

Illegal Beings: Human Clones and the Law

By Kerry Lynn Macintosh

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Ever since Scottish scientists cloned Dolly the sheep in 1997, doomsday scenarios of mad scientists running amok and Machiavellian government leaders creating super-armies have captivated the media. While these scenarios are adequate fodder for Hollywood movies, Professor Kerry Lynn Macintosh debunks them as founded upon scientific misrepresentation. Building upon those misrepresentations, Professor Macintosh argues in *Illegal Beings: Human Clones and the Law* that not only are these fears ill-grounded, but anticloning laws are poor public policy and are unconstitutional under the 14th Amendment's Equal Protection guarantee.

Macintosh, a Professor of Law at Santa Clara University, has extensively written on e-commerce and contract law in the digital age. While this is her first foray into the intersection of constitutional law and cloning, she demonstrates a competent understanding of the issues involved. Structuring the book into three sections, Professor Macintosh begins with a synopsis of the five most common ethical, moral, religious and scientific objections to human cloning. She then transitions to a public policy analysis, arguing that federal and state anticloning laws are poor public policy fueled by the five common objections. In the final section, Professor Macintosh analyzes these laws under the 14th Amendment's Equal Protection guarantee, concluding that these statutes would not survive a strict scrutiny test.

In laying out the five common objections to human cloning¹, Professor Macintosh describes the objections and accurately refutes them as based on unfounded fears or scientific half-truths. For example, she notes that some of the objections are grounded in religious or moral arguments that, by definition, cannot be proven. Turning to a more scientific inquiry, she recognizes that the “identity fallacy,” or the notion that human clones are exact copies of another person, is the basis of several objections. She correctly asserts that identical DNA does not lead to identical persons and personalities.² The identity fallacy reflects an erroneous belief in genetic determinism: that only nature (i.e., DNA) and not nurture (i.e., the totality of the environment from conception in the womb until death) affect one’s personality.³ With respect to objections based on safety to the mother and fetus, Professor Macintosh accurately remarks that these objections are generally valid, but that scientific techniques will improve over time and safety objections will become less relevant.

The opening section is a thorough discussion of common objections to human cloning and their logical fallacies. Professor Macintosh is particularly shrewd in her analysis of safety concerns, where she demonstrates how political leaders have grossly mischaracterized scientific data. Professor Macintosh assumes that the reader has some level of familiarity with the underlying scientific techniques involved in human reproductive cloning and research cloning. She has assumed that any worthwhile discussion requires a rudimentary understanding of biology, the explanation of which is

¹ Kerry Lynn Macintosh, *Illegal Beings: Human Clones and the Law* 7-72 (Cambridge University Press 2005). The five common objections to human cloning are: (1) cloning offends God and Nature, (2) children should not be manufactured, (3) human clones are copies that lack individuality, (4) human clones could destroy humanity, and (5) cloning harms participants and produces children with birth defects.

² Nancy L. Segal, *Human Cloning: Insights from Twins and Twin Research*, 53 *Hastings L. J.* 1073, 1076 (2002).

³ Nat’l Bioethics Advisory Comm’n, *Cloning Human Beings*, Vol. 1: Report and Recommendations 32-33 (1997).

beyond the scope of her book. Those readers with little or no background in biology would be wise to consult some background references.

After debunking the common objections, Professor Macintosh turns to a public policy analysis of proposed federal legislation and existing state legislation. She notes that two federal bills proposed in 2003 criminalized human reproductive cloning,⁴ and the only reason they were not passed was because the House and Senate could not agree on whether or not research cloning should be allowed. Professor Macintosh remarks that the proposed bills define human cloning broadly and propose extra-territorial regulation by criminalizing importation of the cloned “product.” Commenting on the severity of the 10-year prison sentences proposed by both bills, Professor Macintosh interprets the laws as broadly as possible and presents the worst-case-scenario: criminal liability imposed upon all parties involved (i.e., the egg donor, the nuclear DNA donor, the doctor and the spouse). Furthermore, she construes this to include not only complicity and conspiracy to clone, but also complicity and conspiracy to import the cloned “product.” Her insightful analysis points out the potentially wide-ranging effects of criminal legislation.

Professor Macintosh suggests that it would be wise to question federal authority, both legislative and regulatory, to enact anticloning laws. Analyzing congressional authority under the Commerce Clause and the Supreme Court’s holdings in *United States v. Morrison*⁵ and *United States v. Lopez*,⁶ Professor Macintosh ultimately concludes that

⁴ See Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong. (2003); See also Human Cloning Ban and Stem Cell Research Protection Act of 2003, S. 303, 108th Cong. (2003).

⁵ 529 U.S. 598 (2000) (striking down Congressional law regulating gender-motivated violence as exceeding Congressional power under the Commerce Clause because the activity regulated was non-economic in nature).

⁶ 514 U.S. 549 (1995) (holding that Congress exceeded its Constitutional power under the Commerce Clause by enacting a law criminalizing possession of a gun knowingly in a school zone because there was insufficient impact on interstate commerce and the statute did not contain an express jurisdictional element that the gun have traveled interstate).

Congress might not have the authority to regulate reproductive cloning. However, her general tone conveys that she is not entirely convinced by her argument. She then attacks the Food and Drug Administration's (FDA) authority to regulate human cloning. She characterizes the FDA's position as an outright ban on human cloning, relying heavily on a "Dear colleague" letter the FDA sent in 1998 and on FDA testimony to a congressional panel in 2001. Her analysis is convincing when she suggests that sooner or later, cloning techniques will be safe enough that the FDA can no longer legitimately object to human cloning on safety grounds.

