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CLONING AND HARMING: CHILDREN, FUTURE PERSONS, AND THE "BEST INTEREST" TEST

M. A. ROBERTS*

1. THE SIGNIFICANCE OF HARM

A profound issue raised by the prospect of human cloning is the question of harm. If cloning, *while harming no one*, stands to help people with respect to those activities that "form [a] central . . . part of an individual's life" and "contribute . . . powerfully to the happiness of individuals,"¹ then under the United States Constitution and any number of normative theories a ban or restriction on human cloning would be both legally and morally suspect. Thus, the use of cloning to produce a new person may be considered an exercise of procreative liberty protected by the Fourteenth Amendment privacy guarantee. If so, a state will need more than a mere "rational basis" to justify a ban or restriction on cloning.² Rather, the state will be required to show that the ban or restriction is "necessary" in the service of some "compelling interest." But if cloning *harms no one*, then it is hard to see how a ban or restriction on cloning would satisfy this more stringent test of state action.

On the other hand, the state is empowered under the Constitution to take "narrowly tailored" courses of action that have the aim and probable effect of preventing harm. For preventing harm is one of those "compelling interests" for which the state is constitutionally permitted—and morally obligated—to strive.

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1. *Bowers v. Hardwick*, 478 U.S. 186, 204-05 (1986) (Blackmun, J., dissenting).

2. For an explanation of the relevant constitutional law, see John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1388-92 (1998).

This is so, even in those cases in which the legislation necessary to prevent harm constrains the exercise of procreative liberty or other protected right.³ Thus, if cloning can clearly be shown to harm either the person who provides the genome that will be copied (the "clone source") or any of the perhaps several genetically identical persons brought into existence by application of a cloning technique (each, a "clone multiple"), and if that harm can be avoided only through a ban or restriction on cloning, then that ban or restriction can be expected to satisfy even the stringent "compelling interest" test of state action.⁴

On the moral side, it is true that some normative theories do not make their moral evaluations on the basis of the extent to which the conduct at issue imposes harm.⁵ But many normative theories—in particular many consequentialist theories—do care about harm. Such theories may define "harm" as any decrease in (what I will refer to as) "well-being" from some defined baseline level⁶ and analyze well-being according to one of a number of

3. The "harm" principle, in other words, limits the scope of our constitutionally protected freedoms. I have the constitutionally protected right to have and raise a child of my own. But this right does not imply that, if I cannot get pregnant, I may freely take your child from you and raise that child as my own. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (a "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); *In re Guardianship of J.C.*, 608 A.2d 1312, 1316, 1320 (N.J. 1991) (the "cornerstone of the inquiry [as to termination of parental rights] is not whether the biological parents are fit but whether they can cease causing their child harm"; thus, an appropriate basis for termination may simply be that "separating the child from his or her foster parents would cause serious and enduring emotional or psychological harm."); see also *In re the Adoption of a Child*, 716 A.2d 1171 (N.J. Super. Ct. App. Div. 1998); *In re N.M.S.*, 347 A.2d 924 (D.C. Cir. 1975).

4. See Robertson, *supra* note 2, at 1409 ("[H]arm to the child by virtue of its own birth would constitute the substantial harm necessary to justify infringements of procreative liberty.").

5. Kantian, or deontic, theories have this characteristic, in some instances condemning acts on the basis of their generalized type (e.g., lying) and independently of the consequences of those acts. Rights-based theories, as well as theories that consider the distinction between positive "action" (e.g., killing) and negative "inaction" (e.g., letting die) to be morally significant, can also be characterized this way. Though not dismissing the moral significance of harm altogether in the context of cloning, George Annas would deemphasize harm in favor of other considerations, including rights. See George J. Annas, *Commentaries: Human Cloning: A Choice or an Echo?*, 23 U. DAYTON L. REV. 247, 262 (1998) ("Harm to the child is thus not the right (or at least not the only) question . . .").

6. Joel Feinberg has written most enlighteningly on the difficult issue of precisely what this baseline is. See Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, SOC. PHIL. & POL'Y, Autumn 1986, at 144, 145; see also MELINDA A. ROBERTS, CHILD VERSUS CHILDMAKER: FUTURE PERSONS AND PRESENT DUTIES IN ETHICS AND THE LAW 135-78 (1998) (ch. 4: "Wrongful Life")

competing theories, many of which would extend well-being beyond the merely physical and indeed beyond the psychological.⁷

Though they care about harm, traditional forms of consequentialism do not specifically care about what has been described as "person-affecting,"⁸ or "person-based,"⁹ harm. It is not a diminution of some *particular* person's well-being that the traditional consequentialist finds morally significant. What the traditional consequentialist finds significant, rather, is a diminution in *total aggregate* well-being across the entire population, or world. Thus, according to totalism—perhaps the most common statement of consequentialism—a diminution in the level of well-being a given person has in one alternative, as compared to another, is morally significant *only if* it results in a diminution in the level of *aggregate* well-being in the one alternative, as compared to the other.¹⁰

(arguing that harm consists in any diminution in well-being from the highest level of well-being an individual possesses in any of the various alternatives in fact available).

7. Theorists provide a plethora of competing concepts of well-being, though few think that—as it pertains to ethics, law, or public policy—the concept is limited to purely physical well-being. Emotional, or psychological, well-being is widely considered to be critical to overall well-being. Moreover, there is no reason to think that well-being is exclusively limited to conscious, pleasant states of mind. See, e.g., PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION (1993); see also AMARTYA SEN, INEQUALITY REEXAMINED 1-55 (1992) (describing well-being in terms of a person's "capability to achieve functionings"). Thus, the trespass victim might incur a loss even though he or she does not suffer at all. So, conceivably, might the victim of a theft or even a rape.

8. See DEREK PARFIT, REASONS AND PERSONS 351-75 (1984).

9. The term "person-based" is John Robertson's. See Robertson, *supra* note 2, at 1406. Robertson has adopted a "person-based" concept of harm at a time when philosophers, including Parfit, are abandoning the concept in droves. See Parfit, *supra* note 8, at 351-75; see also JOHN BROOME, COUNTING THE COST OF GLOBAL WARMING (1992) [hereinafter BROOME, GLOBAL WARMING]; John Broome & Adam Morton, *The Value of a Person*, 95 PROC. ARISTOTELIAN SOC'Y 167 (1994) [hereinafter Broome & Morton, *Value of a Person*]. I have defended the person-based, or person-affecting, intuition in chapter two ("Is the Person-Affecting Intuition Inconsistent?") and chapter three ("The Nonidentity Problem") of *Child versus Childmaker*, and owe my own view regarding the substantial merits of the intuition to Robertson. See ROBERTS, *supra* note 6, at 45-134.

