

Spring 1998

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Recommended Citation

Robert C.L. Moffat, *Cloning Freedom: Criminalization or Empowerment in Reproductive Policy?*, 32 Val. U. L. Rev. 583 (1998).

Available at: <https://scholar.valpo.edu/vulr/vol32/iss2/8>

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CLONING FREEDOM: CRIMINALIZATION OR EMPOWERMENT IN REPRODUCTIVE POLICY?

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I. INTRODUCTION

In his nightmares, Leon Kass envisions a couple arriving at their friendly corner cloning parlor pleading, "Could we have a clone, please?"¹ Because a clone is simply more of the same, we could even hear in our mind's ear their plaintive tone, reminiscent of Oliver Twist asking for more. Many in the contemporary debate about cloning are saying that the couple should never, under any circumstance, be granted their wish. Not only do the enemies of cloning contend that cloning is entirely unethical, they also believe that it should be made illegal.

For example, the well-publicized medical ethicist Arthur Caplan states his belief that cloning "would make doing anything in humans beyond unethical—it would be criminal."² Some legislators wish to make sure that criminal penalties are as harsh as possible. Immediately after the cloning of Dolly the sheep was announced, Florida legislator Alex Villalobos rushed to file a bill that would make any use of human DNA in medical research a crime. He demonstrated the seriousness of his intentions by asking that the practice be declared a first

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1. The rhetorically negative questions Kass asks are: "Is it a right to acquire the baby of one's choice?" and "Why not, dearly beloved, a more perfect baby?" Leon R. Kass, *The Wisdom of Repugnance*, THE NEW REPUBLIC, June 2, 1997, at 17, 24-25 [hereinafter Kass]; see also Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998).

2. Carol M. Ostrom, *Cloning Humans? It Isn't Ethical*, GAINESVILLE SUN, Mar. 1, 1997, at 6D, 8D.

degree felony punishable by thirty years in prison. His proposed bill was so broad that it would have criminalized work that is presently being done in many places in which bits of human DNA are used in a wide range of scientific research.³

Before we sign on to this ardent campaign for expansion of the criminal law, wisdom dictates that we ask a few questions. Are there pressing reasons to believe that cloning is a threat of such a magnitude that prompt and drastic action is imperative? How persuasive are the justifications offered for restricting freedom by criminalizing cloning? How do the claimed benefits compare with the costs entailed in such an expansion of the criminal law? Are there countervailing reasons in favor of expanding rather than restricting freedom? This Article takes up these questions in the order presented.

II. HOW BIG A THREAT IS CLONING?

Leon Kass envisions a wide variety of potential uses and users of human cloning. For example, he imagines

providing a child for an infertile couple; “replacing” a beloved spouse or child who is dying or has died; avoiding the risk of genetic disease; permitting reproduction for homosexual men and lesbians who want nothing sexual to do with the opposite sex; securing a genetically identical source of organs or tissues perfectly suitable for transplantation; getting a child with a genotype of one’s own choosing, not excluding oneself; replicating individuals of great genius, talent or beauty—having a child who really could “be like Mike”; and creating large sets of genetically identical humans suitable for research on, for instance, the question of nature versus nurture, or for special missions in peace and war (not excluding espionage), in which using identical humans would be an advantage.⁴

But how realistic is this vast array of imagined uses? Are we really on the verge of catastrophe? Is cloning, once the techniques are perfected and the procedure is actually available, likely to be frequent? I very seriously doubt it. We tend to forget that cloning is simply a variant version of *in vitro* fertilization (IVF). Therefore, it is going to share the characteristics of existing procedures of artificial reproduction. I have never heard any couple say they were glad they had to undergo such a procedure in order to try to produce a child. Why?

3. *Cloning Bill Would Put Clamp on DNA Research*, GAINESVILLE SUN, Mar. 8, 1997, at 2B [hereinafter *Cloning Bill*].

4. Kass, *supra* note 1, at 19.

The procedures are expensive, time-consuming, and difficult.⁵ Those who do go through it report emotional and physical exhaustion. And, on top of all that, cloning lacks even the mystery of other artificial reproductive procedures as to what the product of the painful and laborious process might turn out to be.

Kass worries that wealthy persons will choose to maintain a clone in a permanent vegetative state as a source of spare parts. How likely is such a replay of the movie *Coma*? Should we really anticipate Intensive Care Units filled with clones waiting to supply the needs of their twins for body organs? Persons who imagine such a scene cannot have checked the cost of care in the ICU recently, since it is prohibitively expensive. In any event, cloning researchers are excited about the prospects for their research, because they expect to be able to develop the capacity to reproduce tissues and organs using cloning technology. Maintaining entire bodies would be needlessly wasteful. Not only will they be able to provide organ replacement on demand, they anticipate regenerating brain tissue to help Parkinson's patients whose hopes now rest on scarce fetal tissue.⁶

Does that mean there are no situations in which we could expect cloning to be appealing? To this point, I have been able to come up with only two such cases. One would be when IVF procedures cannot be employed using the genes of both parents, because the father's sperm or the mother's eggs are not suitable or are unavailable. In such cases, it must be conceded that at least some parents may choose to clone one of themselves rather than introduce genes foreign to one or both parents into their child.

The other case that seems to present a situation that would make cloning rational was suggested by Ward Cassells, Chief of Cardiology at the University of Texas Medical School. He imagines that parents with a child stricken with leukemia might eagerly choose to clone the child in order to produce a younger twin who could provide a perfect bone marrow match.⁷ Such a prophecy is not at all surprising. There have been cases in the past where parents conceived an additional child in hopes of providing a bone marrow match for their sick child. Apart from such rare cases, I have been unable to discover others in which there would be rational appeal to reproducing something that you already have rather than enjoying the mystery of what a couple might produce in the genetic lottery.

5. For example, the cost is more than \$16,000 for a *single* attempt at pregnancy with sperm and egg donors. *Infertile Couples 'Adopt' Embryos, Choose Traits*, GAINESVILLE SUN, Nov. 23, 1997, at 6A (The New York Times) [hereinafter *Infertile Couples*].

6. *Cloning's Real Benefit Lies Ahead*, GAINESVILLE SUN, Apr. 10, 1997, at 6A.

