instead of the autonomous choices of those most affected. Elites may well believe that they would make better choices than their less well-informed and less articulate fellow citizens, but one would have thought that human dignity was a subject for which first-party assessments should be accorded considerable deference, if not dispositive weight.

Behavioral economics offers two additional reasons—future selves and group polarization—to be skeptical of the utility of human dignity as a policy standard. “Future selves” refers to the fact that we do not necessarily know what our future preferences will be.²⁶ If we cannot accurately predict our future preferences, it becomes extremely difficult to use human dignity to protect us from problematic decisions and technological innovations. Indeed, even our best efforts could easily misfire, at least when judged by our future preferences. Worse still, future preferences are themselves influenced by present decisions.

Group polarization—the phenomenon that individuals who

from the U.S. Postal Service. See *Artist’s Cigarette Stamped Out*, CBS NEWS.COM (Dec. 13, 1999) (noting the removal of cigarette from the images of these individuals used for official U.S. postage stamps), at <http://www.cbsnews.com/stories/1999/02/18/national/main24990.shtml>.

26. See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); DEREK PARFIT, *REASONS AND PERSONS* (1984); *THE MULTIPLE SELF* (Jon Elster ed., 1987); Richard A. Posner, *Are We One Self or Multiple Selves?: Implications for Law and Public Policy*, 3 *LEGAL THEORY* 23 (1997).

deliberate in a group often reach conclusions more extreme than those they held individually prior to deliberation—makes matters even worse.²⁷ What a group deems to be dignified can be greatly affected by the initial distribution of views among the deliberating group and is likely to differ from the results had there been no deliberation.

Given these factors, it is hard to see why the results of these processes should be entitled to any particular deference on the grounds that they represent an immutable and invariant standard of human dignity. Instead, human dignity is clearly a highly contingent and contested vessel under the best of circumstances.

II. A SHORT HISTORY OF TECHNOLOGY AND HUMAN DIGNITY

For centuries, technology has enjoyed a generally favorable reputation in the Western world. The motto of the 1933 World's Fair held in Chicago accurately captured the degree of techno-optimism: "Science finds; Industry applies; Man conforms."²⁸ However, not everyone shares this loyalty to technological innovation; in every generation, philosophers, ethicists, religious figures, politicians, and professional worrywarts have cited human dignity as a reason to restrict innovation or prohibit it outright. Consider a few examples. Galileo was forced to recant his heliocentric views because the Roman Catholic Church had already embraced the Ptolemaic system as more consistent with Biblical revelation and with man's dignity as God's creation.²⁹ Indoor plumbing, the printing press, skyscrapers, the suburbs, automobiles, television, the Sony WalkmanTM, and the franchise for women were all met with the objection that they were inconsistent with human dignity. The Industrial Revolution, which laid the foundation for the modern world, was criticized because machines were expected to destroy human dignity.³⁰ Even the lowly

27. See Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141, 1142-44 (1986); Serge Moscovici & Marisa Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. PERSONALITY & SOC. PSYCHOL. 125 (1969).

28. Norman Balabanian, *Controlling Technology: Should We Rely on the Marketplace?*, 19 TECH. & SOC'Y MAG. 23 (Summer 2000), available at <http://www.njcc.com/~techsoc/bala.html>.

29. See generally THE GALILEO AFFAIR: A DOCUMENTARY HISTORY (Maurice A. Finocchiaro ed., 1989).

30. See William J. Ashworth, *England and the Machinery of Reason: 1780 to 1830*, 35 CAN. J. HIST. 1, 3 (2000).

The machine was . . . regarded by [some people] as a despotic step which would erode liberty, the organic nature of life and institutions, and traditional forms of employment. In addition, the specialisation [sic] demanded by a mechanically

potato had difficulty being accepted in most of the world because people thought it was beneath their dignity to eat “ugly, misshapen tubers. . . that had come from a heathen civilization.”³¹

