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CLONING: ETHICS AND PUBLIC POLICY

*R. Alta Charo**

Much of the discussion about cloning focuses on whether the act of cloning is right or wrong, according to some theory of morality. This is a worthy debate, and one that should help people to decide for themselves whether to take advantage of this technology, should it become available to them. But at the level of public policy, there is a different debate, for example, whether cloning should be forbidden or permitted. It is insufficient to argue that cloning is wrong and therefore should be forbidden. Many things are wrong but nonetheless are permitted, including bad manners, lying (except, for example, when under oath), and having a child when one is too young or impoverished to care for it as one should. The reasons for avoiding a governmental prohibition of such bad acts are many; governmental action might, for example, be ineffective, overly intrusive, oppressive, or harmful to third parties. In other words, at times, governmental prohibitions represent a cure that is worse than the disease.

In the public testimony and submissions to the National Bioethics Advisory Commission ("NBAC"), three kinds of arguments were heard. Each represented a different kind of analysis that led to a conclusion that cloning is wrong. And each was linked to a particular set of policy concerns. In the end, the NBAC found that all but one of the arguments for the wrongness of cloning failed to overcome the obstacles to enshrining that moral conclusion in law.

The first set of arguments focused on the motivations of those who might want to use cloning, a so-called "relational" argument. By this analysis, cloning is neither intrinsically good nor intrinsically bad. Rather, when done for good reasons, it is ethically acceptable. When the motivations are bad, the act itself is bad as well.

By way of example, some people argued that if cloning were used

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to circumvent infertility, it is being pursued for a worthy reason, and is not a bad act. Others suggested that having a child who is a genetic twin of a sibling in need of a bone marrow transplant is arguably good, as it can save the life of one person without undue pain or suffering to the other. Here, too, the suggestion was made that in such cases, cloning is not a bad act and need not be forbidden. On the other hand, these people argued, when cloning is used to satisfy one's ego, or when it is used in conjunction with commercialized eugenics (as, for example, by selling embryos cloned from "desirable" people at a price higher than that of "undesirable" people), then it is evil and should be outlawed.

In many ways, this approach accords better with moral intuition than many of the analytical arguments that follow. As a matter of public policy, however, it is just not feasible to implement. There is a history of miserable experiences when trying to create rules in which the government defined which acts are permitted and prohibited based on the motivations of the actors. For example, many people who support legal abortion are appalled at the notion that it could be used by someone who simply wants to select the sex of a child. They find this inherently sexist, or, at least, unacceptably gratuitous as a justification for abortion. Therefore, these people often want to prohibit abortion for this one particular reason while preserving all other reasons for allowing abortion.

But the states have found the implementation of this public policy unworkable. It requires an inquiry into the hidden psyches of people who propose to have an abortion—an inquiry that is inherently intrusive and subject to fraud and manipulation. Indeed, it harkens back to the pre-*Roe* era, in which the "liberal" states permitted abortion if a woman could persuade a panel of physicians that her reasons were adequate, a process that invited women to dissemble in order to obtain permission. In the end, the procedure was demeaning to the women and failed to achieve its purposes. One could predict a similar phenomenon should a relational ethic undergird a public policy that premises permission to use cloning on a sufficiently persuasive case being made to some appointed body of judges.

The second type of argument heard by the NBAC was deontological, the so-called "thou shalt not" school of reasoning. Simply put, according to this analysis, cloning is wrong because it violates certain fundamental rules about the appropriate relationship between humans and nature, or humans and God; because cloning takes away the necessity of sexual intercourse; and because it confuses our common understandings of kinship and the separation of generations. These assertions were well illustrated by the moral repugnance arguments of Leon Kass.

He, and others like him, argued persuasively that we should take moral intuition seriously, as it bespeaks a deep attachment to certain fundamental values that, however poorly articulated, nonetheless bind us together as a culture.

But whether these intuitions can be a sufficient basis for public policy is a separate question. To the extent that they are premised on explicitly religious convictions, they are insufficient because no one religious view can be imposed on others. The First Amendment to the Constitution guarantees that. Of course, if religious views can be supported by arguments that even nonbelievers can understand and accept, then they can become a basis of public policy; all that is needed is a widespread consensus.

But a consensus, backed up by a popular vote, can become something more than popular democracy at work—it can become oppressive if it stifles the preferences of a dissenting minority. This is tolerated for most situations, where a simply process of “majority rules” is accepted. It is not tolerated, however, when the interests being stifled are considered fundamental to our notions of liberty.

These so-called “fundamental” interests have been identified, albeit imperfectly, by the Supreme Court. They include those things specifically mentioned in the Bill of Rights, such as freedom of speech, assembly, worship, and association. They also include those things so basic that no one would think they need to be listed in the Constitution, such as the right to marry and form a family. And they include those things that are implicit in the decisions of the Supreme Court, by virtue of their close relationship to these aforementioned rights; the fundamental right to privacy falls into this category.

Thus, before one can accept a public policy based upon a consensus that cloning is wrong and a popular vote to prohibit its use, one must ask whether such a prohibition will impinge upon a fundamental right. Here, the waters become murky. Cloning is, arguably, just another form of reproduction. The Supreme Court decisions since the mid-twentieth century have carved out a large area of family life and reproductive decision-making as beyond the appropriate scope of governmental authority, on the basis that these implicate fundamental rights. But there has never been a clear statement that there is a fundamental right to procreate, especially to procreate by means that require third party assistance.