7. *Debate Keeps Raging over Cloning*, GAINESVILLE SUN, Apr. 7, 1997, at 8A [hereinafter *Debate Keeps Raging*].

I conclude that, if available, the cloning of humans would be utilized, but only in a very small number of cases. Hence, I find it a highly dubious proposition that there are good reasons to believe that cloning is a threat of great magnitude demanding prompt and drastic action.

III. THE UNEASY CASE FOR RESTRICTING FREEDOM

Can there be any doubt that the proponents of criminalization wish to restrict freedom? Not at all. Kass is quite forthright in his attack on what he views as an unwarranted expansion of reproductive freedom. Moreover, he makes it clear that he believes such freedom has already been expanded beyond justification. He says:

The principle of reproductive freedom as currently enunciated by the proponents of cloning logically embraces the ethical acceptability of sliding down the entire rest of the slope—to producing children . . . whose entire genetic makeup will be the product of parental eugenic planning and choice.⁸

We may note in passing that Kass shares with the radical exponents of such freedom the assumption that reproduction is solely an individual right. It is important to remember that an alternative view is that reproduction is a practice which, responsibly conducted, benefits society. A number of reasons can be offered in support of such a view, beginning with the obvious one that, without reproduction, society would cease to exist. It is important to keep this social perspective in mind, because it frequently provides the most persuasive reasons supporting the criminal law.

Conventional wisdom in the architecture of expansions of the criminal law places the burden on those in favor of criminalizing behavior that has up to now been legally permitted. Traditionally, the arguments that endeavor to bear that burden are couched in terms of harms or injuries to others. In its earliest efforts, the criminal law sought to put an end to the blood feud by making murder criminal.⁹ Subsequent expansion included physical threats of injury and eventually came to include protection of property as well, since efforts to take property illegally can so often lead to physical violence and thereby threaten public order.¹⁰ In all these cases, the justification for making behavior criminal is clearly harm to others.

8. Kass, *supra* note 1, at 24.

9. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 237 (1978).

10. WAYNE LAFAVE & AUSTIN SCOTT, *CRIMINAL LAW* 702-03 (2d ed. 1986).

A. *Applying the Harm Principle*

The notion of harm to others as the foundation of the criminal law has a long history. However, it was made truly famous when John Stuart Mill in his best-known work, the *Essay on Liberty*, made it the centerpiece of his philosophical argument. There he declared:

[T]he sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.¹¹

Although there has been considerable debate, especially since the Report of the Wolfenden Commission in England in 1957,¹² as to the precise meaning of Mill's harm principle, it marks an obvious beginning point for discussion of any issue of criminalization. In addressing the issue of cloning, proponents of criminalization are rather silent regarding harm to others. The reasons are obvious. It is rather difficult to find the person who is harmed by the practice of cloning. In fact, the only available candidate is the twin created by the cloning process. Kass argues: "Such an arrangement is profoundly dehumanizing, no matter how good the product. Mass-scale cloning of the same individual makes the point vividly; but the violation of human equality, freedom and dignity are present even in a single planned clone."¹³ But is it realistic to anticipate complaints from the twinned person of wrongful birth on the mere grounds that she shares the identical genes of some previously existing person?

11. JOHN STUART MILL, *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 73 (Everyman's Library ed. 1950).

12. WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION Cmd. 247 (1957).

13. Kass, *supra* note 1, at 23.

Consider the cases mentioned above in which I believe cloning might be rationally appealing to prospective parents. In the case of the child conceived to produce a bone marrow match, some critics object, in a naive form of Kantianism, that the younger child is being treated solely as a means to an end.¹⁴ When the child grows up and learns the story of her place in the family, will she feel that she was created only to be used as an instrumentality? Actual experience with such situations indicates that the child is loved not only as a member of the family, but is valued even more as the one who saved the life of the older sibling. In other words, the child is loved for herself and also for her enormous contribution to the welfare and happiness of the family.

In the second case, the cloned child is chosen to be a member of the family in place of another IVF child who would have shared fewer or no genes with the parents. I do not know how parents explain the absence of genetic connection to such a child produced with donated sperm and/or egg. Presumably, the explanation would run somewhat parallel to the explanation proffered to an adopted child, i.e., that we wanted you. However, it would seem somewhat easier for parents in such nonconventional situations to explain their motivation in deciding on a clone in preference to offspring less closely related to them from a genetic standpoint. In any event, it seems hard to imagine why a cloned child would feel a greater basis for objection than children with little or no genetic relationship to the parents. What does seem quite evident is that any arguments against cloning based on direct harm to others are both quite speculative and far from concrete.

B. Harming Oneself

Proving that there is no harm to others is insufficient to make one's case against criminalization in the twentieth century. Our society has seen fit to criminalize a variety of behaviors because we believe that the individual should be protected from herself. Such grounds are typically designated paternalism, although maternalism could be an equally appropriate label. Paternalism may justify punishing riding in a car without the seat belt fastened, the helmetless riding of a motorcycle, or possessing a wide variety of controlled substances. The reason given for such criminal restriction of freedom is that, if individuals were really aware of the nature of their disastrous courses of conduct, they would not do them. If individuals are unaware or are acting irrationally, society is warranted in intervening and trying to prevent those persons from making a big mistake. Although such an eminent authority as H.L.A. Hart feels that

14. The reverend Richard McCormick, a Jesuit theologian at Notre Dame, states flatly that "No human being is a means to another person's purposes. We stand with our own human dignity before God." Ostrom, *supra* note 2, at 6D.

paternalism can provide justification for criminal proscription,¹⁵ paternalism has been highly controversial, except among legislators. Commentators recognize the great danger of overreaching on the part of the state. Even Gerald Dworkin, who accepts paternalism on the ground that it can sometimes provide a coherent justification for criminalization, believes that it should be employed with extreme caution.¹⁶

Could the cloning of whole human beings be prohibited on grounds of paternalism? The justifications are far from apparent. If there are insufficient reasons for prohibiting the practice based on harm to the clone herself, then it seems well nigh impossible to see what paternalism could add that would be relevant to the debate. It is certainly true that some critics would wish to counsel the prospective parents against cloning. It is even possible that some of those counsels would touch on paternalistic reasons. However, it seems clear that the primary thrust of such arguments is more indirect than those offered by paternalism.