10. "Averagism," like totalism, is oblivious to the plight of *particular* persons, caring only about the level of well-being possessed by the *average* person. For a clear account of some serious problems that plague both totalism and averagism, a statement of totalism that avoids a number of these problems, and some useful terminology, see Fred Feldman, *Justice, Desert, and the Repugnant Conclusion*, 7 UTILITAS 189 (1995).

Consider, for example, the choice between bringing one person into existence who will have a very high level of well-being and bringing another person—a numerically distinct person, not simply the same person differently configured—into existence who, as a consequence of an inherited disorder, will not have nearly as high a level of well-being. Other things being equal, totalism will prefer the former alternative: bringing into existence the well-being-superior person. Or consider the choice between bringing and not bringing a new person into existence. Totalism may prefer the former alternative—the “be fruitful and multiply” alternative—even when bringing the new person into existence is viewed as a bad thing by those who already exist (e.g., the mother or an already-existing child).

Thus, what matters, according to totalism, is whether the total aggregate level of well-being across the entire world has been brought to its highest level, that is, maximized. If, on an aggregate basis, more well-being *can* be produced, it *should* be produced. This is so even if, in the alternative that totalism rejects, no one who ever exists (past, present, or future) is harmed and some are helped, and in the alternative that totalism approves, someone *is* harmed and the only person who is made better off is someone who need not ever have existed at all!¹¹

In contrast, person-affecting forms of consequentialism, as I interpret them, do not consider *aggregate* well-being to be morally significant but rather the well-being of *each person* who ever exists. Moral obligation and harm avoidance are understood in terms of whether, for each person who ever exists, that person’s well-being has been brought to its highest level, that is, maximized. Exceptions and restrictions to this simple rule are necessary to cover those cases in which the well-being of one person cannot be increased without decreasing the well-being of another.¹² However, that this simple rule is not itself a complete theory of moral obligation may not be a bad thing. That it leaves a defined set of issues undecided simply provides a plausible point of entry for the kinds of considerations, such as equality, that often have been understood to be in tension with consequentialism.¹³

11. Similarly, it is difficult to believe that an alternative in which vast numbers of people have lives barely worth living could be better than a less populated alternative in which everyone enjoys substantial levels of well-being. This is Parfit’s problem of the “repugnant conclusion,” which he considers to raise a difficulty for the totalist. See PARFIT, *supra* note 8, at 381-90. For a response, see Feldman, *supra* note 10, at 189-206.

12. I have presented such a view in ROBERTS, *supra* note 6, at 45-86 (ch. 2: “Is the Person-Affecting Intuition Inconsistent?”).

13. Historically, objections to consequentialism have focused on issues of equality, fairness, and justice. Such objections have long plagued the

In contrast to totalism, a person-affecting consequentialism—which I have called “personalism”—is more clearly consistent with the view that we are, not simply as a matter of Fourteenth Amendment law or even Millian principles of personal liberty, *morally* free to make choices that we intuitively believe to be our own. Thus, personalism, in cases in which totalism may not, allows individuals to decide (a) whether to produce a new person, and (b) who that new person shall be (e.g., the child with or the child without the hereditary disorder) *without* taking into account the well-being of merely possible future persons (such as a child we may opt not to have).

The issue of whether cloning harms, thus, has legal and moral significance. In this paper, I make three points. The first point concerns the importance of avoiding an excessively broad criterion for determining when conduct genuinely harms. Not just any negative counts. It would hurt me more than I can say should my wonderful little girl grow up to be a Republican. Though my pain would be perfectly real as would the causal link between that pain and her choice, it does not follow that a statute that gives me the right to veto her politics would pass constitutional or moral muster. If harm at all, my pain is, to use Mill’s term, “constructive” or “indirect” in nature. For one thing, *I* am the dominant source of the harm I suffer, rather than it having unavoidably come to me from the circumstance of my child’s politics. It is harm that could have been avoided altogether had I opted to think differently about my daughter’s choice (and in this way we can distinguish a child’s politics from a child’s suicide). In addition, if my daughter’s politics would cause me to suffer so deeply, then perhaps I am doomed to suffer. Had she elected to remain on what I regard as the path of the straight and narrow, my situation may not have improved a whit. Finally, it is not as though the effects of her choice are wholly and purely negative. The effects are mixed. Presumably, her views are of some comfort to her and arguably to others. The presence of all of these factors indicates that the so-called harm that flows from my daughter’s politics would not justify a constraint on her politics.¹⁴

consequentialist and have made consequentialism in general the object of skepticism. It is in fact hard to believe that even in the face of vast and remedial inequalities all that matters morally is the total aggregate amount of well-being in a given alternative. However, person-based forms of consequentialism are not obviously subject to objections premised in equality considerations.

14. See generally JOHN STUART MILL, ON LIBERTY 75-94 (Alburey Castell ed., Harlan Davidson, Inc. 1947) (1860) (ch. 4: “Of the Limits to the Authority of Society Over the Individual”).

Opponents of cloning often describe various negatives as reasons to ban or restrict cloning without recognizing their constructive or indefinite character. Just as often, and just as unfortunately, defenders of cloning cite a range of such negatives, point to that very lack of definition, and proceed quickly to the conclusion that restrictions on cloning are morally and legally impermissible. Both these modes of argument lead to confusion and waste time. We should—it seems obvious—avoid them altogether.

As a second point, however, I argue that we do have good reason to think—and that we are in fact committed to accepting—that human cloning harms people in ways that are perfectly genuine in nature. The harm I will describe is not a harm that will arise in *every* circumstance in which cloning might be used to produce new people. Nor is this harm related to any damage that cloning might do to the undifferentiated, or barely differentiated, human embryo—the kind of harm that might be expected to be imposed in the research context. The argument I will put forward thus does not justify an absolute ban on the use of cloning to produce new people or on research involving human embryos.

My argument supports only the relatively narrow conclusion that, in order to prevent harm, it is necessary—whether in the private setting or the public—to prohibit the use of any cloning or other technique to produce one or more individuals (as “clone multiples”) who are genetically identical to each other or to any original (a “clone source”), other than in certain narrowly defined circumstances. These circumstances would include situations in which, for each affected party—whether clone source or clone multiple—it is either: (a) shown that effective consent has been given by that party, or (b) if that party is incapable of consent, shown, under a heightened standard of proof (such as a “clear and convincing” standard), that the application of the technology is in that party’s “best interest.”

Of course, a legal ban on cloning in one jurisdiction may simply give rise to unregulated, off-shore cloning activities geared toward the production of multiple, genetically identical people. But such a ban, if well-articulated, may just as well serve as a model for other governments and for fertility clinics, institutions, other business associations, and individuals. In any event, speculation about “what will happen off-shore if it doesn’t happen here” should not significantly determine the content of the laws of any jurisdiction. For one thing, it is merely speculation. For another, it sets far too low a standard. That baby-selling is illegal in one jurisdiction probably fuels markets in baby-selling else-

where. From this fact alone, however, it hardly follows that the illegality of baby-selling in the one jurisdiction is a bad thing.

