

Spring 1998

## Of Monsters Unleashed: A Modest Beginning to a Casuistry of Cloning

Catharine Cookson

Emily Ramsey

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

### Recommended Citation

Catharine Cookson and Emily Ramsey, *Of Monsters Unleashed: A Modest Beginning to a Casuistry of Cloning*, 32 Val. U. L. Rev. 419 (1998).

Available at: <https://scholar.valpo.edu/vulr/vol32/iss2/4>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



## OF MONSTERS UNLEASHED: A MODEST BEGINNING TO A CASUISTRY OF CLONING

CATHARINE COOKSON\*

*If an educated man is armed with only reason, if he is disdainful of custom and ignores strength of feeling, if he thinks of "prejudice" and "intolerance" as words with no connotations that are not disgraceful and is blind to religious conviction, he had better not venture outside his academy, for if he does he will have to deal with forces he cannot understand.<sup>1</sup>*

Fear. Horror. Hunger for glory. The driving urge to create and to discover. These passions, and more, dominate the moral debate over cloning, and we ignore them at our peril. The challenge is how to take due account of the feelings and images that swirl around this issue, while not letting them dominate the public discourse. In this Article, I offer a modest suggestion: the process of casuistry<sup>2</sup> is well suited to advance the public debate over the ethics of cloning beyond the emotive level of discourse.

---

\* J.D., Rutgers University, 1980; M.A. [Religious Studies], The University of Virginia, 1992; Ph.D. [Religious Studies], Indiana University, 1997; Visiting Assistant Professor, Indiana University-Bloomington, Department of Religious Studies. The author's areas of interest are ethics, law and religion in America, and religion and social issues. The author wishes to thank Ann Mongoven for her helpful critique of the draft.

1. LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 95-96 (1968).

2. Casuistry is common to both legal and ethical reasoning. In a traditional casuistical analysis, the context of the case at hand fuels the reasoning process: the first question asked is not "what is the law?" but "what is going on here?" Context and facts, not vague impressions, drive the ethical inquiry. Yet, casuistry is not a form of relativism or "situation ethics." Principles are taken into account, not as philosophical abstractions, but as they are embodied in clear paradigmatic instances in which there is no doubt that the particular principle applies (in the common law, these paradigms are called precedents). The particulars of the paradigm are compared with the context of the current case to see how far, on a continuum, the paradigm is from the matter at hand. The closer our present case is to the paradigm, the more certain is our ethical judgment.

Thus, the vital move in casuistry is from abstract principles to paradigmatic illustrations of those principles. These paradigms concretize and embody the essence of the evil or harm that the moral law was most clearly meant to avoid or prohibit, and/or the essence of the good that the principle was most clearly meant to promote. Kenneth Kirk notes that "every principle, to be morally operative, must be accompanied by illustrations and examples" and that "such principle is partially illuminated by the known instances in which it holds good." KENNETH E. KIRK, *CONSCIENCE AND ITS PROBLEMS: AN INTRODUCTION TO CASUISTRY* 107 (1936).

Casuistry relies heavily upon analogy. Not-so-coincidentally, moral debates over cutting edge biotechnology are generally dependent upon analogical argument because no precedents exist to apply to these state-of-the-art contexts. Indeed, much of the controversy surrounding the new technologies involves precisely the following question: which moral analogy is most relevant? By employing the new technology, are we transgressing some vital moral boundary? Or are we simply adding a new illustration to the existing list of examples of a generally acknowledged good?<sup>3</sup>

One key difference between the moral argument of ethical casuistry<sup>4</sup> and the legal casuistry involved in the analysis of a case at bar is the lack of an *a priori* agreement on moral good and on moral boundaries. Lawyers and judges can turn to an authoritative, standard set of laws (and even to paradigmatic illustrations of those laws). Moral discourse in our plural society, however, does not always have the luxury of generally accepted standards and rules, and disagreement over the authority and relevancy of principles and their paradigms forms a key part of public debates over morality as well as proper social policy. The cloning debate fits into this latter category. The public discourse is keenly confused and divided on the issue of which principles are relevant and which paradigms apply.