C. Exploring Secondary Harms

A more frequent justification for criminal law when harm to others is not shown is that government should intervene in order to protect society as a whole from secondary harms. The reason for calling them secondary is that they are indirect, because no specific person is injured even though the community as a whole may suffer in some way. The late John Kaplan identified four secondary harms.¹⁷ Society may be harmed because other individuals in society may "model" the behavior of the cloner. In a somewhat similar vein, society may claim the "categorical imperative" on the basis that, if some individuals engage in cloning, then everyone will want to follow suit and start cloning too, and "what would happen to society then?" Although some critics such as Kass seem to imagine that society might go on a cloning binge, I am greatly doubtful that would happen. I have already mentioned reasons why I believe the practice, even if available, would be quite rare.

Two slightly more specific secondary harms are the "non-support" justification and the "public ward" justification. Non-support would apply to the substance addict who by indulging renders himself unable to fulfill his responsibilities to care for those who are dependent upon his support. Obviously, that justification would not apply to the clone. There is, of course, the possibility that a clone could in rare instances become a public ward,

15. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 30-34 (1963).

16. Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 125-26 (Richard A. Wasserstrom ed., 1971).

17. John Kaplan, *The Role of the Law in Drug Control*, 1971 *DUKE L.J.* 1065, 1066-67.

dependent upon the state. That eventuality is presently possible for offspring conceived in any fashion. At the moment, we do not means-test procreation in any way. I cannot see any justification for singling out cloned offspring for different treatment. In the future, when we do apply means-testing to procreative decisions in general, it would also be appropriate to apply those same limits to cloned progeny as well. Because the process is expensive in itself, we should not anticipate that parents without adequate means will attempt to clone their offspring.

D. Public Harms

The claim of various sorts of public harms has been by far the most controversial source of justifications proffered in support of criminal laws. The reason is that public harms are by their very nature the most abstract, indirect, and ephemeral in character. For that same reason, they are also the most easily abused either through simple overreaching of the criminal law or, in too many aggravated cases, through the stigmatization of practices of minority subcultures for political advantage. Such abuses have been well-documented in the literature on policing¹⁸ and in a variety of sociological studies of reform movements.¹⁹

Nonetheless, there are at least two respected sources of theories of public harm as a justification for criminalization. Lord Patrick Devlin propounds the social disintegration thesis. Professor Herbert Hart offers the notion of public nuisance as a suitable ground for justifying criminal law. Each of these theories appears to have parallels in reasons that are being offered to justify making cloning criminal.

1. The Social Disintegration Thesis

Lord Devlin argued that society has a right and a need to enforce its existing morality in order to prevent social disintegration.²⁰ The test he proposed to determine if the morality of a society is sufficiently fundamental that enforcement is necessary is whether the practice in question provokes such indignation and disgust that a random jury would agree that it is beyond the bounds of toleration. In focusing on the idea of repugnance, Leon Kass offers a highly similar argument. Indeed, some of his language suggests that he fears

18. See, e.g., JEROME SKOLNICK, *THE POLICE AND THE URBAN GHETTO* 26-28 (1968) (describing the "blind pig" as a locus of police harassment of minorities).

19. See, e.g., JOSEPH GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963).

20. Patrick Devlin, *The Enforcement of Morals*, Maccabean Lecture in Jurisprudence of the British Academy (Mar. 18, 1959), reprinted as *Morals and the Criminal Law*, in PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 1-25 (1965).

the disintegration of society if cloning is legally permitted. Certainly, his notion of repugnance sounds very much like Devlin's moral disgust.²¹ Whatever weight repugnance might carry as an argument for the moment, it is worthwhile to remember that disgust did not prove to be a powerful seat of argument for Devlin after all. Why? If the social disgust atrophies, then it disappears as a ground for legislation action.

Devlin himself provided an example of that erosion of moral ground. In his original 1957 essay, he argued against the adoption of the recommendations of the Wolfenden Commission that private homosexual behavior between consenting adults should be decriminalized. Subsequently, in 1965, he wrote a letter on that subject to *The Times*, the accepted way for a public figure in England to make a public statement. In the letter, he announced a change in his view. He now supported the recommendations of the Commission and believed that adult private consensual homosexuality should no longer be criminalized. He felt that by that point in time public opinion had shifted in such a way that it no longer met his disgust criterion.²² Thus, the response to Professor Kass' ground of repugnance is that it carries some weight only until the public gets used to the idea. When the idea no longer engenders disgust or repugnance, that ground disappears. That sort of evolution is common. Initially, public reaction to many scientific innovations is one of disgust, as was the case with IVF and many other procedures when they were first publicized. Repugnance or disgust in many cases seems to be really just a form of temporary social hysteria. One could argue that we ought to be trying to resist such hysteria.²³ In any event, repugnance appears unlikely to provide a long-lasting basis for opposition to cloning or to much of anything else.

2. Cloning as Public Nuisance

In addition to other justifications, H.L.A. Hart accepts nuisance as a possible ground for criminal proscription, for example of bigamous marriage.²⁴ That ground has also proven problematic, but it does suggest the kind of public harm that some critics of cloning seek to invoke. As noted above, Kass rests his opposition primarily on his notion of repugnance, which seems to suggest elements of Devlin's fear of social disintegration. Certainly, his terminology is

21. "In crucial cases, however, repugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate it." Kass, *supra* note 1, at 20.

22. See Letter of Devlin and Other Lords to the TIMES (London), May 11, 1965, at 13.

23. See Robert C.L. Moffat, *Cloning Hysteria: Can We Accept a Revolutionary Role for Science in the Human Future?*, in REVOLUTIONS, INSTITUTIONS, LAW 127-49 (Joel Levin & Roberta Kevelson eds., 1998). The chapter cited provides the basis for the present treatment at certain points, principally in sections IV and V *infra*.

