

CLONING AND HARM TO OFFSPRING

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INTRODUCTION

In reading material on cloning by people who are recognized experts, I have encountered some misconceptions that might usefully be addressed by a philosopher. Hence, some of my comments are of a conceptual rather than an ethical nature, but they bear on ethics.

I

THE VALUE OF A PERSON

First I think one good way to look at the cloning issue,¹ is to remember what Descartes asked you to imagine: a different sort of world, though not one in which an evil genius is running things or you are only dreaming.² Rather, imagine you are under a massive delusion about the way in which you were actually produced. Everything about you remains as you are now, except that you are not the product of sexual reproduction, but of mono-parental cloning. Would you think that your rights changed dramatically? I do not think you would. The question of the historical process of events that leads to the existence of a certain sort of being can, for the most part, be distinguished from the value of the entity that is produced and what gives it value.³ And that is one of the most important things to remember in this area.⁴

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1. I am just thinking about cloning, not genetic manipulation in general.

2. See René Descartes, *Meditations on First Philosophy*, in *MEDITATIONS ON FIRST PHILOSOPHY WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES* 12, 13, 15 (John Cottingham trans., Cambridge Univ. Press 1996) (1641).

3. But not always, as there are interesting philosophical cases where origins do matter to the value of an entity. For example, that a Degas drawing is an expression of the artist's view of nature rather than produced by the random acts of a monkey, gives it value.

4. I have criticized Ronald Dworkin for inordinately emphasizing origins in his account of value. See Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 164-65 (1995) (reviewing RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993)).

Now, what is it that gives a person value? Well, we might divide this issue between, for example, your genotype and your phenotype.⁵ The way you are recognized by others is sometimes strongly determined by your genetic makeup—things such as your eye color. However, there are lots of other things about you, such as whether you like music or whether you are interested in the law or science, that may be the product of the interaction between genes and environment. In this sense, there is no genetic determinism. So, we have the nature of a person, including, at minimum, that it is self-conscious and capable of responding to reasons. These characteristics are part of the phenotype, and only partially due to the genotype. Presumably, they give the person value as a person per se.

Then the question arises: Is this person, if he is in some way genetically identical with someone else, replaceable by that second person, and if he is replaceable does this reduce his value? Sometimes people want to say that a genetic clone is not going to have the same phenotype as you and so it is neither going to be you, nor a replacement for you.⁶ But we all know that, strictly speaking, the clone will not be you: “numerical nonidentity” dictates that there are two different beings. We do not need to point to difference in phenotype to know a clone is not you. Indeed I think that in arguing for nonreplaceability, it is a mistake to focus on the fact that genotype alone does not lead to the same phenotype. The core point is, even if there were someone who was phenotypically identical to me—identical genotypically and phenotypically, but numerically nonidentical—that would not mean that I was replaceable. This is *because I would not be replaceable to myself. That is the crucial ethical point.*

Suppose someone told me: “If we kill you, we will also replace you with a genetically and phenotypically identical being, but one that is numerically different.” That would not in any significant way compensate *me* for my loss of life. Now this raises the question that philosophers often discuss—what is it that we ought to be concerned about in our survival? Is it just a type of gene, a phenotype, or the

5. At least one other symposium participant so addresses this issue. See John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1417 (1998). “[G]enotype” is “the entire genetic constitution of an individual.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 687 (28th ed. 1994). “[P]henotype” is “the entire physical, biochemical, and physiological makeup of an individual as determined both genetically and environmentally, as opposed to genotype.” *Id.* at 1277.

6. See Lee M. Silver, Comments at the New York University Journal of Legislation & Public Policy Symposium, *Legislating Morality: The Debate over Human Cloning* (Nov. 19, 1999) (transcript on file with the *New York University Journal of Legislation & Public Policy*).

particular individual? It seems to many people that it is more the particular individual's survival than their type, either genetic or phenotypic, that is crucial. Now, suppose you were replaceable to everybody else, that is, suppose they do not care about you except for your genotype and your phenotype—they do not care about you as a particular. This is not usually true, but suppose it were. It would still be the case that your right to life and respect would be as strong as any person's because you are not replaceable to yourself. That is the crucial foundation for the idea of respect for the person or the right to life. None of that would be changed by cloning, even if we allow for identity of phenotype.

In sum, I want to point out that an argument based on the fact that cloning will not result in the same phenotype, though well-intentioned and correct, is misplaced. Respect for persons—even if all had the same phenotype and genotype—would be based on the fact that they are self-conscious beings capable of responding to reasons and the fact that each is not replaceable to himself.