As a third and last point, I consider and reject a seemingly potent defense of cloning. This defense is intended to show how broadly benign cloning is as far as future people (the products of human cloning) are concerned. In fact, the specific person-affecting principle on which the defense relies is a principle that I find to be particularly unassailable (though assailed it has regularly been).¹⁵ The problem with the defense, I will show, is that this unassailable principle in fact has no application at all to any but a very few cloning scenarios. The defense, in fact, takes a form of argument (if P, then Q; R; therefore, Q) so patently invalid that its danger has never been marked by one of those Latin names that have been awarded to those truly devious fallacies thoughtful people might actually mistake for the real thing.

The first point that I want to make can best be expressed anecdotally. The remaining two points require more precision.

2. INDEFINITE HARM: AN ANECDOTE

I once had, not so long ago, a wonderful cat. As a tiny six-week old, orphaned with mom and siblings and in the charge of a humane society, his coat was thin and unkempt. But he was playful and inquisitive, and his blue-green eyes shone as though under a jeweler's light. He was discriminating, holding back his purring until late his first night with us when I put him in bed with my daughter and he accepted her as surrogate litter mate. From the beginning, he was uncanny, a surprise. Sprawling on his back and stretching when my daughter sprawled on her back and stretched. Reaching up to turn a door knob when doors were closed to him. Washing his paws under the faucet as we washed our hands. And he was good. Keeping his eye, Nana-like, on the children, he studied Annabel as she sketched and even, sometimes from a distance, wayward Tommy. One would have thought, watching him as an adolescent play wildly with the children, that he had been stripped of claw and tooth. No marks, no blood, on their hands or faces ever. But then one might have observed him reach for something not plump and fleshy and might have noticed him slowly unsheathing his long, sharp claws. He could bring back a very dead vole just a minute or two after being let outside.

On December 27, 1997, at nearly two years old, by then a startlingly green-eyed, darkly-smoked tabby, he was killed. I was

15. See generally, e.g., Broome & Morton, *Value of a Person*, *supra* note 9; BROOME, *GLOBAL WARMING*, *supra* note 9; PARFIT, *supra* note 8, at 351-441.

in Philadelphia at a conference, and my spouse called me at the hotel to tell me. The cat had been hit by a car at some point during the night and was dead. It had been bitterly cold, and a substantial part of my dismay was due to the possibility that we could have done something for him instead of his simply having frozen to death by the side of the road.

What to do, the morning after death? Back home the next day I tried to locate some blood relative of this remarkable cat. But I was told by the humane society that all my cat's orphaned siblings had been satisfactorily "placed." Nor, to my chagrin, were any of the owners planning a move to Tokyo, for example; nor had any died. I went to bed cursing the "responsible" choice to have Tigger neutered. Had he been permitted to spread his wonderful seed atop this beautiful hill, I could have canvassed the neighborhood and, perchance, located some splendid off-spring—some kitten, some adolescent—to make my own.

It was a long night. But the next morning, for just a moment, it all came together for me. I know about cloning. Now my cat was dead. A lightbulb appeared above my head (months before the same thought occurred to the owner of *that dog*, Missy, in Houston). The cat could be cloned. I fought a deep urge to go out into the yard, break through the frozen earth to the wretched body, lift it out of the ground, and put it in the freezer. My hesitation derived from the knowledge that my family had by then had it with the dead cat.

In this moment of hesitation, one way in which cloning can harm occurred to me. Though still a bad thing, my cat's death would have been less of a bad thing for me if I could have started over with a new kitten who would, in some important ways, be very much like—though of course not identical to nor even exactly similar to—the original. But maybe the cat's death, or a child's, *should* be fully a bad thing. Otherwise, we are not fully incentivized to guard their lives and well-being. The depth of the grief that we understand we will feel is powerful insurance against letting a person we love die.

But does this effect of cloning justify a ban on cloning, at least in those cases in which it would be used to "replace" a dead child? I don't think so. Maybe some parent would somewhere be made more careless with a child because of the cloning option, but maybe not. The harm we worry about would not be unavoidably visited upon the child as a consequence of the cloning option. The parent need not have thought of the cloning option as an excuse to be less than reasonably vigilant. Perhaps there are better ways than banning cloning—an option that at least some theorists seem to think is a good thing—to make par-

ents vigilant. Moreover, careless parents, if deprived of the cloning option, may well find some other rationale for being careless with their children. Finally, we surely do not mean to say that any course of action that would help to increase a parent's well-being after a child's death should be outlawed on the ground that the bare possibility of such an increase constitutes a disincentive to parental caution.¹⁶

The effect that the cloning option might bring about in this context—a child being hurt or killed when a parent, in contemplation of the cloning option, is less than maximally vigilant—would be truly horrible. No one would deny that. It is the weakness of the link between the cloning option and the child being hurt or killed that leads us to question whether the harm that is caused is genuinely a harm of cloning.

Of course, one might make the same argument about nuclear weapons. One might argue that it is not the weapon, but what we do with it, that causes harm, and that if we fail to destroy civilization with nuclear weapons we will surely find some other means of doing so. Despite this argument, is it not reasonable to believe that disarmament is a desirable policy? Is it not likewise reasonable to believe that a ban on cloning would be a good thing, an obvious way to make the world safer for children?

In fact, we can identify disarmament as a morally correct policy only by taking into account a number of facts in addition to the obvious fact that nuclear weapons can cause vast suffering. The same is true of cloning. If there is any upside to allowing the use of cloning to replace a dead child—and arguably there is—and if the cloning option either makes no difference, or can readily be made to make no difference, to the parents' level of vigilance, then we have an excellent example of a harm that is constructive and indefinite in nature, and one we cannot properly consider a *genuine* harm at all.

3. THE CONSENT REQUIREMENT AND ITS IMPLICATIONS FOR FUTURE PERSONS AND CHILDREN

3.1 *Consent and the Adult Clone Source*

John Robertson, among other theorists who defend the use of cloning to produce new human beings, accepts that the use of

16. Other examples of less than definite "harms" cited by anti-clonists include, in my view, that clone multiples will not be "individuals in their own right"; that they will be "identical" to each other; that they will be loved only to the extent that each "emulates or resembles" the clone source; that each will be the "property, subject, or slave of the clone source"; and that each clone multiple is deprived of an "open future." Robertson, *supra* note 2, at 1414-18.

any adult as a clone source is morally permissible—and should be made legally permissible—only if the consent of that adult has been obtained.¹⁷ This is so, he suggests, despite the fact that the genome can be collected perfectly well without any bodily or psychological damage at all and, indeed, without the knowledge of the clone source.