A list of future threats to human dignity would certainly include microwave popcorn, Twinkies, and “super-sized” French fries, since they contribute to obesity—a state that public health authorities believe is clearly inconsistent with maximizing human dignity.³² What about pagers, cell phones, and Blackberries™, all of which tend to isolate people from one another and force them to work all the time? What about the Internet, which makes pornography available twenty-four hours a day, seven days a week to anyone with a connection? What about the range of human inventions about which the editorial pages are perpetually exercised (e.g., sport utility vehicles, daytime talk shows, reality television, smoking, and drinking)? What about commodification, the *bête noire* of communitarians?³³ Unless those determining the substantive standards for human dignity are libertines or libertarians, life will

inspired division of labour fed the fears of a classical civic tradition, which saw such an evolution as eclipsing virtue and fueling widespread corruption.

Id.

31. Jeff Chapman, *The Impact of the Potato*, HIST .MAG., Dec./Jan. 2000, available at <http://www.history-magazine.com/potato.html>.

Throughout Europe, potatoes were regarded with suspicion, distaste and fear. Generally considered to be unfit for human consumption, they were used only as animal fodder and sustenance for the starving. . . . Even peasants refused to eat from a plant that produced ugly, misshapen tubers and that had come from a heathen civilization. . . . Frederick the Great of Prussia saw the potato’s potential to help feed his nation and lower the price of bread, but faced the challenge of overcoming the people’s prejudice against the plant. When he issued a 1774 order for his subjects to grow potatoes as protection against famine, the town of Kolberg replied: “The things have neither smell nor taste, not even the dogs will eat them, so what use are they to us?”

Id.

32. See OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., *THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY* (2001), available at <http://www.surgeongeneral.gov/topics/obesity/>. Not surprisingly, the National Association to Advance Fat Acceptance does not share this view of human dignity. See generally National Association to Advance Fat Acceptance Homepage, at <http://www.naafa.org/>.

33. See Richard A. Posner, *An Army of the Willing*, THE NEW REPUBLIC, May 19, 2003, at 27.

For many communitarians, the demon is commodification—the substitution of market services for non-market services. Private prisons, private tutors for four-year-olds applying for admission to \$17,000-per-year New York City kindergartens, Duke University’s sale of freshman places to rich kids, professional dog walkers, the auction of the electromagnetic spectrum, and surrogate-motherhood contracts: these are some of the gaudier examples. Of greater significance is paid child care, though those communitarians who are liberals in the modern sense do not care to dwell on this point.

Id.

quickly become extremely dull.

To be sure, the pursuit of knowledge and the resulting technological advances bring their own unintended consequences, some of which are distinctly unpleasant.³⁴ The higher the risks and stakes, the more prudent it is to be cautious, but a precautionary approach imposes its own costs.³⁵ Those inclined to “cry wolf” on any and all occasions have no incentive to do otherwise if their future predictions are not discounted for past over-statements.

Finally, it is useful to ask, “Compared to what?” when scoring the costs and benefits of innovation. As C.P. Snow neatly observed: “[I]t was no fun being an agricultural laborer in the mid to late eighteenth century, in the time that we, snobs that we are, think of only as the time of the Enlightenment and Jane Austen.”³⁶

III. THE EFFECT OF PROFESSIONAL NORMS AND DISCOURSE

Human dignity is an abstract aspiration, but policy decisions are necessarily concrete. These decisions must therefore be created and implemented by those “in the trenches,” but there is little evidence to suggest that anyone in the trenches really wants to use human dignity as the touchstone for decision-making or has any particular expertise in this area. Indeed, local norms and modes of discourse routinely undermine the ability of practicing professionals (such as physicians, scientists, and lawyers) to actually use human dignity as a decision rule, even were they inclined to do so. Consider the following revealing observations from a well-known physician-anthropologist following his residency in internal medicine:

I have developed the impatience with ethical discussions characteristic of most house officers. It isn't that I don't consider them important, it's just that I don't consider them my job. I follow the rules laid down by the hospital—meaning, the rules laid down by society. Tell me in plain English what the Do Not Resuscitate order means and exactly whom it applies to, and I will carry it out. Tell me which fetuses you want saved and which thrown away; to the best of my technical ability, I will comply. Tell me what sort of craziness warrants involuntary commitment and I will know which patients to keep off the street. Tell me the rules—define them as strictly as you can—for taking the heart out of patient A and

34. See generally EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* (1996).

35. See Cass R. Sunstein, *The Paralyzing Principle*, REGULATION 32 (Winter 2002-2003).

36. C.P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION*, 28-29 (1959).

putting it into patient B, and I will go on with that dazzling technical miracle; I won't have pangs of conscience,³⁷ which I really don't need and which only make my work harder.

