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Posthumous Reproduction Guidelines in Israel

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NOTE: At the time of publication, the author Vardit Ravitsky was affiliated with the National Human Genome Research Institute. Currently March 2007, he is a faculty member in the Center for Bioethics at the University of Pennsylvania.

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In Brief

The President's Council: Fair and Balanced?

A couple of years ago in this space, I offered some observations about how the newly created President's Council on Bioethics might fare ("Some Clues About the President's Council on Bioethics," *HCR* 32, no. 1 (2002): 8). First, I wondered whether the executive order establishing the PCB—with its explicit commitment to being "guided by the need to articulate fully the complex and often competing moral positions on any given issue, rather than by overriding concern to find consensus"—was evidence of the Bush administration's reluctance to give this body any type of policy advisory role. I was concerned that the PCB was set up to be irrelevant—that its academic focus would be lost on senior management in the executive branch. I was

also skeptical that the PCB could sustain it. How would it accommodate the "complex and often competing moral positions"?

Second, I suggested that predicting the PCB's success might be difficult because so much depended on who was named to it. At that time (before any appointments were announced), my main concern was the absence of an explicit reference in the executive order to including "public members." There are both symbolic and instrumental reasons for actively seeking public input through members, and shunning the public, whether through process or appointments, might prove dangerous.

President Bush's recent decision to appoint three rather conservative new members to the PCB, and not to reap-

point two of the more liberal members whose terms had expired, met with a swift and predictable response from many in the bioethics community. Widespread concern arose that the president had removed the two sitting members because their views on controversial issues, such as cloning and stem cell research, differed from his own and from those of PCB chair Leon Kass. Like many of my colleagues, I added my name to a letter to the President expressing our concern with this turn of events. The two removed from the council—Elizabeth Blackburn, a cell biologist of impeccable credentials, and William F. May, one of a small group of philosopher/theologians who jump-started the fledgling field of bioethics more than thirty years ago and is a wise and re-

POSTHUMOUS REPRODUCTION GUIDELINES IN ISRAEL

Should the state permit the extraction of sperm from the cadaver of a recently deceased man at the request of his widow or ex-partner, allowing her to conceive his genetic offspring after his death? Over the past five years, several requests for the posthumous extraction and use of sperm have been heard in Israeli courts, and in October 2003, following a series of discussions held at the Ministry of Justice that involved medical, legal, bioethics, and Jewish law experts, the attorney general published guidelines that will generally allow courts to permit the practice.

The guidelines are based on the assumption that a man who lived in a loving relationship with a woman would

want her to have his genetic child after his death even if he never had the opportunity formally to express such a desire. Legal marriage is not perceived as a necessary condition for such a presumption. In the absence of explicit consent (usually obtained only when sperm is collected prior to death), the courts are advised to allow the use of the sperm. Such use should be based on an appropriate attempt to determine the desires of the deceased by relying on prior behavior and on the testimony of family and friends. However, when the deceased has expressed an explicit objection, the courts are advised to view the objection as an overriding consideration and to deny the request.

The guidelines justify the "presumed consent" assumption by considering the interests of the woman and the deceased man. First, they note that the deceased's interests are uncertain and those of the living partner certain and expressed, and

strong enough to limit state curtailment of her reproductive autonomy. (The guidelines recommend a waiting period, however, allowing the woman to work through her grief before deciding whether to use the sperm.)

Second, the guidelines argue that "even in case of a mistake in evaluating the deceased's will, parenthood is not being forced upon him. He will not be coerced into fulfilling the obligations that a parent usually has vis-à-vis his child." Still, if the court decides to approve the request, according to the guidelines it should instruct the state to register the child legally as the son of the deceased, although such registration does not entail any inheritance rights. Thus while the deceased is "not the father of the child in the usual sense of the term," he is acknowledged as the "legal father," which could also mean he will be seen to some degree as the "social father."

spected scholar—had supported therapeutic cloning. Two of the new members—Diana Schaub, a political scientist at Loyola College in Maryland, and Benjamin Carson, a pediatric neurosurgeon at Johns Hopkins—oppose it. The third—Peter Lawler, a political scientist at Berry College—has a strong pro-life stance that seems to commit him to opposing therapeutic cloning, although he has denied that he does.

