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## Don't Throw the Baby out with the Bathwater: Why a Ban on Human Cloning Might Be a Threat to Human Rights

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# Don't Throw the Baby Out with the Bathwater: Why a Ban on Human Cloning Might be a Threat to Human Rights

*NOTE: While this comment was being prepared for publication, the United Nations General Assembly voted on the issue of human cloning creating a non-binding resolution. While the article has been adjusted in an attempt to reflect the current state of affairs, the relevance of the issues considered in the article has not changed.*

## I. INTRODUCTION

The world is waking up to a new reality that the science fiction of yesterday is steadily becoming the reality of today. The concept of cloning is changing from the genre of science fiction and make-believe to an issue of global importance discussed in the United Nations.<sup>1</sup> While cloning has been discussed and experimented with for a few years now, the world has yet to see a human clone baby.<sup>2</sup> There has been much debate about whether humanity should even venture into this field of science.<sup>3</sup> Policymakers in numerous states and international political bodies feel the need to respond to this development as well.<sup>4</sup>

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1. See generally U.N., AD HOC COMMITTEE ON AN INTERNATIONAL CONVENTION AGAINST REPRODUCTIVE CLONING OF HUMAN BEINGS, at <http://www.un.org/law/cloning> (last updated Jan. 7, 2005) [hereinafter AD HOC COMMITTEE].

2. De Ann Davis, *U.N. Cannot Stop Cloning*, U.P.I., Oct. 25, 2004, LEXIS, News Library, UPI File.

3. See, e.g., NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (1997), available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning1/cloning.pdf> [hereinafter NBAC].

4. See G.A. Res. 56/93, U.N. GAOR, 6th Comm., 56th Sess., 85th plen. mtg., U.N. Doc. A/RES/56/93 (2001); see also Council of Europe: Draft Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings with Explanatory Report and Parliamentary Assembly Opinion, Sept. 22, 1997, 36 I.L.M. 1415.

In December 2001, the United Nations General Assembly created an "Ad Hoc Committee on an International Convention Against the Reproductive Cloning of Human Beings" ("Ad Hoc Committee").<sup>5</sup> It seemed a foregone conclusion<sup>6</sup> that there would be an international ban by the time the committee completed its work.<sup>7</sup> The issue was tabled in committee each year since it was first raised and the UN General Assembly did not pass a resolution establishing a position on this issue until March 2005.<sup>8</sup> The final result was an unsatisfactory and ambiguous non-binding resolution.<sup>9</sup> In the meantime, the debate continues to focus on the issue of "therapeutic" human cloning – cloning for the purpose of using embryos or selectively cultivated body parts for medical treatments.<sup>10</sup>

In the Ad Hoc Committee, there seemed to be a clear consensus among nations that the use of cloning for the procreation of human beings is undesirable and/or unethical.<sup>11</sup> The most elaborate draft document, provided in a letter by the Costa Rican representative, does not draw the line between "therapeutic" human cloning and human reproductive cloning.<sup>12</sup>

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5. See G.A. Res. 56/93, *supra* note 4, at 2.

6. See Edith M. Lederer, *General Assembly Committee Opens Two-Day Debate on Anti-cloning Treaty*, AP ONLINE, Oct. 21, 2004, available at Westlaw, ASSOCPR file.

7. This comment is not attempting to debate whether or not cloning should be banned. The existence of a ban is peripheral to the premise that human clones should have human rights. The only connection is that a cloning ban would have a potentially adverse effect on the rights of clones by creating a climate in which they could be stigmatized or punished for their very existence. See Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) that Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 1, 30-32 (2000) (explaining why it is illogical and inappropriate to transfer disapproval of the cloning process to the clones themselves).

8. Maggie Farley, *U.S. Campaigns for Treaty to Ban Use of Embryo Stem Cells*, L.A. TIMES, Oct. 23, 2004, at A3; *United Nations Declaration on Human Cloning*, G.A. Res. 53/280, U.N. GAOR, 59th Sess., 82nd plen. mtg., U.N. Doc. A/RES/59/280.

9. See Press Release, General Assembly, General Assembly Adopts United Nations Declaration on Human Cloning by Vote of 84-34-37, U.N. Doc. GA/10333 (Mar. 3, 2005), available at <http://www.un.org/News/Press/docs/2005/ga10333.doc.htm> [hereinafter U.N. Press Release].

10. See *id.*; see also Richard Highfield, *UN Urged to Outlaw the Cloning of Babies*, THE DAILY TELEGRAPH, Aug. 30, 2004, available at 2004 WLNR 4153348.

11. See U.N. GAOR 6th Comm., 59th Sess., Agenda Item 150, U.N. Doc. A/C.6/59/L.2 (2004) [hereinafter Total-Ban Proposal]; U.N. GAOR 3rd Comm., 59th Sess., Agenda Item 150, U.N. Doc. A/C.6/59/L.8 (2004) [hereinafter Ban on Post-natal Clones Proposal].

12. See Letter dated 2 April 2003 from the Permanent Representative of Costa Rica to the United Nations Addressed to the Secretary-General, U.N. GAOR 58th Sess., at 1-2 & 11 U.N. Doc. A/58/73 (2003) [hereinafter Costa Rica Letter]. This line, or lack of it, seems to

The ambiguities in the proposals and resolution create a legal ambiguity that could potentially affect the legal status of clones.<sup>13</sup>

This comment does not attempt to argue that human cloning should or should not be allowed. It accepts the premise that “[i]n science, anything that can be done, will be done.”<sup>14</sup> If society recognizes that cloning will be done, making it a crime to create a clone cannot encompass the entirety of cloning policy. The purpose of this article is to point out the danger of ambiguity regarding anti-cloning laws. This comment proposes that any international convention on the cloning issue include a clarifying statement ensuring that potential “live birth” (or post-natal) clones would have equal protection under international human rights treaties regardless of the legality of their creation, and that any human cloning policy that does not address the cloned children’s rights is inherently incomplete.