---

3. One illustration of this is the assessment of the ethics of embryonic gene manipulation. If used in a therapeutical context to cure a genetically transmitted disease, then this use, some would argue, is most like traditional medicine in which the cure of disease is not simply morally acceptable, but can be morally compelling. If, however, the process is used to genetically "enhance" offspring according to "socially prescribed blueprints of perfection," then the case more closely fits the paradigmatic moral evil of eugenics. Glenn McGee, *Parenting in an Era of Genetics*, HASTINGS CTR. REP., Mar.-Apr. 1997, at 16, 17. McGee notes that not every enhancement effort, of course, is the moral equivalent of eugenics. More important, for McGee, is not the use of genetic enhancement in and of itself so much, but, rather, the "deadly sins" that parents commit against their children, sins that are a danger in any type of enhancement effort. *Id.* at 17. These parental sins are "calculativeness, overbearingness, shortsightedness, hasty judgment, and pessimism." *Id.* Paradigmatic examples of the moral horror of eugenics are Nazi efforts to achieve a "pure" race, as well as efforts here in the United States to minimize the procreation of "inferior" humans for the good of the society through forced sterilization. See THE LYNCHBURG STORY: EUGENIC STERILIZATION IN AMERICA (Wordview Pictures 1993).

4. Helpful works explaining and developing casuistry as an analytical process for ethical decision-making are the following: ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988); John D. Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 69 IND. L.J. 983 (1994); Richard B. Miller, *Narrative and Casuistry: A Response to John Arras*, 69 IND. L.J. 1015 (1994). James F. Childress notes the widespread use of an ethical process that eschews absolutist principlism and gives due attention to the contextual particulars in James F. Childress, *Moral Norms in Practical Ethical Reflection*, in CHRISTIAN ETHICS: PROBLEMS AND PROSPECTS 196 (Lisa Sowle Cahill & James F. Childress eds., 1996). Childress, however, uses a definition of casuistry that is more limited than my operating approach to casuistry. See Catharine Cookson, *Bridging the Garden and the Wilderness: A Proposed Alternative Process for Resolving Free Exercise Conflicts* (1997) (unpublished Ph.D. dissertation, Indiana University) (on file with author).

Adding to the muddle of the public debate is the sometimes lurking, and sometimes explicit, recourse to horror stories of fantastic experiments that have gone awry. Such citation to tales of horror blurs the boundary between moral fable and paradigmatic case, however. The popular images of the stories of Frankenstein and the Jurassic Park, for example, are not paradigmatic cases in the casuistic sense of "paradigm": they are not specific, contextualized cases with practical details for comparison and contrast. Particularly in the context of the debate over cloning, such tales (or, at least, the popular images conjured by these tales) are vehicles for the expression of our greatest fears and imagined horrors. Arguments premised upon such fables are dismissed at our peril, however: cautionary tales that have a strong grip on the public's imagination tend to contain the most piercing insights into the general human condition. As such, these fables have a place in the moral discussion. The problem is how to usefully and properly incorporate these metaphorical stories into a reasoned debate over cloning.

Casuistry neither ignores metaphorical fables as irrelevant, nor privileges them as authoritative precedent. Fictional narratives instead are most usefully treated as general maxims whose aphorisms (i.e., the morals of the stories) can be used in the accumulation of arguments for or against a particular resolution of the case at hand.<sup>5</sup> The key to the narratives is to extract the moral truth that

---

5. Jonsen and Toulmin are better at giving examples of maxims than at precisely defining them. They explain, for example, that maxims are aphorisms that are more particular than broad commandments (Thou shalt not lie), yet more general than paradigms. Typical maxims, for example, range from "Don't kick a man when he's down" to "A lesser evil can be tolerated to prevent a greater." JONSEN & TOULMIN, *supra* note 4, at 253. "These maxims," note Jonsen and Toulmin, "are seldom further proved; their relevance is seldom explicitly demonstrated; yet they play an important role in the development of a moral argument." *Id.*

