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What's So Strange About Human Cloning?

by
RADHIKA RAO*

This essay addresses three questions. First, what exactly is so strange and disturbing about human cloning? Second, how do the strange and disturbing aspects of cloning translate into constitutional doctrine? Specifically, how are they relevant to whether or not the constitutional right of privacy protects cloning to create a child? Third, granting that there are many bad reasons to ban cloning, are there also some good reasons why the state might wish to prohibit the cloning of human beings?

I. Three Characteristics of Human Cloning

In an article titled *The Wisdom of Repugnance*, Dr. Leon Kass, who now heads President George W. Bush's Council on Bioethics, declares that "offensive, grotesque, revolting, repugnant, and repulsive . . . are the words most commonly heard regarding the prospect of human cloning."¹ His repugnance seems to be shared by the vast majority of Americans. Polls taken over the last five years consistently show that most Americans oppose the cloning of human beings.² According to Kass, such "repugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate

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1. Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679, 686 (1998).

2. Ninety percent of respondents to a *Time/CNN* poll taken in February 2001 believe it is a bad idea to clone human beings, which is almost as many as the 93% who were opposed to human cloning in a *Time/CNN* poll taken four years earlier, shortly after the announcement of the successful cloning of a sheep named Dolly. Although the specific results of any given poll depend upon its exact wording and approach, "it seems indisputable that human reproductive cloning is not popular in the United States." REP. OF THE CAL. ADVISORY COMMITTEE ON HUM. CLONING, CLONING CALIFORNIANS? 53 HASTINGS L.J. 1145 (2002) [hereinafter CLONING CALIFORNIANS?].

it.”³ His argument is as follows:

We are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear. Repugnance, here as elsewhere, revolts against the excesses of human willfulness, warning us not to transgress what is unspeakably profound. Indeed, in this age in which everything is held to be permissible so long as it is freely done, in which our given human nature no longer commands respect, in which our bodies are regarded as mere instruments of our autonomous rational wills, repugnance may be the only voice left that speaks up to defend the central core of our humanity. Shallow are the souls that have forgotten how to shudder.⁴

Kass compares cloning to incest, bestiality, and cannibalism, which also provoke a visceral negative response that cannot be completely captured in rational arguments.⁵

Other scholars believe that we should distrust disgust.⁶ Not only is revulsion alone not an argument, but it may often signal fear of the unknown or unthinking prejudice. Professor Laurence Tribe warns that we should not ban cloning for the wrong reasons.⁷ He argues that it is not a coincidence that Kass' opposition to cloning is embedded in an essay that decries the sexual revolution, feminism, and the gay rights movement, suggesting that cloning may be feared because of its potential to contribute to the decline of the traditional family.⁸ On this view, cloning is “the technological apotheosis of Murphy Brown and Ellen DeGeneres, the biomedical nemesis of Dan Quayle, Phyllis Schlafly, and Pat Robertson” precisely because it would allow single women, gay men, and lesbians to have children.⁹

In order to determine whether cloning should be prohibited or permitted, it is necessary first to understand the motivations underlying the impulse to ban human cloning. Why do so many people recoil from the prospect of human cloning, and consider it so odd and unsettling, or even offensive and repugnant? Precisely what is it about cloning that they find so deeply disturbing? Are there good reasons for this widespread repugnance, or does it simply reflect fear of the unknown and irrational prejudice?

3. Kass, *supra* note 1, at 687.

4. *Id.*

5. *Id.*

6. See, e.g., MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 423, 453-54 (2001).

7. Laurence Tribe, *On Not Banning Cloning for the Wrong Reasons*, in CLONES AND CLONES 221 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998).

8. *Id.* at 226-27.

9. *Id.* at 227.