II

PERSONAL IDENTITY

Having explained why your worth and your identity are not challenged by cloning, I now want to say something in defense of the view that cloning threatens a sense of human identity.⁷ My comments apply equally to the cases of human clones that already exist—genetically identical twins—except that I will imagine that twins have an identical genotype and phenotype. Even if the following does not really make a difference to the moral permissibility of cloning, I think it is interesting to see how the most theoretical issues in philosophy can connect with some people's concerns about cloning.

There is a sense of "personal identity" that is commonly used by psychologists, doctors, and biologists. It is a holistic sense of personal identity—the sense in which I am a philosopher, a lawyer, someone who is interested in art, or someone who makes jokes. All of this is part of my identity, for someone would not be me if she were not interested in philosophy or law or making jokes. This psychosocial, holistic notion of identity is not the philosopher's notion of personal identity at all. The philosopher's notion of personal identity concerns those properties that are essential to your nature, such that if we

7. See, e.g., Robertson, *supra* note 5, at 1383, 1410.

changed them, you truly would no longer exist.⁸ It is a fact or a datum or a premise in most philosophical arguments that there are many things about you that could be very important and yet could have been different and you still would be you. For example, if you suddenly lost half of your IQ, the holistic notion might say it was no longer you, but a philosopher might say it was still you and that the decrease in your IQ helped explain why you were much worse off than you had been.

Some philosophers claim that if the same sperm and egg from which you arose had been placed in a different environment, or had been held up in some laboratory and started dividing at a later point in time, it would still have been you.⁹ This would be true even if you no longer had the important phenotypic properties you have now (for example, if you had a totally different personality). According to these philosophers, you would have had a different phenotype, but it still would have been you.¹⁰ Just as most phenotypic properties are not essential properties, neither are many historical properties, like the day of your birth or the day of your death. These attributes could have changed, and you would still be you. Some genetic properties are similarly nonessential. Now the question is, what are the essential properties? There is much debate over this.

As I have already noted, many people who say that a clone will *not* be you point to the expected phenotypic difference. (They should, of course, point to numerical nonidentity, but most people are obviously aware of that.) The fact that, in the philosopher's sense, it could have been you with a different phenotype makes this response seem weaker. Further, when I consider individuals who are phenotypically different from me but genetically identical, I may think that any one of those individuals is an example of what I might have been like. Of course, even if we have the same genotype, and could even have the same phenotype, I would not be them. Consider a scenario where I did not turn out to be a professor of philosophy, but was influenced by a different teacher in grade school to pursue a career in literature. In this hypothetical world, I exist with my essential properties but do not have the phenotype that I presently have. In my conception of my clones, they do not have all my essential properties, but there is a sense in which *they* are instantiating more of the possible forms of life that I might have taken. So, I think I have a somewhat different re-

8. See HAROLD W. NOONAN, *PERSONAL IDENTITY* 2-3 (1989); SYDNEY SHOEMAKER & RICHARD SWINBURNE, *PERSONAL IDENTITY* 4-5 (1984).

9. See THOMAS NAGEL, *Death*, in *MORTAL QUESTIONS* 1, 8 (1979).

10. SAUL A. KRIPKE, *NAMING AND NECESSITY* 52-53 (1972).

sponse to these other beings than I have when there is another being whose genotype is radically different from mine, for I may then think that, in virtue of that alone, she is not instantiating the various forms of life I might have lead.¹¹

I think considerations such as these—only partially grasped, not as a full-fledged philosophical theory of identity—may underlie some people's sense that it is desirable to have beings who share their genotype. Now, I do not think this is necessarily a decisive argument against cloning, since one's genetically identical twin shares this characteristic as well, and I do not think there is a strong reason to prevent natural identical twinning. On the other hand, these considerations may provide reason not to seek such twins.

Notice that the very thing which might make one uncomfortable with even phenotypically different clones existing simultaneously with oneself could be desirable if the clones existed after one did. If we cannot be immortal, having a successor who is a clone could come as close as possible to immortality. Indeed, according to at least one philosophical theory of personal identity, such a successor to you might actually be you.

III

ETHICAL ISSUES

Having made these general conceptual and ethical points, I shall turn to more practical issues in ethics.

