

Cloning and Reproductive Rights

By Lawrence Pasternack, Oklahoma State University

Following the 1997 resolution by the National Bioethics Advisory Commission, various federal and state bills were authored to proscribe any attempt to produce a human clone. These bills accord with what appears to be the prevailing public sentiments towards human cloning: fear, repugnance, and even religious indignation. However, these sentiments, as well as the current legislative approach towards cloning fail to give due attention to the similarities between it and other forms of reproduction. Cloning, *in vitro* fertilization, artificial insemination and coital reproduction may differ in means, but all have the same end: the birth of human children.

The purpose of this paper is to address this point of similarity by arguing that a categorical ban on the use of cloning technology for human reproduction would conflict with the principles of personal liberty found in the Constitution. My argument will develop through three steps. First, I will discuss a number of Supreme Court precedents which articulate how the fundamental right to engage in reproductive activity is integral to personal liberty. Second, I will develop an argument to the effect that this right applies not only to coital but also to technologically assisted forms of reproduction. Third, I will argue that the distinctive features of cloning technology are not material to the scope of this right, and hence, do not warrant that an exception can be made in its case.

I. Coital Reproductive Rights

Two separate lines of reasoning for the existence of a fundamental right to engage in

reproductive activities have been drawn from the Constitution. One stems from the right to privacy, a right that is not explicitly acknowledged in the Constitution, but one that has been taken to be among those fundamental rights which are considered penumbral to explicitly enumerated rights¹. The other argument stems from the principle of personal liberty expressed in the Due Process Clause of the fifth and fourteenth amendments. There has been some controversy concerning whether privacy or liberty serves as the better basis for claiming the existence of reproductive rights; one response to this controversy is to dissolve it by suggesting that the existence of zones of privacy is part of what “gives life and substance” to personal liberty². Thus, privacy arguments need not be rigidly separated from liberty arguments. The following argument for the existence of reproductive rights follows this understanding of the relationship between privacy and liberty.

A much cited passage from *Eisenstadt v. Baird*, the 1972 Supreme Court case concerning the distribution of contraceptives, reads “If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”³. The seemingly obvious understanding of this statement is that among the core expressions of the right to privacy is the right to either engage in or to avoid reproduction. Yet this interpretation has been attacked by some. It has been argued that *Eisenstadt* as well as the earlier cases of *Griswold v. Connecticut* and *Skinner v. Oklahoma* would be interpreted too broadly if they were read to affirm the right to engage in reproductive activities. The more narrow interpretation of these cases limit their import merely to the right to protect our bodily integrity⁴. Since *Skinner* concerns the state’s power to forcibly sterilize convicted criminals, it is asserted that all that has

been established is the right to not have our reproductive capacity forcibly terminated; and as *Griswold* and *Eisenstadt* concern the availability of contraceptive devices, some have contended that these cases only establish the right to avoid unwanted pregnancy. In other words, this line of interpretation maintains that reproductive rights only extend to the right to retain the capacity to reproduce and the right to prevent reproduction; no right to engage in reproductive activity has as yet been established.

It seems farfetched for the advocates of the narrow interpretation of reproduction rights to read the above quote from *Eisenstadt* as supporting only the right to avoid rather than the right to engage in reproductive activities. Although both *Griswold* and *Eisenstadt* concern access to certain means for avoiding reproduction, it is quite clear that the Court's reasoning heavily depends upon their acknowledgment of a right to choose either positively or negatively in favor of reproduction. In fact it may be said that the Court understands the right to access contraceptives to exist only because it is a component of a broader right to engage in reproductive activities. This seems to be the intent behind the claim that we have the right to be "free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child". Similarly, the majority opinion in *Carey v. Population Services International*, asserts that "the decision whether or not to beget or bear a child is at the very heart of this [privacy] cluster of constitutionally protected choices"⁵ and understands that it is upon this principle that both *Griswold* and *Eisenstadt* are based. And furthermore, although the Supreme Court found the Oklahoma law permitting forced sterilization of criminals unconstitutional on the grounds that it fails to meet the test for Equal Protection, they recognize that the right to reproduce is among the "basic civil rights of man". The *Skinner*

decision does not directly depend upon the recognition of this right as do the other cases cited; nevertheless, because the Court affirms the existence of such a right, *Skinner* is cited in succeeding cases as the first explicit acknowledgment of this right.

Little further needs to be said on this point. Reproductive rights are not narrowly limited to the right to retain the capacity to have offspring or the right to voluntarily inhibit this capacity. Rather, the Supreme Court has made it quite clear that there exists a constitutionally protected right to engage in reproductive activities. Undoubtedly reproductive choices are among the most intimate and life-defining. Few other events in life have as much of an impact on our conception of ourselves, our duties and our lifestyle as becoming a parent. It is precisely for this reason that the Court has explicitly affirmed the existence of a fundamental right to engage in reproductive activities⁶.