A consent requirement in the case of cloning, where the adult donates his or her whole genome to the effort of producing a new person, has its precursor in the widely acknowledged need for consent in the case of gamete donation. Thus, the use of another's gametes in the production of a new person is considered to require consent, even in the case in which those gametes might be put to use without any bodily or psychological damage and without the source's knowledge. Imagine a woman who has already been successfully treated for her infertility and has produced just the baby or babies she hoped for by application of *in vitro* fertilization and embryo transfer. Imagine further that a certain number of excess ova—ova for which the woman no longer has any use—were collected from her ovaries and are now held in storage in liquid nitrogen by the fertility clinic. Would it be acceptable for the clinic to make use of the one woman's excess ova without her consent in the treatment of another woman's infertility? Clearly, I think, not.

In both instances—the case of genome donation and the case of gamete donation—the consent requirement seems extremely plausible. We want to retain a certain amount of control over our reproductive capacity and so want to be recognized as having a right of consent for the use of our gametes by others. Cloning may not be considered strictly a form of “reproduction” since reproduction involves gamete donation whereas cloning involves the donation of the entire genome. But for this very reason, if anything, the consent requirement may well be *more* important in the case of cloning. We eschew the loss of control over our genetic identity. We do not want a situation in which we would exist as one of perhaps many genetically identical individuals rather than as one of one being thrust upon us without our consent. We would, in short, consider the unconsented placement of ourselves by others in such a situation as presenting a grave risk of harm.¹⁸

17. See Robertson, *supra* note 2, at 1446; see also Ruth Macklin, *Testimony Before the National Bioethics Advisory Comm'n*, Mar. 14, 1997, quoted in GINA KOLATA, CLONE: THE ROAD TO DOLLY AND THE PATH AHEAD 20, 250 (1998).

18. Natural twinning can be distinguished; it is “orchestrated” by no one at all, and so does not count as agent-induced harm. Moreover, we do not think that the woman can be compelled to have an abortion on the basis of the

Indeed, in the usual case, a consent requirement exists because the activity at issue involves the risk of harm to the individual whose consent is considered to be required. Thus, the reason that the cardiac surgeon must obtain the patient's informed consent before performing open heart surgery is that the patient is entitled, prior to the procedure, to second-guess the surgeon on whether the surgery itself is really the patient's best option. It may not be. Medication alone will in some instances be the better choice, given the condition of the heart and the patient's age and personal preferences. Where medication is the better choice, in the sense that the patient would have been better off with medication than with surgery, and surgery is performed instead, the patient is harmed. Thus, it is the fact that surgery carries with it a risk of harming the patient, together with the understanding that the patient should not be subjected to this risk unless he or she chooses, that forms the basis for the right of consent.

Similarly, we need another's permission to take money out of his or her bank account even if our doing so will likely benefit that person, by, for example, allowing us to invest that person's money on his or her behalf in some truly marvelous investment vehicle. In contrast, we may make deposits to another's bank account without that person's consent. The difference in these two cases is that the withdrawal of funds creates at least the risk of harm while the deposit does not.

Thus, our insistence on the consent right implies that we think being used without consent as a clone or gamete source involves a significant risk of harm. Notably, the fact that we think that cloning poses a significant risk of harm—enough of a risk that a consent requirement should be imposed—alone will be adequate to support the main implications of this paper. Thus, there is no urgency to come to a final view, for purposes of this paper, as to the precise nature of the harm for which cloning places us at risk. In other words, there is no particular need to say precisely what is so bad about having a situation thrust upon us without our consent in which we exist as one of perhaps many genetically identical individuals rather than as one of one. Nonetheless, a brief discussion of this issue can serve to resolve any lingering doubts regarding the appropriateness of the consent requirement. Thus, we consider what the harm of cloning may

interests of the fetus or, more importantly, of the person into whom that fetus will ultimately develop. This is not to say, however, that in some cases involving multiple fetuses the woman is not morally obligated to abort selectively. See Philip G. Peters, Jr., *Harming Future Persons: Obligations to the Children of Reproductive Technology*, 8 S. CAL. INTERDISCIPLINARY L.J. (forthcoming 1999).

plausibly be, given that the clone or gamete source need not suffer any bodily or psychological damage and need not even be burdened by the knowledge that he or she has acted as clone or gamete source. What, in other words, is the likely basis for the consent requirement?

The answer to this question is two-fold. First, though in some instances unconsented cloning may not give rise to psychological injury, in other instances an individual may suffer extensive psychological injury upon learning that he or she has unconsentedly been placed in a situation in which he or she is one of perhaps many genetically identical individuals rather than one of one. Here the harm is easily identified. Few theorists will deny, at this late date in the twentieth century, that harm extends beyond merely bodily harm. Some theorists might dismiss harm in the form of psychological injury as merely "constructive" harm—avoidable misery that the subject has created for himself when he might perfectly well have considered his status as unconsented clone source in a more positive light. This approach does not seem particularly plausible. More importantly, it is not an approach one can consistently maintain if one considers the right of consent a necessary means of protecting one's own mental health in the brave new world of reproductive technologies.

Second, even in instances in which individuals for one reason or another—perhaps because they have not been informed of their status as clone source—do not suffer psychological injury, they may nonetheless have been harmed. For harm does not necessarily require bodily or psychological damage. Our well-being is not strictly measured in bodily and psychological terms. Thus, we can be harmed even in cases in which there has been no bodily or psychological damage. We can, moreover, be harmed without being aware of having been harmed. Well-being is not, in other words, simply a matter of enjoying some conscious, pleasant state of mind.

But neither is well-being anything very mysterious. Thus, having funds withdrawn from our bank account without our consent can harm us even in a case in which we are unaware that the funds have been withdrawn and we suffer neither bodily nor psychological damage. Violations of the control we want to maintain over our own reproductive capacity and, perhaps more so, over our own genetic identity, can likewise harm us. Though the unconsented use of someone's gametes will not necessarily make that person a legal parent of the new person those gametes are used to produce, the bare establishment of the genetic link between the unwitting gamete source and the new person seems

to damage interests in privacy and wreak havoc on the control we think we ought to have over our own bodies, including their reproductive capacity.¹⁹ The genetic link in the case of cloning is obviously much closer, and the disruption of control and the potential harm is correspondingly much greater.

The loss of control over the use of one's gametes in the production of another constitutes a harm. Likewise does the loss of control over the use of one's very genome. In both instances, the potential for harm creates a sound basis for the consent requirement.²⁰ Of course, in most instances, potential harm in the form of psychological injury creates an independent and quite straightforward basis for the consent requirement as well. However, as noted above, for purposes of this paper, the bare admission that we think that our being used as clone sources without our consent places us at significant risk of harm is enough. A fully-developed account of harm will not be necessary.

3.2 *Consent and the Nonadult Clone Source*

It thus seems that cloning advocates would agree that laws should be put into place—and may already be discernible in common or constitutional law—to reflect the ethical consensus that no one should wake up one day to find himself or herself unconsentedly one of perhaps many genetically identical individuals rather than simply one of one. But this apparent common ground vanishes the instant we shift our focus from the adult, who is capable of giving consent, to children and future persons, who are not.