Cloning debates often overlook the need to *explicitly* confirm the human rights of cloned humans. While it seems most people believe clones are automatically bestowed with such rights, there may be others who disagree. Forfeiting the initiative on such a matter could mean the unnecessary sacrifice, or at least the abuse, of human lives.

This comment will illustrate the need for an explicit recognition of the human rights of human clones. Section II(A) will explain basic terms needed to understand the issue. Moreover, Section II(B) will give a short history of cloning technology. Section II(C) will then provide a context of the legal history of cloning around the world. Section III will show how this legal ambiguity is in danger of being created and will explore the ramifications of ignoring the clone’s rights while banning the practice of human cloning. This section will also show that the concept of human rights for clones, while almost completely

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be the defining factor dividing the committee into two groups; see also Total-Ban Proposal, *supra* note 11, at 2 *Ban on Post-Natal Clones Proposal*, *supra* note 11, at 2.

13. There is, of course, an assumption that if one is creating a ban on cloning, the reason is to stifle the existing impetus that exists to make clones. At the very least, this assumption is borne out by reports about the Raelian cult and the efforts of Dr. Panos Zavos. See, e.g., Liam McDougall, *Cloning Pioneer Accuses Peers of Smear Campaign*, SUNDAY HERALD, Sept. 24, 2004, at 11, available at 2004 WLNR 5223597.

14. LORI B. ANDREWS, NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: THE CURRENT AND FUTURE LEGAL STATUS OF CLONING, at F10 (1997), available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning2/cc5.pdf> (quoting Rabbi Moses Tendler, professor of medical ethics at Yeshiva University).

overlooked, is consistent with the majority of scholars in the scientific, theological, and legal communities. Finally, Section IV will propose the relatively simple remedy for the problem of clones' human rights. The limitations of this solution and the residual benefits will be identified as well.

## II. BACKGROUND

### *A. Basic Terminology - What Do We Mean When We Say "Clone"?*

Cloning, the topic of much popular speculation and discussion, is "the manipulation of a cell from an animal or human in such a way that it grows into a copy of that animal with identical nucleic DNA."<sup>15</sup> "Somatic cell nuclear transfer" ("SCNT") is the technical terminology for what lawmakers, theologians, and scientists are generally referring to when they talk about human cloning.<sup>16</sup>

Cloning is just one form of assisted reproductive technologies ("ARTs") possible today. It is distinct from other techniques for assisting reproduction such as in-vitro fertilization, artificial insemination, and other fertility therapies.<sup>17</sup> One of the biggest distinctions between cloning and other ARTs is that the genetic material does not come from a male's sperm or a woman's egg, but from a cell taken from a fully developed organism (potentially taken from anywhere on the organism's body, e.g. from the skin).<sup>18</sup>

Cloning does not necessarily result in a fully developed animal. In the field of human cloning, the debate is divided between reproductive and therapeutic cloning.<sup>19</sup> Reproductive

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15. *Id.* at F8.

16. *E.g.*, Costa Rica Letter, *supra* note 12, at 3. This comment refers to 'human cloning,' but the term could easily be interchanged with 'SCNT' when referring to a human context. Scientifically, the term 'cloning' actually refers much more broadly than 'SCNT.' For a short layman's description of various kinds of cloning, see Yuriko Mary Shikai, *Don't Be Swept Away By Mass Hysteria: The Benefits Of Human Reproductive Cloning and Its Future*, 33 SW. U. L. REV. 259, 264-265 (2004).

17. See Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L. J. SCI. & TECH. 1, 23-27 (1997) (describing the full gamut of various assisted reproductive technologies).

18. See, ELISA EISEMAN, NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: VIEWS OF SCIENTIFIC SOCIETIES AND PROFESSIONAL ASSOCIATIONS ON HUMAN NUCLEAR TRANSFER CLONING RESEARCH, at C-17, available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning2/cc3.pdf> (last visited Nov. 12, 2005).

19. The terminology in this field is not consistent. *E.g.*, Duane Nash, *Recommended*

cloning is the term for when the goal is to create a viable human being with identical genes.<sup>20</sup> Therapeutic cloning is the term for when the goal of the cloning is not to create a whole organism, but to create embryos and/or to cultivate biological materials for medical treatments/research.<sup>21</sup> This is the focus of the recent stem-cell research debate.<sup>22</sup> The use of therapeutic cloning could potentially result in cultivated body parts, such as a liver, without the need to develop a whole being.<sup>23</sup> The benefits of this field of research are highly debated, but the preliminary research is promising.<sup>24</sup>

Although cloning is well debated, genetically identical organisms already naturally exist in the animal kingdom. Identical twins are beings born with the same genes.<sup>25</sup> The donor of the genetic material and a clone produced would be, in a sense, twins. This comparison is not perfect since a clone and its donor will have different ages depending on the lapse of time between their births. Additionally, since they will not develop in the same womb under the same conditions, any developmental effects that the environment would have on a fetus will obviously not be identical. Some commentators refer to clones as “twins” of the donor because it is both expedient and true to a certain degree.<sup>26</sup>

### B. A Short History of Cloning

The concept of cloning has been around for a long time.<sup>27</sup> It has been on the horizon of science for decades. The concept fascinated fiction writers for generations and was explored

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*Response for Human Cloning Patent Applications*, 42 IDEA 279, 283-284 (2002). The terms used in this comment, while not definitive, seem to be the most commonly used. See, e.g., Kevin Buckley & Paul Lesko, *Attack of the Clones ... and the Issues of Clones*, 3 COLUM. SCI. & TECH. L. REV. 1, 7 (2002).