They note elsewhere that, in resolving concrete issues in fields such as bioethics (or biotechnology), the offerings of most novelists are helpful only generally, and not in the most particularized sense of concrete experience. They write:

Novelists and others may frame some rough moral generalizations about broad kinds of human actions and motives—for example, treachery or innocence—but except for a few authors such as Iris Murdoch, these rarely involve deep analytical or theoretical insight, and they often rise scarcely above the level of homespun maxims such as, "Honesty is the best policy." Meanwhile problems of moral appraisal, merit, or obligation arise out of experience in actual practice on occasions and in ways that need to be looked at in all their relevant detail. Like the clinical judgment of a perceptive physician, moral wisdom (*phronesis*) "speaks to the condition" of a particular agent, acting in a specific situation.

*Id.* at 296. This points up some very serious drawbacks to the casuistical method as described by Jonsen and Toulmin: it is geared to explicit and precise cases. What, then, does the casuist do when faced with the need to make broad policy determinations about cutting-edge technology? As demonstrated in this article, I think that the casuistical method can also be used to formulate an appropriate, nuanced approach to future-directed public policy issues, such as those posed by cloning. Casuistry enables imaginative, analogical analysis and solutions. And it can move the debate beyond abstractions and conflicts of principles to a focused assessment of the context at hand.

has resonated with the public. These insights can then be usefully added to the arguments that cumulatively shape the ultimate resolution or response.

In the case of cloning, narratives are particularly useful because of the novelty of the context, and yet they must be used with particular caution precisely because the context is novel. There are no paradigmatic precedents on point, because no one has done this sort of thing before. Hence we are, as already noted, left to our imaginations or to reasoning by analogy to known situations. Fictional narratives exploring matters close to the issue are imaginative journeys into the Brave New World<sup>6</sup> that we now, in the real world, are poised to actually enter. Authors such as Mary Shelley and Michael Crichton cannot provide us with a roadmap of detailed particulars, as actual paradigms do, but they can remind us of the dangers of our human failings and thus outline possible pitfalls in the journey. It is in this spirit that I will now examine two science fiction narratives that have not only resonated with the public psyche, but also are representative, I think, of fears which underlie the cloning debate: Mary Shelley's *Frankenstein*<sup>7</sup> and Michael Crichton's *Jurassic Park*.<sup>8</sup>

*Frankenstein* is probably the most difficult to analyze because there are numerous movie versions, two distinct written editions, and an archetypal Frankenstein monster that has assumed a life of its own in popular culture. As might be expected, the Mary Shelley novel is far more nuanced and complex than the popular image of an evil scientist creating a monster that runs amuck. The novel's scientist, Frankenstein, is both flawed and heroic.

Frankenstein and the first narrator of the story, the adventurer and letter writer Robert Walton, are driven by the same passions to "be the first," to (as they said on the original *Star Trek*) "go where no man has gone before." Walton writes to his sister, Margaret, of his quest to sail to the North Pole: "I shall satiate my ardent curiosity with the sight of a part of the world never before visited, and may tread a land never before imprinted by the foot of man. These are my enticements, and they are sufficient to conquer all fear of danger or death."<sup>9</sup> Profit and wealth play no role in this quest. Walton instead envisions himself as an altruist whose scientific discoveries shall "confer on all mankind to the last generation" an "inestimable benefit."<sup>10</sup>

---

6. See ALDOUS HUXLEY, BRAVE NEW WORLD (1946).

7. See *infra* notes 9-17 and accompanying text.

8. See *infra* notes 18-20 and accompanying text.

9. MARY W. SHELLEY, FRANKENSTEIN: OR, THE MODERN PROMETHEUS 17 (Courage Books 1990) (1831) [hereinafter SHELLEY (1831)].

10. SHELLEY (1831), *supra* note 9, at 18.

Walton and Frankenstein meet when Walton's crew rescues Frankenstein from the arctic waters. Telling Frankenstein of his quest, Walton exclaims that the price he might pay is of no moment: "how gladly I would sacrifice my fortune, my existence, my every hope to the furtherance of my enterprise."<sup>11</sup> In his feverish enthusiasm, Walton reveals the lengths to which he would go to accomplish his dream: "One man's life or death were but a small price to pay for the acquirement of the knowledge which I sought; for the dominion I should acquire and transmit over the elemental foes of our race."<sup>12</sup>

Walton's revelation evokes a heart-wrenched outburst from Frankenstein: "Unhappy man! Do you share my madness? Have you drank also of the intoxicating draught? Hear me—let me reveal my tale and you will dash the cup from your lips!"<sup>13</sup> And thus begins Frankenstein's tale of horror.

