

Illegal Beings: Human Clones and the Law

By Kerry Lynn Macintosh

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Reviewed by Sara Finiki

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Suffolk University Law School

In 1997, the world's first cloned animal, Dolly, was born. Since that time, the cloning of human beings became a very real possibility, and our society has reacted strongly with uncertainties as to what consequences these types of experiments may bring forth. Many people are afraid of the impact that the cloning of humans could have on our society. Scientists and researchers are eager to discover what benefits cloning may offer, which has already led to the cloning of several types of animals. Lawmakers and regulators of scientific research are faced with important questions as to how cloning should be regulated, without much consistent background information upon which to base their decisions. Even if human cloning were to be outlawed completely, the constitutionality of such laws remains unclear. The author attempts to address the many fears and uncertainties our society has expressed in reaction to cloning experiments, which are mainly due, she feels, to a gross misunderstanding of how cloning actually occurs, and a perception that cloned humans would be unequal to humans born through sexual reproduction.

There are several bills which have been introduced in Congress to regulate cloning. The Food and Drug Administration (FDA) has also enacted regulations to prevent human cloning for the time being. In 2003, a bill was introduced in Congress that would make it illegal for any person to knowingly perform, attempt to perform,

participate, or attempt to participate in human cloning in the United States.¹ It also proposed to make it illegal for anyone to bring an embryo or child produced by cloning in another country back to the United States.² This bill proposed to outlaw not only reproductive cloning, but research cloning as well. The House of Representatives passed this bill, but it failed in the Senate because several senators wanted to allow researchers to engage in cloning for research purposes.³ Another bill was introduced in the Senate in 2003 to ban reproductive cloning only, permitting human embryos to be cloned but not implanted.⁴ This bill was never put to a vote in the Senate. Presently, the only federal regulations regarding cloning are those put in place by the FDA in 1998, which require researchers pursuing cloning human beings to file an investigational new drug (IND) application, but also refuses to approve such applications, effectively prohibiting any legitimate human cloning research.⁵ The debate over how cloning should be regulated is an ongoing one, and is not likely to be completely resolved in the near future, with many uncertainties surrounding the impact that either allowing or completely prohibiting cloning may have.

This book is written on the premise that human cloning is inevitable, even though it is currently prohibited through FDA regulations. The author is a professor at the Santa Clara University School of Law; although she has published several articles and a book in the past, this is her first book dealing with the topic of human cloning. She addresses five common objections to human cloning, and explains how these objections reinforce

¹ H.R. 534, 108th Cong. §2 (2003).

² Id.

³ Kerry Lynn Macintosh, *Illegal Beings: Human Clones and the Law*, 76 (2005).

⁴ S. 303, 108th Cong. §101 (2003).

⁵ Stuart Nightingale, *Dear Colleague Letter about Human Cloning*, Oct. 26, 1998, <http://www.fda.gov/oc/ohrt/irbs/irbletr.html>.

stereotypes that we have as a society have formed about clones. She further explains why she believes that anticloning laws are bad public policy, and how any laws enacted in the future to outlaw human cloning would inevitably be unconstitutional.

Legitimate reasons for delaying human cloning, such as ensuring its safety and scientific validity, have been clouded by the continuance of exaggerated and often inaccurate beliefs about what human clones would be like. Professor Macintosh places the objections over cloning into five categories: first, that cloning offends God and nature; second, that treating children as “products” violates human dignity; third, that human clones lack individuality; fourth, that human clones could destroy our society by overpopulation and lack of genetic diversity; and fifth, that cloning will produce children with birth defects. Professor Macintosh explores each of these ideas in detail, devoting a chapter to each. She expresses that fear over what cloning could produce has been furthered by misunderstandings of the science behind cloning. Professor Macintosh points out that this false belief causes many people to fear cloning because they believe that exact copies of human beings will be made, from their exact DNA to their personality and mannerisms. She does a good job of analogizing the initial fears expressed by many when in vitro fertilization (IVF) was first introduced with fears that currently exist about cloning. At the time IVF first came into use, many people expressed concern that children born through this method would be in some way different than those conceived naturally, or that parents and doctors were “playing God”. Now that IVF is a common way for parents with fertility difficulties to conceive a child of their own, little concern is raised by the public that these children are in some way lesser than children who are born without any medical intervention. Children who are born as a