20. Nash, *supra* note 19, at 284. This is the popular concept of taking John Doe's cells to make Joe Doe #1, John Doe #2, John Doe #3 and so on.

21. *Id.* at 282-283.

22. E.g., John M. Broder & Andrew Pollack, *Californians to Vote on Spending \$3 Billion on Stem Cell Research*, N.Y. TIMES, Sept. 4, 2004, at A1.

23. Buckley & Lesko, *supra* note 19, at 5.

24. See generally Broder & Pollack, *supra* note 22.

25. As opposed to fraternal twins which are born together, but with distinct genes.

26. E.g., Katz, *supra* note 17, at 2 (citing *Bromhall v. Rovrik*, 478 F. Supp. 361, 263 n.1 (E.D. Pa. 1979)).

27. At least one author traces the concept of clones as far back as biblical times. See Wendy Doniger, *Sex and the Mythological Clone*, in CLONES AND CLONES 114, 116 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998).

repeatedly. Scientists first succeeded at cloning simple organisms. The first animal "clones" were probably frog tadpoles, produced in 1952.<sup>28</sup> After overcoming the hurdle of proving the basis of the theory, scientists tried to clone progressively more advanced animals with various levels of success.<sup>29</sup>

The most famous story of success in this field is Dolly, a sheep cloned in Scotland in 1996.<sup>30</sup> While Dolly gained much fame, her story does not bode well for future clones. It took two hundred seventy-seven failed attempts, including twelve miscarriages, before Dr. Ian Wilmut finally succeeded in producing Dolly.<sup>31</sup> Despite a successful birth, Dolly had many health problems related to cloning.<sup>32</sup>

After Dolly, scientists succeeded with other mammals such as cows, goats, cats, and mice.<sup>33</sup> However, numerous unsuccessful attempts are made for each successful clone, and a host of health problems afflict the clones that survive to birth.<sup>34</sup> Nonetheless, the technology progressed to the point where entrepreneurs are marketing the commercial cloning of pets.<sup>35</sup>

In the human context, cloning for the purpose of producing stem cells is much debated, and yet is being pursued in all parts of the world. There are ethical concerns about creating human embryos with the intended purpose of destroying them.<sup>36</sup> This comment makes no attempt to explore the morality or the legitimacy of that research. Rather, it focuses on the consequences

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28. See Shikai, *supra* note 16, at 267 (citing ROBERT G. MCKINNELL, CLONING: OF FROG, MICE AND OTHER ANIMALS (2d. ed. 1985)).

29. See THE PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY (2002), available at <http://www.bioethics.gov> [hereinafter PCBE] (providing a table showing eight mammals of varying size that were successfully cloned by the time the report was written).

30. ANDREA L. BONNICKSEN, CRAFTING A CLONING POLICY: FROM DOLLY TO STEM CELLS 1 (2002).

31. Nathan A. Adams, IV, *Creating Clones, Kids & Chimera: Liberal Democratic Compromise at the Crossroads*, 20 ISSUES L. & MED. 3, 15 (2004) (citing GINA KOLATA, CLONING: THE ROAD TO DOLLY AND THE PATH AHEAD 239 (1998)).

32. *Id.* at 16 (citing Camillo Fracassini, *Dolly the Sheep's Creator Admits She May Have to be Put Down*, SCOTLAND ON SUNDAY, Jan. 6, 2002, at 1). Gross genetic abnormalities arose in Dolly, which among other things, resulted in advanced aging. *Id.* These problems are likely to happen in other clones unless scientists figure a way to solve them.

33. See PCBE, *supra* note 29, at 63.

34. *Id.* at 62.

35. See Alan Zarembo, *\$50,000 Cloned Kitten Truly Isn't One of a Kind*, L.A. TIMES, Dec. 23, 2004, at A18.

36. See generally PCBE, *supra* note 29, at 117.

of reproductive cloning.

There are reports that some attempts are being made to create a cloned baby.<sup>37</sup> A much publicized report about babies cloned by Clonaid, a company run by the Raelians, a large cult with followers in Canada, France, East Asia, and Switzerland, raised world awareness of the potential imminence of human reproductive cloning and raised much speculation.<sup>38</sup> While such claims are as yet unsubstantiated, scientists who wish to continue research in the field of human reproductive cloning are doing so.<sup>39</sup>

### *C. A Brief History of Legal Responses to Cloning*

#### 1. The United States – State Reactions

In the United States, there was much response to the developments in cloning technology. Numerous states such as California,<sup>40</sup> Arkansas,<sup>41</sup> Iowa,<sup>42</sup> and Virginia<sup>43</sup> have legislation regarding cloning. In all cases, any legislation pertaining to human reproductive cloning is negative, usually criminalizing the act (or the attempted act) of cloning.

#### 2. The United States – Federal Reactions

In addition to state actions, the federal government has taken steps towards building a policy on cloning technology. Under President Clinton, the National Bioethics Advisory Commission (“NBAC”) examined various policy issues related to human

37. *E.g., Scientists Skeptical About Claim of Cloning*, L.A. TIMES, Apr. 7, 2002, at A9 (reporting on Italian scientists who had been attempting to produce the first human clone).

38. Dana Canedy & Kenneth Chang, *Group Says Human Clone Was Born to an American*, N.Y. TIMES, Dec. 28, 2002, at A16. The group’s claims were never substantiated.

39. *See, e.g., Cloning Impasse*, THE BOSTON GLOBE, Oct. 26, 2004, at A12.