I believe that there are at least three aspects of human cloning that produce this deep anxiety in the public at large. First, cloning involves asexual replication rather than sexual reproduction. Cloning is asexual not only because it separates babymaking from sex, but also because it does not even require the joinder of sperm and egg to produce a child. Cloning consequently results in the replication of an existing genome; it does not involve the random recombination of genes, which in sexual reproduction results in a child with a new and unique genetic identity.¹⁰

Second, as a consequence of the first feature, cloning also provides the awesome power to engage in a form of genetic selection, to choose the child's entire genome, and to predetermine its genetic identity. Instead of risking the randomness of the genetic lottery to create a child with a completely unpredictable mix of genes, prospective parents can use cloning to simply duplicate an existing person, a person with a known genetic identity.¹¹

Third, cloning affords not just the power to select the child's entire genetic make-up, but also the power to produce multiple copies of the same person. In so doing, cloning essentially opens the door to the mass production of human beings.

What are the consequences of these three characteristics of human cloning? First, unlike sexual reproduction, which is inherently collaborative, requiring at least a minimal degree of cooperation with other persons in order to obtain both sperm and egg, asexual replication can be performed by one person acting all alone, without reproductive assistance from others. Thus cloning frees individuals from the need to connect with others and engage in marriage or any kind of intimate relationship in order to have children. In so doing, cloning could be viewed as radically individualistic and ultimately antisocial or even alienating, the paradigm right of isolated individuals. In an article entitled *The Demand for Human Cloning*, Judge Richard Posner and Professor Eric Posner suggest that cloning would actually lower or eliminate the natural barriers to reproduction currently provided by the need to cooperate with others in order to find someone willing to donate sperm, egg, or gestational services.¹² In so doing, it would enable extreme narcissists, psychologically disturbed individuals, sociopaths, and other misfits to replicate

10. Technically, a clone produced by somatic cell nuclear transfer would not be completely genetically identical to the genetic donor. Although the clone would possess the same genotype, he or she would result from a different egg, with its own distinct mitochondrial DNA. See CLONING CALIFORNIANS?, *supra* note 2, at 1176 (on psychological harm to cloned child).

11. But see the caveat noted in the preceding footnote.

12. Eric A. Posner & Richard A. Posner, *The Demand for Human Cloning*, in CLONES AND CLONES, *supra* note 7, at 233.

themselves to the detriment of the rest of society.¹³ This may be one source of the anxiety about human cloning.

Another source of anxiety is attributable to the fact that cloning would make it possible to produce a child who is virtually genetically identical to an existing or previously existing person. As a result, many fear that the cloned child would suffer from a loss of uniqueness and a diminished sense of individuality, grounded in the fact that he or she is believed to be the genetic copy of another. Studies of identical twins arguably provide some indication of whether that fear is justified: Professor Nancy Segal points out that the similarities between identical twins do not necessarily produce psychological harms, and sometimes result in psychological benefits from a feeling of enhanced identity.¹⁴ On the other hand, it could be argued that the difference between a clone and an identical twin is that identical twins begin life with a blank slate, equally ignorant of each other's destiny, whereas a cloned child starts life with the knowledge of what his genetic predecessor has already become. As a result, the cloned child may feel that much about himself or his fate is already predetermined, losing the sense of freely constructing his own identity and choosing his own future. Even if we do not believe in genetic determinism, we may fear that the life of a cloned child would always be haunted by the shadow of the original and unduly shaped and constrained by the expectations of others. And even if such expectations are false, if they are widely shared by the child's parents and by society, they risk becoming a self-fulfilling prophecy. Hence, the cloned child would arguably be deprived of the right to a unique identity and denied the right to an open future.¹⁵

Moreover, by offering the power to select the child's entire genome, cloning might not only cause parents to harbor unrealistic expectations, but also to view the cloned child more as an object manufactured according to precise specifications than as an independent person. To the extent that cloning fosters such social attitudes, it may ultimately lead to the objectification of children in general, who will be treated as mere means to parental fulfillment rather than as ends to be loved and cherished for themselves. By blurring the boundaries between biology and technology, cloning seems to move us one step closer to a view of children as man made products, rather than natural creations.

Finally, part of the anxiety about cloning is attributable to a fear

13. *See id.*

14. *See* Nancy L. Segal, *Human Cloning: Insights from Twins and Twin Research*, 53 HASTINGS L.J. 1075 (2002).