A. Parents Using Genetic Material

Some people say that if parents have a child by sexual reproduction who they think is turning out very nicely, they might want to clone that child and have a later twin. Of course this may be misguided if genotype does not ensure phenotype. But perhaps they can-

11. However, not all changes in my genotype would have been essential ones; someone with a somewhat different genome and different phenotype could also represent what I might have been. And it is consistent with two people being clones at origin that changes have been made post-conception to the genetic material of one so that the two differ genetically to a great degree. Possibly, another way to make this point based on genotype identity is to note how one might think of one's relation to the particular embryo from which one developed. If I am a person (self-conscious, etc.), the embryo is not; our phenotypes are different. Yet, some people think they, not someone else, began in that embryo. One of the things the embryo and I share is our genotype. We also share our origins. I would not share my origins with another person (though we both may have stemmed from a common cell), but if I shared a genotype with him, this would make him related to me in one respect—in a way the embryo from which I arose is related to me.

not otherwise have another child. Now, one thing lawyers should consider is whether the parents themselves may permissibly decide to take the genetic material of their child to make another. Should not the first child have some say over whether his genetic material (either a cell or the formula for his cell type) is going to be used to make a sibling of his? After all, this older child will now, in one sense, be the biological parent of the younger child. If the child gives consent to the use of his genetic material and is not capable of taking responsibility for the new person, presumably there will have to be something akin to adoption by the parents of the older child. Thus, there are questions pertaining to consent and responsibility for this new offspring that must be settled.

Furthermore, suppose a single parent had cloned his first child from his own cells and the parent decides that he wants to use his own genetic material to make yet another clone. Now, you might say that this is the parent's genetic material, surely he can do with it what he wants, assuming that cloning is permissible. Well, I am not so sure. If there is a first child who is also a clone of the second child *and* a clone of the parent, I am not sure that the first child's consent is not required for creating yet another individual with the same genetic makeup. A possible analogy is the sharing of a house—someone we have incorporated into our household should, perhaps, be consulted before another party joins us. Still, I recognize problems with such a requirement of consent. For instance, suppose a child clone of a parent himself comes to the point of wanting to reproduce. It would be odd to think he must get his parent's permission to do so. There could be some asymmetry here: A parent's responsibilities to the child are not reflected in the child's responsibilities to the parent. (Nor is there a personal responsibility to the sibling from which one is cloned to get that sibling's permission before one clones one's own child.)

B. Could Cloning Wrong the Child Who Is Cloned?

It has been argued that a child cloned from someone else would tend to think that its future had already been lived by the older person from whom it was cloned. But this depends on a mistaken view of genetic determinism. If phenotypes depend on more than genes, the types of futures clones have can differ.

At the other extreme are those who claim that so long as a child brought into existence has a life worth living, there can be no wrong done to it, at least when the alternative would have been its non-existence. I do not agree with this position, but it is important to make the grounds for holding it clear. Philosophers distinguish between person-

affecting and nonperson-affecting moral principles.¹² Person-affecting principles apply when the same person will be, for example, better off if we do an act and would be worse off if we do not do it.¹³ So, if I do not give a sick child medicine, *it* will be worse off, and better off if I do. Nonperson-affecting moral principles (if there are any) would apply in a case where, if we act, one person will exist, and if we do not act, either that person will not exist or someone else will exist.¹⁴

Let us assume that we accept a philosophical theory of personal identity which says that individuals who arise from different cells are different individuals. Then suppose that *if* we do not produce clone A, who will have a life worth living, we will instead create non-cloned B, who will have a better life just by virtue of not being cloned. A will not be benefited by our alternative act because he would not exist. On the other hand, (it is arguable) B will not be made worse off by creating A's less good life, since B will not exist if we create A. Creating the better life rather than creating the worse life is nonperson-affecting in the sense that the person who has the better life is not made better off than *he* would otherwise have been. The person who would have had the worse life is *not* created, and so he is not made better off than he would otherwise have been.

If our acts could only be wrong if someone is wronged by them, and one could only be wronged if one is made worse off than one otherwise would have been, then (on the assumed theory of personal identity) the cloned person cannot be wronged by being created to any life minimally worth living rather than not being created at all. But if not all moral principles are person-affecting principles, then we could do the wrong act without wronging anyone. Suppose we have the option of now creating a handicapped child with a life worth living or waiting two months and creating a different, non-handicapped child. If, other things being equal, it is wrong not to wait, then we act wrongly by creating the handicapped child, even if we do not wrong the handicapped child if we do not wait (since it is not worse off in being created than it otherwise would have been).¹⁵ Hence, if it would

12. See generally DEREK PARFIT, REASONS AND PERSONS 394 (1984) ("This part of morality, the part concerned with human well-being, should be explained entirely in terms of what would be good or bad for those people whom our acts affect.").