Lest these observations be dismissed as an idiosyncratic anecdote, it is clear that law has largely replaced ethics as the "decider" of such controversies.³⁸ Physicians now routinely defer to ethics committees and legal counsel, and risk-aversion has become a widely accepted default rule.³⁹ Medical ethicists now spend most of their time determining where and how the law has defined boundaries for professional discretion, instead of dealing with medical ethics.

Anyone who thinks these institutional changes have somehow made human dignity the touchstone for all decisions does not know many lawyers. Consider the fate of legal ethics in the modern academy, where, over the past few decades, the relevant course has changed from "legal ethics" to "professional responsibility" to "the law of lawyering." These changes parallel the rise of a legalistic approach to these issues; punitive disciplinary rules supersede aspirational standards, private litigation trumps norms of practice and professional self-regulation, and rule-bound procedural justice replaces open-textured professional discretion.

Scientists also turn out to be highly unreliable advocates for human dignity. With all due respect to practicing scientists, introspection about the implications of their work is not their strong suit.⁴⁰ Worse still, the default norms of science define the discovery and application of knowledge to be the highest manifestation of human dignity. As a result, few scientists have argued against the pursuit of knowledge or in favor of restrictions on technology.

37. MELVIN KONNER, *BECOMING A DOCTOR: A JOURNEY OF INITIATION IN MEDICAL SCHOOL* 364-65 (1987).

38. See generally David A. Hyman, *How Law Killed Ethics*, 34 *PERSP. BIO. MED.* 134 (1990).

39. See generally MARSHALL B. KAPP, *OUR HANDS ARE TIED: LEGAL TENSIONS AND MEDICAL ETHICS* (1998).

40. See generally SNOW, *supra* note 36, at 1-28 (describing intellectuals as "Natural Luddites"). The issue was put more snidely by the *New York Review of Books*: "For most wearers of white coats, philosophy is to science as pornography is to sex: it is cheaper, easier, and some people seem, bafflingly, to prefer it." Steve Jones, *The Set Within the Skull*, 44 *N.Y. REV. OF BOOKS* 13, 13-14 (Nov. 6, 1997) (reviewing STEVEN PINKER, *HOW THE MIND WORKS* (1997)).

My perspective is informed in large part by the years I spent as a research scientist, doing molecular biology and genetics at two different institutions. See generally David A. Hyman et al., *Cloning and Generation of a Genetic Map of Bacteriophage N4 DNA*, 162 *VIROLOGY* 328 (1988); David A. Hyman & Robert E. Malone, *Interactions Between the MAT Locus and the Rad52-1 Mutation in Yeast*, 7 *CURRENT GENETICS* 439 (1983).

The deliberations of the President's Council on Bioethics regarding cloning demonstrates the consequences of these belief patterns. The Council includes four scientists and thirteen physicians, philosophers, law professors, and public intellectuals.⁴¹ It voted unanimously to support a ban on cloning for reproduction ("cloning-to-produce-children"),⁴² but split 10-7 regarding a temporary ban on cloning for research.⁴² Although a substantial majority (71%) of the non-scientists supported the temporary ban, not one of the four scientists concurred. Instead, each scientist filed a personal statement reciting the importance of this research and the benefits of allowing scientists to pursue knowledge more or less as they saw fit.⁴³

Finally, leave aside the variability of the standards likely to be employed by those in the trenches and focus on the decision-making process. If the past is even remotely predictive of the future, those implementing these standards are likely to overestimate their expertise ("often wrong, but never in doubt"), frame issues solely in terms of their own particular area of expertise, and generally adhere to the path-dependent social norm that prevails among their colleagues.⁴⁴

