

MORALITY: THE STARTING PLACE FOR THE DEBATE OVER HUMAN CLONING

I. INTRODUCTION

A war is raging in the United States. It is an intellectual war to determine whether morality is a legitimate basis for argument, and if so, whose morality will gain ascendancy. At stake in this war are traditional notions of family, individual identity, personal autonomy and life.

The latest battle in this war, human cloning,¹ has been raging for over a decade, in various forms and degrees. However, it only recently came to the attention of the general public with Ian Wilmut's announcement in February, 1997² that he had successfully cloned a sheep using a technique known as somatic cell nuclear transfer or SCNT.³

Wilmut's announcement caused quite an uproar. By and large, the public was repulsed, with one CNN/Time poll showing that

[o]f those polled, 69 percent said they are scared by the prospect of cloning humans, and 89 percent said it would be morally unacceptable. Three-quarters [74%] said that cloning human beings is against God's will, and 29 percent said they are so troubled by the ability to replicate life, that they would participate in a demonstration against cloning humans.⁴

This fervor reached a climax with the announcement by Dr. Richard Seed, in January 1998, that he intended to raise funds immediately to clone a human.⁵ Since then, the controversy has diminished in the pub-

¹ The words "clone" or "cloning" are used to mean human cloning unless otherwise indicated.

² Rick Weiss, *Scottish Scientists Clone Adult Sheep; Technique's Use With Humans Is Feared*, WASH. POST, Feb. 24, 1997, at A1.

³ SCNT is a process in which a geneticist removes the nucleus from the egg of a female animal, and replaces it with the nucleus from a donor's reproductive cell. In the case of Dolly the sheep, the transplanted nucleus came from the mammary gland of an adult sheep. Once the nucleus is placed in the egg, the egg is stimulated with an electric current to cause the egg to activate. It is critical to note that because the nucleus comes from an already existent donor, it contains a complete set of chromosomes; these chromosomes do not necessarily come from the gestational mother or from a marital father. Genetically, the clone is the offspring of the donor's parents, and is the identical twin of the donor. NATIONAL BIOETHICS ADVISORY COMM'N, *Cloning Human Beings: Report And Recommendations of the National Bioethics Advisory Commission*, 22 (1997) [hereinafter NBAC Report]. See also John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1374 (1998).

⁴ Poll: Most Americans say cloning is wrong: 7 percent would clone themselves, CNN Interactive, Sci-Tech Story page, (Mar. 1, 1997) <http://cnn.com/TECH/9703/01/clone_poll/index.html>.

⁵ Rick Weiss, *Scientist Plans to Clone Humans; Anticipating Ban, Researcher Says He Has Assembled Doctors, Volunteers*, WASH. POST, Jan. 7, 1998, at A3.

lic's eyes and the issue now appears to be largely relegated to a battle in the professional circles of law, science and ethics, occasionally punctuated by a newspaper article.⁶ We shouldn't be surprised that public interest has subsided. After all, the public appears to be taking the route that Dr. Seed predicted in January of 1997. When questioned by a CNN reporter, Dr. Seed stated:

New things tend to pass in three phases . . . the first phase is . . . fear and abhorrence, the second phase is . . . passivity and tolerance, and the third phase is enthusiastic endorsement, and that's what I think will happen with human cloning.⁷

While public interest has waned, professional interest appears to have increased. What was once a discussion primarily limited to scientific journals has truly become a battle between cloning supporters and opponents. Cloning advocates focus on what they consider to be more practical or utilitarian issues such as the potential uses of the technology, its practicality, and efficiency. They reject their opponents' more ethically-focused arguments as being "highly speculative, moralistic, or subjective judgments" and argue that "personal moral opposition alone is not an adequate basis for laws that prohibit others" from enjoying the benefits of cloning.⁸

This note is not only about cloning. Cloning is simply a means to examine the two primary world views in conflict in America today. My proposition is that the bases of the cloning argument and other similar issues are world views which are necessarily subjective and moralistic in nature. Therefore, morality is the only valid starting point for any truly reasonable debate on such issues. To demonstrate the validity of this point, I will focus on the primary strategies and rationale employed by both sides, and the world views that drive these strategies.

II. ARGUMENTS AND STRATEGIES.

Almost immediately after Wilmut's announcement, President Clinton tasked the National Bioethics Advisory Commission (NBAC) to engage in a 90-day study of "the ethical and legal issues that surround

⁶ The lack of similar public outcry over more recent cloning developments indicates that the public is becoming indifferent to the issue of cloning. See, e.g., Rick Weiss and John Schwartz, *Monkeys Cloned for First Time; Oregon Scientists Created Primates From Embryos Not Adult Cells*, WASH. POST, Mar. 2, 1997, at A4; Associated Press, *Cloned Lamb Has Human Protein Gene; Sheep Could Produce Substances to Treat People*, *British Scientists Say*, WASH. POST, July 25, 1997, at A30; Rick Weiss, *Scientists Clone Adult Lab Mice; Process May Hurry Human Application*, WASH. POST, July 23, 1998, at A1 (cloning of multiple generations of mice (cloning a clone)).

⁷ *Interview with Dr. Richard Seed* (Cable News Network, Jan. 7, 1998), <<http://www.cnn.com/TECH/9801/07/cloning.folo/video2.html>>.