II. Non-Coital Reproduction

A somewhat more thorny problem is whether the right to engage in reproductive activity can be extended from coital to non-coital forms of reproduction. As yet there are no Supreme Court cases addressing this issue, so the arguments for the legal right to have unimpeded access to reproductive technologies must be made by way of extrapolation from what has been said concerning coital reproduction. My strategy will be to show that precisely the same grounds upon which it has been argued that there exists a right to engage in coital activity for reproductive purposes equally apply to the use of non-coital means for the same purpose.

It is difficult to construct a plausible argument for there being some relevant difference between coital and the current means of non-coital reproduction such as *in vitro* fertilization.

Such an argument can hardly appeal to the intentions behind or the results of these practices. Non-coital reproductive activity shares with at least the germane cases of coital activity, the intent to produce a child and, if successful, the realization of that intent⁷. However, there is an obvious difference in their means and it may be argued that it is by virtue of this difference that the use of reproductive technology stands outside the protections afforded to coital reproduction. Since Non-coital reproduction is not a private matter in the way that sexual intimacy is, advocates of non-coital reproduction cannot appeal to privacy rights for support. Hence, it may be argued that access to reproductive technologies such as *in vitro* fertilization lack constitutional protection. Separate reproduction from sexual intimacy, and it is without constitutional protection.

But this argument is easily rebutted. The reason why sexual intimacy is protected is not limited to the pleasure of the act or the emotional bond of which it is part. This would be to argue that there are no other liberty claims relevant to reproduction except ones directly stemming from privacy⁸. It is true that both *Griswold* and *Eisenstadt* emphasize the aspects of sexual intimacy other than reproduction; but this is because they are cases which concern contraceptives rather than behavior positively related to reproduction. In both cases as well as in other aforementioned Supreme Court cases, there is recognized a fundamental right to beget children, a right that does not logically stem from its connection to sexual intimacy. Intercourse and reproduction are obviously related, but just as there can be intercourse without the intent nor even the possibility of reproduction, so there can be reproductive activities without intercourse. Intercourse and reproduction are conceptually, physically and legally separable. But their separability rather than weakening the case for the right to use non-coital forms of reproduction,

instead strengthens the case.

The importance of sexual intimacy may offer one line of support for the claim that there exists a right to reproduce, but this right is also supported by virtue of the centrality of reproductive choices to our personal liberty⁹. If there is a right to engage in reproductive activities, it should be sufficiently justified by the extremely high degree of importance that the choice to beget children has in our lives. Such non-coital forms of reproduction as *in vitro* fertilization and artificial insemination are pursued with precisely the same intentions and aim to realize the same ends as the relevant instances of coital reproduction. If the right to engage in reproductive activity is derived from the fundamental importance of these intentions and the life-affecting consequences of the ends, then non-coital forms of reproduction deserve the same constitutional protection that is afforded to coital reproduction.

III. Cloning

If there happens to be some non-coital means of reproduction for which the state would have a compelling interest in preventing, it could hardly be *in vitro* fertilization or artificial insemination¹⁰. It seems quite unlikely that these established technologies pose such a serious threat that they ought to be banned. Yet just such a claim is made about cloning. Arguments in favor of such a ban have taken various forms. Some object to human cloning because of its expected consequences for the clonal child or society at large. Other arguments try to establish that cloning is inherently wrong because it is an affront to human dignity. I cannot here respond to every objection that has been raised against cloning. But I will address four objections to cloning which I have selected either because of their philosophical weight or popular appeal.

The first two consider whether there are sufficiently serious physical or psychological risks to the clonal child to warrant its prohibition; the second two consider whether there are materially relevant intrinsic differences between cloning and other forms of reproduction.

There are as yet unknown risks to the clonal child both physical and psychological in nature. For example, current methods of cloning have an extremely low success rate. In the first and best publicized case of cloning, only one out of 277 attempts succeed, creating the sheep known as Dolly. Others died in the womb and others died shortly after birth. Similarly, the slightly more advanced method used in Honolulu to clone mice realized only a 3% success rate. Given this, it may be argued that the current methods are too unsafe to warrant use on humans. But these numbers are somewhat deceptive because they compare the number attempts to transfer nuclear material into a host egg against the number of live births. In a sense, this is like comparing the number of copulations against the number of live births. It would be more appropriate to compare the rate of successful implantations of a cloned cell against the number of live births. Interpreted in this way, Dolly was the one success from 34 cells which reached the blastocyst stage. And recently in Japan, a cloning experiment met with considerably greater success. Out of ten implanted cow embryos, four achieved live and healthy births. This number certainly compares favorably against the 20% success rate of *in vitro* fertilization.