24. HART, *supra* note 15, at 38-43.

more colorful than either Devlin's or Hart's. But his repugnance also seems quite similar to Hart's public nuisance, since his grounds for claiming repugnance amount to the idea that cloning (as with Hart's idea of bigamy) would work mischief within the social fabric.²⁵ Hence, if it constitutes any kind of harm, the claimed harm would have to be public in nature.

Public harm clearly seems to be the nature of Kass' claim. He sees cloning as perhaps the greatest threat to human civilization in its entire history. He talks about cloning as a "narcissistic self-re-creation."²⁶ He assumes throughout that the essence of human nature is genes, an assumption that may be less surprising in light of his background as a scientist. But we must recognize that his arguments are premised on that assumption: that human identity is biological in nature.²⁷ He speaks repeatedly of the genotype: "the natural grounding of kinship,"²⁸ and "flesh of their flesh."²⁹ He presents a highly emotive evocation of good old fashioned unplanned human reproduction. Indeed, one is often tempted to wonder if his main complaint regards reproductive *planning* of any sort. But his claim does raise interesting and important questions. Presumably, although he is not really clear about it, the public nuisance that cloning would produce would be a reduction in new genetic combinations and a stagnation of society, because too many persons would be mere replications of past ones.

Such possible claims merit our serious consideration. Kass' emphasis on genes is reminiscent of the sociobiological argument that a species will attempt to secure its genetic survival, even to the point of one member of the herd sacrificing itself in order to save the rest. Indeed, the sociobiologists can cite some fascinating behaviors in support of their thesis. However, when we turn our attention to the human realm of the animal kingdom, even though bloodlines may still be important, cultural factors enter into the picture. For example, we should recall that Sir Henry Sumner Maine claimed, more than a century ago, that the most significant invention in the growth of human societies was the legal

25. "[R]epugnance may be the only voice left that speaks up to defend the central core of our humanity. Shallow are the souls that have forgotten how to shudder." Kass, *supra* note 1, at 20.

26. "Thanks to modern notions of individualism and the rate of cultural change, we see ourselves not as linked to ancestors and defined by traditions, but as projects for our own self-creation, not only as self-made men but also man-made selves; and self-cloning is simply an extension of such rootless and narcissistic self-re-creation." *Id.* at 18.

27. "These biological truths about our origins foretell deep truths about our identity and about our human condition altogether." *Id.* at 21.

28. "What would kinship be without its clear natural grounding? And what would identity be without kinship?" *Id.* at 21.

29. *Id.* at 22.

fiction of adoption.³⁰ Adoption was a way of bringing someone who was not genetically related into membership in the family, clan, or tribe. The wonders of culture are demonstrated in the fact that this legal fiction led to the adopted person being treated as a blood relative. That is only one small example of the power of culture in human societies. We are thoroughly familiar with the phenomenon of brother fighting against brother in civil wars and other deadly conflicts. We also know that spouses often remain more loyal to their spouses than to their genetically-related families. Bonds of culture frequently outweigh those of genes.

Continuing within the framework of biological argument, Kass argues that the practice of cloning would make breeding entirely instrumental in nature. When we stop to think about it, we realize that viewing marriage and offspring from an instrumental perspective has essentially been the worldwide standard up until the last hundred years or so when in the West the novel idea of romantic love as the basis for reproduction entered into the picture. But does that prove Kass' point? Not really. Though kinship factors were occasionally important, the dominant factor in arranged marriages has not been the genetic component. What has mattered is the cultural component. The social, economic, and power relations of the families involved are the most important factors in the relationship. Those connections have been very important in these arrangements, and it is notable that they are cultural.

Kass furthers his biological worries, fearing that prospective parents will simply ask for a more perfect baby.³¹ His nightmare is that, if cloning is available, then when the parents ask for a clone, the provider may try to sell them up to a more expensive model: "Well now, you realize that there are further options. You don't have to choose either one of you, you could look in my cupboard and have a Marilyn Monroe or a Mel Gibson or an Einstein or a Wilt Chamberlain. Tell me what your dream child is, and we can make it happen."³² The scenario is genetically seductive, but the problem is that the clones are merely twins. What the parents end up with will depend on the life experiences of the clone, especially what happens to them during their first three years of life. The parents may provide so much stimulation during that critical early nurturing period that the copy of Wilt may be much brighter than the original. If so, the young Wilt may find basketball a complete bore, and he will

30. "[W]ithout . . . the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps toward civilisation." HENRY SUMNER MAINE, *ANCIENT LAW* 26 (10th ed. 1884).

31. Kass, *supra* note 1, at 25.

32. Actually, this choice is already available at large *in vitro* reproduction clinics. *Infertile Couples*, *supra* note 5, at 6A. Cloning apparently would alter the existing situation only slightly.

curse his parents for saddling him with awkward and uncomfortable height. We can never be certain of the product of the cloning process in humans, because the vagaries of socialization constitute such a large variable.

Kass also worries that people may choose whatever is currently in fashion.³³ If cloning were widely available, choosing according to fashion could become a possibility. There is evidence of that kind of human behavior at the present time. A relatively trivial example is the way the popularity of names changes with the generation. Hardly any of the names of my aunts would be likely to be given to a current baby girl. These fashions change and are even made the subject of some sociological study. On the other hand, parents may also consult the list in order to avoid bestowing too common a name on their offspring.

A more serious example of following fashion is that of gender selection. In India and China particularly, we are now able to begin to see the results of choosing boy children. What does a society do with a boy child when there are ten or fifteen boy children looking for that one female with whom to establish a mateship? A lot of drones are left over, and China is now struggling with the social problem of what to do with all those excess males. For the moment, it clearly is a problem. But it is also a situation that is not going to continue for the long term. Matters of social choice are self-correcting, because social choices change in response to new social realities. If parents select the unusual, the uncommon will become common and, therefore, no longer special. If parents actually did frequently choose the Marilyn Monroe model, brunettes will become more unusual and will stand out from the crowd. A temporary imbalance may occur in social decisions, but, in the long run, such decisions are self-correcting. Indeed, I find it hard to imagine that, even with such options available, parents would not return to the traditional model of conception.