IV. CONCLUSION

Almost four centuries ago, Francis Bacon imagined a prosperous and happy society based on "the knowledge of causes, and secret motions of things; and the enlarging of the bounds of human empire, to the effecting of all things possible."⁴⁵ He promised that these endeavors would result in the "relief of man's estate."⁴⁶ Today, we have far surpassed Bacon's wildest dreams; human invention, the

41. PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY, at xiii-xiv (2002), available at <http://www.bioethics.gov/reports/cloningreport/cloning.pdf>. This categorization in the text refers to a council member's primary employment; scientists are primarily bench researchers, although two of the scientists (Daniel W. Foster and Janet D. Rowley) also hold medical degrees. The other two practicing scientists on the Council are Elizabeth H. Blackburn and Michael S. Gazzaniga.

42. See *id.* at x-xi.

43. See *id.* at 246 ("Statement of Professor Blackburn: Why a Moratorium on Cloning-for-Biomedical-Research is Not the Way to Proceed"), 252 ("Statement of Dr. Foster: For Proposal Two"), 254 ("Statement of Dr. Gazzaniga"), 290 ("Statement of Dr. Rowley: Support for Proposal Two").

44. See Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 675 (2002).

45. See FRANCIS BACON, *NEW ATLANTIS* 35 (Alfred B. Gough ed., Oxford University Press 1915) (1627).

46. See FRANCIS BACON, *THE ADVANCEMENT OF LEARNING* 32 (Michael Kiernan ed., Oxford University Press 2000) (1605).

protection of private property (real and intellectual), hard work, good luck, and good laws have combined to make life immeasurably better. Romanticism about what has been lost is all well and good, but most people prefer to take advantage of the fruits of science and technology, and they find ways to reconcile it with their human dignity.⁴⁷

To be sure, the recent controversies over science and technology have involved the application of biotechnology and cloning to human beings. The possibility of “engineering the engineer” raises more complicated and difficult questions (and potentially greater risks to human dignity) than the kind of problems we have faced in the past.⁴⁸ The systematic application of biotechnology and cloning⁴⁹ may well lead us down the slippery slope to a Brave New World.⁵⁰ Each step has its own predictable logic, justified in no small part by the fact that a series of prior steps were taken.

As a pragmatic matter, it may seem sensible to take a “better safe than sorry” approach to these matters, particularly if the risks and

47. C. P. Snow understood this point perfectly well:

It is all very well for us, sitting pretty, to think that material standards of living don't matter all that much. It is very well for one, as a personal choice, to reject industrialisation [sic]—do a modern Walden, if you like, and if you go without much food, see most of your children die in infancy, despise the comforts of literacy, accept twenty years off your own life, then I respect you for the strength of your aesthetic revulsion. But I don't respect you in the slightest if, even passively, you try to impose the same choice on others who are not free to choose. In fact, we know what the choice would be. For, with singular unanimity, in any country where they have had the chance, the poor have walked off the land into the factories as fast as the factories could take them.

SNOW, *supra* note 36, at 27. See also DINESH D'SOUZA, *THE VIRTUE OF PROSPERITY: FINDING VALUES IN AN AGE OF TECHNO-AFFLUENCE* (2000); VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES: THE GROWING CONFLICT OVER CREATIVITY, ENTERPRISE, AND PROGRESS* (1998).

48. See generally LEON R. KASS, *TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS* (1985).

We are in turbulent seas without a landmark precisely because we adhere more and more to a view of nature and of man that both gives us enormous power and, at the same time, denies all possibility of standards to guide its use. Though well-equipped, we know not who we are nor where we are going. We are left to the accidents of our hasty, biased, and ephemeral judgments. . . . We triumph over nature's unpredictabilities only to subject ourselves to the still greater unpredictability of our capricious wills and fickle opinions. That we have a method is no proof against our madness. Thus, engineering the engineer as well as the engine, we race our train we know not where.

Id. at 37-38. See also LEON R. KASS, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS* (2002).