40. CAL. HEALTH & SAFETY CODE §§24185–24186 (Deering 2005) (prohibiting human reproductive cloning, but defining it as “the creation of a human fetus that is substantially genetically identical to a previously born human being”). §24187, which expired in 2003, also created a civil penalty.

41. ARK. CODE ANN. §§ 20-16-1001–20-16-1004 (2003) (criminalizing human cloning, but distinguishing all other cloning that does not result in genetically identical humans).

42. Human Cloning Prohibition Act, IOWA CODE ANN. §§ 707B.1–707B.4 (2003) (criminalizing human cloning, but allowing scientific research).

43. VA. CODE ANN. § 32.1-162.21 - 32.1-162.22 (2004) (creating civil penalty for human reproductive cloning, but allowing other forms of cloning including animals).



cloning.<sup>44</sup> During the Commission's inquiry, there was a moratorium on federal funding for research.<sup>45</sup> The resulting recommendations included, among other things, a continuation of the moratorium, a call for legislation banning human reproductive cloning (with a sunset provision) and encouragement to enter into an international treaty banning human reproductive cloning.<sup>46</sup> The NBAC considered the creation of cloned children both unsafe and unethical, but it determined that more information on therapeutic cloning was needed before a final determination could be made.<sup>47</sup>

Later, President George W. Bush created a new body called the President's Council on Bioethics ("PCBE") that reached slightly different conclusions.<sup>48</sup> On the issue of human reproductive cloning, the seventeen-member council unanimously called for a permanent ban.<sup>49</sup> The PCBE was less unified as to therapeutic cloning, with seven members in favor of regulated research and ten against all human cloning.<sup>50</sup>

The United States has not yet created a national ban on human cloning. While the U.S. House of Representatives repeatedly passed a bill banning all human cloning,<sup>51</sup> the U.S. Senate has not passed its version of the bill.<sup>52</sup> The bill would have criminalized all human cloning, therapeutic and reproductive alike.<sup>53</sup>

### 3. Other Countries

Other countries have approached advances in cloning technology in different ways. Some issued moratoriums as facts about cloning continue to develop. Israel passed a moratorium on all cloning in 1998,<sup>54</sup> but the five-year moratorium expired in 2003. Israel subsequently enacted a permanent ban.<sup>55</sup>

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44. NBAC, *supra* note 3, at Letter from the President.

45. NBAC, *supra* note 3, at Letter of Transmittal to the President.

46. *Id.* at 108-110.

47. *Id.* at 109.

48. PCBE, *supra* note 29, at Preface.

49. PCBE, *supra* note 29, at Letter of Transmittal.

50. *Id.*

51. *E.g.*, Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong. (2003).

52. *Cloning Impasse*, THE BOSTON GLOBE, Oct. 25, 2004, at A12, available at LEXIS, News library, Bglobe File.

53. H.R. 534 § 302.

54. See Michel Revel, *Human Reproductive Cloning, Embryo Stem Cells and Germline Gene Intervention: An Israeli Perspective*, 22 MED. & LAW 701 (2003).

55. Nina Gilbert, *Knesset Imposes Permanent Ban on Human Cloning*, THE

Other countries, such as Singapore, have been vocal in their encouragement of cloning, at least as far as therapeutic cloning is concerned.<sup>56</sup> The United Kingdom, one of the nations most outspoken on cloning, began to issue licenses for sanctioned therapeutic cloning research.<sup>57</sup> No state has actively promoted *human* reproductive cloning, but some states such as Japan<sup>58</sup> and South Korea<sup>59</sup> made headlines around the world for their advances in reproductive cloning of animals.

Still other states, such as Costa Rica, have condemned cloning humans in unequivocal terms.<sup>60</sup> France passed a law calling human cloning a “crime against the human species,” but left the door open for embryonic research.<sup>61</sup>

#### 4. International Reactions

In Europe, the Council of Europe has begun to address the cloning issue. In 1998, the Council adopted an additional protocol to its biomedical convention that called for an international ban on human cloning.<sup>62</sup> The text of the protocol is vague in its broadness; it is unclear whether “cloning” referred to therapeutic as well as reproductive cloning.<sup>63</sup> Regardless, only a limited number of European countries signed that ban.<sup>64</sup>

JERUSALEM POST, Mar. 14, 2004, available at <http://www.jpost.com>.

56. Chang Ai-lien, *The Biomedical Gamble - A Bet Well Placed*, THE STRAITS TIMES, Oct. 30, 2004, available at LEXIS, News Library (describing Singapore’s aggressive biomedical industry).

57. *U.K. Grants First Cloning License to Develop Research Stem Cells*, WALL ST. J., Aug. 12, 2004 at D3.

58. *Seeing Double, Even Triple Japan's Cloned Prize Bull Recloned*, THE GOLD COAST BULLETIN, May 25, 2004, available at LEXIS, News Library.

59. *Korea to mass-produce pig organs for human transplants*, SYDNEY MORNING HERALD, June 1, 2004, available at <http://www.smh.au/articles/2004/06/01/1086058836809.html>.

60. See, e.g., Costa Rica Letter, *supra* note 12, at Annex 1.

61. *French Parliament Bans Human Cloning*, AGENCE FRANCE PRESSE, July 9, 2004, available at Westlaw, AGFRP database. France drew an almost arbitrary line between using clone embryos and using embryos from other ARTs for research.

62. Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Jan. 12, 1998, Europ. T.S. No. 168 (entered into force Mar. 3, 2001).

63. *Id.* (“Any intervention seeking to *create a human being* genetically identical to another human being, whether living or dead, is prohibited.”) (emphasis added). It begs the question, “What is considered a human being?”

