Why an Acceptable Cloning Policy Will Be Hard to Achieve

John Robinson

Follow this and additional works at: http://scholarship.law.nd.edu/ndjlepp

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndjlepp/vol13/iss1/2
WHY AN ACCEPTABLE CLONING POLICY WILL BE HARD TO ACHIEVE

JOHN ROBINSON*

As my contribution to today's discussion on cloning policy, I would like to call attention to one feature of that discussion, a feature that will make it very difficult for our legislatures and for our courts to arrive at a cloning policy that will be acceptable to more than a handful of two participants in that discussion. The feature that I have in mind is the deep diversity that exists among the discussants, a diversity so deep that on several points it will not only be difficult for them to reach agreement; it also will be difficult for them to understand each other at all. To illustrate what I mean, I ask the reader to visualize cloning policy for the moment as the product of four different sorts of inputs: scientific, political, religious, and financial. The following is one form that such a visualization might take:

* Associate Professor of Law, University of Notre Dame. This is an edited version of remarks that Professor Robinson made at a conference on cloning and the law, sponsored by the Notre Dame Alumni Association, in Washington, D.C. in November of 1998.
My basic claim today is that it will be immensely difficult for these four inputs to flow together in the production of acceptable cloning policy. Let me take a few minutes to explain why that is so.

Turn first to the “science” circle. Imagine if you can that there is such a thing as a (or the) scientific community. If (or insofar as) such a community exists or could come into existence, it is (or would be) uniquely planetary. For such a community, that Dolly was cloned in Scotland is a matter of complete indifference. She might just as well have been cloned in Cambodia or in Cameroon. In such a community, the theory behind the cloning of Dolly and the technique required to effect it is available to each of its members almost immediately, and efforts at replication begin as soon as the theory and technique are available. The members of this community share a capacity for understanding the theory and implementing the technique that distinguishes them from the great mass of their compatriots and they share standards of scientific rigor that allowed them to confirm Dolly’s bona fides as a clone just about as quickly as they had been able, a few years ago, to reject cold fusion as, at best, an illusion. Information transfer within the scientific community now takes place more rapidly and more thoroughly than ever before, and the time it takes for theoretical breakthroughs to produce technological improvements has been vastly reduced as a result—as your calculator, cell phone, or laptop reveals. One could almost say that the scientific community has achieved a level of orthodoxy (and an ability to police heterodoxy) not known in the West, at least, since Martin Luther posted his ninety-five theses on the door of the Cathedral in Wittenburg almost five hundred years ago.

So remarkable have been the achievements of science in recent centuries, and so startling has been the rate of scientific advance in recent decades, that even scientists themselves have sometimes succumbed to the temptation to think of science and its methods as having some sort of ultimacy with respect to matters of meaning and morals, as if any dispute that did not lend itself to scientific resolution was not a legitimate dispute at all. Disputes of that sort, it is sometimes thought, are best relegated to a private sphere, where the disputants can have at each other as harmlessly, and as ineffectually, as possible.

It should be clear from the description I have just given that any attribution of ultimacy to science with regard to what ought to be done is profoundly wrong-headed. Not only is it true that science as science has precious little to say about how we should live, but scientists themselves have a distressingly poor track rec-
ord with respect to recognizing any moral constraints on their activities. Even the choice of Dolly as a name suggests that those who named her have not yet come to terms with sexism as a moral category. With regard to the cloning debate, we can expect to hear much more from the scientific community about the scientific potential of cloning than about the moral issues it raises, and virtually nothing from the scientific community about how those moral issues should be resolved.

Proceed now to the “religion” circle in the visualization that I proposed earlier. Under one understanding of the great settlement agreed to here and in Western Europe two centuries ago, there should be no religious circle at all in the cloning debate. On this understanding, to let religion influence policy is to violate the Establishment Clause of the First Amendment, if not in fact at least in spirit. Such an understanding, however, must be rejected if only in order to bestow some seriousness on the cloning debate itself. That debate becomes serious only if opponents of cloning can articulate arguments against it that have at least as much intellectual force as do the arguments for cloning made by its proponents. And where, outside of our religious communities, are we likely to find the conceptual resources adequate to the critique of the morality of as considerable a scientific achievement as cloning? Nowhere—so religion must play a role in the cloning debate or the debate will be a sham.