49. KASS, *TOWARD A MORE NATURAL SCIENCE*, *supra* note 48, at 34-36.

50. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1075-91 (2003).

stakes are high enough.⁵¹ Yet, our dismal record for predicting genuine risks to human dignity actually counsels in favor of a reverse-precautionary principle in handling such matters.⁵²

More generally, it is hard to see how human dignity can be quantified in a way that does not beg all of the hard questions about using it as a policy measure.⁵³ If dignity cannot be quantified, it cannot be operationalized, no matter how appealing as a policy standard it might otherwise appear to academics.⁵⁴ As such, although there is likely to be a considerable amount of storm and fury on the subject of human dignity in coming years, it is unlikely that any of this effort will actually do much to enhance human dignity. Instead, there is a significant risk that these efforts will actually undermine the cause they seek to advance.

Given the difficulties identified in this article, one obvious question remains: "Why has human dignity taken center stage as a policy standard?" A full response to this question lies beyond the scope of this article, but the most important reason is that human dignity constitutes the moral "high ground" in most policy disputes. Neither side is willing to surrender this valuable terrain to the enemy, and the plasticity of the underlying standard makes it possible for both to assert ownership of the moral high ground with the utmost good faith.⁵⁵ Unfortunately, once both sides have claimed that human dignity is at stake, even a modest dispute on a minor issue is converted into a super-charged normative battle. Compromise solutions are much less appealing when first principles are (or seem to

51. See Sunstein, *supra* note 35, at 32.

52. Under a reverse-precautionary principle, the burden of demonstrating the necessity for any and all restrictions should fall on those advocating the restrictions, and all reasonable presumptions should be indulged against them. Of course, this approach has the mirror image of the problems that result from a precautionary approach. See *id.*

53. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 123 (1990) ("[I]ntangibles such as the promotion of human dignity . . . are too nebulous for progress toward achieving them to be measured.").

54. A similar problem was noted with the development of the Clinton Health Security Act. See Robert Pear, *Now it Can Be Told: The Task Force Was Bold and Naïve and Collegial*, N.Y. TIMES, Sep. 18, 1994, at E7 ("It may be the problem is the presence of too many academics, whose intellectual interests in the policy issues far exceeds their understanding of the needs of a successful policy-making process.") (quoting a memorandum from James R. Ukockis, senior economist at the Treasury Department, to Marina Weiss, dated March 10, 1993).

55. The same strategy has been observed in public health debates. See Peter D. Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 J. L. MED. & ETHICS 705, 705 (2002) ("[W]e argue that human rights rhetoric is contestable terrain and that opponents of public health have effectively co-opted human rights language. . .").

be) at stake.

In *The Music Man*, Professor Harold Hill warns the citizens of River City that the arrival of a pool table “spells trouble with a capital T” for the positive social norms that prevail in their community.⁵⁶ He explains that playing pool (instead of billiards) necessarily leads to sloth, “the first big step on the road to the depths of degradation.”⁵⁷ In short order, the children of River City will start smoking, drinking, gambling, and even worse behavior.⁵⁸

Of course, Professor Hill is exploiting the fears of the parents of River City so he can sell them band uniforms and instruments for their children. Playing pool does not inevitably lead to human degradation, and participating in a band does not inevitably avoid that state. Similarly, technology is not pool and it is unclear whether the opponents or proponents of biotechnology are behaving more like Professor Harold Hill. More importantly, even if some forms of technology could rightly be deemed “trouble with a capital T,” human dignity is not an effective policy tool with which to attack that problem.

56. MEREDITH WILLSON, THE MUSIC MAN (1957), <http://www.libretto.musicals.ru/text.php?textid=233&language=1>.

Well, either you're closing your eyes
 To a situation you do not wish to acknowledge
 Or you are not aware of the caliber of disaster indicated
 By the presence of a pool table in your community.
 Ya got trouble, my friend, right here,
 I say, trouble right here in River City.

* * *

Trouble, oh we got trouble,
 Right here in River City!
 With a capital “T”
 That rhymes with “P”
 And that stands for Pool.

Id.

57. *Id.*

58. *Id.*