Why is it that discussion of cloning so easily leads us off into such genetic fantasies? I think the explanation lies in the fact that the greatest excitement about cloning is in commercial animal agriculture. The idea of being able to reproduce the great race horse, or more importantly the best dairy cow or beef steer, or the best wool producing sheep is very exciting, because these animals have significant commercial possibilities. What we must note is that these are situations in which our evaluation is exclusively genetic. Hence, when we start

33. Kass, *supra* note 1, at 25.

talking about human cloning, the genetic focus in the animal kingdom carries over, and we are misled by our tendency to continue thinking that genes are the whole picture.³⁴

The genetic fallacy also dominates the popular image of cloning. When people hear the term "cloning," they think of movie portrayals where the story is made interesting by having instant full-grown reproductions. They do not think of producing a twin. This is not a mistake that Kass makes; he recognizes that a twin baby of the donor will be produced. He worries, however, that when the child grows up, he may feel genetically cheated, because of his realization that he is a genetic carbon copy of his dad. Kass thinks that situation will create problems because of the expectations imposed on the young twin. Of course, there is always potential for that kind of problem, and it may take some education for parents to realize how significant the cultural variables are. But such problems can also arise at present, because people may have to deal with the pressures of being a junior or perhaps a Charles III, if he were to become king.

How strong, can we conclude, is the case for criminalizing cloning? Any evidence of possible harm to the clone is at best highly speculative. Paternalistic grounds for prohibiting wishful parents from cloning are equally weak. The secondary harms that supply the basis for much current criminal legislation simply do not materialize at all in the case of cloning. Public harms? These can be quite real and of great social importance. But in the case of cloning, they provide little basis for prohibition. Social-disintegration is a transitory specter without foundation. The argument from public nuisance rests on assumptions that humans are mere biological creatures, for whom culture is an extraneous detail. While it is not possible to conclude that fears of potential undesirable consequences due to cloning are entirely non-existent, it does seem clear that those fears are extremely speculative and fall far short of the threshold of evidence appropriate for an intrusion of the criminal law into the realm of freedom and private autonomy.

34. Kass provides an excellent example of this line of thinking:

Scientists who clone animals make it perfectly clear that they are engaged in instrumental making; the animals are, from the start, designed as means to serve rational human purposes. In human cloning, scientists and prospective "parents" would be adopting the same technocratic mentality to human children: human children would be their artifacts.

Kass, *supra* note 1, at 23.

IV. WEIGHING THE COSTS OF RESTRICTING FREEDOM

In comparison with the rather weak reasons for making cloning criminal, what might the costs to society be of expanding the criminal law in that way? Do such efforts constitute an irrational fear of scientific research? "Many editorial pages," according to Tom Teepen who writes for Cox Newspapers, "seem horrified almost to the point of calling for scientists to be hanged from the street lamps."³⁵ After mentioning Galileo's difficulties with Pope Urban VIII, Teepen concludes that he thinks "far spookier than the advent of Dolly [the cloned sheep] is the idea of Congress rushing off from gee-whiz headlines into the iffy business of passing laws about what scientists may research and what they may not." Is Teepen overreacting? Even Kass admits that "[t]he proposal for such a legislative ban is without American precedent, at least in technological matters"³⁶ That same fact is acknowledged by members of the study panel appointed by President Clinton. They concede that their recommendation is unprecedented, in that "it would apparently be the first time that a field of medical research would be prohibited by law."³⁷

President Clinton appointed the panel following his issuance on March 4, 1997, of an executive order prohibiting the use of federal research funds for cloning of humans.³⁸ In an administration that has sometimes been noted for procrastination, the President's action was remarkably swift, coming within ten days after Dr. Ian Wilmut's announcement that he had cloned Dolly at the Roslin Institute in Edinburgh, Scotland, on February 23, 1997. The panel appointed by the President to study the subject is the National Bioethics Advisory Commission. It was asked to consider whether legislation on the subject should be recommended. That blue-ribbon panel of eighteen experts has since reported to the President, recommending legal restrictions on cloning research.³⁹ However, panel members are uncertain regarding the wisdom of imposing legal restrictions. Dr. Harold Shapiro, President of Princeton University and Chair of the Commission, worries that "[w]e don't know whether the right legislation would be formulated or whether it would be out of date too

35. Tom Teepen, *Go Slow on Anti-cloning Laws*, GAINESVILLE SUN, Mar. 12, 1997, at 10A.

36. Kass, *supra* note 1, at 26.

37. Gina Kolata, *Panel: Prohibit Human Cloning*, GAINESVILLE SUN, June 8, 1997, at 1A (The New York Times) (quoting panel member Alexander Morgan Capron, Professor of Law, University of Southern California).

38. *Cloning Bill*, *supra* note 3, at 2B.

39. See Kolata, *supra* note 37; NATIONAL BIOETHIC ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS (1997).

quickly.”⁴⁰ That concern is probably one of the reasons that the Commission has proposed a time-limited moratorium restricted to cloning research of entire humans.

Under the Committee’s proposal, “legislation would be crafted so that the anticloning laws automatically would expire after about three to five years unless a body of experts, after careful review, decided that the laws should be maintained.”⁴¹ Undoubtedly, at least some panel members are aware that such restrictions are much easier to impose in the heat of the present public excitement than they would be to remove when the interest in the issue has cooled. It is also possible that the current hysteria has driven the Commission to propose some limitations, even against its better judgment, in an attempt to ward off much more damaging restrictions that would be both more inclusive and not time-limited. In this latter regard, it is notable that the Commission’s proposal is really a compromise. Although cloning that leads to the birth of a child would be forbidden, at least in the immediate future, experimentation with cloned human cells in the laboratory would not. One significance of allowing such cell research to continue is that science would be allowed to try to learn how to make spare parts, such as tissue that could be used to replace diseased organs or burned skin.⁴²

But, even with the Commission’s attempt at a judiciously limited proposal, is any kind of legislative interference with scientific exploration feasible or wise? The principal worry addressed by the Commission seemed to be that, without legal restriction, private IVF clinics may proceed with cloning attempts.⁴³ That may be true. But legal restrictions are likely to be futile. If there is sufficient market demand to drive such experimentation, legal restriction will only push the clinics off-shore, outside of our legal jurisdiction. Consider as an example the recent situation of baseball star Rod Carew. His daughter Michelle was stricken with leukemia. Tragically, a bone marrow match could not be found for her, and the disease eventually took her life.⁴⁴ Can we imagine that the

40. *Panel Backs Cloning Moratorium*, GAINESVILLE SUN, May 18, 1997, at 7A (The New York Times).