Much has been reported about how May and Blackburn left. May, it was said, expressed a willingness not to be reappointed. Blackburn was reportedly surprised and angry to learn that she was not being re-appointed. But I may be among the few who do not find the distinction between “not re-appointed” and “dismissed” to be the salient moral and policy issue. Their departures—and the appointments of the new members—raise other, more significant issues about how committees created via the Federal Advisory Committee Act (FACA) rely on and make use of experts.

Before turning to those issues, let’s be clear about whether these departures

were especially unusual. The PCB is a federal advisory committee, and like all such committees, it is subject to FACA, a federal law enacted in 1972 to provide the public with an assurance that groups established to advise the government are publicly accountable. FACA committees, as their name implies, are advisory, and as such may only make recommendations. They cannot make policy—a power reserved for “the President or an officer of the Federal Government.” At any one time there are about 1,000 federal advisory committees, and many of these have provided advice on bioethics, science, and health policy. Some, like the National Commission (1974-78) and the President’s Commission (1980-83), were authorized by Congress; others, like the Advisory Committee on Human Radiation Experiments (1994-95), the National Bioethics Advisory Commission (1995-2001), and the President’s Council on Bioethics, were established by executive order.

While there are important distinctions in how these commissions were authorized, funded, and staffed, the similarities outnumber the differences.

One of the similarities (especially familiar to committee members and staff) is the capacity of these bodies to attract critical attention. Like other commissions, PCB reports have received their fair share of criticism. In my view, a fair reading of the PCB’s work to date suggests that it has tackled difficult problems but on some of these areas has provided scant policy advice. But such criticism is what one hopes will happen when public commissions deliberate on ethically challenging topics. NBAC reports were criticized for recommending policies that were both too permissive (*Cloning Human Beings*), and too restrictive (*Research Involving Persons with Mental Disorders*).

Another similarity is the criticism that inevitably accompanies presidential appointments. Again, this is to be expected when commissions are established with only rough guidelines for representation and a limited number of slots to be filled. When I served as executive director of NBAC, I often received inquiries about how members were selected. I referred most of these to the Office of Personnel Management in the

The guidelines limit the approval of posthumous requests to female ex-partners and deny any such rights to the deceased’s parents or any other party. The document makes no reference to the potential child’s interests. During the discussions that led to the guidelines, some experts referred to posthumous reproduction as “the intentional creation of orphans” and worried about the impact on offspring, but these reservations are not expressed in the final document. This omission could be perceived by some as a significant oversight, since the potential child’s perspective is not represented.

In addition to these explicit justifications, the guidelines reflect deeply ingrained cultural values. Israel implements strong pro-natalist policies that stem from the trauma of the Holocaust and the demographic pressures of maintaining a Jewish democratic state. Moreover, Jewish tradition holds reproduc-

tion and parenthood as paramount. In the case of posthumous reproduction, these attitudes are combined with the primacy that Israeli culture and Jewish tradition assign to honoring the memory of the dead.

Thus the guidelines are consistent with Israel’s generally supportive approach to reproductive technology. For example, Israeli law acknowledges (under certain conditions) surrogacy agreements and regulations that allow the importation of donor eggs to overcome shortage. A supreme court ruling even acknowledged a woman’s right to use frozen embryos over the objection of her ex-partner. Moreover, the state plays an active role in providing access to reproductive technology by publicly funding IVF for the birth of up to two children from the current marriage and also for single women who choose to use anonymous sperm donation.

A country such as the United States that emphasizes the value of personal autonomy may find the “presumed consent” assumption inappropriate. However, Israeli culture tends to encourage genetic parenthood at almost all costs. In that cultural atmosphere, these new guidelines are likely to be welcomed by the courts and accepted by public opinion.

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