⁸ See, e.g., Robertson, *supra* note 3, at 1441..” *Id.* See also, Ira H. Carmen, *Essay: Should Human Cloning Be Criminalized?* 13 J. L. & Politics 745 (1997).

the subject of cloning human beings.”⁹ In June 1997, the NBAC recommended, among other things, that “[f]ederal legislation should be enacted to prohibit anyone from attempting, whether in a research or clinical setting, to create a child through somatic cell nuclear transfer cloning.”¹⁰ Ironically, proponents and opponents alike have soundly criticized the NBAC’s report. Supporters consider the report to be too restrictive in its recommendation of criminalizing human cloning via SCNT,¹¹ while opponents consider it to be too lenient in its exclusion of other research, including other types of human cloning, such as twinning.¹² It is significant, especially in the context of this note, that despite the NBAC’s recommendation, Congress has been unable to enact any law regarding cloning. As a result, the courts and administrative agencies, such as the Patent Trademark Office (PTO) and the Food and Drug Administration (FDA), are the only entities actually regulating cloning to any appreciable degree.¹³ Unfortunately, such regulation occurs in the absence of any real national or representative dialogue.

Largely because of the courts’ action in the area of reproductive rights, the central strategy for cloning proponents appears to be one of associating human cloning with procreative liberty, in effect piggybacking it on the “right of choice” of *Roe v. Wade* and *Planned Parenthood v. Casey*.¹⁴ This way, even if the Congress enacts one version of the

⁹ NBAC Report, *supra* note 3, at iv. See also Exec. Order No. 12975, 60 Fed. Reg. 52063 (1995).

¹⁰ NBAC Report, *supra* note 3, Executive Summary.

¹¹ See Robertson, *supra* note 3, at 1434, 1437; CARMEN, *supra* note 8, at 750 (questioning whether any evidence supported the NBAC’s recommendation of “legislation in the form of penal law”).

¹² See George J. Annas, *Human Cloning: A Choice or an Echo?* 23 U. Dayton L. Rev. 247, 269-70 (1998) (“The proposed Act specifically does not prohibit or restrict any other type of research.”). In 1993 Jerry Hall announced that he had successfully created a preembryonic twin through a process called blastomere separation or “twinning.” Twinning of preembryos is a process in which human blastomeres are purposely split by a geneticist in order to create twins. According to Professor Ira Carmen, “when Jerry Hall demonstrated the ability to cleave human blastomeres, with no thought whatever of implanting any of the resulting clones, many bioethicists were more than disturbed by the possible consequences. ‘What we are talking about,’ said one, ‘is the ability to mass-produce humans.’” CARMEN, *supra* note 8 at 747. See also Kathy Sawyer, *Researchers Clone Human Embryo Cells; Work Is ‘Small Step’ In Aiding Infertile*, WASH. POST, Oct. 25, 1993, at A4.

¹³ See *e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that in the context of frozen embryos, “the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the preembryos in question.”); *FDA Says No Human Cloning Without FDA Approval*, Dow Jones News Serv. Jan. 20, 1998; “‘Morality’ Aspect of Utility Requirement Can Bar Patent for Part-Human Inventions,” 55 PATENT, TRADEMARK & COPYRIGHT JOURNAL 555-57 (Apr. 9, 1998) (citing *Lovell v. Lewis*, Fed. Cas. No. 8568 (C.C. Mass. 1817)).

¹⁴ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). See also Robertson, *supra* note 3, at 1390 (“Some right to

proposed ban it has been considering since last year, the law will be subject to the "particularly careful scrutiny" that the Fourteenth Amendment requires in cases involving reproductive choice.¹⁵ However, even some cloning advocates admit that this strategy may not work in light of the fact that "the Court has never recognized an affirmative right to procreate by anyone, at any time, by any means."¹⁶

On the other side of the issue, cloning opponents are focusing on a myriad of issues that seem to spring from more conceptual and ideological concerns such as the rights of the clone, the moral "rightness" of creating or manipulating life, and its spiritual or religious permissibility.¹⁷ When opponents venture into a more utilitarian world, they are concerned with the probability of future abuse either as a result of sheer excitement over new technology, or as a result of the world market forces and economic interests.¹⁸ Such policy arguments are much better suited

engage in genetic selection would also seem to follow from the right to decide whether or not to procreate."); Note, *Human Cloning and Substantive Due Process*, 111 HARV. L. REV. 2348 ("human cloning as a reproductive technique is a protected liberty, guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments") [hereinafter *Due Process*].

¹⁵ *Roe*, 410 U.S. at 170.

¹⁶ Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 47 (1997).

¹⁷ See Annas, *supra* note 12, at 249-50.

The most important things we can learn [from the almost universal condemnation of human cloning] will likely be about life, not science, about values, not technique- things. . . . The danger is that through human cloning we will lose something vital to our humanity, the uniqueness of every human. . . . [human cloning] symbolizes science's unrestrained quest for mastery over nature for the sake of knowledge, power, and profits. Cloning can also be seen as undermining our very concepts of parenthood, parental responsibility, fertility, and the status and value of children.

Id. See also 144 CONG. REC. S318-02, S318 (daily ed. Feb. 3, 1998) (statement of Sen. Bond)

Moreover, in September of 1994, a federal Human Embryo Research Panel noted that "allowing society to create genetically identical persons would devalue human life by undermining the individuality of human beings." Further, the panel concluded that "there are broad moral concerns about the deliberate duplication of an individual genome. The notion of cloning an existing human being or of making carbon copies of an existing embryo appears repugnant to members of the public. Many members of the panel share this view and see no justification for federal funding of such research."