41. Kolata, *supra* note 37, at 1A, 12A.

42. Paul Recer, *Human Cloning Research?* GAINESVILLE SUN, June 5, 1997, at 1A, 8A (Recer is an Associated Press science writer). See also *Stocking Body Parts: Growth of Animal Organs Gives Hope for Producing Human Supply*, GAINESVILLE SUN, July 23, 1997, at 6A (Associated Press); *Cloned Calf a Step Toward Improved Animals*, *Science*, GAINESVILLE SUN, Aug. 8, 1997, at 9A (Associated Press).

43. Kolata, *supra* note 37, at 1A, 12A (The New York Times) (quoting commission member Dr. Bernard Lo, director of the medical ethics program at the University of California at San Francisco).

44. See Bill Johnson, *He’s Plainly Not the Same Rod Carew*, ORANGE COUNTRY REG. (Cal.), Dec. 31, 1995, at B1.

next time wealthy parents have a child in such a predicament that they would not turn to an overseas clinic for attempts to clone a twin of the sick child in order to try to save her? Pushing that research offshore leaves it entirely outside the existing systems of institutional review and the regulations that would otherwise govern the operation of such clinics. It is important to remember that we already have in place a rather elaborate system of institutional review boards and ethical committees that screen research on human subjects. Because the members of those review boards are people with training and educational background in these fields of research, the existing structure of oversight seems to be a far more appropriate method of scrutinizing scientific projects than turning the task over to politicians eager to dictate both where research funds should go and what science should be permitted to explore.

Is there any rational justification for such fears of what scientists might do? Are they evil or at best amoral individuals in whom any trust would be misplaced? Dr. Wilmut himself stated that, at the present stage of development of cloning technology, “[s]imilar experiments with humans would be totally unacceptable. It would be quite inhumane to contemplate using these techniques at this stage.”⁴⁵ His reason is that the technology is in such a primitive state that there would be an unacceptably high number of failures to permit experimentation in the cloning of entire humans at the present time. Yet Kass finds it necessary to quote him out of context: “Even Dolly’s creator has said he ‘would find it offensive’ to clone a human being.”⁴⁶ Can that be anything more than an educated man joining in the public hysteria that provides such a poor basis for public policy decisions?

Up to this point, Congress has taken no action on the recommendations of the National Bioethics Advisory Commission. That inaction seems due in part to disagreement as to whether the Commission’s proposals are too moderate. Majority Leader Dick Armey, who considers himself a libertarian in political theory, announced an extremely unlibertarian view that the cloning of humans should be permanently banned. Perhaps a stalemate between various degrees of unwise intervention may save us from unprecedented interference in scientific research. However, inaction at the federal level has led to proposals to restrict cloning in at least twenty-four different states. Given the even lower level of competence in the state legislatures, we should not be surprised to learn that many of these bills “are so broadly worded they could also prevent researchers from using routine techniques for developing new drugs.”⁴⁷ A variety of poorly drafted state laws on the subject would constitute “an absolute disaster

45. *Sheep Cloner Says Cloning People Would Be ‘Inhumane’*, GAINESVILLE SUN, Mar. 13, 1997, at 3A.

46. Kass, *supra* note 1, at 19.

47. *Cloning Bills Said Too Broad*, GAINESVILLE SUN, Mar. 18, 1998, at 9A (Associated Press).

for medical research," according to Jeff Trewitt, a spokesperson for the Pharmaceutical Research and Manufacturers of America.⁴⁸ Such cautions remind us of the risks and dangers of permitting political interference in the conduct of scientific research.

Beyond immediate practical considerations such as those just mentioned, we should be even more concerned that legislative prohibition of scientific research raises the specter of the totalitarian subjection of science to politics. Stephen Chirchett's 1997 London West End play *Tom and Clem* reminds us of the bitter fruit of Joseph Stalin's transformation of science into political ideology. To be sure, legislative proscription of cloning research is not yet a new heresy in the tradition of the foolishness of Stalin's Lysenko.⁴⁹ But it represents a potential first step in that direction. Many years ago, reacting directly to that Stalinist example,⁵⁰ Michael Polanyi addressed the wisdom of attempting to direct the work of scientists. His careful analysis showed how self-defeating and counterproductive are efforts to direct what researchers do.⁵¹

Should we feel tempted to claim that Stalinist despotism cannot happen here? We should remember that many of the same avowed enemies of cloning are also conducting campaigns to persuade the Congress and many state legislatures to adopt requirements that medical personnel distribute pseudo-scientific "information" pamphlets to women seeking abortions. Such folk are also frequently busily involved in totalitarian efforts to repress science by mandating the teaching of so-called "creationism" in public schools. It seems clear that eternal vigilance is indeed the price of freedom. It also seems eminently clear that making cloning criminal would entail substantial costs to society. Expanding the criminal law in that way would endanger much current

48. *Id.*

49. MICHAEL POLANYI, *PERSONAL KNOWLEDGE* 238 (1958) (reporting that "In August, 1948 Lysenko triumphantly announced to the Academy of Science that his biological views had been approved by the Central Committee of the Communist Party and members rose as one man to acclaim this decision.")

50. *Id.* at 27, 218 (referring to Lysenko as a "fanatical crank" and as "self-deluded").

51. MICHAEL POLANYI, *THE LOGIC OF LIBERTY* (1951). In *Personal Knowledge*, Polanyi notes with sadness that some are "forced to conform to the views of people who are themselves either dishonest or self-deluded, as Lysenko's followers mostly were." POLANYI, *supra* note 49, at 218. My colleague Prof. Frank Allen raised a further important point that restricting scientific inquiry also deprives us of the benefit of the serendipitous gains of the research, and by definition, we cannot know in advance what those might be. Letter from Francis A. Allen, Professor Emeritus, University of Florida College of Law, to Robert C.L. Moffat, Professor of Law and Philosophy, University of Florida College of Law.

medical research and threaten the atmosphere of free inquiry essential to the conduct of basic scientific investigation. Although it may sometimes require courage to face the mob, we should strenuously resolve to oppose giving in to the irrational fears that drive the criminalization efforts.