Still, there are additional and probably more important risks which need to be considered. Concerns have been raised that clones may experience higher rates of cancer, have shorter life spans, or suffer from other defects as the result of the cloning process or the age of the genetic material used. These concerns are ones that ought to be considered but as yet there is no evidence to support them. Nevertheless, they are just the kind of concerns that warrant further

testing before we attempt to clone humans. They do not warrant a prohibition on cloning to stand for perpetuity nor do they speak to the intrinsic wrongness of cloning. At best, they, like the possible risks of any other new medical procedure, should be studied before the procedure is used on humans.

In addition to the physical unknowns, there have been ample concerns raised about whether clonal children will experience debilitating psychological harm. If a child is cloned from a successful scientist, then, it is argued, the parents will inevitably expect her to become a successful scientist herself; if a child is cloned from a famous artist, then the parents will expect her to become a success in the arts, and so forth. Although this may in fact happen, it seems presumptuous to think that it will always or even usually happen. Surely, the parents, if they know the genetic origin of the child, will have certain expectations. However, such is already the case with children conceived in the usual manner: academically successful parents will expect their children to be academically successful and athletically successful parents will expect their children to be athletically successful. Parents encourage their children to adopt the values and goals that they themselves hold. Sometimes this encouragement becomes overly coercive or abusive. Sometimes parents can accept from their child nothing but the level of performance and the kinds of interests that they themselves have. Sometimes parents are despotic and children suffer. It may even be that there would be a higher frequency of such dysfunctional relationships in families with clones. However, neither has it been proven that there would be a higher frequency nor even if there were, would that, on its own, justify the prohibition of cloning. The state has traditionally been quite hesitant to interfere with family life. Typically only in cases where parents are physically abusive or when children's physical well being is at risk do they

interfere. Given this, it would hardly be consonant with the traditional affirmation of a family's privacy rights to outright prohibit cloning because it is possible that some parents would be overly domineering.

Another possible psychological harm will lead us into my discussion of the second group of objections. It has been argued that a child brought up with the knowledge that she is a clone will be unable to develop a healthy self-identity. The clonal child may be expected to replay the life of her original and thereby see herself as redundant, as having already lead her life in the body of her original and so is without any uniqueness or individual worth.

It is this concern about the importance of uniqueness that I suspect underlies much of the public anxiety over cloning. The sense of importance or worth a person has about herself often is expressed in the following form: "I am special because there is no one else like me". The fear is that cloning would destroy this so-called specialness because with cloning, there could be created others who are genetically identical to oneself. Hence, cloning is seen as an assault against the ground upon which individual worth depends. And as an assault against individual worth, cloning does violence to human dignity.

I will acknowledge that a clonal child may feel just this way. Parents may treat their child as if she were nothing but a duplicate of a life already lead. She may see herself as without worth and she may believe her lack of worth is due to her lacking genetic uniqueness. However, as already noted, the possibility of bad parenting, except in the most extreme cases, cannot be used as the basis for curtailing an individual's right to bear and rear their child as they see fit.

If this putative threat to the clonal child's self-worth can carry sufficient force to warrant the prohibition of cloning, then the danger cannot be one drawn merely from a possible

psychological effect of how some parents may rear their clonal child. Instead, the danger must be less speculative and must be shown to be intrinsically related to cloning.

Yet, those who make the argument that cloning is an offence to human dignity base their argument on a premise they would hardly accept if they knew they held it. If clones lack the worth that genetically unique children have, it is, presumably, because they are not genetically unique. I see their argument going something like this: if a person is not genetically unique, then that person lacks or has a diminished degree of moral worth; because cloning produces children who are not genetically unique, they lack or have a diminished degree of moral worth; therefore, as it is wrong to destroy or diminish a child's moral worth, we ought not clone children.

Notice how this reasoning presupposes a genetic reductionism¹¹. It presupposes that a person's worth is drawn from her particular genetic endowment. However, I would greatly doubt that those who believe cloning destroys a person's worth would explicitly admit to holding such a reductionism. Far more so than cloning, the doctrine of genetic reductionism is a social danger. It serves as a basis for racism, fosters genetic determinism, and ignores the importance of experience, reflection and choice in a person's development. I would expect that those who make the aforementioned argument against cloning would not approve of these consequences of genetic reductionism nor would they, if asked outside the context of cloning, claim that the basis for a person's worth stems from her genetic code. Instead, I would expect that they would ground worth in such philosophical or religious notions as personal character, the capacity to set ends, or the soul.