Id.

¹⁸ Annas, *supra* note 12, at 258. George Annas, one of the chief opponents of human cloning, states,

Both the genetics and bioethics communities have consistently underestimated the power of market forces and commercialism to shape the demand for and uses of new reproductive technologies. In fact, the debates in the 1960s, 70s, and 80s are virtually silent about the likely role of the market in setting the practice parameters of the new genetics. We must not be so naïve. Medicine itself is now widely viewed as a market good, and the

for the arena of legislative debate and may not necessarily carry a great deal of weight in the courts or within administrative agencies.

One possible area of common ground shared by both camps appears to be a conviction that a primary way to regulate cloning of humans is through money.¹⁹ Proponents argue that if there is to be any state regulation of cloning, it should be through federal funding. For instance, John Robertson, professor of law at the University of Texas School of Law, recently argued that “[t]he NBAC’s call for a federal criminal ban of a new medical technique has few precedents. . . . [T]he federal regulation of bioethical issues, if it exists at all, occurs overwhelmingly through the federal funding power, and it does not include criminal sanctions.”²⁰

Similarly, George Annas, a health law professor at Boston University School of Public Health and leading cloning opponent, argues that “[a] simple way to stop commercialization in embryos before it starts is to regulate or manage the market by prohibiting the purchase and sale of human embryos, much the way we now prohibit the purchase and sale of human organs and fetal tissues.”²¹ Therefore, he concludes that “[a] federal statute prohibiting commerce in human embryos should be enacted.”²² Of course, although this statute would be aimed at commercial activities, it would still most likely be a criminal statute.

It is unfortunate that the only apparent agreement between the parties regards a *method* by which cloning may be regulated. This is particularly unsettling in view of the fact that there appears to be no consensus regarding the more foundational question of whether cloning should be regulated *at all*. This situation is to be expected, however, when one considers that the opposing parties have not even agreed on the nature of the debate.

III. THE “MISSING BATTLE”

Military men occasionally use a slang term, “missing battle,” to describe what happens when converging enemy units, intent on destroying each other, completely miss each other in the fog or confusion of war. That is what has happened in the debate on cloning.

Cloning proponents, primarily concerned with the potential benefits of the new technology, examine the moral or ethical considerations only secondarily. Issues of ethics or morality are important only to the extent

once-nightmare scenario has become a reality: Medicine has become a business, and business ethics have eclipsed medical ethics.

Id.

¹⁹ See Robertson, *supra* note 3, at 1437; Annas, *supra* note 12, at 260.

²⁰ See Robertson, *supra* note 3, at 1437.

²¹ Annas, *supra* note 12, at 260.

²² *Id.*

that they represent limitations on the new technology.²³ Thus, they ask how we can responsibly protect test subjects and how informed consent should be handled. They also consider how we should accommodate those who are morally opposed to cloning. But in many cases, cloning advocates seem, for whatever reason, to simply skip over the question of whether cloning should be permitted at all. They assume that some degree of cloning must be permitted, and brand those who argue otherwise as being simply moralistic.²⁴

Most cloning opponents, on the other hand, primarily focus on the moral, spiritual or ethical implications. According to them, no dialogue regarding the practicality or possibility of cloning should even be considered until the ultimate question is answered: whether cloning is morally right.²⁵ To that end, they argue that a complete ban should be imposed on all human cloning until the moral question has been analyzed and answered.²⁶ To reverse this order would be to put the cart before the horse.

²³ See, e.g., *Due Process*, *supra* note 14, at 2365 ("human cloning will probably face various sorts of government regulation to guarantee the safety of the technology and to protect the interests of future children and third parties.").

²⁴ See, e.g., Robertson, *supra* note 3, at 1441. ("[P]ersonal moral opposition alone is not an adequate basis for laws that prohibit others from using a technique that enables them to achieve legitimate goals of having and rearing biologically related children.").

²⁵ See, e.g., Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135 (1994-95). In his discussion of the British Warnock Report on reproductive technology, (presented on June 26, 1984) Stenger notes that,

Before addressing specific issues, the Committee recognized the problem of relating legislation and morality in such controversial areas as human life. It was accepted without argument that birth, death, and establishing a family were morally significant issues. It was also accepted that such issues with respect to embryos and assisted reproduction were not determinable by rules, for none existed about such issues, nor by arguments from utility, for these required prior judgments about the status of the embryo.

Id. at 141.

While the Committee ultimately determined that "in practical terms a collection of four or sixteen cells was so different from a full human being . . . that it might quite legitimately be treated differently" and, therefore, "it might legitimately be used as a means to an end that was good for humans," the key is that the Committee understood that "[t]his is a *moral judgment*, with focus not on potentiality but on actuality, on what the embryo was at a particular time." *Id.* (ellipses in original, emphasis added).

²⁶ See Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998) ("We should declare that human cloning is unethical in itself and dangerous in its likely consequences."); Christine L. Feiler, *Human Embryo Experimentation: Regulation and Relative Rights*, 66 FORDHAM L. REV. 2435, 2457 (1998) ("Recent historical events have taught the world that anticipated community benefit cannot be absolute in any moral society."). See, e.g., Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135 (1994-95). In his discussion of the British Warnock Report on reproductive technology, (presented on June 26, 1984) Stenger notes that,

This predicament seems to erect an impenetrable barrier to any real national discourse on the issue, and the danger is that while the two primary camps are missing each other on the nature of the debate, administrative agencies and the courts are filling the void and becoming de facto policy makers.²⁷ In short, if the parties do not quickly come to some consensus regarding the debate, the issue will be taken out of their hands.