No sooner do we recognize the necessity of a role for religion in the cloning debate than we are forced to acknowledge two monumental problems incident to that recognition. The first of these problems relates to the fragmented nature of religion in the modern world. The cloning debate is closely related to the abortion debate—a debate that has revealed, first, how divided the several Christian confessions are on both the status of the embryo and on the role of sex in human life, and second, how much division there is within each of those confessions on those issues. Efforts at the formation of united fronts on the part of several confessions often succeed only to the extent that each party to the front is willing to ignore its own distinctive understanding of the human condition and its own distinctive modus operandi with respect to disputed moral questions—all in the interest of having a voice in some great and pressing policy debate. But this is to throw out the baby in order to save the bathwater, where the baby is a particular confession’s understanding of the human condition and its modus operandi with respect to moral questions. When these are put to one side, the vacuum thereby created is quickly filled by the very muddle-
headed consequentialism that we should hope religion will contest.

This brings us to the second problem incident to acknowledging the need for the presence of religion in the cloning debate. This problem stems from the massive disconnect between science and religion that has characterized their coexistence over the course of the past 350 years. That this disconnect would never have been as massive as it became if all of the parties to it had been as conscious of their own limitations and of the limitations of their position has, I think, been established beyond any doubt. The somewhat quixotic efforts on the part of the current Pope to right the wrong that the Catholic Church did to Galileo in the seventeenth century provides some evidence for this claim, as does the equally quixotic efforts of Pierre Teilhard de Charden to reconcile evolutionary theory with Christian soteriology a generation ago. It remains true, however, that as a sociological matter, it is the rare scientist (and the still more rare biologist) who is equally at home in scientific discourse and religious discourse when he or she is addressing the morality of a scientifically feasible project. It is true, furthermore, as a conceptual and methodological matter, that it is only with the greatest difficulty that scientific and religious thought mesh once we leave the plane of high abstractions and descend to the level of concrete problems. To offer only a single example in defense of this generalization, I will note how resistant modern scientific thought has been to efforts to distinguish intended effects from those that are merely foreseen—a distinction that is crucial to the functioning of Catholic moral theory.

Consider now the “finance” circle. I must confess at the outset that the label is a lame one. What I am getting at here is the significant role that money—private money, philanthropic money, and government money—have played, and will continue to play, in the development of modern reproductive and biomedical technology. Because thousands of American couples for whom intercourse does not result in pregnancy are willing to invest $7,500 of their own money in \textit{in vitro} fertilization efforts that have a one-in-four chance of resulting in a sustainable pregnancy, we have hundreds of IVF clinics and no serious debate about the propriety of \textit{in vitro} fertilization procedures. Once the technology for xenotransplants has been perfected, we can expect there to come into existence a multi-billion dollar per year market for hog- and cow-generated kidneys, livers, hearts, and lungs, and no serious debate about the propriety of xenotransplantation. By parity of reasoning, if (or as) private dollars are invested in cloning at a level comparable to the current pri-
vate investment in *in vitro* fertilization procedures, that level of investment will both guarantee cloning a central place in the biomedical research agenda and tend to stifle debate over its propriety. Financial imperatives will conspire with technological imperatives to confer upon cloning a societal legitimacy that, as a moral matter, it will never have earned.

We come, finally, to the "politics" circle, and the first thing I need to do is to deny its separateness from the other circles. Only a fool would deny that money talks quite effectively in political assemblies, and the scientific and religious communities make every effort to have their voice heard and their view prevail in political deliberations. For those reasons our focus here is on the political process to the extent that it adds something to the volatile mix of financial, scientific, and religious contributions to the cloning debate. When we do this, we are confronted right off the bat with two crucial problems. We can call the first of those problems the *impotence* of government. In the case of cloning (as opposed to several other projects), it is true both that governmental funding may not be necessary to the success of the project and that governmental prohibition may be unable to prevent its success. If forty states ban cloning research, the research will take place in the other ten. If the federal government bans cloning research where the end in view is a cloned human, the research will move off-shore. The main effect of governmental efforts to address cloning research may, therefore, be that government—state and federal—plays no effective role in its regulation—surely an outcome that few would desire.

The impotence of government to one side, the political circle faces a much greater problem. Let us call this one the *ignorance* of government. Here your senator faces the same difficulties as your bishop. Cloning is hard to understand, as is stem-cell research and xenotransplantation. Neither your senator nor your bishop is likely to be a biologist and neither are the people closest to them likely to have much scientific expertise. But when conscientious legislators look outside of their intimate circle of advisors for advice on cloning and its regulation, they are likely to encounter the cacophony that I described previously. Their scientific advisors will be long on technique and short on moral analysis, and their religious advisors will argue among themselves on the correct moral approach and be as fuzzy on specifics as the legislators themselves are.

None of this inspires much confidence with respect to the law governing cloning research; but all is not lost. We go into the discussion about cloning and its regulation with no illusions as to the moral wisdom of the scientific community or as to the
ease of non-platitudinous scientific-religious exchanges, and recent history has taught us not to expect either wisdom or heroism from our legislators. Perhaps the collective humility that we bring to the great cloning debate that lies before us will help us, after all, to arrive at a cloning regime with which we all can live.