Frankenstein's transgression is not uniquely his own but echoes Adam and Eve's Fall. He had aspired to "become greater than his nature will allow,"<sup>14</sup> and he yearned to be creator:

A new species would bless me as its creator and source; many happy and excellent natures would owe their being to me. No father could claim the gratitude of his child so completely as I should deserve theirs.<sup>15</sup>

11. *Id.* at 25.

12. *Id.*

13. SHELLEY (1831), *supra* note 9, at 25-26. This edition is a reprint of the 1831 edition, published by Henry Colburn and Richard Bentley, London. Interestingly, this last anguished exchange was not in the earlier edition. In the first version, Mary Shelley had instead described a Frankenstein who was more didactic than horror-stricken:

Yesterday the stranger [Frankenstein] said to me [Walton writes], "You may easily perceive, Captain Walton, that I have suffered great and unparalleled misfortunes. I had determined, once, that the memory of these evils should die with me; but you have won me to alter my determination. You seek for knowledge and wisdom, as I once did; and I ardently hope that the gratification of your wishes may not be a serpent to sting you, as mine has been. I do not know that the relation of my misfortunes will be useful to you, yet, if you are inclined, listen to my tale. I believe that the strange incidents connected with it will afford a view of nature, which may enlarge your faculties and understanding.

MARY W. SHELLEY, *FRANKENSTEIN: 1818 TEXT, CONTEXTS, NINETEENTH-CENTURY RESPONSES, MODERN CRITICISM* 17 (J. Paul Hunter ed., 1996) (1818) [hereinafter SHELLEY (1818)]. For sparking my treatment of *Frankenstein* and its moral, I am indebted to the nuanced, stimulative, and imaginative critical essays offered in this Norton Critical Edition.

14. SHELLEY (1831), *supra* note 9, at 42. See also SHELLEY (1818), *supra* note 13, at 31 (same text).

15. SHELLEY (1831), *supra* note 9, at 43. See also SHELLEY (1818), *supra* note 13, at 32 (same text).

Frankenstein's single-minded devotion to his pursuit numbed his conscience. He kept his work a secret from everyone, and thus there was no one to call him back to his senses. As he relates this tale to Walton, Frankenstein now recoils in horror at the activities that he had once performed so routinely:

I pursued nature to her hiding-places. Who shall conceive the horrors of my secret toil, as I dabbled among the unhallowed damps of the grave, or tortured the living animal to animate the lifeless clay? My limbs now tremble, and my eyes swim with the remembrance; but then a resistless, almost frantic, impulse, urged me forward; I seemed to have lost all soul or sensation but for this one pursuit. . . . I collected bones from charnel-houses; and disturbed, with profane fingers, the tremendous secrets of the human frame. In a solitary chamber, or rather cell, at the top of the house, and separated from all other apartments by a gallery and staircase, I kept my workshop of filthy creation. . . .<sup>16</sup>

Frankenstein's flaws are an inordinate self-pride and arrogance, and an intense preoccupation with accomplishing what no one had done before. These excesses both fueled his scientific inquiry and overrode his moral sensibilities. Importantly, Shelley portrays Frankenstein's fall as part of the common human condition—she warns us that Frankenstein's flaws are our flaws, too.