Of course, as a general matter, children do not have the consent rights that adults have. They do not have a right of consent to most medical treatments, for example, because they cannot effectively consent. It is beyond obvious that future persons—persons who do not yet exist but who, as a result of the conduct we engage in today, will come into existence at some future time—are incapable of consent so long as they are merely future.

Thus, children and future persons are, unlike adults, disabled from eliminating the issue of harm in the cloning context by giving consent. But what implications does this fact have for

19. See *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) ("The profound impact that [becoming parents solely in the genetic sense] would have on [the Davises] supports their right to sole decisional authority as to whether the process of attempting to gestate these preembryos should continue.").

20. Leon Kass makes a related point regarding consent, questioning how theorists who would insist on a consent right can consistently deny that cloning is not harmful. See Leon Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U.L. REV. 679, 694 (1998).

whether cloning has the potential to harm these individuals? Virtually none, it seems. The child cannot effectively consent to the donation of his or her kidney to someone in renal failure. But this fact hardly implies that removing the child's kidney does not pose a significant risk of harm to the child. The harm issue does not go away just because the individual at risk of harm is unable, for whatever reason, to consent.

Likewise, from the fact that a child cannot effectively consent to being used as a clone source it does not follow that being used as a clone source does not harm the child, if not during childhood, then later in life. Precisely the same can be said of the early, undifferentiated human embryo. In contrast to the case of children, in the case of the embryo the consent issue is not even interesting. Moreover, many believe that the undifferentiated embryo is, in itself, devoid of moral significance. But from this fact it does not follow that the person, about whom we do, or should, care, into whom the undifferentiated embryo may eventually develop cannot be harmed by earlier having been put to use as a clone source.²¹

In both instances, the harm for which the individual who cannot consent—whether child or future person—is placed at risk when he or she is used as a clone source is precisely the harm for which we take ourselves to be placed at risk. The harm does not arise from the process of cloning *per se*—an innocuous procedure, from the point of view of the fully formed human being or the early, undifferentiated human embryo. Rather, the harm arises from *finding* oneself placed in or *being* placed in a situation in which one is simply one of many genetically identical individuals rather than one of one. Whether or not a matter of psychological injury, the harm arises from the violation of the control that one thinks one has over one's own genetic identity. It is the very kind of damage we as adults anticipate for ourselves—the very basis for our insistence on claiming for ourselves of the right of consent.

21. I argue elsewhere that future people who will exist are important, for moral purposes, prior to the point at which they come into existence. And I have argued that person-affecting approaches are consistent with this view. See ROBERTS, *supra* note 6, at 1-43 (ch. 1: "What Is the Person-Affecting Intuition?"); cf. DAVID HEYD, GENETHICS: MORAL ISSUES IN THE CREATIONS OF PEOPLE 99, 106 (1992). Larry Temkin suggests that the nonidentity problem provides us with a good reason to limit any person-affecting approach we might adopt to currently existing people. See LARRY TEMKIN, INEQUALITY 245-82 (1993). I have argued otherwise, in ROBERTS, *supra* note 6, at 87-133 (ch. 3: "The Nonidentity Problem").

We might strive to create what Amartya Sen calls an "entrenched inequality"²² by teaching children and future persons that, though the harm of being used without consent as a clone source counts morally and legally if it happens to *us*, the same harm is without moral or legal significance if it happens to *them*. Such a strategy might quell outrage on their part and dampen their urge to litigate. But it is far from a morally permissible strategy, and any attempt to incorporate it into the law would be constitutionally as well as morally problematic. Consider, for example, the constitutional status of a state law or state hospital policy in which adults would retain the right to consent to donating one of their own kidneys while a child's kidney may be taken without any process beyond that of obtaining consent from the child's parent. Though children are routinely considered to have a lesser constitutional status than their parents, such a law or policy should trigger close judicial scrutiny.

At the same time, the fact that a child cannot effectively consent to the donation of his or her kidney to another does not imply that the donation cannot, or even that it should not, take place. One plausible approach that some courts have taken in such contexts has been to allow children and other incompetents to be subjected to very questionable medical procedures, including bone marrow and kidney donations and even sterilization, as long as it is shown (perhaps, shown clearly and convincingly) that the procedure is in the individual's best interest.²³ The pro-

22. SEN, *supra* note 7, at 55.

23. The issue of subjecting children and other incompetents to medical procedures that place them at risk at the behest of their parents is an issue that comes before the courts from time to time. This is so, despite the fact that in the routine medical case parents are assumed to be acting in their children's best interests and so are considered to be able to give effective consent for a wide variety—though not all—medical procedures and treatments. See *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (subjecting three-and-a-half year old twins to a bone marrow harvesting procedure against mother's wishes to benefit a half brother with whom the twins had no close relationship not permitted since not in the twins' best interests); *In re Grady*, 426 A.2d 467 (N.J. 1981) (sterilization of nineteen year old woman with Down's syndrome may be ordered in the exercise of the court's *parens patriae* jurisdiction on a showing by clear and convincing proof that sterilization is in the woman's best interest); *In re C.D.M.*, 627 P.2d 607 (Alaska 1981) (involving facts similar to the *Grady* facts); *Strunk v. Strunk*, 445 S.W.2d 145, 146-47 (Ky. 1969) (mother's request to transplant kidney from twenty-seven year old incompetent son to his twenty-eight year old competent brother approved, on grounds of best interest, in order to avoid psychological trauma to incompetent son of older brother's death). An alternate standard for determining when risky and questionable medical procedures or treatments should be permitted is the "substituted judgment" test. Though there may be much to be said for this test in the context of withdrawing life support treatment from once-competent individuals

posals to extend the "best interest" test for applications of embryonic and somatic cloning in cases where the would-be clone source (whether child or future person) is incapable of consent is an obvious one.

If our concern is to insure that, in these questionable cases, the parent who requests the procedure is properly motivated and that the procedure will not harm the child, then the best interest test seems manifestly appropriate. On this test, the donation of a kidney by a child to someone who has no close relationship to the child or responsibility for the child—even in the case where the parent urges that the donation go forward—will ordinarily not be permitted. In contrast, donation to a sibling—particularly a sibling on whom a needy child can be expected to depend—may be acceptable. Of the alternatives available from the child's own point of view, living with only one kidney and having a sibling survive to whom one is strongly attached may be the best.²⁴ If the best that *can* be done for the child *has* been done, it is difficult to see how the child can at the same time have been harmed in any legally or morally significant way.²⁵

3.3 *Best Interest Test for Use of Nonadults as Clone Sources*

Do cloning advocates concede that the best interest test should be applied when the individual placed at risk is a child or a future person and when consent to acting as a clone source cannot effectively be given? Do cloning advocates concede that the child or undifferentiated embryo should be used as a clone source only if imposing on the child or future person into whom that embryo may develop the condition of existing as one of perhaps many genetically identical individuals is in that individual's own best interest?

who are in a persistent vegetative state, I believe that it is far too indeterminate for application in cases in which the donor has never been competent and so is not in a position to have clearly expressed his or her views with respect to the medical procedure at issue. I thus put it aside for present purposes. For an interesting discussion of the history of the substituted judgment test and the best interest test, see Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1 (1990).