V. EMPOWERING FREEDOM

The law can act with respect to society in four fundamental modes. First, it can prohibit action, as in the expansion of the criminal law. Second, at the opposite extreme, the law may require action. Third, the law may also remain neutral by not regulating conduct. Fourth, in a positive vein, the law can promote behavior by providing frameworks that facilitate action in pursuit of human purposes. Even if we are convinced that negative governmental action with respect to cloning would be unwise, the question remains whether no action would be preferable to legal encouragement. What possible reason could there be for the government to facilitate cloning? Cloning technology promises to produce many important new biomedical discoveries that could provide great benefits for society. In the few instances noted above, the cloning of entire humans would benefit the families concerned.

But focusing solely on cloning frames the question too narrowly. The real question should be: what is the value of adding to the range of legal powers in order to enhance human freedom? How could cloning figure in that larger picture? Governmental action might enhance human freedom by facilitating scientific inquiry through the creation of an environment in which science does not feel itself under constant threat from outside interference. Cloning is merely one of a large number of biomedical technologies which, if encouraged, could enlarge the range of options available. Whether that should be pursued depends on whether a larger range of freedom is desirable. Whether that is so may depend on just exactly what we mean by freedom.

Lon Fuller, the late Carter Professor of General Jurisprudence at Harvard Law School, conducted a detailed analysis of freedom that may be helpful. He distinguished between what he termed "freedom from" and "freedom to."⁵² That distinction is familiar to philosophers, because the noted philosopher Isaiah Berlin subsequently expressed it as positive and negative liberty.⁵³ Fuller believed that the concept of freedom had deteriorated in Western society as the

52. Lon Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305-25 (1955). Fuller's essay was first presented as a paper at a Conference on Jurisprudence and Politics at the University of Chicago Law School in April 1954.

53. Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969). The essay was delivered as Berlin's Inaugural Lecture at Oxford in October 1958 and was originally published that year by the Clarendon Press.

focus shifted from freedom to accomplish objectives to freedom from any kind of restraint. However, "freedom from" provides a false sense of an ideal state of being, for if one were truly free from all restraint and "had in fact to choose everything for himself, the burden of choice would become so overwhelming that choice itself would lose its meaning."⁵⁴ In fact, some form of social order is necessary to accomplish true freedom, for "in all significant areas of human action formal arrangements are required to make choice effective. The choices [one] can make without requiring collaborative social effort for their realization are trivial."⁵⁵ In many cases, that collaborative social effort takes the form of the distinct facilitation that law can provide. Hence, he concludes that "freedom to" is closer to the meaning of true freedom, because it implies a conscious choice among a meaningful range of alternatives that are actually available.⁵⁶

With this helpful distinction in hand, I might now surprise the reader by declaring my agreement with people like Kass who worry about the explosion of claims to reproductive freedoms. The reason for my agreement is that such claims are founded on a rampant individualism, heedless of the interests of society, that seeks a large surplus of freedom from any kind of restraint. We need to recognize this phenomenon as a major contemporary social problem. This society has indulged itself in the notion that human reproduction is an entirely personal choice in which society has no legitimate interest at all. We have compounded that error with the idea that children are personal property with which parents can do as they please, almost without limit. Certainly, in this view, society has no special interest in seeing that all children have the requisite environment for successful development. Indeed, it is a striking challenge to envision any area of life in which we grant a wider range of freedom from constraint than with decisions concerning fertility and child-rearing.⁵⁷ However, that abdication of social responsibility is matched by an equal measure of neglect in the opposite direction. As a society, we provide very, very little governmental facilitation that would enhance "freedom to" in these critical domains of the life of our society.

What sort of measures might we as a society take? We could develop programs on a massive scale that the new research in early childhood development suggests are necessary.⁵⁸ Indeed, that new research may develop

54. Fuller, *supra* note 52, at 1311.

55. *Id.* at 1312.

56. *Id.* at 1307-09.

57. See, e.g., Joseph Grcic, *The Right to Have Children*, in PERSPECTIVES ON THE FAMILY 219-32 (Robert C.L. Moffat et al. eds., 1990).

58. See *Nightline: Building Brains—The Sooner, The Better* (ABC television broadcast, Apr. 16, 1997) [hereinafter *Nightline*].

its own momentum in governmental action because its conclusions are so clear.⁵⁹ The results in the pilot programs have been so dramatic that we should anticipate that they will become a major ingredient in the quest to improve test scores, because children who have been through these programs are producing above average scores. One thing to note about these pilot programs is that, although there is governmental involvement, a mandatory model has not been employed. Instead, the program is based on a helping model. Every new child receives a home visit in order to help the parents improve their parenting skills and to screen to see if they need more follow-up help.⁶⁰ It is important to note that, though such programs could use governmental coercion to achieve the desired action, force has not proved necessary to achieve the goals of the programs. Totalitarian methods have not been needed; noncoercive techniques are far more effective, because they are organized to take advantage of voluntary cooperation.⁶¹

Nonetheless, because we are so accustomed to unlimited freedom from constraint in fertility and child-rearing decisions, many will quite likely react with horror to the suggestion of any restriction on the range of choice we presently exercise. But change need not necessarily usher in an era of totalitarian micromanagement of personal decisions. Repeated studies have shown that, given the opportunity to control fertility, women are eager to do so. In other words, women have responded with considerable enthusiasm to having the "freedom to" control their fertility. In fact, in a number of Western European countries, the birth rate has fallen so much that governments worry about lacking sufficient births to maintain population replacement. Those governments have attempted to devise a variety of schemes that would make more attractive the exercise by their citizens of their freedom to procreate. Similarly, in the pilot studies on early childhood development, parents have proven to be quite receptive to the "freedom to" be provided with assistance in developing the nurturing skills needed for effective parenting.