IV. WHY THE DEBATE SHOULD START WITH MORALITY.

A. Morality Is The True Basis Of Both Arguments

The mere fact that the two sides would rather focus on different bases for argument in this debate, does not mean that there is not a common basis for the argument. In this section, I will show that both perspectives arise as a result of conflicting world views. The conflicting views place contrary values on the various interests involved in this issue. Thus, because both sides are based on divergent world views, the very essence of the argument is moral in nature.

In 1935, Hans Kelsen propounded his Pure Theory of Law which "endeavors to answer the question, What is the law? But not the question, What ought it to be?"²⁸ He continued:

[f]rom the standpoint of rational knowledge there are only interests and conflicts of interests, the solution of which is arrived at by an arrangement which may either satisfy the one interest at the expense of the other, or institute an equivalence or compromise between them. To determine, however, whether this or that order has an absolute value, that is, is "just," is not possible by the methods of rational knowledge. Justice is an irrational ideal.²⁹

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²⁷ See *supra*, note 14.

²⁸ Hans Kelsen, *The Pure Theory of Law Part I*, 50 L.Q. REV. 474, 477 (1934).

²⁹ *Id.* at 482.

Proponents of human cloning would agree with this train of thought. Although they may not necessarily agree with the full import of legal positivism, they do tend to view the issue as a mere competition of interests that consists of no absolute values; only the donee's individual rights as weighed against a myriad of other competing interests.³⁰ However, in the process of weighing these competing interests, an interesting phenomenon has occurred; liberty to clone has emerged as the one absolute value.

There is no express grant of procreative liberty or personal autonomy in the Constitution. Rather, these notions have been implied as elements of due process of law under the Fifth and Fourteenth Amendments, and alluded to in other foundational documents such as the Declaration of Rights and the Declaration of Independence.³¹ Within this context, cloning supporters see the right to clone as a liberty interest of which one cannot be deprived without due process of law, consistent with a "substantive" reading of the Due Process Clause.³² Since a fundamental right is alleged to be involved, regulation of that right is permitted only if the government can show a compelling interest, and only if the regulation is the least restrictive means of pursuing that interest.³³

Procreative choice is the most prevalent liberty interest that proponents cite.³⁴ In fact, cloning advocates almost universally accept the as-

³⁰ Robertson, *supra* note 3, at 1387 ("A proper assessment of cloning requires that it be viewed in light of the realities of how it might be used once it is shown to be safe and effective.").

³¹ U.S. CONST. amends. IX, X; THE DECLARATION OF INDEPENDENCE para. 1 ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness . . ."); DECLARATION OF RIGHTS OF THE CONTINENTAL CONGRESS, Oct. 14, 1774, para. 7 ("That the inhabitants of the English Colonies in North America, by the immutable laws of Nature, the principles of the English Constitution, and the several Charters or Compacts, have the following RIGHTS . . . 1. That they are entitled to life, liberty, and property . . ."). See also AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO (1787). The ordinance was propagated "for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions, are erected." *Id.* at preamble. Additionally, the ordinance specifies that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at Art. 3.

³² U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

³³ See *Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,") (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969)).

³⁴ See generally Robertson, *supra* note 3, at 1388-1403; Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503 (1998) (cloning may help

sersion that a right to clone exists for infertile couples who otherwise would be unable to have a child.³⁵ Indeed, according to supporters, cloning represents a wonderful opportunity for infertile couples to have biologically related offspring.³⁶ This assumed right is also the easiest to justify because it appears to fall directly in line with the overall notion of reproductive choice as established by the Supreme Court.³⁷ Since a fetal clone is not legally a person, it receives little or no consideration in the choice to bring it into existence or to terminate its existence. If the clone has any concrete rights at all, they only arise after its birth when it is considered to be an actual human being under the law. Any notion of an absolute value of the life of the clone prior to birth, therefore, is subordinated to the parent's, or donating party's, desire to create the clone.³⁸

However, as soon as one reaches this point, the nature of the argument changes for two reasons. First, it becomes, necessarily, moral in nature because fundamental and somewhat intangible rights are implicated.³⁹ Second, it becomes apparent that the argument now involves a balancing of at least three liberty interests: the right to procreate on the part of the parents (which has not yet been extended to cloning), the rights of security and property on the part of the clonee (assuming the clonee is not one of the parents), and the rights of life, security, and property of the child.⁴⁰ This latter interest (on the part of the child) is exceptionally important because unlike abortion, where it has been held that a child has less compelling interests prior to birth, when one en-

infertile men fulfill the Jewish mandate to "be fruitful and multiply"); *Due Process*, *supra* note 14, at 2348.

³⁵ For the sake of simplicity, and because procreation is the most prominent of the justifications for cloning, I will not discuss any of the other potential uses for cloning. For an eye-opening introduction to potential uses of cloning technology, such as eugenics, organ or tissue sources, or the replacement of a dead child. See Robertson, *supra* note 3.

³⁶ See, e.g., Robertson, *supra* note 3, at 1388; Broyde, *supra* note 34.