15. For a general discussion of the right to an open future, see Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980).

of mass production of individuals with desired genotypes. This possibility evokes science-fiction images of armies of identical clone automata who will be regarded as fungible goods or products that are manufactured according to preset specifications, and maybe even traded on the market just like any other widget, rather than unique beings who are priceless. Of course, cloning doesn't necessarily put a price tag on any particular individual, nor does it necessarily lead to the trade of cloned children on the market. But if cloning does cause people to be viewed as fungible products, it is feared that we may move one step closer towards markets in people and body parts. Such a result would threaten not only to commodify persons but also to commercialize the family, a realm which many believe should be shielded from the economic pressures that govern the market.

How do these three aspects of cloning compare to other assisted reproductive technologies whose use is already widespread, such as artificial insemination, in vitro fertilization, and surrogate motherhood? The other assisted reproductive technologies also separate babymaking from sex, but they still require sexual reproduction: the joinder of sperm and egg. The other assisted reproductive technologies also afford some opportunities for genetic selection. Artificial insemination may be accomplished with the use of genius sperm banks offering sperm derived from Nobel prize winners, and in vitro fertilization may be accompanied by web sites selling supermodels' eggs or advertisements in college newspapers offering a premium price for eggs obtained from donors with specially valued physical or intellectual attributes. One assisted reproductive technology applies a much more advanced mode of genetic selection. In vitro fertilization coupled with preimplantation genetic diagnosis enables couples at risk of conceiving children with certain genetic diseases to examine a single cell taken from an embryo that has been created in vitro, in order to genetically select only those embryos that are free from the risk of that particular disease. Thus, these other assisted reproductive technologies also allow a certain degree of genetic selection, but they still require the random recombination of genes to create a child with a new and unpredictable genome, rather than the duplication of a person with a known genetic identity. Moreover, while these other assisted reproductive technologies actually involve the commercial purchase and sale of eggs, sperm, and gestational services on the market, they do not provide the capacity for the mass production of many identical human beings.

II. A Constitutional Right to Clone?

So, what does all this mean for the question whether or not there is a constitutional right to clone a human being? Paradoxically, the

very same features that make cloning appear so alien and unsettling, also render it more private than existing methods of assisted reproduction. Artificial insemination generally involves the participation of sperm donors, while in vitro fertilization and surrogacy may require the involvement of egg donors and those who supply gestational services. By bringing these strangers who are necessary to provide gametes or gestational services into the reproductive process, the couple attempting to reproduce is diminishing the privacy of their intimate association and simultaneously enhancing the state's interest in protecting these other individuals, who become potential parties to the relationship and whose own interests and rights may diverge from those of the couple.¹⁶ But cloning does not require the intrusion of any strangers in the reproductive process precisely because it can be performed all alone, without the reproductive assistance of others (aside from those who provide merely technical assistance). Moreover, other forms of assisted reproduction may involve the commercial exchange of sperm, eggs, and gestational services, placing them outside the boundaries of the constitutional right of privacy,¹⁷ but this is not true of cloning, which does not necessarily involve any commercial transactions at all, apart from contracting for merely technical assistance.

Ironically, even though cloning is more private than other methods of assisted reproduction, because it is free from the participation of strangers and the influence of commercial interests, it also seems alien and even antithetical to the values underlying the constitutional right of privacy. Because of that, human cloning actually calls into question the meaning of the constitutional right of privacy. It places us at a crossroads between two competing visions of privacy—privacy as an individualistic right and privacy as a relational or communitarian value.¹⁸ Both strands of privacy resonate with the case law. If privacy protects the individual's right to reproductive autonomy, then cloning would naturally be next in line for constitutional protection to the extent that it involves individuals who are acting all alone in reproducing, free from the conflicting needs or interests of others. But if privacy is viewed as a right, not of isolated individuals, but of those engaged in intimate relationships, then cloning should receive no constitutional protection.

How do we choose between these competing conceptions of privacy? I would choose the latter conception of privacy as a relational right. I have previously argued that the principle that

16. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1117 (1998).

