

THE DEBATE ON HUMAN CLONING AND LEGISLATIVE MORALITY: NOTES ON EUGENICS FOR AN AGE OF AFFLUENCE

*Frank P. Grad**

I

LEGISLATIVE ETHICS

My forty-five years of experience as a legislative draftsman has convinced me that an ethical or moral position will either motivate or be mentioned in legislation if such a position will help to pass the law or help to get the legislator elected. For example, housing legislation, enacted to create more public housing for working people who cannot afford to buy or rent housing produced by the market, will be justified: (1) if it is good for the economy; (2) if it will provide jobs; (3) if it will help to develop a particular area for investors; and finally (4) because providing affordable homes for working people who could not otherwise afford them is the “right” thing to do. Such legislation is not only a “good” thing, but it will also look good on one’s legislative record for the next election.

When abortion issues are discussed, ethical state legislators will note that they cannot prohibit abortions or prohibit women from terminating their pregnancies because the federal Constitution will not allow states to do so. However, state legislatures can provide by law that they will not pay for abortions from the welfare budget or from their public health budgets. State legislators will appeal to ethical concerns on both sides of the issue.

Likewise, sex is a moral issue, and, consequently, procreation becomes a moral issue. In an article I wrote in 1968, some thirty-odd years ago, I made reference to artificial insemination.¹ One of the

* Joseph P. Chamberlain Professor Emeritus of Legislation; former Director, Legislative Drafting Research Fund, Columbia Law School. B.A., 1947, Brooklyn College; LL.B., 1949, Columbia Law School.

1. Frank P. Grad, *Legislative Responses to the New Biology: Limits and Possibilities*, 15 UCLA L. REV. 480, 506-08 (1968) (noting that although by 1968 artificial insemination had been practiced for some fifty years, it had not been expressly legalized in any state).

most frequently cited judicial opinions of the 1920s held that a woman who allowed her procreative organs to be invaded by the sperm of a man to whom she was not married had engaged in adultery.² Only recently may a woman who has a child begotten, with her husband's consent, by donor-provided artificial insemination give birth to a legitimate child.

It is probably fair to say that moral and ethical points are more readily raised *against* activities such as sex, artificial insemination, and cloning, rather than in *support* of activities and objectives, such as welfare, public housing, preventing homelessness, family planning and other such questionable enterprises. It seems to be easier to provide negative moral directives, such as thou shalt not steal, kill, or commit adultery, than affirmative directives, such as providing for minimum wages, welfare, or public health. As I have frequently remarked in my seminar on state constitutional law, both the federal and state constitutions are long on negative directives, as contained in the Bill of Rights, and very short on affirmative ones. It is true that affirmative constitutional obligations are more frequently found in state constitutions, many of which do provide in very general terms for public health, public education, public housing, and social welfare. That is the reason why in the post-New Deal era we look increasingly to the states for certain affirmative program authorizations. Further, under the state's general police power, health, safety, and welfare are all matters that fall under the jurisdiction of state, rather than federal, government. Congress has only delegated powers, and the police power is not one of them. The federal government is, of course, deeply involved in matters of public health both through the federal commerce power and through its very effective power to tax and spend for the general welfare, including spending for genetic research.

Thus we arrive at the legislative consternation caused by Dolly's appearance.³ That stupid cloned sheep may safely graze in Scotland

2. Orford v. Orford, [1921] 58 D.L.R. 251, 258 (Can.) (stating that "the essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person"). See also Doornbos v. Doornbos, No. 54-S-14981 (Super. Ct., Cook County, Ill. Dec. 13, 1954) (holding conception by artificial insemination to be adulterous practice).