64. See Joseph Schuman, *19 Nations Sign Ban on Cloning*, CHI. SUN-TIMES, Jan. 12, 1998, at 3, available at LEXIS, News Library.

In 2001, the United Nations, at the request of the foreign ministers of France and Germany, created an "Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings."<sup>65</sup> The committee, with representatives from well over half of the UN members, has not come to consensus except that the ban on human cloning is important. Each year since its inception, the Ad Hoc Committee tables the issue, and the debate continues in the next year.<sup>66</sup>

The Ad Hoc Committee submitted various proposals for approval. Costa Rica, a strong proponent of the total ban policy, and Belgium, an advocate of a more reserved ban, are leaders in the debate that settled into three distinct groups.<sup>67</sup> The states promoting a total ban on all forms of cloning is described as a group of "Christian" nations.<sup>68</sup> The group of states that called for a ban on human reproductive cloning, but a more restrained position on therapeutic cloning, is made up of secular western European countries and other technologically advanced states.<sup>69</sup> A final group consists of a number of Muslim and African countries that advocate no action by the UN.<sup>70</sup>

On March 8, 2005, the United Nations General Assembly voted on a non-binding resolution on the issue of human cloning.<sup>71</sup> The vote was by no means unanimous with only eighty-four countries approving.<sup>72</sup> It seems that the ambiguous nature of the resolution was the biggest factor in the way the vote came out.<sup>73</sup> Given the non-binding nature of the resolution, it is reasonable to assume that while the matter is settled for the immediate future, the world may yet decide to create a binding convention.

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65. Rosario M. Isasi & George J. Annas, *Arbitrage, Bioethics, and Cloning: The ABCs of Gestating a United Nations Cloning Convention*, 35 CASE W. RES. J. INT'L L. 397, 404 n.21 (2003).

66. See Ad Hoc Committee, *supra* note 1.

67. Editorial, *UN Cloning Ban is the Wrong Idea*, BANGKOK POST, Nov. 22, 2004, available at Westlaw, JPECNWSP database [hereinafter BANGKOK]. Cf. Davis, *supra* note 2 (dividing the field into the two groups).

68. BANGKOK, *supra* note 67.

69. *Id.*

70. *Id.* Their position is more of a "wait and see" approach, letting the two opposing groups spar over the details.

71. United Nations Declaration on Human Cloning, G.A. Res. 53/280, U.N. GAOR, 59th Sess., 82nd plen. mtg, U.N. Doc. A/RES/59/280 (Mar. 23, 2005).

72. See U.N. Press Release, *supra* note 9. There was almost an equal number absent or abstaining from the vote.

73. See *id.*

## III. ANALYSIS

*A. Current Human Rights Documents Are Not Informative*

The protection of human rights should be a central theme of any international treaty that is intended to address the activities of individuals. "Human rights" is a blanket term for a vast basket of principles that states and international organizations have recognized as being essential for the fair treatment of every single human being. Modern human rights developed in the aftermath of World War II. The Universal Declaration of Human Rights ("UDHR"), originally adopted in the United Nations in 1948, is a benchmark for what rights are considered human rights.<sup>74</sup> Among the various subjects covered in the UDHR are: "the right to life, liberty and security,"<sup>75</sup> a prohibition against slavery,<sup>76</sup> "the right to recognition everywhere as a person before the law,"<sup>77</sup> "the right to a nationality,"<sup>78</sup> "the right to own property,"<sup>79</sup> and many others.<sup>80</sup> There is also language specifically disallowing disparaging treatment of people by various means of discrimination, including race, gender, religion, and birth.<sup>81</sup> While this document is not the exclusive, definitive expression of these principles, individual states and the international community recognize that human beings inherently have certain rights.<sup>82</sup>

The problem is that the above mentioned human rights documents were all drafted *without clones in mind*. At the time most human rights documents were drafted, human cloning was still purely fictional. The UDHR gives a comprehensive list of the

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74. A Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter *UDHR*].

75. *Id.* at Art. 3.

76. *Id.* at Art. 4.

77. *Id.* at Art. 6.

78. *Id.* at Art. 15.

79. *Id.* at Art. 17.

80. *See generally id.*

81. *Id.* at Art. 2.

82. The *UDHR*, while not binding, is representative, in general, of conventions such as the *International Covenant on Civil and Political Rights*, which is binding on signatories. G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc. A/Res/2200(XXI) (1966). These treaties start from the basic assumption that they refer to humans. For a list of principal human rights treaties, including dates that the countries of the world became signatories, see Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, at <http://www.unhcr.org/refugees/pdf/report.pdf> (last visited Nov. 12, 2005).

types of discrimination that are prohibited including, "race, color, sex, language . . . or any other status."<sup>83</sup> Despite this broad language, there has been a need to enumerate other statuses such as "genetic characteristics," or genome, in other documents that seek to curtail discriminatory activities.<sup>84</sup>

One could argue that the legal maxim "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) has no place for use when such inclusive language exists in the UDHR. It seems, however, that the maxim might apply in this situation where the term 'excluded' was only a figment of someone's imagination at the time of drafting.