product of reproductive therapies are not looked down upon in our society; Professor Macintosh argues that clones should not be any different. Many of our fears and concerns as a society are based on the continuing idea that human clones will be exact genetic replicas of their parent, and therefore look exactly the same, have the same personality, and essentially be the same person. Professor Macintosh's clear and concise explanation of the scientific process of cloning helps to dispel this notion that a clone will be an exact copy of its parent. Her belief is that imposing this basic scientific knowledge upon our society might change the negative opinions that many people have about cloning. I believe that this is a valid point, but it does not address the concerns about how human cloning experiments would prevent the problems that researchers faced when cloning other animals. A major concern for many is the idea that many human embryos will be destroyed in the process of creating a human clone. As the author herself notes, in cloning experiments on animals, the percentage of live births was only .32 to 11 percent of the total number of embryos transferred.⁶ Professor Macintosh's analysis seems to be lacking in a legitimate defense for the possible destruction of potentially large numbers of human embryos through cloning experiments.

The author argues that human cloning is a legitimate way to allow those who cannot have their own children through sexual reproduction, such as homosexual couples, infertile men and women, and men and women who are carriers of genetic diseases, to have biological children of their own. Professor Macintosh tends to be optimistic in the view that cloning will only be used for legitimate methods to help parents conceive healthy children of their own. She tends to minimize the concern that many people have

⁶ Kerry Lynn Macintosh, *Illegal Beings: Human Clones and the Law*, 50 (2005), citing *The National Academies, Scientific And Medical Aspects Of Human Cloning 2* (2002) at Table 1, 114-19.

that cloning could be very dangerous if not closely regulated, such as the creation of clones simply to use their tissue or organs. However, Professor Macintosh expresses legitimate concerns that outlawing cloning in the United States entirely could have dangerous effects, because it will cause people to pursue cloning in illegal manners when such research could be done under the careful supervision of top scientists with experience in genetic research. By outlawing cloning outright, the dangerous effects of cloning could be brought to light by the failed experiments of scientists driven by the desire for fame.

In analyzing the legality of anticloning laws, Professor Macintosh draws an interesting comparison between anti-miscegenation laws and laws banning cloning. She suggests that laws banning cloning would be unconstitutional in the manner that laws banning interracial marriages are, reasoning that anti-miscegenation laws were enacted in part to prevent the birth of interracial children, and laws banning cloning would also work in a similar manner, to prevent certain children from coming into existence. Professor Macintosh also argues that the psychological and social effects that these laws could have on (what she considers to be inevitable) human clones could be devastating. The lack of education of the American public about clones would contribute to this ongoing stigma that human clones are not “real people”. In making her argument for how anticloning laws would be struck down as unconstitutional, Professor Macintosh suggests that if anticloning laws were enacted and later challenged, the appropriate standard of review for such a case would be strict scrutiny.⁷ She claims that human clones should be seen as a suspect class, and therefore such a law should not be upheld unless there is a compelling reason for preventing cloning, and narrowly tailored means to achieve this

⁷ Bernal v. Fainter, 467 U.S. 216, 219 (1984).

goal; she claims that the government's interest in preventing human cloning could not withstand the strict scrutiny standard.⁸ The legitimacy of this argument may fail to be proven anytime in the near future, but Professor Macintosh produces interesting legal theories into the way such a case might be examined.

I recommend this book for people who are interested in learning more about the myths and misperceptions about human cloning, and how many of those myths may be dispelled through the education of our society about the truths of the scientific process behind cloning. For those interested in exploring the constitutionality of anticloning laws, this book also provides an interesting discussion of how such laws would violate constitutional principles. Although the author sometimes makes extreme suggestions regarding how cloning should be regulated in our country, the book gives good background information on the attempt to regulate cloning, and offers an interesting perspective on what type of legal controversies we can expect to see if and when a human clone is born.

⁸ Bernal v. Fainter, 467 U.S. 216, 219 (1984).