3. In February 1997, Dr. Ian Wilmut announced that he had cloned an adult mammal (Dolly, a ewe) for the first time. Gina Kolata, *Scientist Reports First Cloning Ever of Adult Mammal*, N.Y. TIMES, Feb. 23, 1997, at A1; Thomas H. Maugh II, *Scientists Report Cloning Adult Mammal*, L.A. TIMES, Feb. 23, 1997, at A1; *Scientists Succeed in Cloning a Sheep*, ST. LOUIS POST-DISPATCH, Feb. 24, 1997, at 1A, noted in David Orentlicher, *Cloning and the Preservation of Family Integrity*, 59 LA. L. REV. 1019, 1020 n.6 (1999).

in the knowledge—if it has any—that it has generated more law review articles on ethics than has the dropping of nuclear bombs on civilian populations. (I must confess that at the time I was all in favor of that drop because it got me home from military service a great deal sooner than otherwise.) Why did the cloning of a sheep bring about this grand ethical renaissance? It may be that many legislators respond to the religious/moral pressures of their constituents. The making of babies by unmarried persons and the subsequent abortion of fetuses have become major political issues, and although artificial insemination is no longer the issue it was thirty-odd years ago, it is still not accepted by major religious groups. In vitro fertilization is also still religiously suspect, as is any alternative to the “natural,” less expensive, and more pleasurable way of producing children.

The legislators I know are as decent, ethical, and moral a bunch as most of the rest of us, and therefore they respond to these events and to the political pressures generated thereby. Legislation may be part of a political program, but not one generated spontaneously in the minds of legislators. Often legislation responds to social, economic, legal, or natural events, including, even, scientific events. For most legislators, taking a position on cloning is essentially cost free. In short, objecting to cloning is more likely to gain votes than to lose them, unless there are major groups or institutions in an electoral district that have a stake in certain scientific developments. However, such a polity is unlikely, unless you represent a district with research hospitals, research institutions, or other scientific or economic interests, such as constituents with major interests in the pharmaceutical or medical appliance industries.

II

ETHICS AND CLONING

Through the state’s police power, state legislators have clear jurisdiction over matters related to birth, death, and, in between, health. Congress has no police power; therefore, if it wants to legislate regarding cloning, it can most easily do so under its taxing and spending power by providing that no federal public funds may be applied to certain kinds of research or procedures. State legislators, on the other hand, will legislate on matters regarding, for instance, the designation of the father or mother of a child begotten by artificial insemination or by any surrogate procedure using donated sperm or ova. The state clearly has the power to enact state laws to designate the person who will act as the parent or parents of the person produced by cloning. The state is also likely to impose the same parental duties of care and

support on such a person or persons as would be imposed on natural parents whose child was conceived in the usual way in or outside of a marriage.⁴

From a simpleminded point of view, cloning is another technique of producing a child. But cloning differs radically from other methods of baby making, which involve a man's sperm and a woman's ovum. Here the specific technique used is that of somatic cell nuclear transfer, using a single source of genetic material.⁵ In consequence, the child will have only one-half of the usual genetic inheritance.⁶ But in the absence of a DNA test comparing the child to the progenitor, successfully cloned children will be indistinguishable from children conceived naturally. Like all other babies, clones will be born as infants from women after nine months of gestation, and every such infant will be a new human being, entitled to the feeding, diapering, caring, and loving to which all babies are entitled. Legally, it will be a person entitled to all of the rights, privileges, and protections that the Constitution and laws provide, and eventually it will also have the usual obligations, including the duty to pay taxes.

We do not as yet have laws to provide for the obligations of the child's progenitor and birth mother. If it has been "cloned" by a scientific institution, we do not as yet have any laws which provide for corporate liability for its creation. Additionally, considering the public stir created by the cloning of a lamb, we will need special protections to guard the new infant from the public relations excesses and the hullabaloo that will surround its birth. We will also need to protect this baby from other, novel kinds of adverse influences.

Geneticists agree that an infant resulting from somatic cell nuclear transfer is not a photocopy of its progenitor. Like other persons, it will be born into its own peculiar environment and its personhood will be clear, though perhaps limited in some respects by its genetic inheritance. It will be subject to the same environmental influences in its development as every other person born into this world.