³⁷ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) ("the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

³⁸ *Roe*, 410 U.S. at 164.

³⁹ See Kelsen, *supra* note 28. See also U.S. CONST. preamble. "WE THE PEOPLE of the United States, in Order to form a more perfect UNION, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity . . ." *Id.* (emphasis added).

⁴⁰ It is quite possible that more than three liberty interests may be implicated. For example one commentator noted that "Attorney Nanette Elster has identified thirteen different parental configurations in human cloning with four to ten competitors for the status of parent." Annas, *supra* note 12, at 253 (citing Chicago-Kent College of Law, *Is Human Cloning on the Horizon?*, Dec. 5, 1997 (press release, on file with the University of Dayton Law Review)).

dorses cloning for procreative interests the intent is that the child *will* eventually be born. Therefore, the question is more analogous to situations involving the status of a fetus as it pertains to inheritance or devise, where courts have held that the fetus is a legal person. In view of this consideration, one can see that the balance between the two competing liberty interests is much more even.

B. Two Competing Views of Morality

Having demonstrated that the debate over human cloning is moral, it is appropriate to discuss whose morals should form the basis of that discussion. At least two comprehensive world views compete in this argument. The first stresses the existence of a perfect and discoverable absolute law, or law of nature, and the depravity of human nature.⁴¹ This view arose from Judeo-Christian values involving the basic assumption that a divine, transcendent being exists, and that that being, known as God, put in place an immutable law that affirms the value of human beings.⁴² Governments are legitimate only to the extent that they do not contravene this immutable law. According to this world view, judges discover the already existing law of God; they do not create it.⁴³ Finally, any law that contradicts the law of nature and nature's God is not law.⁴⁴ Contemporary legal thinking has moved away from this world

⁴¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *39-40. *See also infra* note 45. Blackstone's natural law concept differed from that of some later philosophers because he did not believe that natural law was discoverable solely through the application of reason. According to Blackstone, "every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error." *Id.* at *41. To supplement faulty human reason, God

in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce it's [sic] laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was [sic] attainable by reason, in it's [sic] present corrupted state; since we find that, until they were revealed they were hid from the wisdom of ages.

Blackstone at *42.

⁴² *Id.* at *41.

⁴³ *Id.* at *40. "These are the eternal, immutable laws, of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions." *Id.*

⁴⁴ *Id.* at *41. The law of nature "is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." *Id.*

view, but it still exerts a profound influence on our entire system of government. Our traditional understanding of fundamental rights is founded upon it.⁴⁵ It pervades our founding documents, and provided the basis for the legitimacy of the Colonies' rebellion against England. This is particularly evident by virtue of the fact that, from the period 1760-1805, the founders cited Montesquieu and Blackstone, natural law theorists, twice as often as any other author or work, with the exception of the Bible.⁴⁶

According to this world view, it is *the duty* of society to protect the fundamental or absolute rights of persons. Sir William Blackstone declared:

For the principal aim of society is to protect the individual in the enjoyment of those absolute rights, which were vested in them by the

⁴⁵ See generally The Federalist No. 10 (James Madison). The pessimism with which the founders viewed human nature is an integral component of the natural law theory. The fact that American republican government is based on a series of checks and balances limiting the abuse of power by fallen men serves as a prime example of influence of natural law in the founding of the Republic. Indeed, if man were essentially good, there would be no need for such an elaborate system to prevent the abuse of power. The concept that man is corruptible was best encapsulated in the famous statement by Lord Acton:

If there is any presumption it is . . . against holders of power, increasing as the power increases Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men There is no worse heresy than that the office sanctifies the holder of it.

LORD ACTON, *ESSAYS ON FREEDOM AND POWER* 335-36 (Gertrude Himmelfarb, ed., 1955). This concept was also recognized by natural law theorist Edmund Burke when he wrote

Law and arbitrary power are at eternal hostility. . . . He who would substitute will in the place of law is a public enemy to the world Power to be legitimate must be according to that eternal, immutable law, in which will and reason are the same If I were to describe slavery, I would say with those who hate it, it is living under will, not under law.

PETER J. STANLIS, *EDMUND BURKE AND THE NATURAL LAW* 63, 74, 245 (1965).

⁴⁶ JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* 52 (1987). "The most cited thinkers were not deists and philosophes, [sic] but conservative legal and political thinkers who often were also Christians. . . . Baron Charles Montesquieu leads this list [of thirty-six authors] with 8.3 percent of all citations, followed closely by Sir William Blackstone with 7.9 percent and John Locke with 2.9 percent." *Id.* at 52-53. Professor Eidsmoe based his assertion on research conducted by two professors, Donald S. Lutz and Charles S. Hyneman. In their study, they reviewed an estimated 15,000 items, and closely read 2,200 books, pamphlets, newspaper articles, and monographs with explicitly political content printed between 1760 and 1805. They reduced this to 916 items, about one-third of all public political writings longer than 2,000 words.

From these items, Lutz and Hyneman identified 3,154 references to other sources. The source most often cited by the founding fathers was the Bible, which accounted for 34 percent of all citations. The fifth book of the Bible, Deuteronomy, because of its heavy emphasis on biblical law, was referred to frequently.