Additionally, the UDHR and other human rights treaties repeatedly refer to "all human beings," "all members of the human family," "everyone," and "no one" (inclusive, though negative).<sup>85</sup> These assume the basic first step that individuals are considered human beings. Animals and corporations, both of which arguably have some modicum of rights, are not part of this inclusion. There is a strong legal argument that since clones were purely science fiction when the UDHR was written, there is no way to assume that clones are automatically included.<sup>86</sup> The concern here is that without explicitly identifying clones as being part of the all-inclusive group called "human beings," someone may try to place them somewhere along the spectrum of rights between human beings and animals.<sup>87</sup>

The Universal Declaration on the Human Genome and Human Rights ("UDHGHR") is one of the human rights agreements produced by the United Nations where an additional form of discrimination is prohibited. One might be inclined to think that clones are protected by the principles in the agreement. The UDHGHR bars discrimination based on genetic characteristics.<sup>88</sup> There is a distinction between discrimination

83. UDHR, *supra* note 74, at Art. 2 (emphasis added).

84. *Universal Declaration on the Human Genome and Human Rights*, UNESCO Gen. Conf. Res. 29, reprinted in *Records of the General Conference, UNESCO, 29th Sess., 29 C/Resolution 19*, at 41 (Nov. 11, 1997) (adopted by the U.N. General Assembly, G.A. Res. 152, U.N. GAOR, 53rd Sess., U.N. Doc. A/Res/53/152 (Mar. 10, 1999)) [hereinafter *UDHGHR*].

85. See, e.g., UDHR, *supra* note 74.

86. One might be confronted by similar legal conundrums if other science fiction beings such as extraterrestrials, sentient computers, and the like were to prove as real as clones potentially will be.

87. See discussion of examples *infra* Section III(B).

88. UDHGHR, *supra* note 84. Also known as 'eugenics.'

based on “genetic traits,” and the discrimination that clones would face. Clones would not be discriminated against because of how they were born or because of their genetic traits. Naturally occurring twins share the same genetic traits the same way that clones and their genetic donors would. Likewise, the birthing process for a clone baby would be like other births.<sup>89</sup> For lack of a better term, the issue with clones is really a matter of “conception.” Regardless of the term used, however, it is still a matter of discrimination contrary to human rights principles. Like “discrimination based on genetic traits,” it is necessary to enumerate “discrimination against clones” as a form of discrimination that is proscribed under the UDHR.

### *B. The Ad Hoc Committee’s Efforts*

In 2001, France and Germany proposed the creation of the Ad Hoc Committee that, until recently, was working on the convention to ban human cloning.<sup>90</sup> The issue, while deemed of global importance, had been tabled each year due to various disagreements over therapeutic cloning.<sup>91</sup> Countries contributing to the Ad Hoc Committee grouped themselves into two camps. One camp saw the ban as a measure to stop the creation of whole cloned human beings.<sup>92</sup> The other camp wanted to ban *all* human cloning (including the creation of human clone embryos for medical research and treatments).<sup>93</sup>

The most comprehensive document put forth is the Costa Rica proposal, which lays out, in detail, the articles and provisions Costa Rica wishes to be included in the ban.<sup>94</sup> U.S. President George W. Bush openly favored this proposal and asked the UN General Assembly to support it.<sup>95</sup> The problem is that the Costa

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89. A possible future exception would be created by artificial wombs, *see infra* note 120.

90. Elizabeth L. Shanin, Development, *International Response to Human Cloning*, 3 CHI. J. OF INT’L L. 255, 255 (2002).

91. *See Farley, supra* note 8.

92. *See id;* *see also* Ban on Post-natal Clones Proposal, *supra* note 11.

93. *See Farley, supra* note 8; *see also* Total-Ban Proposal, *supra* note 11.

94. *See generally* Costa Rica Letter, *supra* note 12. It is the only document made available by the Ad Hoc Committee which is an attempt “to serve eventually as the basic document for discussion.” The proposal was actively backed in the Ad Hoc Committee by about sixty-one countries. *See also* Total-Ban Proposal, *supra* note 11.

95. President George W. Bush, President Speaks to the United Nations General Assembly (Sept. 21, 2004), <http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html>.

Rica proposal intentionally uses ambiguous language and explicitly refuses to define "human being."<sup>96</sup> In the definitions section, it even refers to the product of cloning as a "living organism" in clear contrast to the other terms that imply persons.<sup>97</sup> This is almost certainly done in an attempt to shoehorn embryos into the definition of victim so that all forms of human cloning would be banned. However, the result, inadvertent or not, is to create an unanswered question as to whether the "living organism" will be considered "human" for purposes of human rights protection.<sup>98</sup> If the concerns over embryos are any indication, it seems logical to infer that the Costa Rica proposal does *not* intend to draw into question the humanity of clones, but intends to recognize the humanity of clones enough in the earliest stages of prenatal development. That point is, however, not stated explicitly enough to foreclose debate. Indeed, there is some evidence that Costa Rica itself might be unclear on the humanity of clones.<sup>99</sup>

Furthermore, there is a danger that a total-cloning ban, with all its consequences, may be motivated in part by politics rather than out of concern for human rights. Somehow the question of whether humans should be cloned has turned into the question of when life begins, a topic linked strongly with abortion.<sup>100</sup> Given the contentious issues surrounding the identification of the exact moment that human cells form a human being, this is clearly outside the scope of this comment.<sup>101</sup> If President Bush's known

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96. Costa Rica Letter, *supra* note 12, at Annex II.

97. *Id.* at Annex I, Art. 1.

98. With this question in mind, a close reading of the proposal leaves the answer unclear. All reference to concerns about affronts to human dignity do not necessarily go beyond the threat to the involuntary genetic donor and the woman who brings the clone to term in her uterus. See Total-Ban Proposal, *supra* note 11 (noting concern for "serious dangers of a medical, physical, psychological and social nature"—all of which could pertain to the genetic donor and woman who carries the clone to term); Costa Rica Letter, *supra* note 12, at Annex I. See, e.g., Nati Somekh, Note, *The European Total Ban on Human Cloning: An Analysis of the Council of Europe's Actions in Prohibiting Human Cloning*, 17 B.U. INT'L L.J. 397, 418-420 (1999) (criticizing similar use of the ambiguous term "human dignity"); see also Isasi & Annas, *supra* note 65 at 402; see also, U.N. Press Release, *supra* note 9.