24. These are analogous to the facts of *Strunk*, 445 S.W.2d at 146-47 (allowing kidney donation in case where incompetent man could be expected in future years to depend on older brother).

25. Of course, a still better alternative from the point of view of the incompetent would be to have the sibling survive but not by way of donation of the incompetent's own kidney. But such an alternative may not be available. Unavailable alternatives do not count in our assessment of which alternative best serves the interests of the incompetent.

Proof under the clear and convincing standard that using a child or undifferentiated embryo as clone source is and will be in the best interest of the child or the future person into whom that embryo may develop seems a plausible test for courts to use in determining the permissibility of the application of the cloning technologies in the production of new people, and I hereby propose it.²⁶ In addition, judicial approval on grounds of best interest should be made a statutory prerequisite of any application of cloning technologies for the production of new people. Such clarity in the law is necessary for the protection of children and future persons, notwithstanding the fact that liability may well attach under common law tort principles even in the absence of a statutory scheme specifically designed to address cloning issues.

The best interest test would not support a complete ban on the use of cloning to produce new people. Rather, it would allow us to draw lines. The best interest test would, for instance, distinguish applications of cloning in Ayala-type circumstances, where the cloning of a sick child might well save that very child's life,²⁷ from using a seemingly superior child or embryo as clone source to produce many embryos for uterine transfer.

26. See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (holding that the Constitution does not prohibit a state from requiring that an incompetent patient's wishes be established by clear and convincing facts).

27. In the Ayala situation, the parents of a daughter stricken with leukemia conceived another child in the hope that that child would prove a suitable donor for a bone marrow transplant. See Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1170-75 (1996). On the facts of Ayala, the "best interest" test would come into play twice: once with respect to the bone marrow transfer procedure, and again with respect to the cloning of the older sister. In the actual Ayala case, it seems evident that the younger of two sisters, the baby the parents produced in the hope that she would be able to serve as bone marrow donor, would reap clear benefits if her older sister's life, threatened by leukemia, was saved rather than lost. Moreover, the burden placed on the younger sister—the risks inherent in bone marrow donation—were slight. So the argument could be made that the bone marrow donation was in the younger sister's best interests. In the actual Ayala situation, the hospital proceeded with the donation and the older sister's life was saved. Had the parents produced a clone of the older sister, the parents would have had a great deal more certainty that the newly-created daughter would be able to serve as a bone marrow donor. With respect to the bone marrow transfer itself, the "best interest" analysis in the hypothetical case would be exactly the same: from the younger sister's point of view, the benefit of the donation was substantial and the risk very slight. Of course, a different result might (quite appropriately) be obtained in cases in which the risks for the younger sibling are greater, e.g., where the issue is not bone marrow donation but rather kidney donation.

Advocates of cloning, however, do not propose the best interest test. Robertson himself never directly addresses how harm to the child can be avoided when the child is incapable of consenting to being used as a clone source. Rather, he only briefly addresses the consent issue, writing simply that “[c]hildren do not ordinarily have the right to determine whether their parents have additional offspring.”²⁸

While this statement is generally true, it hardly follows that no consent issue—and no harm issue—arises where the parents’ reproductive choice involves using the child as a clone source. Similarly, although I do not have the right to determine whether my competent, adult sister has a child, it hardly follows that no consent issue arises where my sister’s reproductive choice involves using me as a clone source. It does not follow that I cannot be harmed by her choice.

The consent issue arises in the case of children and future persons because the harm issue arises. Since children, and of course embryos, are incapable of effectively giving consent, some other protective device for addressing the issue of harm must be found; consent cannot fill the role. As noted earlier, I believe the best interest test is a plausible candidate.

At another point, Robertson takes another tack, writing that, “[a]s long as the DNA is obtained noninvasively,” being used as a clone source by one’s parents in no way burdens the existing child.²⁹ And again, “[a]s long as obtaining DNA from [children] does not involve harmful bodily intrusions . . . parents should be free to use DNA from existing children to have and rear additional children.”³⁰

But does the “noninvasive[ness]” of the procedure in general imply that unconsented genome donation cannot *harm*? Does the “noninvasive[ness],” or the absence of “bodily intru-

The best interest test applied to the cloning of the older sister, the sister who had leukemia and for whom no appropriate bone marrow donor had been found, would support the use of cloning in this context. If the younger sister had the same DNA as the older sister, the significant risk that there would be no tissue match between the siblings would have been eliminated. It seems evident that, although the interest in genetic control is very strong, so strong that in the ordinary case we think that adults have the right to consent to being used as a clone source, the interest in life and health are, within limits, stronger. By analogy, when someone collapses suddenly from heart failure, we think it perfectly permissible for medical treatment to be given even in the absence of consent from that person and even if the treatment involves a significant risk of harm.

28. See Robertson, *supra* note 2, at 1446.

29. See *id.*

30. See *id.* at 1394.

sion," of the collection of the genome imply, in the case of the *adult*, that unconsented genome donation cannot harm, and therefore that no consent is necessary? Clearly, not. The mechanical collection of the genome, without more, is not problematic for anyone. The harm the adult worries about, rather, is that of *finding* oneself unconsentedly placed in, or *being* unconsentedly placed in (whether one discovers it or not), the situation of existing as one of perhaps many genetically identical individuals rather than as one of one. And it is precisely that harm that we should consider as we assess the technology of cloning from the perspective of children and future persons.

One might propose a dual definition of "harm"—one for adults that is broad enough to form the basis of the consent requirement we insist on retaining, and one for children and future persons that is narrow enough that we need not create a mechanism (such as the best interest test) that would protect those who cannot effectively consent. Robertson comes very close to such a proposal when he (a) insists that adults have a right of consent to being used as a clone source, but (b) considers "tangible harm" to the child to be the sole limiting principle on the adult's constitutional right of procreative liberty.³¹ This approach, however, is indefensible. If being used as a clone source can harm adults, it goes without saying that being used as a clone source can harm children as well—if not during childhood, then later in life. Likewise, using an undifferentiated human embryo as a clone source can harm the future person into whom that embryo eventually develops.

In short, the fact that the genome can be collected "noninvasively" and without "bodily intrusion" does not answer the question of when an individual incapable of consent may legitimately be used as a clone source.