4. See, e.g., R. Alta Charo, *Biological Truths and Legal Fictions*, 1 J. HEALTH CARE L. & POL'Y 301 (1998) (arguing that legislators should not blindly rely on biological facts that may be illusory or misleading, but should ask what social purpose is to be furthered by reliance on biological categories).

5. For a description of the science and application of cloning, see generally NAT'L BIOETHICS ADVISORY COMM'N, *CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION* 13-34 (1997).

6. For an early comment on cloning and the consequences of this unusual genetic inheritance, see Frank P. Grad, *New Beginnings in Life: A Lawyer's Response*, in *THE NEW GENETICS AND THE FUTURE OF MAN* 64-77 (Michael P. Hamilton ed., 1972).

We will need to protect this new child against the intrusive curiosity of the world, scientific and lay, which will forever seek to discover how closely the clone develops to its progenitor. The cloned child will grow up under a microscope manipulated by a curious and intrusive world. While all children have problems growing up in an adult world, a cloned child will have normal problems many times multiplied. Both its physical and mental development are likely to be under constant observation, likely to turn the cloned child into a very unhappy child indeed.

There will also be many investments in the child's development and future. Its progenitor, one would hope, would not only have the normal protective instincts of a father or mother, but also a major capital investment in the range of \$1 to 3.5 million.⁷ Further, the cloned child is likely to suffer from constant intensive observation and constant intrusive caretaking, which even a very healthy child with normal parents is likely to resist, suffer from, and rebel against. How to protect against all such intrusions is a difficult problem, and it is difficult to imagine how this could be done.⁸

With all the biological and scientific difficulties involved in cloning, why should it be done? It is very difficult to produce a clone; it took Dr. Wilmut 277 attempts to produce the cloned sheep.⁹ When a clone is successfully produced, genetically it will be an identical twin of its progenitor. There are already numerous studies of identical twins, and there seems little need for more twin studies involving a twin produced by cloning. The National Bioethics Advisory Commission (NBAC) noted that if a cloning effort were attempted in humans, "it would pose a risk of hormonal manipulation in the egg donor; mul-

7. See, e.g., LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGIES* 7 (1999) ("And for \$3.5 million, Dr. Richard Seed of Chicago says he will clone *you*."). Embryologist Don Wolf indicated that the cost of equipment and personnel necessary to clone a human will be roughly one million dollars. *Id.* at 248-49.

8. We were not successful in the case of Elián González, the rescued six-year-old Cuban who was subject to media frenzy while the government decided whether to grant his asylum claim. See, e.g., Edna Buchanan, *Playing to the Cameras in Miami*, N.Y. TIMES, Apr. 27, 2000, at A27 ("The press served everyone's interest except Elián's."); Frank Rich, *America Finds Another JonBenet*, N.Y. TIMES, Apr. 22, 2000, at A13 (noting hypocrisy surrounding public profession of care while same public was "so willing an audience for a circus" centering on boy). See also *Gonzalez ex. rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (upholding as reasonable INS decision to reject Elián González's asylum claim).

9. See NAT'L BIOETHICS ADVISORY COMM'N, *supra* note 5, at 65.

multiple miscarriages in the birth mother; and possibly severe developmental abnormalities in any resulting child.”¹⁰

In discussing the work of the NBAC with respect to human cloning, Professor John A. Robertson raises the issue of whether, with such limited returns, the substantial chances involved in human cloning and the endangerment of the human being created by cloning are worth the risk.¹¹ Though he appears to counsel caution in this respect, he seems to believe that a couple who knowingly chooses to bring a child into the world—similar to couples who bring genetically handicapped children into the world—must be allowed to do so on the basis of fully informed consent. The question of the impact of the procedure on the child that is produced gives rise to the possibility of wrongful life claims and litigation by children who have been born deformed but who otherwise would not have been born at all, the common situation in the wrongful life claims. Raising the question of nonexistence against life with a severe defect, he notes that wrongful life has not been a favored cause of action.¹²