A similar argument can be made against those who claim that cloning, unlike other forms of reproductive technology, lacks constitutional protection because it is not, in fact, a form of

reproductive technology at all. Rather than being a form of reproduction, it is mere replication and hence it is not constitutionally protected¹². I find it hard to take this objection seriously as it seems to me to be little more than a mere verbal dispute. Cloning is replication in the sense that it creates a being that is genetically identical to the original, but it is surely reproduction as well in the sense that it produces a new member of a species. Furthermore, to deny cloning constitutional protection because the offspring are not genetically unique again belies a genetic reductionism that we would expect to be at odds with the other beliefs held by the opponents of human cloning. To take seriously the claim that cloning is mere replication is to exaggerate the importance of a person's genetic endowment, ignoring the many other factors which form a person's identity. Unless we want our laws to reflect a commitment to genetic reductionism, then we cannot say that this argument identifies a relevant difference between cloning and other forms of reproduction.

IV. Conclusion: Cloning and Legislation

By virtue of the fundamental character of the right to engage in reproductive activities, the burden is upon those who wish to prohibit cloning to prove that there exists material differences between it and other means of reproduction. Although human cloning may reasonably be prohibited until such time that the possibility of physical harm has been dispelled, neither can the patently speculative claim that the clonal child will inevitably suffer severe psychological harm nor the claim that cloning is an affront to human dignity meet the standard of strict scrutiny required for the abridgment of a fundamental right.

If there is any room for legislation limiting cloning technology, it would have to be narrowly

tailored to avoid undue interference in reproductive choices. Yet there may be such room if it is possible to adequately distinguish between uses of cloning within what could be considered a roughly traditional family context and other uses which lack constitutional protection. This, I would suggest, is not merely an *ad hoc* stipulation because the right to engage in reproductive activity has been understood to express not merely a right to procreate but to procreate with rearing intent. Hence, legislation which limits the availability of cloning technology to individuals with rearing intent may survive constitutional challenges. We could prohibit the military, corporations, sports teams, and so forth from using cloning and thereby offer some defense against the sort of science fiction fears which the notion of cloning has engendered. Whether such legislation would be effective, whether it would carry sufficient teeth to prevent potential abuses, and also whether it is even needed, is, however, another matter.

1. “penumbras, formed by emanations from those guarantees that help give them life and substance” (Griswold v. Connecticut 381 U.S. 479).
2. See Jeffery L. Johnson, “Privacy, Liberty and Integrity, *Public Affairs Quarterly*, 3 (1989), 15-34.
3. Eisenstadt v. Baird 405 U.S. 438.
4. See Clarke D. Forsythe, “Human Cloning and the Constitution”, *Valparaiso Law Review*, 32 (1998), 469-542; and Ann MacLean Massie, “Regulating Choice”, *Washington and Lee Law Review* 52 (1995) 135-172.
5. Carey v. Population Services International 431 U.S. 678.
6. See also Planned Parenthood v. Casey 505 U.S. 833.
7. Obviously, intercourse is not always performed with the intent of producing a child, nor even is the production of a child always the reason for non-coital reproductive activities. There is no need to provide examples of the former case, but an example of the latter is a woman agreeing to use *in vitro* fertilization to satisfy her husband’s request even though she knows but her husband refuses to accept that she is incapable of becoming pregnant even through such means.
8. Another argument is that the legal right to engage in coital reproduction inherently concerns a person’s right to use his or her body for the purposes of reproduction, thus extra-corporeal reproductive matter such as donated sperm or ova, being no longer part of the person’s body, is beyond the scope of this right. But this argument, like the one above, construes the basis for reproductive rights too narrowly.
9. This point is articulated throughout the Supreme Court cases which pertain to reproduction including Skinner v. Oklahoma, Eisenstadt v. Baird, and Planned Parenthood v. Casey. See also, *Harvard Law Review*, 111 (1998) 2357.
10. See John A. Roberston, *Cloning and The Constitution*, Princeton: Princeton UP, 1994, 97ff, and *Harvard Law Review*, 111 (1998) 2361.
11. George Annas, one of the most prominent opponents to cloning is also one of those who most obviously falls into to this inconsistency. Consider the following passage: “The danger is that through human cloning we will lose something vital to our humanity, the uniqueness (and therefore the value and dignity) of every human. Cloning represents the height of genetic reductionism and genetic determinism.” (“Why We Should Ban Human Cloning”, *The New England Journal of Medicine*, 339 (1998), 123).
12. See George Annas, “Human Cloning: Should the United States Legislate Against It?” *American Bar Association Journal*, May 1997, 80.