Further complicating matters is the question of whether cloning is a form of procreation, in either the biological or social sense. While it surely is a form of making a new person, it is divorced from the sexual interaction that forms the emotional and social underpinnings of the ex-

perience that has led courts to claim a zone of “privacy” for American citizens. Thus, it is worth questioning whether the Supreme Court, were it to revisit those earlier cases in light of this new development, would premise its decisions on a right to make a new person or on some other kind of right, such as the right to form intimate associations with others that may entail family formation.

If it is true, though, that cloning is, at least arguably, a form of exercising a fundamental right, then reasons for its prohibition must go beyond moral repugnance. They must be consequentialist, the third category of argumentation heard by the NBAC. In other words, to abridge a fundamental right, one must show that there is a compelling state purpose to be achieved—such as the prevention of a probable and serious harm—and that the only way to achieve this purpose is to abridge the right.

Thus, many people argued that cloning would harm children and society. Children, they argued, would be harmed by the excessive expectations brought to their births by the adults who believed that genetic duplication guarantees duplication of all physical and even psychological traits. Even though this is untrue, it would be the expectations of the parents that would cause the harm. In addition, they argued, the child itself might have false expectations based on the circumstances of its birth, and thus lose the unexpected quality of an open future that is the norm for children. Others argued, too, that a child conceived through cloning would suffer a form of genealogical bewilderment, as it might well have a rearing parent who was a biological sibling. People argued, too, that cloning would be harmful to society, as it would encourage a kind of commercialization, or, at least, commodification, of children. Images of mass marketing in cloned embryos are featured heavily in testimony and newspaper letters to the editor. And the merging of images of cloning and images of soulless drones gave rise to widespread fears of whole populations being created for slave labor.

Should all these things come to pass, they might well be harmful, and some might even meet the test for a compelling purpose. But these harms were both vague and uncertain, hardly enough to overcome the obstacles to abridging what might be a fundamental right. In the end, the NBAC identified only one kind of harm that met this test, and this was the possibility of physical side-effects from the cloning procedure that could result in injury to the children. In the near total absence of animal data, and in the presence of suggestive hints of physical problems that might be associated with cloning (ranging from atypically high mutation rates to shortened life span), it seemed appropriate to limit use of the

technologies. In keeping with a policy of limiting rights as little as possible, however, the NBAC recommended that the prohibition be of five years duration only, while animal data accumulated. Then a reassessment could take place. The NBAC did consider other ways to protect children from harms associated with premature use of cloning in humans. For example, it considered whether the threat of medical malpractice suits would be sufficient to dissuade careless use of the technology. If a person acted in a way that was unreasonably careless, then that person could be punished in the form of monetary damages. This result would send a signal to the rest of the community and serve as a deterrent for similar behavior. By retrospective punishment of an individual, society deters similar acts in the future and changes the standard of care. Unfortunately, this is not a particularly satisfying solution. Judging somebody to be unreasonably careless is a difficult task. It is easy to imagine that driving significantly above the speed limit is unreasonable behavior. In a rapidly evolving field, however, there is no professional speed limit, no point of reference established for comparison. For this reason, among others, tort and malpractice law were unlikely candidates for effective regulation of human cloning.

Alternatively, the NBAC considered a voluntary moratorium, in which physicians and researchers in the United States would agree not to attempt human cloning until a certain period of time had elapsed to allow sufficient data of animal cloning to accumulate. The NBAC commissioned a study on the history of voluntary moratoria in the area of genetic engineering. With a few exceptions, this method worked extremely well in terms of achieving self-restraint in the biological community. However, the NBAC could not ignore the lack of federal oversight in the field of *in vitro* fertilization, which was an artifact of attempts by the federal government to divorce itself from abortion politics. An absence of federal funding has meant an absence of federal oversight. Reproductive technologies are characterized by a confusion between research and therapy, experimental and standard care, all of which means that patients are poorly protected from overly zealous practitioners and from the exigencies of the marketplace. The NBAC was unable to get a statement from any relevant professional society in that field to try to achieve a voluntary moratorium on the part of their members. The absence of such a statement from one of the societies representing the very professionals who might be interested in offering the technology meant that a voluntary moratorium was not a realistic means for curbing premature and possibly unsafe experimentation.

At the end of the day, many people complained that the NBAC had

failed in its duty. By never issuing a stinging condemnation of cloning, by never endorsing any one of the many arguments claiming its inherent wrongness, the NBAC had failed to grapple with the issues, they claimed. But that is not the case. The NBAC is not a group of individuals speaking for themselves, nor a group of religious leaders interpreting a text. It is not the authoritative moral voice of America. Rather, it is a committee of people dedicated to offering advice on how to develop public policy that is ethically defensible. This means that the ethics of the policies as well the ethics of the underlying acts are at issue. For this reason, the NBAC considered its job to be to integrate arguments about the ethics of cloning with an understanding of American political and legal culture.

Newsweek ran a piece a number of years ago, before the end of the cold war, that recited a little ditty attempting to explain differences in national political cultures. It went something like this: in the United States, everything is allowed unless it is specifically prohibited; in East Germany, everything is prohibited unless it is specifically allowed; in the Soviet Union, everything is prohibited especially if it is allowed; and in Italy, everything is allowed especially if it is prohibited. While casual and perhaps too cute, this ditty nonetheless captures some fundamental approaches to governance. The NBAC took this advice to heart.