Professor Robertson marches under the banner of procreative liberty, assuming as a given that any process that results in the birth of a live child, particularly one which has no alternative way to be born, carries out procreational freedom.¹³ Compared to all other methods of enhancing reproduction, such as in vitro fertilization, intracytoplasmic sperm injection, donor egg fertilization, egg to egg cytoplasmic transfer, and egg to egg nuclear injection, the method of somatic cell nuclear transfer allows the production of specially customized babies. In the view of some observers, this method is a major advance of “procreative liberty” because it will allow lesbian couples and single women to produce babies without the active involvement of men. Not only would it avoid the involvement of difficult persons such as males in the process, but it would also avoid relying on the uncertain genes of an anonymous sperm donor.¹⁴ However, as Dr. Lee M. Silver

10. *Id.*

11. See John A. Robertson, *Wrongful Life, Federalism, and Procreative Liberty: A Critique of the NBAC Cloning Report*, 38 JURIMETRICS J. 69 (1997) [hereinafter Robertson, *Wrongful Life*].

12. See *id.* at 74 & n.20 (1997).

13. See *id.* at 82. See also Orentlicher, *supra* note 3, at 1023 (raising question of whether it can be harmful to child to be born with diminished individuality when alternative is not to be born at all).

14. See Lee M. Silver, *How Reprogenetics Will Transform the American Family*, 27 HOFSTRA L. REV. 649 (1999).

notes, at the time of this writing, a protocol of somatic cell nuclear transfer safe for human use has not been described.¹⁵

Professor Robertson, in some excellent and technically detailed articles, also supports human cloning and other similar techniques because he wants to encourage scientific and intellectual freedom to examine and develop these new techniques.¹⁶ In his exposition, persons created through nuclear transfer cloning do indeed have two genetic parents—the same genetic parents as the clone source. I agree that procreational freedom is not limited to coitally fertile couples, but includes the right of infertile couples, including homosexual couples, to use non-coital means of reproduction as well. Robertson asserts that procreational freedom might be plausibly extended to the use of donor eggs, sperm, and embryos (without necessarily extending it to full surrogacy).¹⁷

It is easy to agree with Professor Robertson that the state ought to have little control over the manner in which parents produce children as long as health and life are protected. There is a question, however, of whether the right of privacy, which includes the right of procreative liberty, should—and legally may—be moved such a distance from its origins. Initially, reproductive privacy was the doctrine to protect the right of women, of prospective mothers, to make the sole choice of whether to carry the fetus to term or whether to have it aborted. Originally, the right of reproductive liberty was very much a right of married couples to beget a child, and particularly of the woman, whether or not married, to choose whether or not to bear a child. Once the fetus is conceived, the woman who will carry the baby has the choice as to whether to carry the fetus to term or to abort. The question of reproductive liberty then becomes whether anybody, including the state, has a right to interfere with a decision that involves the mother's body.¹⁸

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

16. See, e.g., Robertson, *Wrongful Life*, *supra* note 11; John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371 (1998); John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609 (1999).

17. See Robertson, *Liberty, Identity, and Human Cloning*, *supra* note 16, at 1379.

18. Cf. Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 466 (1999) ("All women should have equal control over their early embryos and fetuses [W]omen undergoing [assisted reproductive technologies] should have the same ability to control their early embryo accorded naturally conceiv-

Perhaps Professor Robertson is correct to assert that procreative freedom is now a free-floating right that allows any one person to have a child by whatever novel and sophisticated genetic technology exists. While it is good to speculate on wide and almost unlimited freedoms, we should not lose track of the source of those freedoms which were first said to grow out of the intimate relationship between husband and wife, as in *Griswold v. Connecticut*,¹⁹ and as later developed in *Roe v. Wade*,²⁰ which focused primarily on a pregnant woman's right to make decisions relating to the fetus she carried. While one is ready to acknowledge that rights expand and develop, it should be examined whether the idea of procreative liberty extends to cloning when there is only one progenitor, and when the ultimate carrier of the fetus to birth—the womb for rent—has no part in its genetic makeup and clearly no say in its future.