In demonstrating that the five objections have inspired anticloning laws, Professor Macintosh artfully connects part one with part two. Her primary support is drawn from congressional testimony⁷ and publications from the National Bioethics Commission and the President's Bioethics Council. However, her treatment of the subject is one-sided and self-serving. She only acknowledges statements confirming that the five objections have inspired the laws; she does not even attempt to present any congressional testimony showing that some legislators may not be inspired by the five objections. Although her evidence is one-sided, she effectively demonstrates that there is probably a link between the five objections and anticloning laws.

Perhaps the most significant theoretical development comes next: Professor Macintosh states that anticloning laws reflect a policy of "existential segregation." Coining a new term, Professor Macintosh generally defines existential segregation as the practice of discriminating by preventing the existence of a disfavored class. Reasoning by analogy to anti-miscegenation laws, which criminalized interracial marriages and thus attempted to prevent the birth of mixed race children (a disfavored class), Professor

⁷ Incidentally, most of the cited congressional testimony is from members of the Republican party.

Macintosh argues that anticloning laws similarly attempt to prevent the existence of a disfavored class. The analogy is cogent, and is perhaps the most compelling theoretical development in the book. While this analogy accurately suggests that the two laws send similar messages to the children (i.e., mixed race children and cloned children), she takes the reader a step further in her analysis. Most people would consider anti-miscegenation laws abhorrent by modern moral standards, and Professor Macintosh recounts the Supreme Court cases striking them down.⁸ In so doing, she entices the reader to accept future arguments that anticloning laws are unconstitutional. However, the reader should not be persuaded by this clever extension. While anti-miscegenation laws were struck down as violative of the parent's fundamental right to privacy, Professor Macintosh ultimately concludes that the anticloning law are unconstitutional based on rights derived from the *children* of human cloning, *not the parents who conceived them*. By juxtaposing these two arguments, she suggests to the reader that they should accept her future argument without careful consideration of its logical underpinnings.

Setting up her final constitutional analysis, Professor Macintosh justifies attacking the laws because the social costs outweigh the benefits. Her analysis, however, is misguided. Professor Macintosh briefly discusses costs to the parents and society, but primarily rests her case as imposing burdens upon those who are born through cloning in violation of the law. In discussing the benefits, she essentially states that there are no benefits. While her assumption that some will violate anticloning laws is reasonable, her assumption that all potential side-effects from human cloning are known is not. She ignores that rational adults, who only want what's best for their children, may seek out "superior" gene donors. Thus, there is a likelihood that decreased genetic diversity could

⁸ See *Loving vs. Virginia*, 388 U.S. 1 (1967).

occur through individual, rational, decentralized choices. Her argument suggests that decreased genetic diversity would only occur via government-implemented programs (the Machiavellian leaders discussed earlier). And by focusing primarily on the costs to those born through human reproductive cloning, Professor Macintosh fails to acknowledge the costs to society as a whole. In so doing, she essentially argues that, on balance, the rights of those born through cloning are superior to the rights of society as a whole.

Professor Macintosh concludes with an analysis under the 14th Amendment's Equal Protection guarantee. Her argument assumes that any ban on reproductive cloning will not be completely successful because the desire to have children is so strong that some will risk criminal punishment. The argument is tenable, as we know that nearly all laws are broken at some time or another, especially when motivation to circumvent the laws is high. Reconnecting with her prior discussions, Professor Macintosh links the constitutional analysis to the public policy analysis, demonstrating the discriminatory purpose behind the laws (existential segregation) and reminding the reader that these laws are founded upon fear and misrepresented facts. In so doing, she continues to remind the reader that accepting her conclusion that anticloning laws are unconstitutional is a justifiable position.

The most persuasive reasoning comes when Professor Macintosh argues that human clones are a suspect class subject to strict scrutiny under the 14th Amendment. Building upon her assumption that anticloning laws will not entirely prevent human cloning, she proceeds through a series of factors that the Court has previously used to identify suspect classes.⁹ In analyzing the factors one-by-one, she shows that human

⁹ Kerry Lynn Macintosh, *Illegal Beings: Human Clones and the Law* 161-74 (Cambridge University Press 2005). Professor Macintosh states that the Supreme Court has identified the following factors as indicia of a

clones satisfy nearly all criteria. Convincing the Supreme Court to adopt a strict scrutiny analysis would likely be the most important part of the plaintiff's case, as this would shift the burden to the government to prove that it is asserting a compelling state interest by the least restrictive means possible.

Perhaps the most problematic part of the analysis occurs next when Professor Macintosh addresses standing to sue before the federal courts. Again, her analysis focuses primarily on the rights of those who were born as human clones. She briefly touches on the rights of the parents, who may be prosecuted for having cloned a child outside the United States and then denied re-entry. In identifying a cognizable harm, she rests most of her argument on the legal stigma that human clones will face: the discriminatory effect of existential segregation. This will be a difficult issue for the courts to address.

Concluding her book, Professor Macintosh states that the anticloning laws will not survive a strict scrutiny test. She essentially declares that the five objections are not legitimate (let alone compelling) state interests, and that they are not narrowly tailored to achieve their purpose anyway. There is very little new material presented in the final chapter, which primarily serves to remind the reader that the five objections are untenable objections.

In summary, Professor Macintosh's book presents a thorough analysis of the five objections that have been made against human reproductive cloning. The reader will find this summary to be particularly helpful. In general, she does not advocate that we should proceed with caution, but rather that all these fears are misguided. Assuming that a

suspect class: (1) disabilities, history, and powerlessness, (2) discrete and insular minorities, (3) visible characteristics, (4) immutable characteristics, (5) fairness, stereotypes, and the ability to contribute to society, (6) stigma and opprobrium, and (7) congressional action and political realism.

cloned human will be born in the near future, we may very well see all these arguments (and more) played out.