59. See STANLEY I. GREENSPAN, *THE GROWTH OF THE MIND AND THE ENDANGERED ORIGINS OF INTELLIGENCE* (1997). See also Marcia Barinaga, *New Insights into How Babies Learn Language*, 277 SCI. 641 (1997); B. Devlin et al., *The Heritability of IQ*, 388 NATURE 468-71 (1997); Matt McGue, *The Democracy of the Genes*, 388 NATURE 417-18 (1997).

60. The statements in the text refer to the program in Brattleboro, Vermont, which has been in operation long enough for its "graduates" to be scoring above average on standardized tests in the second grade. However, "thirty-two states are spending money on early education for children newborn to three." *Nightline*, *supra* note 58.

61. See generally William McBride, *Noncoercive Society: Some Doubts, Leninist and Contemporary*, in COERCION 178 (J. Roland Pennock & John W. Chapman eds., 1972). On population policy in particular, see Robert C.L. Moffat, *Population, Reciprocity, and Human Potential*, in LAW AND THE ECOLOGICAL CHALLENGE 111-19 (Eugene E. Dais ed., 1978).

That receptiveness should not lull us into a sense that such a revolutionary transformation in the exercise of human freedom would be smooth sailing. For one thing, it would require an emphatic social rejection of a wide variety of ardent advocates of freedom from constraint. Take just two of the myriad possible examples. We could not tolerate the view of some self-styled feminists who urge unlimited choice to reproduce accompanied by unlimited demand for public support for their procreation. Nor would there be any room for the anti-abortionist's passionate defense of unlimited freedom for fetuses. These and many similar advocacies undercut the cohesion required for effective social action. If social order is a prerequisite to true freedom, we must marshal all of our energies to defeat the efforts of such anti-social individualism. Rampant individualism is the product of a culture which idolizes "freedom from" but which wishes at the same time to avoid all responsibility for the exercise of unconstrained freedom.

Defining freedom as such licentiousness has given freedom an undesirable reputation. It has become associated with those who seek to duck responsibility for their decisions. Frequently, these "moral Luddites" attempt to avoid responsibility for their choices by claiming that to exercise conscious choice would amount to "playing God."⁶² This is offered as an excuse for doing nothing. Of course, what people overlook about the notion of "playing God" is that playing God simply means making decisions. The Pickwickian Catch-22 is that deciding not to make a decision is itself a decision. The moral Luddites wish there were an escape from responsibility for deciding, but there is none.⁶³ Is this a problem which should concern us? Polls indicate that many people are worried about our "playing God" by engaging in scientific intervention.⁶⁴ Although in many cases that worry will last only until they have become accustomed to the idea, we must also recognize an underlying desire to escape responsibility for making decisions. In other words, the desire represents a flight from "freedom to." Why? Because the freedom of responsible choice bears the costs they wish to avoid: making real decisions and accepting their consequences.

Equally reprehensible are those who idealize science and believe it will provide the answers to all human problems. They also seek to avoid responsibility for choice by wishing to allow science to make those decisions. That view represents a complete misunderstanding of science, because science

62. Kass also worries about people "playing at being God." Kass, *supra* note 1, at 17.

63. For more extensive treatment, see Robert C.L. Moffat, 'First, Do No Harm': *Mixed Signals in Our Thinking About Life and Death*, in SPACES AND SIGNIFICATIONS 109, 117-120 (Roberta Kevelson ed., 1996).

64. *Debate Keeps Raging*, *supra* note 7.

cannot provide a scheme of values nor intelligently guide public policy.⁶⁵ Science provides us with possibilities. Cloning, as with all previous scientific breakthroughs, represents potential "freedom to." But public policy must provide the framework within which that potential can be realized. Those guidelines both constrain and effectuate freedom.

Fuller suggests that the framework in which freedom is best realized is in "a congenial environment of rules and decisions"⁶⁶ in which individuals are both informed as to the range of alternatives and the consequences of choosing various alternatives and allowed to participate in "decisions that affect the practical significance of [their] freedom."⁶⁷ In order to carry out such a vision, we must educate members of our society to enhance their understanding of the real meaning of freedom. Too much of the current attempt at discourse obstructs that needed education by interfering with the rational processing of information. That in turn prevents intelligent participation in both public and private decisionmaking. To achieve an effective scheme of social ordering, our society must take a level-headed approach to the possibilities exposed by science and the problems created by the exercise of freedom from both constraint and responsibility. A large step in that direction would be a social compact that individuals will once again take full responsibility for the consequences of their decisions.

VI. CONCLUSION

At the beginning, I asked if there are pressing reasons to believe that cloning is a threat of such magnitude that prompt and drastic action is needed. I believe it is clearly not. The popular and political reaction has been exaggerated and overblown, and a hurried legal response is unnecessary and would be unwise. Are there persuasive justifications for restricting freedom by criminalizing cloning? A detailed canvass of the possible reasons demonstrates that the reasons fall far short of the threshold of evidence and argument that an intelligent society should demand before further expanding the reach of the criminal law. That case becomes even less persuasive when the extremely weak advantages of expanding the criminal law are compared with the costs of doing so.

Finally, we should consider seriously the strong reasons in favor of expanding rather than restricting freedom. Empowering our citizens in the exercise of responsible freedom makes a great contribution to the enhancement

65. See, e.g., Robert C.L. Moffat, *The Indispensable Role of Independent Ethical Judgment*, 21 U. FLA. L. REV. 477 (1969).

66. Fuller, *supra* note 52, at 1314.

67. *Id.* at 1315.

of social order. Criminalizing conduct is negative in character and is potentially damaging to social cohesion,⁶⁸ and it should always be our last resort in responding to social problems. So far as cloning is concerned, the issue itself is relatively trivial. Its import lies in the larger context: in its consequences for the atmosphere in which scientific inquiry is conducted, and in the political and popular attitudes toward the exercise of responsible freedom. Whether we should be cloning entire humans is not terribly important in itself. But we clearly should make great efforts to clone freedom.

68. See Robert C.L. Moffat, *Consent and the Criminal Law*, in *CONSENT: CONCEPT, CAPACITY, CONDITIONS, AND CONSTRAINTS*, BEIHEFT NF 12, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 147-58, 152-56 (Lyman Tower Sargent ed., 1979).