III

EUGENICS FOR THE AFFLUENT

There is moreover the question of whether procreative privacy provides the right to create made-to-order, custom-tailored babies, just because one has enough money to do so. This would include both cloning and the use of cloning for various advanced techniques of genetic enhancement to produce brighter, more beautiful, more athletic, or otherwise distinguished babies.²¹ It is that circumstance which leads one to fear that we may well have arrived at a new eugenics for the affluent, where a scientific interest in genetic development is less important than the power of money to use genetic, that is, medical, resources to satisfy a desire for improved offspring. Even if the cloning effort is successful, the offspring and its genetically related progenitor may not have all that much in common. There are, however, no assurances that cloning will be successful, because all of these

ing women: the right to decide whether to continue or terminate the existence of the embryo.”).

19. 381 U.S. 479 (1965) (invalidating state prohibition on use of contraceptives as unconstitutional invasion of marital privacy).

20. 410 U.S. 113 (1973) (invalidating state prohibition on abortion as unconstitutional invasion of privacy).

21. See, e.g., Maxwell J. Mehlman, *How Will We Regulate Genetic Enhancement?*, 34 WAKE FOREST L. REV. 671 (1999) (arguing that self-regulation, government restrictions on access and use, and national lottery will be among approaches necessary to regulate genetic enhancement). See also Roberta M. Berry, *Genetic Enhancement in the Twenty-First Century: Three Problems in Legal Imagining*, 34 WAKE FOREST L. REV. 715 (1999) (arguing that any regulation of genetic enhancement must take into account best interests of child, motivations of parents, and social pressure to “upgrade” offspring).

technologies are novel and acknowledged to be fraught with dangers to the resulting child. Aside from the dangers, there is the nagging question of whether a society that cannot afford to supply significant parts of the population with necessary medical services can afford the luxury of custom-made babies, remembering that the basis for such services is the scientific and institutional groundwork developed at public expense through governmental support.

It is unlikely, however, that we can prevent and prohibit geneticists from proceeding with efforts to clone a human. There is scientific curiosity and challenge, and there is the enormous goad of scientific fame and the possibility of unlimited economic returns. A particularly prominent geneticist made an offer to Lori Andrews to produce a clone for her for \$3.5 million.²² At the turn of the century, a number of states have either introduced legislation to ban human cloning or have adopted such legislation.²³ Such state legislation does not reach beyond state lines, and the prohibition may easily be avoided by having the scientific manipulation take place elsewhere. With these great scientific, reputational, and economic incentives, we can be sure that a human clone will be produced in the near future. In addition to Scottish sheep, mice have been cloned, and so have thoroughbred cows, because a cloned prize cow or bull is likely to be economically rewarding—a very expensive animal.²⁴

There is no way of knowing this, but it is also not impossible that a human clone is already developing within a surrogate mother's womb. There are numerous surrogate mothers carrying fetuses who began life in vitro. Who would know whether a particular surrogate mother carries such a fetus resulting from somatic cell nuclear transfer? Until the birth of the cloned child, who other than the press would have any interest in the disclosure, particularly in light of ongoing efforts to make cloning punishable as a crime? A plausible scenario of this kind requires little imagination.

Attempting to prohibit cloning and to make it a crime is not likely to succeed because such a law is practically unenforceable. It is not surprising that no serious effort has thus far been made to pass and enforce prohibitory legislation. The most that has been done is to choose the easy route of a moratorium, comfortable because it satisfies

22. ANDREWS, *supra* note 7, at 7, 248-49.

23. *E.g.*, CAL. HEALTH & SAFETY CODE § 24185 (WEST 2000); MICH. COMP. LAWS ANN. § 333.16274 (West 2000); R.I. GEN. LAWS § 23-16.4-2 (1999); *see also* MO. ANN. STAT. § 1.217 (West 2000) (prohibiting use of state funds in human cloning).