17. See *id.*

18. See *id.* at 1078-79.

connects the series of cases involving marriage, the family, procreation, parenting, and sexuality is not Justice Brandeis' famous "right to be let alone."¹⁹ On the contrary, it is the right to come together in close consensual relationships.²⁰ Privacy does not simply guarantee individuals the right to sexual, reproductive, and parental autonomy.²¹ It protects the relationships between people that develop in the course of these activities, rather than the individual's solo right to engage in such activities.²² Accordingly, the right of privacy should not attach to isolated individuals; it belongs instead to close relationships, fostering intimate associations that mediate between the individual and the state.²³ Privacy should be viewed as a relational right that "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."²⁴

Can this understanding of privacy be reconciled with the contraception²⁵ and abortion cases,²⁶ or with the one case in which the Supreme Court struck down a law authorizing compulsory sterilization of certain categories of criminals?²⁷ Do these cases presuppose that the right to privacy is an individual right, or are they consistent with the concept of privacy as a relational value? I believe that reflecting on the differences between the issues in these cases and the issue of cloning shows that they may be reconciled with the understanding of privacy that I am defending here.

It is true that the Supreme Court has found a fundamental constitutional right to *avoid* reproduction, whether by means of contraception or abortion. Some scholars infer that there is a parallel fundamental right *to* reproduce with the assistance of new technologies, including cloning.²⁸ But one reproductive right does not necessarily follow from the other. The Supreme Court relied heavily

19. See *id.* at 1102 and n.154 (citing *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Berger v. N.Y.*, 388 U.S. 41 (1967)).

20. See *id.* at 1103.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1103 and n.157 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)).

25. See, e.g., *Griswold v. Conn.*, 381 U.S. 479 (1965) (striking down a statute prohibiting the use of contraceptives by married persons because it violated their constitutional right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons on equal protection grounds).

26. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a Texas statute criminalizing abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (retaining and reaffirming the "essential holding" of *Roe*).

27. *Skinner v. Okla.*, 316 U.S. 535 (1942).

28. See, e.g., John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1441 (1998).

upon two factors in the contraception and abortion cases that are conspicuously missing from the cloning context. Because pregnancy entails a massive invasion and occupation of a woman's body, constitutional protection for the right to avoid reproduction is essential both to safeguard bodily autonomy and to ensure gender equality.²⁹ But these precedents erect no constitutional barrier to a ban upon human cloning, which neither results in invasion of the integrity of the body nor endangers women's equality. Compulsory sterilization laws similarly implicate the concerns regarding bodily integrity and social equality that animated the Court in the contraception and abortion decisions, so they, too, are distinguishable from laws regulating medically assisted reproduction.³⁰ The lesson of these decisions is that autonomy works in tandem with equality. Sometimes it is necessary to recognize a right to reproductive autonomy in order to prevent gender or class inequality. But the same analysis does not apply when the claim for autonomy threatens to reproduce existing inequalities and create new inequalities.

III. On Banning Cloning Only for the Right Reasons

All of this suggests that a law banning human cloning would be fundamentally different from a law banning contraception or abortion, or a law compelling sterilization, to the extent that it is motivated by concern for the ways in which human cloning threatens to undermine individual autonomy and exacerbate inequality. In *Washington v. Glucksberg*,³¹ the Supreme Court upheld a law preventing physician-assisted suicide, even though it deprived some individuals of the right to make a deeply personal and intimate choice—the choice to terminate life. In that case, the state asserted strong and substantial interests, both in protecting individual autonomy by preventing the addition of what could be seen as an inherently coercive choice, and in furthering equality by preventing judgments about the relative quality and value of different lives, which could threaten the interests of those who are poor or others who are disadvantaged in our society.³² The same analysis could be applied to a law banning human reproductive cloning, because the freedom to engage in human cloning also threatens to undermine true autonomy, and to reproduce existing inequalities while perhaps even creating some new ones.

In theory, cloning technology promises to enhance autonomy by affording individuals a new option, which they are free to use or

29. See Rao, *supra* note 16, at 1112-13.

30. See *id.*

31. 521 U.S. 702 (1997).