Frankenstein compounded his transgressions by abandoning his creature at its birth. Rather than take responsibility for what he had made, he ran in horror:

I had desired [the ability to infuse life into an inanimate body] with an ardour that had far exceeded moderation; but now that I had finished, the beauty of the dream vanished, and breathless horror and disgust filled my heart. Unable to endure the aspect of the being I had created, I rushed out of the room. . . .<sup>17</sup>

Frankenstein's failure to attend to the consequences of his creative actions ultimately causes the being's destructive rampage. Tellingly, the creature avenges itself by killing the innocent; the forces Frankenstein unleashed crash upon those who least deserve such tragedy.

---

16. SHELLEY (1831), *supra* note 9, at 43. See also SHELLEY (1818), *supra* note 13, at 32 (same text).

17. SHELLEY (1831), *supra* note 9, at 45. See also SHELLEY (1818), *supra* note 13, at 34 (same text).

The moral fable of the Frankenstein genre is further developed by Michael Crichton in the book *Jurassic Park*: humans as creators myopically fixated on a goal without regard for the consequences. What Crichton brings to Shelley's basic formula is the power of money. Big money.

Bioengineered DNA was, weight for weight, the most valuable material in the world. A single microscopic bacterium, too small to see with the naked eye, but containing the genes for a heart-attack enzyme, streptokinase, or for "ice-minus," which prevented frost damage to crops, might be worth five billion dollars to the right buyer.<sup>18</sup>

Crichton has given us a modern fable wherein profits and the thrill of discovery have become the Absolute, blinding one to the dangers and potential effects of the activity. Secrecy compounds the problem, for it prevents others with clearer sight from intervening.

Crichton furthermore highlights the modern problem of dispersed power. Frankenstein acted on his own; there were no layers of supervisors, experts, lawyers, accountants, investors, etc., and no other specialists with whom Frankenstein had to collaborate. The modern corporate world of venture capitalists, interlocking companies, and highly-specialized professionals has made it harder to pinpoint any one person as committing a transgression causing harm, the traditional sin of commission, while making it easier to fall into sins of omission. Crichton's paleontologist, Alan Grant, angrily confronts lawyer Donald Gennaro (the investment banking lawyer) with his particular sins of omission:

"You sold investors on an undertaking you didn't fully understand. You were part owner of a business you failed to supervise. You did not check the activities of a man you knew from experience to be a liar, and you permitted that man to screw around with the most dangerous technology in human history. I'd say you shirked your responsibility."

Gennaro coughed again. "Well, now I'm taking responsibility [by having the military bomb the island and destroy it by air]."

"No," Grant said. "You're still shirking it. And you can't do that anymore." . . .

---

18. MICHAEL CRICHTON, *JURASSIC PARK* 69 (1990).



. . . . .  
. . . Grant turned to Gennaro. "Your island is a mess, Mr. Gennaro. Your experiment is a mess. It has to be cleaned up. But you can't do that until you know the extent of the mess. We have to account for every animal born on this island. Then we can burn it down."<sup>19</sup>

Setting aside the dramatics of the situation and the caricatures, the scene conveys a clear moral: sins of omission are as deadly as sins of commission. Responsibility is abdicated when a person in power fails to supervise carefully. An even more particular moral of this exchange is that it is an abdication of responsibility when one in power continually defers to "the experts." The specter raised by Crichton in *Jurassic Park* is more than just dinosaurs run amuck; it is corporations run amuck. The dispersion of responsibility in modern enterprises too often means that no one is responsible.<sup>20</sup>

What do these horror fictions from popular culture add to the legal and ethical discussion over cloning? Precisely this: the public's fears of biotechnology surface in the form of such nightmarish popular images, and the proponents of biotechnological experimentation and development (such as cloning) have not directly addressed them. Pro-human-cloning arguments understandably have centered on the factual debunking of the typical cloning rumors and fantasies. Human clones do not emerge fully-grown from the test tubes; an army of Hitler/Nazi clones, for example, could not threaten the world tomorrow. Any clones would start out as infants that are born and grow to maturity as any other child. The importance of nurture, as well as nature (genetics), is emphasized. And the notion that the creation ultimately undermines the goal of the creator<sup>21</sup> is repeated in response to ethicists' objections that people (with vicious or good intentions) will clone themselves or beloved others, driven by the improper desire to continue the existence of the cloned dead. Such schemes, cloning advocates well note, are doomed to failure.<sup>22</sup>