13. See *id.* at 394-96.

14. See *id.*

15. Derek Parfit proposes this example:

The 14-Year-Old Girl. This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child's life, his life will, predictably, be worth

be better to be a non-cloned child than a cloned child even with a life worth living, we might do the wrong act in creating the cloned child.

There are alternatives to nonperson-affecting principles that might have the same implications. For example, we might combine a person-affecting principle with a different theory of personal identity.¹⁶ Some philosophers hold a theory according to which you can be the closest continuer to what would otherwise have been you.¹⁷ Suppose this is true. Then in the absence of the cloned child, a non-cloned child would have been created, then the actual cloned child might possibly correctly say that he would have been that non-cloned child and been better off.

The further alternative is that we can wrong someone in a person-affecting way, even if we do not make him worse off than he otherwise would have been. For example, if we do not allow a competent adult to make a decision for himself, we may wrong him, even if he is thereby prevented from doing something bad to himself. If we do not let a black person on an airplane because it is segregated, we have wronged him, even if the plane crashes, and his life is saved by our act.¹⁸ I suggest that we might wrong people even if we create them to lives worth living according to this reasoning:

- (a) no one is harmed in not being created, because there is no one to be harmed if we do not create someone; hence,
- (b) we can set a high standard for permissibly creating people, demanding that creators create lives that are more than minimally satisfactory;¹⁹ and
- (c) if new people have a right to this, then we could violate their rights by creating them without meeting this standard; one way to avoid the violation is by not creating them.

All I have said does not show that the cloned child is wronged, for the standard we must meet in creating people need not require that only the best lives be created. What I have said is only intended to

living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.

Id. at 358.

16. Interview with David Enoch, Ph.D. Candidate, Department of Philosophy, New York University, in New York, N.Y. (Feb. 2000).

17. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 34-35 (1981).

18. See James Woodward, *The Non-Identity Problem*, 96 *ETHICS* 804, 810 (1986).

19. See F. M. KAMM, *CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* 135 (1992) ("This internal logic may also include the idea that some efforts are required to make the next generation at least as well off as the present one . . .").

argue against the view that we cannot do wrong to the cloned child because creating someone with a life worth living who would otherwise not exist at all can never involve doing wrong or wronging the person we create.

It may also be useful here to note a way in which I disagree with a common interpretation of person-affecting principles since I believe it is significant for public policy concerning freedoms of pregnant women. Suppose a fetus in the womb is not yet a person. It is physically possible to affect the person who will develop from the fetus by doing things to the fetus. For example, the person might be worse off than it would otherwise have been if I expose the fetus to toxic substances. Some think this means that there is no moral difference whether I do something to the fetus or to the person himself if the end result is the same effect on the person.²⁰ I disagree. Here is an example in which, I believe, it is permissible to affect a person in one way by doing something to a fetus though not to affect the person in the same way by doing something to the person. Suppose a woman has given a fetus genes that will result in a person with an IQ of 160. She decides this is too smart, not for the person who has the high IQ, but the comfort of the family. So she takes a drug during early pregnancy to reduce the IQ to 140. I believe this is permissible (for reasons to be given below). But it would not be permissible, I believe, for her to give her child, once conceived, a pill that reduces its IQ from 160 to 140. What is the difference between affecting the person by affecting the fetus and directly affecting the person himself? A fetus, not yet being a person, is not the sort of being that is entitled to keep a property it has, such as a 160 IQ, and the person who will develop from the fetus will not fall below an acceptable level of life, if the parent takes back something from the fetus that she gave it. A 160 IQ is far above the minimal standard owed to the people we create. But a child already being a person (I assume) is entitled to keep the beneficial characteristic. Hence, I believe it is impermissible to give it the pill even if doing so would not cause it to fall below the minimum owed to one's child.²¹

Nor does the analysis of this case strictly require that the woman give the 160 IQ to the fetus. For suppose it is the father's genetic material that is primarily responsible for the high IQ. The woman's

20. See, e.g., ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 170 (2000) (“[I]t would be wrong for parents substantially to close off most opportunities that would otherwise be available to their children . . .”).

21. I first presented this argument in CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY, *supra* note 19, at 207.

services as the carrier of the fetus are still needed to bring this potential IQ to fruition and if she reduces the excellence of these services (for instance, by refusing to give it what it needs to have such a high IQ) so as to bring down the IQ, this too can be permissible for the same reasons as given above. Furthermore, if a pregnant woman may deliberately reduce the IQ in the way I have described, it would also be permissible for her to do certain things while she is pregnant, such as eat certain foods or take certain drugs, that, as a foreseen though unintended side effect, would make the fetus and the person that arises from it worse off in comparable ways.