24. *See* GINA KOLATA, CLONE: THE ROAD TO DOLLY, AND THE PATH AHEAD 120-56, 159-68 (1998).

many critics and because it postpones the decision to a later date.²⁵ At such a later date, it is said (without any clear explanation of what we'll know then that we don't know now), we shall have more facts and a better basis and more knowledge with which to legislate effectively.

Even though many knowledgeable persons believe for a variety of reasons that cloning a human being is undesirable,²⁶ people who are opposed to the idea of cloning a human being shy away from criminalizing the procedure because such an effort would not be useful. It would be ineffective, and discourage genetic research generally. Aside from the novelty of growing a human clone, there is little positive inducement—aside from personal motivations—for doing so. If we want to examine two specimens with the identical genetic inheritance, we can do so by studying human twins. The process of somatic cell nuclear transfer is no longer novel—it has been done on other advanced species, and, as noted above, it is a rather wasteful process. Further, in addition to its enormous expense, the human being produced by the process will lack one-half of the normal genetic inheritance. This has a negative impact on human development generally. Finally, although it is not likely that there will be too many human clones in the immediate future, it is likely that with increases in the number of persons with an undifferentiated genetic background there may be an increase in genetic errors and malformations. The normal variety of gene pools produced in the population provides some corrective aspects not present when the genetic source of human development is limited. Also, as discussed, a child resulting from somatic cell nuclear transfer is, in a sense, disadvantaged. In sum, aside from wanting to clone a human being just to show that it can be done, there appear to be no persuasive reasons for doing so.

We must then discourage persons who have the means to do so from underwriting a deal to have themselves cloned. A person who

25. After the public announcement of Dolly's birth, President Clinton declared a ban on the use of federal funds for human cloning research and called for a private sector moratorium on cloning. Katharine Q. Seelye, *Clinton Bans Federal Money for Efforts to Clone Humans*, N.Y. TIMES, Mar. 5, 1997, at A13.

26. See, e.g., Lisa Sowle Cahill, *No Human Cloning: A Social Ethics Perspective*, 27 HOFSTRA L. REV. 487 (1999); R. Alta Charo, *Cloning: Ethics and Public Policy*, 27 HOFSTRA L. REV. 503 (1999); Vernon J. Ehlers, *The Case Against Human Cloning*, 27 HOFSTRA L. REV. 523 (1999); Sophia Kolehmainen, *Human Cloning: Brave New Mistake*, 27 HOFSTRA L. REV. 557 (1999); Emily Marden & Dorothy Nelkin, *Cloning: A Business Without Regulation*, 27 HOFSTRA L. REV. 569 (1999); Karen H. Rothenberg, "Being Human": *Cloning and the Challenges for Public Policy*, 27 HOFSTRA L. REV. 639 (1999). But see, e.g., Orentlicher, *supra* note 3, at 1019 (arguing that cloning should be permitted because it allows infertile couples to procreate without third parties).

has so much self-adulation and self-love as to want to be cloned is an “idiot” in the classical sense. The word idiot, from the Greek *idiotes*, means not only a limited person but one who is so private and selfish as not to be interested in the welfare of the polis, the community.²⁷ This person is a self-adulatory loner who has deprived the new person of one-half of the usual genetic inheritance. Such a person cannot relate to anyone else and for that very reason is not a fit parent for any child, whether cloned or not.

27. See 7 OXFORD ENGLISH DICTIONARY 625 (2d ed. 1989) (noting derivation from *idios*, “private, own, peculiar . . . one not professionally learned or skilled; also a private (as opposed to a public) man”).