---

19. CRICHTON, *supra* note 18, at 370-71.

20. Christopher Stone has examined the problem of corporate structures that result in, if not encourage, irresponsibility and lack of oversight on ethical issues. See CHRISTOPHER STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

21. The inevitability that the creation will not honor or obey (and will even undo) the creator is also reflected in both *Frankenstein* and *Jurassic Park*. See *supra* notes 9-20 and accompanying text.

22. These arguments, of course, are directed to human cloning efforts and do not assuage the public's fear of man-made demon-creatures getting loose (flushed mistakenly out into the world through sinks and drains?) and destroying the world-as-we-know-it.

While such examinations of results in context are a driving force of casuistry, these educational efforts alone will not assuage the public's fears of cloning horrors because these factual assurances are directed only at the nightmares themselves, and not the root causes. In other words, the popular horror images and beliefs about cloning are the result of the fears and not necessarily the sole cause of the fears. The nightmarish images persist despite educational efforts, in part because of a perception that the very process of discovery, invention, and production is itself out of control.

Genetic enterprises especially and inherently implicate the future of life itself and the issue of humans "playing God." The public perceives that profits, investment, and the thrill of discovery and of being "the first," are driving the biotechnology business. The public suspects that no one cares about the long term consequences but only about short term profits, that there are no external checks and balances, that power is too diffused under the corporate framework, and thus no one within the enterprise is ultimately responsible for the public's safety.

The Frankenstein maxim of bearing responsibility for what one has created has found its way into the common law. For example, a New Jersey court pronounced a "Frankenstein monster" theory of toxic tort liability: if you make the monster and it escapes, you are absolutely liable for the damage it causes.<sup>23</sup> Such after-the-fact moral and common law responsibility, however, is of little comfort to innocent victims of irreversible damage. In its collective rush to encourage corporate flourishing, our society - has neglected the issue of community flourishing. We have blithely assumed that the two are one and the same. In areas such as cloning, which the general public views with suspicion and fear, a necessary prerequisite to gaining societal approval to carry on the

---

23. *Kenney v. Scientific, Inc.*, 497 A.2d 1310 (N.J. Super. Ct. Law Div. 1985). In this case, people living near a landfill alleged damages caused by toxins that leaked from the landfill as runoff, leachate, and/or fumes. The generators of the waste claimed that they had no responsibility for the damage because the waste was not under their control. The court rejected this logic:

Since the potential for calamity lurking in an abnormally dangerous substance is precisely what justifies the imposition of absolute liability, the place where the substance ultimately does its marauding should not serve to dissipate such liability. *A company which creates the Frankenstein monster of abnormally dangerous waste should not expect to be relieved of accountability for the depredations of its creature merely because the company entrusts the monster's care to another, even an independent contractor.*

*Id.* at 1320-21 (emphasis added). This is a variant of the principle from *Rylands v. Fletcher*: one who brings onto land something (in the *Rylands* case, a reservoir of water) that is abnormal or unduly dangerous is responsible for the damage it causes if it escapes. Good intentions and lofty purposes do not matter: if your activity results in harm, you are responsible. See *Rylands v. Fletcher*, L.R. 3 H.L. 330, 338 (1868). See also W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 78 (5th ed. 1984).

work is clarifying the biotech company's preventive responsibilities to safeguard the public's health, safety, and ethical sensibilities. In other words, the way to ensure that corporate flourishing leads to community flourishing is to re-fasten the bindings of public responsibility onto corporations and the persons who run them, particularly in areas such as cloning where the stakes involve the stuff of life itself.

In sum, cloning is a new frontier, and no one can predict the future. In this situation, biotechnology's assurances as to safe outcomes will not assuage the public fear, because the process of biotechnological research, development, and production itself is not fail-safe.<sup>24</sup> Biotech companies that undertake cloning projects have the burden of proving to a fearful public that a well-designed system of internal as well as external checks and balances exists to protect society's interests up-front. The public's perception is that laws assessing accountability after-the-fact are too little, too late, when the monster has already done its irreparable worst.