32. See *id.* at 731-32.

refuse. However, the very existence of such technology may undermine autonomy in several different ways, for both parents and their cloned children. Once such technology exists, it may trigger a genetic "arms race" in which parents feel compelled to use cloning technology because they fear that failure to do so could result in a competitive disadvantage to their child.³³ The Posners thus argue that the demand for human cloning would extend far beyond those who are infertile.³⁴ They argue that there is a real danger that cloning could ultimately crowd out sexual reproduction because the genetically best-endowed would clone themselves rather than mix their genes with people on the rung below, and so on down the line, until the least well-endowed would ultimately be forced to clone due to the inability to find anyone willing to mate with them.³⁵ Thus, the very existence of the choice to clone may ultimately take away the choice *not* to clone, undermining true autonomy. Moreover, even if prospective parents would opt out of such a genetic "arms race," market forces may achieve virtually the same results, coercing all but the very wealthy to use cloning technology whenever it is deemed necessary to conceive and carry to term "healthy" children. Individuals may face financial pressures to use cloning in order to ensure the birth of a child free from risk of a genetic disease, exerted by insurance companies, employers, or a society unwilling to subsidize the choice not to use such technology under certain circumstances. And finally, the autonomy of the cloned child might also be undermined to the extent that he or she is viewed and treated as the genetic copy of another.

Beyond threatening the autonomy of prospective parents and cloned children, use of cloning technology may also pose more pervasive risks to all of society. First, unequal access to such powerful technologies may exacerbate inequalities in our society, enabling the wealthy to pass on their privileges to their progeny in perpetuity. If cloning actually serves as a form of genetic selection and if some of the success of the wealthy is attributable to their superior genetic endowment, then by confining cloning to those wealthy enough to afford the technology, it is possible that we risk creating entrenched, virtually permanent, caste hierarchies. In *Plyler v. Doe*, the Supreme Court expressed concern about the denial of public education to illegal alien children because this might "promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries."³⁶ But

33. Professor Peter Huang uses economic analysis to make the same argument for genetic selection technologies. See Peter H. Huang, *Herd Behavior in Designer Genes*, 34 WAKE FOREST L. REV. 639 (1999).

34. See Posner & Posner, *supra* note 12.

35. See *id.*

36. 457 U.S. 202, 230 (1982).

if educational inequalities are troubling because they could perpetuate a caste system, then what about genetic inequalities?

Moreover, the very existence of cloning technology could alter our concept of what is "normal" and disadvantage all those who deviate from society's ideal, ultimately entrenching notions of geneticism or genetic essentialism. By thus fostering attitudes that reduce people to their genes and encourage genetic discrimination, cloning could endanger the equality of all citizens.

In theory, cloning could also be used to enhance equality by enabling individuals from social groups that have historically suffered discrimination to achieve parenthood. Cloning could, for example, empower single women, gay men, and lesbians to have children that are genetically related to them, without risking the involvement of third parties in the process. But I believe that cloning technology would actually be used in a way that would at best replicate existing patterns of inequality. Dr. Lee Silver presented a survey from *Harper's Magazine* suggesting that, if given the power to engage in genetic selection, 84% of the individuals surveyed would use it to select for disease immunity and 64% would use it to select for intelligence, but an astounding 51% would use such technology to screen for sexual orientation and another 19% confessed that they would use such technology to select for gender.³⁷ Thus, it is more likely that cloning technology would actually be used, not to enhance the rights of single women, gay men, and lesbians, but rather to screen them out of the population.

To conclude, I agree with many of the participants in this symposium that we should not ban human cloning for the wrong reasons—out of ignorance of what cloning really is, or fear of the unknown, out of repugnance for what seems unnatural or against the intentions of God, or out of prejudice against a technology that allows single women, gay men, and lesbians to have children. Those are all illegitimate reasons for banning human cloning. But this does not mean that human cloning should not be banned for the right reasons: out of genuine concern for autonomy, both of the cloned person, who may become the prisoner of preset expectations, and of prospective parents, who may feel financial or social pressure to use this technology in order to provide their children with a competitive edge in society; out of genuine concern for the harms that might result from the objectification and commodification of cloned children; and out of genuine concern that cloning technology could be used, not only to reproduce existing inequalities, but also to create new categories of discrimination and new classes of prejudice.

37. See Lee Silver, *Public Policy Crafted in Response to Public Ignorance is Bad Public Policy*, 53 HASTINGS L.J. 1039 (2002).