I draw this conclusion about the permissibility of making the person worse off even though I believe the creator of what will be a new person has stronger responsibilities—or at least ones that have a different source—than those that other people have. For example, some say that a creator's responsibility not to create a child whose life is not worth living stems from the duty we all have to prevent harm to others.²² This means that they think the responsibility stems from a duty which any bystander could have to aid another. However, the creator is not only a bystander; he is in the position of possibly causing a life that could be so bad that it was not worth living (for example, someone uncomprehendingly in endless great pain). The duties on agents not to cause such harms are greater, I think, than the duties of bystanders to help prevent or stop them. Nevertheless, I believe such a strong duty is consistent with making the fetus and the person stemming from it worse off in the ways I previously described for the reasons I previously gave.

C. *An Argument for Cloning as a Genetic Link to Our Offspring*

Professor John Robertson distinguishes between cases where couples or individuals are fertile and those in which they are infertile, and he thinks that in the case of those who are fertile and capable of producing normal offspring, the need for cloning is greatly diminished.²³ However, keep in mind that Professor Robertson believes that many people have a very strong desire to have genetically connected offspring,²⁴ and also a desire to rear these biological offspring and to have a continuing connection to them. Robertson believes that so long as a potential parent is capable of having a genetic connection to her normal offspring, her reproductive rights do not entail produc-

22. BUCHANAN ET AL., *supra* note 20, at 226.

23. See Robertson, *supra* note 5, at 1395-96; John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 633 (1999).

24. See Robertson, *supra* note 5, at 1379.

ing a cloned child that assures a stronger genetic similarity.²⁵ This is an argument that challenges the belief that an assumed strong desire for biological connection justifies a right to move from sexual to non-sexual reproduction. I am not sure it is correct.

Consider this hypothetical: Suppose that it actually takes four people to produce offspring; not couples, but quadruples are needed. That means that if you have a child genetically related to you, only twenty-five percent of the genetic material comes from you. We can imagine, indeed, that ten people are needed to produce a child—*ménage à dix*. Only ten percent of the genetic material comes from you. Could we understand individuals in these worlds seeking to clone, assuming there is a strong desire for genetic connection? They already have some genetic connection, so Robertson should say, “No, they have no reason to seek more.” But suppose these people heard the latest news out of their labs: the invention of *two-person* offspring. That is, now only two people are needed for sexual reproduction; sexual reproduction as we know it. Would they have reason, based on the desire for more genetic impact, to introduce this two-person, rather than ten-person, sexual intercourse? If there is a sufficient justification to warrant offspring with a somewhat greater genetic connection, there might be a similar reason for introducing cloning in which there is one hundred percent genetic connection. These hypothetical cases show that given the assumption about the desire for biological connection, more genetic connection may be reasonably preferred to less (contrary to Robertson). Perhaps this would be a reason to support a right, at least, to noninterference with cloning.

It is, of course, possible that the ideal number for reproduction is the number who are emotionally involved with each other. Then the desire is for producing a genetically related fusion of emotionally bonded individuals, not just having a strong biological connection.

CONCLUSION

My final point brings me in a sense full circle to my starting point in this article. There is a tension between the importance of genetic connection with offspring, and the idea that phenotype, and not genotype, determines who we really are. If genetic connection is so important, this suggests that people think their genes *are* very important to who they are. It is the latter thought that leads people to think they

25. See Robertson, *Two Models of Human Cloning*, *supra* note 23, at 1403 (suggesting that fertile couples might nevertheless resort to cloning to avoid passing on to their progeny genetic defects or diseases).

should project their genes into the future. Suppose someone offers me a genetically unrelated child that is phenotypically identical to me, including all the same interests and values that I have. I am told that I still have not satisfied a supposed intense desire for genetic connection. Thus, the idea that passing on your genes is so important to you is at war with (1) the idea that phenotypic difference is enough to distinguish and to relate individuals, and (2) with the idea that cloning will not seem a most attractive way of reproducing.²⁶ It is the desire for offspring that fuse genetic material (and phenotypic properties) of emotionally bonded people and the desire to avoid simultaneous instantiations of “our” alternative possible lives that speak against this reason for cloning. It is the desire for what is closest to immortality by way of a closest successor that speaks for it.

26. I am aware that the underlying drive to have one's genes pass on may only give rise to a conscious *desire to reproduce*, not a conscious desire to pass on one's genes. One could have the first desire before one knows anything about genes. But once one is genetically literate, a new desire with passing on one's genes as its object may arise.