The usual, unimaginative options for legal accountability are corporate laissez-faire (deference to corporate control with lawsuits to assess after-the-fact damages) and government regulatory control. However, systemic accountability and safeguards need not be solely the responsibility of either the corporation or bureaucratic government regulation. Casuistry looks to analogy for creative solutions, and I suggest that the model offered by the American National Standards Institute (ANSI) is one private regulatory success that the biotechnology field would do well to emulate. ANSI notes, "ANSI does not itself develop American National Standards . . . ; rather, it facilitates development by establishing consensus among qualified groups."<sup>25</sup> Members of the committees that establish the standards come from all interested areas of society: industry, labor, technical experts from academe, government regulatory agencies, etc.

---

24. As Robert Burns's maxim goes:

The best laid schemes o' mice an' men  
Gang aft agley,  
An' lea'e us nought but grief an' pain,  
For promis'd joy!

Robert Burns, *To a Mouse*, in *POEMS AND SONGS OF ROBERT BURNS* 111, 112 (James Barke ed., 1960).

25. American National Standards Institute, *An Introduction to ANSI, ANSI Online* (last modified February 26, 1998) <<http://web.ansi.org/public/about.htm>>. The ANSI organization and process also offers a model for *international* cooperation and consensus on standards for biotechnologies such as cloning. ANSI cooperates with and is part of a larger, international, standards-setting organization. Such international private regulatory control would obviate the problem of corporate forum-shopping, i.e., relocating its research facilities to the nation that would regulate the least. (In *Jurassic Park*, for example, the facilities were on an island belonging to Costa Rica.)

In the case of cloning and other biotechnological endeavors, the ANSI consensus model offers a "middle way" between the laissez-faire and governmental control approaches. Such a private, non-profit group would provide a forum for input from interested/affected members of the general public, especially non-dominant groups whose voices are not heard in the corporate board room or by the professional association committee.<sup>26</sup> The ANSI model also does not have the usual enforcement problems of other voluntary committees; once the standards are agreed upon and adopted by the committees, they are then often adopted wholesale by the United States regulatory agency for that area and enforced as any other government regulation. Additionally, the tort system informally enforces ANSI regulations in that a product that does not conform to the applicable standard is assumed to be defective. Although this is often an after-the-fact remedial process (that is, after irreparable damage has been done), liability insurance carriers can aid in the preemptive enforcement of standards through their risk assessment inspections and inquiries during the rate-setting process. Risky endeavors that may be outside the standards are assessed appreciably higher rates (if they are covered at all).

Providing a system of enforced responsibility that looks to long term effects and social good will not, however, satisfy all objections to cloning. Many hold that the very activity itself is blasphemous, that we cross the boundary of what is proper for human beings when we manipulate the genetic code and deny uniqueness to creatures whom God intended to be the singular result of the random merger of genes from father and mother. Such deontological (i.e., the breaking of the rules) and teleological (i.e., the violating of the natural law, or what is proper for human flourishing, etc.) arguments can be conversation-stoppers in public discourse.<sup>27</sup> "Consensus" does not mean that

26. For instance, I understand from discussions at the 1997 meeting of the American Academy of Religion's Section on Indigenous Religious Traditions that the Human Genome Project Task Force was surprised at the vehement objections raised by indigenous peoples against the harvesting of their genes.

27. At this point, something must be said regarding rules for conducting discussions within a format modeled on ANSI. It is far easier, I would think, to reach a consensus on engineering matters than on public policy issues such as cloning. For guidance on rules of public discourse, therefore, I enthusiastically recommend CHRISTOPHER MOONEY, *BOUNDARIES DIMLY PERCEIVED: LAW, RELIGION, EDUCATION, AND THE COMMON GOOD* (1990). While directed at public discourse over issues of law and religion, its vision is certainly helpful for public discourse on any contentious matter. Mooney emphasizes the inevitability of conflict and the necessity of compromise. All rival moral claims and values cannot prevail.