99. "[C]loning reduces the human being to a mere object of industrial production and manipulation." Farley, *supra* note 8 (quoting Costa Rica's Minister of Foreign Affairs and Worship, Roberto Tovar).

100. See Kristen Philipkoski, *Cloning Bill Bans Abortion Too?*, WIRED NEWS, May 30, 2002, available at <http://www.wired.com/news/medtech/0,1286,52838,00.html>.

101. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in

political views on abortion<sup>102</sup> are any indication, the dispute over cloning might potentially be used to set a precedent in international law that could undermine<sup>103</sup> abortion rights in domestic arenas.<sup>104</sup>

### *C. Ramifications of the Ambiguity- Some Hypotheticals*

The following are three hypotheticals that illustrate the dangers of ignoring the rights of clones:<sup>105</sup>

#### Hypothetical #1 – Disposing of a Problem

Dr. Unscrupulous, in violation of his country's law banning human reproductive cloning, creates a clone of himself in his secret research facility.<sup>106</sup> The clone has serious health issues as predicted by scientists involved with cloning. The doctor is arrested, imprisoned, and levied a tremendous fine. Mr. High-Level-Bureaucrat, in accordance with the law, orders the destruction of the facility where the cloning took place. What happens with Baby Unscrupulous? Mr. Low-Level-Bureaucrat, overseeing the destruction of the facility, is confronted with what to do. He sees the baby as an "it" and does not want to deal with the hassle, the responsibility, the budgetary effects of providing medical care for the ill baby, or the media circus that such a thing would entail. He orders the baby euthanized due to "its health."

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a position to speculate as to the answer.  
Roe v. Wade, 410 U.S. 113, 159 (1973).

102. Laura Meckler, *Bush Plan Is Progress for Foes of Abortion*, CHI. SUN-TIMES, Feb. 1, 2002, available at Westlaw, CHISUN database.

103. All the anti-cloning proposals mentioned in this comment include the adoption of domestic laws. E.g. Total-Ban Proposal, *supra* note 11. Some countries, such as the U.S., could potentially upset their domestic politics by adopting an international convention that might override domestic laws. See generally *Missouri v. Holland*, 252 U.S. 416 (1916) (recognizing that the treaty-making power of Congress can overrule state laws protected by the Tenth Amendment to the U.S. Constitution).

104. This would be ironic if it were successful since the *Total Ban Proposal*, at the same time, is expressly concerned with the welfare of women. *Total-Ban Proposal*, *supra* note 11.

105. This is by no means an exhaustive set. The ways in which clones might be harmed are as unlimited as the human imagination. The goal of this comment is merely to demonstrate the way in which this issue is demanding of consideration. In light of this, the examples are limited to infant clones being treated by state actors because such abuses would likely be the most immediate consequences of the ban.

106. Assuming that there is a ban, the chances that unscrupulous scientists will move their efforts away from public observation will rise and with this, the chances of mistreatment would probably rise.



### Hypothetical #2 – Making the Undesirable Go Away.

Same scenario, except that there are five *healthy* copies of Baby Unscrupulous. Unnerved by the weirdness of it all, Mr. Low-Level-Bureaucrat looks for an expedient way to deal with the uncomfortable fact of their existence. Like many unwanted female babies in his country, all five Unscrupulous Babies just “disappear” along with the cloning facility.

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### Hypothetical #3 – Opportunity for “Medical Research”

Same scenario, except the baby is brought higher up the chain of command. Mr. High-Level-Bureaucrat hands the baby over to health ministry officials who view this as an opportunity to examine cloning without violating international treaties in accordance with the declaration against human cloning. The child is taken into government facilities for “observation,” the likes of which would not otherwise be acceptable under their laws if the clone were deemed a human being.

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As the hypotheticals illustrate, there may be many reasons for the mistreatment of human clones. Many of the factors have been attacked by scholars who support human cloning in principle.<sup>107</sup> They argue that the dangers are overblown and out of proportion with reality due to pop culture,<sup>108</sup> especially if cloning is properly regulated.<sup>109</sup> In response, what may be true in an industrialized nation with western values would not necessarily hold true in any number of other nations with different cultural values, governments, and varying levels of development. One of the assumptions seems to be that human clones would always be considered human.

## 1. Countering Assumptions

There are numerous points that can be raised to counter the previous assumption. First, governments may have little incentive

107. See, e.g., GREGORY E. PENCE, WHO'S AFRAID OF HUMAN CLONING? 39-57 (1998).

108. See *id.* As an alternative, there are science fiction writers who have explored the gamut of cloning possibilities from the most perverse mistreatments to the most enlightened treatment of clones as full, legitimate members of future societies—even whole societies where cloning is the only means of procreation. See, e.g., LOIS MCMASTER BUJOLD, THE MILES VORKOSIGAN SAGA (series), (Baen Books, 1986-2003).

109. PENCE, *supra* note 107, at 154-157.

to take on the increased financial burdens that may be created.<sup>110</sup> Next, people unfamiliar with cloning might react out of complete ignorance, treating clones as if they are disposable copies. Further, even those who learn in detail what cloning is and how it differs from natural procreation may be subject to the “Yuk factor,” which has been recognized as one of the predictable reactions to clones.<sup>111</sup>

Additionally, there are places in the world where, unfortunately, infanticide is practiced on female babies.<sup>112</sup> It is possible that in places where healthy females are frequently discarded, some might place an equally low value on the lives of clone babies. Also, in parts of the world where overpopulation is rampant, it does not stretch the imagination to conceive of a state that might, for expedience and population control, withhold rights to clones as a means of consolidating resources.