Id. at 51-52.

immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.⁴⁷

Blackstone grouped all fundamental rights into three categories: "the right of personal security (life), the right of personal liberty; and the right of private property."⁴⁸ Of the right of personal security, Blackstone wrote

The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. . . . LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. . . . An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to it's [*sic*] use, and to take afterwards by such limitation, as if it were then actually born.⁴⁹

Many cloning opponents, on this basis, take the view that a human baby is an independent individual, subject to the same legal protections as any other human.⁵⁰ This view regards life as starting at conception, although it need not. Some opponents who believe that life begins at some point later than conception are nonetheless concerned about the emotional pain and loss of individual identity that they believe a cloned person would feel throughout life.⁵¹

The other competing world view is a humanist world view. This view became prevalent around the turn of the century. It draws a great deal of its doctrine from the positivism, utilitarianism, and Darwinian social theory which were becoming popular at approximately the same time.⁵² Proponents of this view contend that the "universe [*is*] self-existing and not created;" that the "the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values;" and that "[m]an . . . alone is responsible for the realization of the world of his dreams, that he has within himself

⁴⁷ BLACKSTONE, *supra* note 40, at *120.

⁴⁸ *Id.* at *125.

⁴⁹ *Id.* at *125-26.

⁵⁰ See, e.g., Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469, 492-93 (1998).

⁵¹ See, e.g., Annas, *supra* note 12. While it is not clear where Prof. Annas stands regarding the beginning of human life, his arguments do not depend at all on the view that life begins at conception.

⁵² GEORGE H. SABINE & THOMAS L. THORSON, A HISTORY OF POLITICAL THEORY 647-49 (1973) (discussing the effect of Darwin, Comte and Mill on liberal social philosophy).

the power for its achievement.”⁵³ Those who hold this comprehensive view reject any concept of an absolute divine law or law of nature and, instead, emphasize a relativist perspective in which good and evil are defined by the desires of the community in general. For instance John Stuart Mill, a utilitarian, emphasized

that all questions of political institutions are relative, not absolute, and that different stages of human progress not only will have, but ought to have, different institutions; that government is always in the hands, or passing into the hands, of whatever is the strongest power in society; and that what this power is does not depend on institutions, but institutions on it.⁵⁴

This relativism is also evident in the Humanist Manifesto II, which states “moral values derive their source from human experience. Ethics is *autonomous* and *situational*, needing no theological or ideological sanction.”⁵⁵ One of the original signers of the first Humanist Manifesto, the influential philosopher John Dewey, hoped for a day when people would forsake a desire to conform to an absolute view of righteousness. Rather, individuals in this utopia would judge for themselves what behavior is appropriate relative to the current situation.

Suppose . . . men had been systematically educated to believe that the important thing is not to get themselves personally “right” in relation to the antecedent author and guarantor of these values, but to form their judgments and carry on their activity on the basis of public, objective and shared consequences.⁵⁶

Finally, Karl Llewellyn, describing legal realism, carried this no-absolute principle over to the law, stating that

[t]he common points of departure are several.

- (1) The conception of law in flux, of moving law, and of judicial creation of law.
- (2) The conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its

⁵³ HUMANIST MANIFESTOS I AND II 8-10 (Paul Kurtz ed., 1973) [hereinafter Kurtz]. The primary source for the above quoted material is the Humanist Manifesto I which was first published in *The New Humanist*, May/June (1933), and was signed by 34 individuals, including John Dewey. The Humanist Manifesto II was published in *The Humanist*, Sep./Oct. (1973). Its 114 signatories included Francis Crick, the geneticist who, in concert with James Watson, first mapped a DNA strand; B.F. Skinner, former Professor of Psychology at Harvard University; and Sir Alfred Ayer, former philosophy professor at Oxford and advocate of positivism.

⁵⁴ ESSENTIAL WORKS OF JOHN STUART MILL 99 (1961).

⁵⁵ *Id.* at 17 (emphasis in the original).

⁵⁶ 4 JOHN DEWEY, THE LATER WORKS, 1925-1953: THE QUEST FOR CERTAINTY 38 (Jo Ann Boydston ed., 1988).

purpose, and for its effect, and to be judged in the light of both and of their relation to each other.⁵⁷

The humanist view that there are no absolutes is largely predicated on the belief that man is basically good and, though perhaps not perfect, eventually perfectible based on the Darwinian theories of evolution and natural selection.⁵⁸ Again, in Dewey's words, "nature, including humanity, with all its defects and imperfections, may evoke heartfelt piety as the source of ideas, of possibilities, of aspiration in their behalf, and as the eventual abode of all attained goods and excellencies."⁵⁹

Finally, because man is essentially good, he may be trusted to legislate or rule in a manner conducive to the common good. Under the humanist world view, then, law is not an absolute concept that one discovers but, rather, a tool used to achieve a societal end.⁶⁰ As such, there is no such thing as an invalid law; only laws that have outlived their purpose or which did not achieve the end for which they were enacted.

As can be seen, the humanist world view is diametrically opposed to the natural law view. Where such a dichotomy exists, there will be conflict and eventually one world view will gain dominance. The question at this point is, which world view will control?

C. Which world view will predominate?

It should now be clear that both perspectives in the cloning argument arise from conflicting world views that are moral in nature. Because the two views are essentially irreconcilable, one must emerge as dominant over the other. The question is, will this choice take place as a result of a democratic process involving debate and the involvement of the people through their representatives, or will one view be imposed on the nation as the de facto result of nominally amoral policy making, court rulings, or administrative regulations?