31. See *id.* at 1402. Possibly, Robertson means to embrace more than mere bodily intrusion as "tangible harm." At a later point, for example, he raises the issue of the extent to which existing as a clone might cause psychological injury. See *id.* at 1418. Perhaps he intends to include psychological injury as a form of "tangible harm." More generally, perhaps he is suggesting for the child a definition of harm that would more or less embrace the notion of harm we find in the law of torts. But the definition of harm Robertson is suggesting for adults is broader than this because adults can be cloned without their knowledge and without physical or psychological damage, and we still insist on the adult's right to consent. Since issues of privacy are implicated, we think, for adults, it may be appropriate to identify this latter definition of harm by analogy to a constitutional conception of privacy. In any event, however precisely characterized, any approach that relies on a dual standard of harm remains unacceptable.

3.4 *Best Interest Test for Production of Clone Multiples*

Much of the preceding argument regarding harm and the clone source also applies to clone multiples—those individuals produced by application of cloning techniques. Imagine that an adult has consented to being used as a clone source, thereby rendering moot the issue of harm to that adult. Suppose, then, that the technique of somatic cloning is used to produce a number of human embryos genetically identical to both the clone source and each other. Some of the embryos are immediately transferred to develop *in utero*; others are stored in liquid nitrogen and, at various later times, removed from storage and transferred to develop *in utero*. Babies are eventually born into different families at different times. These babies find themselves existing as one of perhaps many genetically identical individuals, rather than simply as one of one.

Embryonic cloning has, of course, the same ability to produce clone multiples. Indeed, it may well be a fiction to consider one of two embryos that have been created from a single embryo as the clone “source” and the other as the clone “multiple.” The status of these two embryos is precisely the same. We may thus opt to think of neither as the clone source, and rather to conceive of both—together with any additional embryos created—as clone multiples. As in the case of somatic cloning, babies may eventually be born into different families at different times. And as in the case of somatic cloning, these babies find themselves placed in the situation of existing as one of perhaps many genetically identical individuals rather than as one of one.

When children or future persons are pressed into service as clone sources without their consent, the fact that they cannot consent does not, as we have seen, eliminate the issue of harm. The same is true for clone multiples. At the relevant time—the time of the application of the cloning techniques—they had no capacity to consent. But the fact that clone multiples cannot consent to their status as clones does not eliminate the issue of harm. The harm is not the collection of the genome *per se*. The harm rather consists in *finding* oneself unconsentedly placed in, or *being* unconsentedly placed in (whether one discovers it or not), the situation of existing as one of perhaps many rather than as one of one. This harm is potentially suffered not simply by the clone source but also by each clone multiple.

Since the harm is the same for the clone multiple as for the clone source, the test for applying the technique when consent cannot be effectively given—the best interest test—should be the same as well.

Consider, as an example, the case of Sissy, one of ten genetically identical individuals cloned from a consenting adult, Sally. Sally's consent is informed, effective, and valid. Sissy, of course, was in no position to give consent at the time the somatic cloning technique was applied. But she is now a full-fledged person, say, a three-year-old. Were Sissy's best interests served by being placed in the situation of being one of ten genetically identical individuals? I think not, especially in a world where we so value having control over our own genetic identity.³² She would have been better off as one of one—and in full possession and control over the genetic identity that we consider of such vital importance in our own cases. The best interest test is thus failed in this case. Sissy ought not, and it ought not have been legal for her to have been, produced as one of many. Precisely the same analysis that I have used here for somatic cloning holds for embryonic cloning as well.

4. THE "BETTER TO EXIST" DEFENSE OF CLONING

But if Sissy were not a clone, she would not, *could* not, exist, and is it not better to exist as a clone—as one of perhaps many, even *very* many—than never to exist at all?

This is, in essence, a defense of cloning offered by John Robertson, Lee Silver, and Ruth Macklin. According to this defense, even if the condition of being a clone—of being placed in a situation in which one is one of perhaps many genetically identical individuals rather than simply one of one—is or can be a bad thing, the condition nonetheless does not represent a genuine harm to any clone multiple. More precisely, suppose that it appears that giving a child "the same DNA as another individual" would harm that child.³³ Further suppose that the state has banned both embryonic and somatic forms of cloning in an effort to prevent this apparent harm. According to Robertson, "but for [such techniques], the cloned person would not exist. Banning the technique may prevent a child from being born into the circumstances of concern"—the circumstance of existing as one of many rather than as one of one—"but it does so, not by assuring that [he or she] is born in different [better] circumstances, but by preventing [him or her] from being born at all."³⁴

32. See ROBERTSON, *supra* note 6, at 200.

33. ROBERTSON, *supra* note 2, at 1405; see also LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 120 (1997); MACKLIN, *supra* note 17.

34. ROBERTSON, *supra* note 2, at 1405.

It does seem implausible that the child we purport to be worried about really would be better served by never having existed at all. As Robertson, I believe correctly, observes,

Preventing existence as a way to prevent harm to the person who would exist makes sense for that person only if it reasonably appears that once born, the child's existence would be so full of pain and suffering that [his or her] interests would be best served by nonexistence. . . . But it is rare that the techniques at issue—whether cloning or other genetic manipulations—would cause harm or suffering to such an extent.³⁵

At another point Robertson repeats this argument: "Of course, the fourth, fifth, or *n*th clone of a particular DNA would not itself be harmed, not having any alternative way to be born."³⁶ Thus, even if cloning harms the person given "the same DNA as another individual," preventing the harm necessarily involves preventing the existence of that person. *That* is not in the person's interests. Being one of several genetically identical individuals—as opposed to not existing at all—is from the person's own perspective the lesser of two evils. Like the fleeting discomfort of a vaccination essential to good health, the *apparent* harm of cloning turns out not to be a *genuine* harm at all.

This argument, however, contains a critical error.³⁷ In most instances of cloning, preventing any particular person from suffering the harm at issue—the existence as one of many rather than as one of one—does *not*, contrary to what Robertson says, necessarily involve preventing the existence of that person. Suppose a number *n* of genetically identical individuals, each a person and each a clone multiple, have been brought into existence either via embryonic or somatic cloning. Consider the circumstance of any arbitrary individual—we shall call her "Sissy"—in this set of *n* members. Does preventing the harm to Sissy of existing as one of many rather than as one of one (or including Sally, one of two) necessarily require the prevention of Sissy's existence? The answer clearly is no; the responsible agents might

35. *See id.*

36. *See id.* Robertson has presented this particular argument on numerous occasions. *See, e.g.,* JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 169 (1995); John Robertson, *The Question of Human Cloning*, HASTINGS CENTER REP., Mar.-Apr. 1994, at 10-11.

37. I have argued this point elsewhere, in connection with views held by Robertson and others. *See* ROBERTS, *supra* note 6, at 192-94; Melinda Roberts, *Human Cloning: A Case of No Harm Done?*, 21 J. MED. & PHIL. 537 (1996); Melinda Roberts, *A Way of Looking at the Dalla Corte Case*, 22 J.L. MED. & ETHICS 339, 339-42 (1994); Melinda Roberts, *Good Intentions and a Great Divide: Having Babies by Intending Them*, 12 LAW & PHIL. 287, 287-317 (1993).

have instead prevented the existence of *others*—in particular the existence of each clone multiple *other than Sissy* in the set of n individuals. The proposal is not that the agents kill off the other n clone multiples. Rather, the proposal is that the n clone multiples, less, of course Sissy, never be brought into existence as persons in the first place.