Accordingly, Mooney sees two choices as to discourse: public discourse and "political discourse." *Id.* at 29-31. Political discourse is the use of public law and political power to force one constituency's views upon the rest of society "to oppose one ideology with another." *Id.* at 29. Mooney observes:

The whole effort has nothing to do with public discourse and in fact testifies to a loss of

one group may hold the entire process hostage. It does mean that all must enter the process willing to compromise. I suggest that casuistical reasoning can help continue the conversation by engaging in the discussion of analogies and paradigms.<sup>28</sup> And in the meantime, cloning activities that are not controversial

confidence in such discussion, as does every other attempt at single issue politics . . . . These issues are raised in public not because questions are thought to be open, offering hope of creative answers and shared meanings, but because they are presumed to be closed to all considerations of change.

*Id.* at 29-30. This option is warfare, with coercion as the weapon of choice.

The second option open to those who seek to influence public policy directly is to participate in what Mooney terms "public discourse." Such discourse seeks creative solutions to pressing issues and shared meanings of the common good because these form the basis of a public consensus for action. When seeking consensus on civic action, the emphasis is not on our distinctiveness but on the search for shared experiences, reasons, and goals. As Mooney notes: "Remember that we are talking here about how to achieve consensus on civic action, not consensus on religious belief." *Id.* at 31. I think Mooney's model for public discourse is a vital key to our society's survival in the face of ever-increasing pluralism: we all must become translators and interpreters. And we all must enter the discourse willing to compromise.

28. One story that gives pause for thought is Kurt Vonnegut's short story, *Adam*. See Kurt Vonnegut, Jr., *Adam*, in WELCOME TO THE MONKEY HOUSE 285-92 (1968). It is not about cloning, per se. But it is about birth, the human impulse to continue family bloodline, and how one couple's miracle is another couple's non-event. Hans Knechtmann and his wife Ava had grown up in the Nazi camps. Heinz "was only twenty-two, but seemed and felt much older. He had died a little as each member of his family had been led away and killed by the Nazis, until only in him, at the age of ten, had life and the name of Knechtmann shared a soul." *Id.* at 285. The story takes place in the waiting room of a hospital delivery room; Ava is in labor. "This would be his second child. The last time he had waited, he had waited on a straw-tick in a displaced-persons camp in Germany. The child, Karl Knechtmann, named after Heinz's father, had died, and with it, once more, had died the name of one of the finest cellists ever to have lived." *Id.* at 286. The baby is born, it is healthy, and Heinz is ecstatic. When he sees the baby, he sees sparks of his family in him, sparks of the Knechtmann line. Heinz calls the baby a "treasure house. Everything is saved in you." *Id.* at 288. Heinz tries to share his wonder and excitement with another new father from the waiting room, but this man's reaction to the birth of yet another child is ho-hum. When Heinz visits Ava the next morning, she asks him how the baby is. Their exchange ends the story:

"Perfect. Perfect, Avchen."

"They couldn't kill us, could they, Heinz?"

"No."

"And here we are, alive as we can be."

"Yes."

"The baby, Heinz—" She opened her dark eyes wide. "It's the most wonderful thing that ever happened, isn't it?"

"Yes," said Heinz.

*Id.* at 292.

Heinz and Ava had their child. To take great license with the story: what if Heinz and Ava could not have a child? What if cloning was the only way to carry on their family line, *and* they had no ethical objections to using cloning and *in vitro* fertilization? Is it truly "playing God" to restore what evil human beings have destroyed? Just as those who support cloning ignore at their peril the fears of the public and the flaws of their own system of checks and balances, so, too, must principled opponents of cloning with open heart and mind consider the importance of family line and family tradition to the human race.

1998]

*ON MONSTERS UNLEASHED*

431

can be continued under standards and limits established by group consensus. In sum, I have offered no grand solutions to the cloning debate; indeed, I hope to have added further complexity to it, a complexity that the casuistical process is uniquely equipped to handle.