There are three primary ways to proceed at this point. First, we may appease many cloning advocates by simply avoiding the moral argument altogether.⁶¹ This course of action would certainly be the easiest, and it would most likely result in the quickest realization of legalized cloning. There is no doubt that many today, especially in the governing elite, embrace humanism to some degree and believe that morality

⁵⁷ Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1235-36 (1931).

⁵⁸ Kurtz, *supra* note 53, at 18.

⁵⁹ Dewey, *supra* note 56, at 244.

⁶⁰ See *supra*, text cited at note 56.

⁶¹ Robertson, for example, would seem to prefer this approach. See Robertson, *supra* note 8.

should not be the basis of public debate.⁶² However, the polarization of the nation on issues such as abortion, euthanasia and homosexual marriage, clearly indicates that there is a large portion of the electorate that, though they may not be able to articulate it as such, still hold to a more traditional Judeo-Christian world view.⁶³ Excluding the valid arguments of such people on the grounds that they are too moralistic will cause greater polarization of society. Additionally, this option would certainly engender a great deal of resentment on the part of those upon whom the humanist world view—itsself a moralistic creed—would be imposed. Finally, this policy would violate the eighth tenet of the second Humanist Manifesto:

We are committed to an open and democratic society. We must extend participatory democracy in its true sense to the economy, the school, the family, the workplace, and voluntary associations. Decision-making must be decentralized to include widespread involvement of people at all levels—social, political, and economic. *All persons should have a voice in developing the values and goals that determine their lives.*⁶⁴

A second course of action is one that was endorsed by Harvard Philosophy professor John Rawls in his book, *Political Liberalism*.⁶⁵ According to Rawls, “the aim of political liberalism is to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions.”⁶⁶ In order to accomplish this aim, political liberalism must “be impartial . . . between the points of view of reasonable comprehensive doctrines.”⁶⁷ To achieve this “reasonable” impartiality, Rawls developed what he termed an “inclusive view” which permits “citizens, in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen the ideal of public reason it-

⁶² The views of at least a portion of the Supreme Court in the “notorious mystery passage from *Casey*: ‘At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life[.]’” which according to Richard Neuhaus “flies in the face of all that the Founders meant by ‘ordered liberty,’ liberty ordered to the truth, and not least to the truths of what the Declaration of Independence calls the ‘Laws of Nature and of Nature’s God.’” Richard J. Neuhaus, *Rebuilding the Public Square*, 44 LOY. L. REV. 119, 125 (1998) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), and THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)). However, *Washington v. Gluckberg*, 521 U.S. 702 (1997), casts doubt on whether the Court takes this passage seriously as a general rule of constitutional law.

⁶³ See, e.g., Gail Russell Chadock, *Culture of the Yell!@#!*, CHRISTIAN SCIENCE MONITOR, Nov. 5, 1998, at 9. (“some issues have become so polarized that the prospects for a civil conversation have narrowed severely.”).

⁶⁴ Kurtz, *supra* note 53, at 19 (emphasis added).

⁶⁵ JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

⁶⁶ *Id.* at xix.

⁶⁷ *Id.*

self.”⁶⁸ However this inclusive view appears to be an exception to the general rule that “on fundamental political matters, reasons given explicitly in terms of comprehensive doctrines are never to be introduced into public reason.”⁶⁹

In a sense, Rawls appears to be creating a sort of civic justice, somewhat akin to the notion of “civic religion,”⁷⁰ in which there is a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement. It expresses their shared and public political reason. But to attain such a shared reason, the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself.⁷¹

However, although the notion of a civic religion and Professor Rawls’ idea of justice may be conceptually similar, Professor Robert George, of Princeton,⁷² argues that it is more accurate to view this concept of justice as a disguised attempt to impose a liberal comprehensive view.⁷³ George arrives at this conclusion in contemplation of Rawls’ admitted exclusion of the views of those he terms “rationalist believers.”⁷⁴ According to George, Rawls denies these believers a voice in the national discourse on the pretext that their claims cannot “be publicly and fully established by reason”⁷⁵ In response, George states that

[t]his denial can be sustained, however, only by addressing the merits of the actual arguments that the rationalist believers publicly advance in support of their beliefs, arguments which the liberal principle of le-

⁶⁸ *Id.* at 247.

⁶⁹ *Id.*

⁷⁰ The idea of civic religion is one in which the similarities between religious denominations and the religious traditions of the nation are emphasized over issues that divide believers. It is a sort of cultural religion that finds its expression in practices such as opening Congressional sessions with nonsectarian prayer, printing “In God we Trust” on coins, and acknowledging God in the Pledge of Allegiance. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Marsh v. Chambers*, 463 U.S. 783, 793 n.14 (1983). Although this notion and Professor Rawls’ idea of justice are conceptually similar, it may be argued that this idea of “civic justice” is proportionally more diluted because it seems to create an acceptable concept of public justice rather than distilling the various concepts down to a common denominator.

⁷¹ RAWLS, *supra* note 65, at 9-10.

⁷² Professor George is an Associate Professor of Politics at Princeton University, and Commissioner of the United States Commission on Civil Rights.

⁷³ *See generally* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *Yale L.J.* 2475 (1997).