How might agents accomplish this end? They might have applied the cloning techniques to produce the n embryos from which the n human beings, including Sissy, develop. They might then have destroyed all those n embryos except for the one from which Sissy developed. Had they done so, Sissy would have existed as one of one (or two, including Sally) rather than as one of n . In this way, preventing any particular person from suffering the harm at issue—the harm of being brought into existence as one of perhaps many rather than as one of one (or two)—does not necessarily involve preventing the existence of *that* person.

This example raises a last, critical issue that must be addressed. In the example, Sissy has been produced as one of n clones. But suppose agents had acted to improve Sissy's lot, and that she alone, among the n clones, had been brought into existence. Since Sissy and Sally are genetically identical, Sissy exists, in this new example, not as one of one but rather as one of two. Has she been harmed? Here, it seems, the "better to exist" argument works. For it seems that Sissy cannot exist except as a clone of Sally and so, in the new example, has not been harmed by the application of the cloning technology.

More generally, Robertson presumes—correctly, I believe—that existence as one of many is preferable to nonexistence.³⁸ Moreover, I concede that the existence of each clone multiple depends necessarily on the application of a cloning technique. But it is not the cloning technique *per se*, whether somatic or embryonic in form, that creates the risk of harm. The harm occurs later, when multiple, genetically identical, full-fledged persons are brought into existence. As I have argued, contrary to Robertson's view, the harm of cloning is perfectly avoidable. Each of the clone multiples—those full-fledged human beings

38. Others disagree, arguing that we cannot sensibly compare existence with nonexistence and thus cannot accept Robertson's conclusion that existence is better than nonexistence. See Cynthia B. Cohen, "Give Me Children or I Shall Die!": *New Reproductive Technologies and Harm to Children*, HASTINGS CENTER REP., Mar.-Apr. 1996, at 23-24. But to deny the sensibility of the comparison does not refute Robertson's conclusion. In fact, it strengthens it. If a defective existence is the only possible alternative for the supposed victim, then how could the victim possibly be genuinely harmed, or wronged, in that alternative?

produced via cloning—*can* exist independently of each other. Let the lab technician produce a hundred genetically identical human embryos if he or she pleases. But if these hundred genetically identical embryos are brought to term as persons, the harm done to each is not truly unavoidable. Contrary to Robertson's view, for *each* of the hundred children there exists an alternative course of action that would have prevented *that* child from suffering the harm at issue. Agents need only have brought that *one* child into existence and *not* done the same with respect to the remaining ninety-nine.³⁹

Notably, the view that this particular fact has ethical significance unmistakably invokes the person-affecting concept of harm that was introduced earlier.⁴⁰ In contrast to personalism, totalism would disregard avenues by which the well-being of any particular person can be increased and rather focus on the extent to which the level of aggregate well-being can be increased. Thus, according to totalism, producing the hundred—who are as individuals made less well off by their status as clone multiples, yet together in possession of a good deal of well-being—might be the morally obligatory course of action! But Robertson has, correctly, I believe, declined to endorse what he calls a “class-based” view of harm in favor of a “person-based” approach.⁴¹ Thus, it is not open to him to claim now that the aggregate level of well-being, and not the well-being of any particular person, is what has moral and legal significance.

One might object that I have misconceived the nature of personal identity, and that one who exists as one of many genetically identical individuals is *not the same person* as the one who exists as one of one.⁴² If this extremely fine-grained criterion of personal identity were correct, then it would also be correct that the person who exists as one of many can *only* exist as one of

39. Robertson proposes that cloning technologies be limited to the production of no more than three genetically identical offspring. See Robertson, *supra* note 2, at 1451. Nothing in his article clearly supports such a limitation. We can easily imagine cases in which three are too many and cases in which three are not enough. Here too the best interest test is an appealing alternative, for it has precisely the attributes any *ad hoc* rule itself lacks: the ability to tell us when three is too many and when three are not enough. In fact, Robertson's “limit-of-three” rule speaks volumes: he recognizes, and expects us to recognize, a serious normative issue—one that he has argued at length does not exist.

40. See *supra* text accompanying notes 8-13.

41. See Robertson, *supra* note 2, at 1406.

42. There are some textual suggestions that Robertson accepts such a fine-grained view of personal identity. Thus, in another context he indicates that “any parental pre-birth manipulation” implies a distinct human being. See *id.* at 1408.

many, and that to try to improve things for that person (by giving that person control over his or her own genetic identity) will have the untoward effect of preventing that person from existing at all.

But the theory of personal identity on which this analysis rests is manifestly false. Not *every* pre-birth manipulation brings into being a new potential person. One twin can survive the demise of the other. Indeed, it is plausible that not even genetic or chromosomal manipulations necessarily change identity (more precisely: cause one person to come into existence in place of another). Thus, it is plausible that one might have existed and had eyes of a slightly different color than one in fact has. Indeed, it seems that in the Down's syndrome child we can see the chromosomally healthy person that the Down's child might have been. Consequently, if medical technology progresses to the point where we can repair the chromosomes of the embryo that carries the extra chromosome responsible for Down's, we must do so if we reasonably can do so. And we must not avoid doing so on the excuse that that child's existence necessarily requires that that child suffer Down's syndrome. At the moment, it does; but it need not. I agree with Robertson that "knowingly bring[ing] a disabled or handicapped child into the world is not a sufficient basis for prohibiting couples from making that choice, at least when they plan to rear the child themselves and have the resources to do so."⁴³ But if technology ever enables us to make the repair, the moral analysis will change dramatically.⁴⁴

43. See *id.* at 1407.

44. Robertson actually suggests otherwise. He considers an instance in which the "condition [was] correctable and the parents refused correction, claiming that they would not have brought the child into the world if correction were required. Even in that case it is difficult to say that the child is actually harmed . . ." See *id.* at 1408, n.133. But this is a mistake. It is quite easy to say in this context that the child is actually harmed, assuming that the parents really do have the choice and that money that they spend on the repair does not require them, e.g., to starve another child. The extent of the harm done is the difference between the level of well-being the child would have if that child had been conceived, the correction been done, and the child in fact been born. That the parents *would* not have chosen to conceive the child, or to bring the child to term, if required by law to make the correction is both legally and morally irrelevant. To see this, simply imagine a man who has shot someone in the arm, defending his conduct with the claim that, had he not shot his victim in the arm, he would have shot him in the heart, that it is preferable to be shot in the arm and live than to die, and that, *ergo*, no harm was done.