⁷⁴ *See* RAWLS, *supra* note 65, at 152-53. Rawls’ idea of rationalist believers is not defined, but appears to involve one who “insists . . . that certain questions are so fundamental that to insure their being rightly settled justifies civil strife” and who “contend that these beliefs are open to and can be fully established by reason” *Id.*

⁷⁵ *Id.* at 153.

gitimacy and the Rawlsian ideal of public reason are meant to rule out in advance, irrespective of their soundness, on grounds independent of the truth or falsity of the principles the arguments are meant to vindicate.⁷⁶

If George is right, then this option would be no better than the first (complete exclusion of morality in the debate) since the views of opponents, many of which are admittedly given predominantly in terms of comprehensive doctrines, would be excluded. Again, a large portion of the population would be relegated to the position of spectators in fundamental arguments such as cloning.

The final option is to start with morality as the basis of the argument. Note the wisdom of Proverbs 19:2, which states that "it is not good for a person to be without knowledge, and he who makes haste . . . errs."⁷⁷ Whether the issue is national or individual in terms of scope, it is never a good policy to jump to a decision without fully exploring all of the possible ramifications of that decision. However, three conditions must be met before we can fully explore this issue. First, we must implement a national ban on all human cloning in order to protect all interests involved while the debate takes place. This ban must be comprehensive and must be implemented by the legislature.

Second, we must allow the debate to occur in the legislature where full and fair argument are possible. It is only in this forum that a comprehensive argument that permits a hearing of all views, including those that are solely moral in nature, may occur. This does not restrict the argument to moral considerations; it simply includes them. The legislature is the only arm of government that can accommodate this type of discourse. As noted above, there are some who will balk at participating in a discussion that they consider to be "highly speculative, moralistic, or subjective . . ."⁷⁸ The problem is that when these individuals dismiss such arguments, they fail to discern that speculative, moralistic, and subjective judgments are exactly what a large portion of the electorate feels the debate should include.⁷⁹ For those who are not as certain of the eventual implications of issues such as cloning, any supposition regarding the future ramifications of cloning are necessarily speculative.

Finally, we must be prepared to take whatever amount of time is necessary and available to explore all of the options because there really is no true limitation on the amount of time available. We are not in competition with other nations, because every other nation capable of exploiting this technology has already banned, or is in the process of ban-

⁷⁶ George, *supra* note 73, at 2484.

⁷⁷ Proverbs 19:2 New American Standard Version (NAS).

⁷⁸ See, e.g., Robertson, *supra* note 3, at 1441.

⁷⁹ See, e.g., NBAC Report, *supra* note 3, at chs. 3, 4.

ning, human cloning.⁸⁰ Additionally, since cloning advocates have characterized this debate primarily in terms of reproductive liberty, and since there are many viable alternatives for those who desire to reproduce, there really is no danger that a specific person's procreative rights will be denied simply because the *option* of human cloning is not available.

We must recognize that there is more at stake in this issue than the right of parents to have a child or the rights of a scientist to research exciting new technology. What is truly at stake is the opportunity of all citizens to participate fully in the political system. To preserve this truly foundational right, the discourse must be conducted according to the third option: a legislative process that is receptive to all manner of rationale, whether utilitarian or moralistic.

V. CONCLUSION

When those who subscribe to the humanist world view refuse to allow the natural law and Judeo-Christian world-view to enter the debate, they are, in a very real sense, imposing their morality on the remainder of the population. They are not "tolerant." This is quite an irony considering that only a decade ago, conservative Christians were accused of imposing their morality on the nation when they merely protested the sale of certain music to children.⁸¹

The issue of cloning may very well be the most important issue that humanity will face in the coming century because it has the potential to redefine our very understanding of the notion of life. Regardless of one's perspective on the morality of cloning, if we simply choose to avoid the issue we are engaging in intellectual fraud. If we choose to clone, it must be for a better reason than mere utilitarian convenience. In the words of

⁸⁰ See *Banning Federal Funds for Human Cloning Research: Hearing of the Technology Subcommittee of the House of Representatives*, CONG. TESTIMONY, FEDERAL DOCUMENT CLEARING HOUSE, July 22, 1997 (Opening Statement of Rep. Constance A. Morrell, Chairwoman, Subcommittee on Technology, House Science Committee).

The European Union and several countries, including Germany, Denmark, Australia, Spain, and the United Kingdom, already have laws, or are preparing laws, to forbid human cloning. France, Argentina, China, and Japan have also indicated an intention to deter efforts to clone humans, as well as 20 countries associated with the Council of Europe and the World Health Organization. Additionally, at the June G7 Summit of Economic Countries in Denver, the President, along with the heads of state for Japan, Germany, England, France, Italy, and Canada, collectively endorsed a worldwide legislative ban on human cloning.

Id.

⁸¹ See, e.g., Catherine Fox, *COMMENTARY Censorship: threat in black and white*, ATLANTA J. & ATLANTA CONST., Dec. 31, 1989; William Murchism, *Forewell, Mr. Falwell*, DALLAS MORNING NEWS, June 17, 1989, at 31A; Maitland Zane, *Jello Feels Artistic Chill Despite Porn Acquittal*, S.F. CHRON., Sept. 1, 1987, at 6.

Pope John Paul II, “[i]f this technology is not ordered to something greater than a merely utilitarian end, then it could soon prove inhuman and even become the potential destroyer of the human race.”⁸²

William W. Harty

⁸² Christopher P. Winner, *Pope says technological progress needs to be monitored for morality*, USA TODAY, Oct. 16, 1998, at 10A.