Finally, unless preemptive measures are taken, contemporaneous with the ban, a state that finds itself the host of the first clone(s) will have a proverbial can of worms opened in its lap. The most expedient way of avoiding most of the problems, legally, socially, and otherwise, might be to determine that clones are separate from humans, and therefore, undeserving of the same protections. It is both plain and logical that we cannot *assume* that everyone would treat clones as human beings.

The above examples focused on the reasons that a state might have to treat a clone as a non-human. Other non-state actors might have further reasons. An American Bar Association report theorized that if a couple were to commission a clone to be their child, they might reverse their desire to have a clone child if there were severe genetic or developmental defects.<sup>113</sup> The hypothetical

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110. See Katz, *supra* note 17, at 28. If Dolly is any measure, human clones could potentially have serious health issues. Without legally defining parentage, a clone could very likely become a ward of the state and a burden to society.

111. See, e.g., Susan Greenlee, *Dolly's Legacy to Human Cloning: International Legal Responses and Potential Human Rights Violations*, 18 WIS. INT'L L. J. 537, 551 (summarizing the “Yuk Factor” as the way “[p]eople are morally repulsed by the idea of human cloning but cannot clarify the reasons for the repulsion.”). One might argue that the “Yuk factor” is a close analog to homophobia.

112. See, e.g., *India: Female Infanticide: Old Reasons, New Techniques*, THE HINDU, June 24, 2001 available at LEXIS.

113. Phyllis P. Bossin, *Resolution #109 with Accompanying Report*, ABA SECTION OF FAMILY LAW at 5 (adopted by ABA House of Delegates Aug. 9-10, 2004), at <http://www.abanet.org/leadership/2004/annual/dailyjournal/109.doc> (last visited Nov. 12, 2005) [hereinafter *ABA Report*].

family might conceivably argue that the clone was not really a human being so they could have it destroyed.<sup>114</sup>

## 2.It Will Not Matter “Why” a Clone Was Made

All the hypotheticals above ignore the question of why the clones were made. While it is reasonable to question the scientist's motives in cloning for determining the level of criminal culpability,<sup>115</sup> it is not important for the clone's rights. Not only might motives change throughout the period the fetus is developing, all motives other than for procreation lend inevitably to the issue of the treatment of the clone. If a family wants a child and gets a clone, it would presumably become a part of the family and be treated equally. That family could conceivably have wanted to replace a killed son.<sup>116</sup> If, however, there is ever another “use” for the child, ethical concerns are raised and the rights of the child become an issue of debate.<sup>117</sup> As the ABA hypothetical shows, if the motive was appropriate at the time of the initial cloning, it does not mean that the motive will remain constant throughout the development of the child following birth.<sup>118</sup> Additionally, as will be noted further, the recognition of human rights status for clones is not so much related to the relationship between the ones responsible for the clones as to the relationship between the clones and society at large.

## 3.Advances in Technology

The hypotheticals make no assumptions that technology is limited to individual clones brought to term in a woman's womb. It should be elementary that the “Yuk factor” does not have as much weight when there is only one clone. Twins are a commonplace and accepted aspect of society. A clone would be a genetic “twin,” though would probably be years younger. If, however, the number of individuals with duplicated genetic material exceeds what could

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114. *Id.* at 5.

115. A lesser punishment might be reasonable for someone who is trying to provide children for an infertile couple rather than for a person who makes clones to harvest organs, or as some sort of a financial venture.

116. This reasoning was part of the ABA report hypothetical, not part of a movie. See *ABA Report*, *supra* note 113, at 3.

117. Carla McClain, *Should a Baby Be Born to Save Another Child?*, ARIZONA DAILY STAR, July 18, 2004, available at <http://www.dailystar.com/dailystar/relatedarticles/30433.php>.

118. See *ABA Report*, *supra* note 113, at 5.

normally occur in nature, the “Yuk factor” might become a driving force in mistreating clones. Having a twin is acceptable and relatively commonplace. It is not hard to imagine that seeing thirty, forty, or more “identical twins” would stress the average person’s comfort level.

As the number of “identical” clones increases in a given scenario, the fears illustrated in science fiction become proportionately greater.<sup>119</sup> In recognition of this, the theoretic potential of artificial wombs should not be ignored.<sup>120</sup> If cloning technology is limited to the number of women available to carry cloned babies to term, the likelihood of large numbers of identical people would understandably be limited as well. If babies could be born from a machine that replicates the conditions of a womb, there would be virtually no limit on how many identical babies could be produced simultaneously. While it is not widely accepted,<sup>121</sup> the artificial womb concept has existed for a long time.<sup>122</sup>

Ironically, the argument that “it is only science fiction” should not carry so much weight since human cloning itself was still considered science fiction not so long ago. While estimates that artificial wombs will be around in five years are not likely credible,<sup>123</sup> any blanket statement that there will *never* be artificial wombs is not very credible either.<sup>124</sup>

#### *D. Arguments for Giving Human Rights Status to Clones*

The basic premise for granting human rights status to clones is

119. See, e.g., *THE BOYS FROM BRAZIL* (Artisan Entertainment 1978); *STAR WARS - EPISODE II, ATTACK OF THE CLONES* (Twentieth Century Fox 2002). Also, judging from these movies and other pop-culture references, there may be a logical misconception that clones will almost always be produced in batches rather than as individuals.

120. Sacha Zimmerman, *Ectogenesis: Development of Artificial Wombs*, S.F. CHRONICLE, Aug. 24, 2003, available at 2003 WLNR 8314656.

121. See Scott Lee, *Scientists Say Controversial Artificial Wombs could Prove Helpful with Premature Babies and Miscarriages*, PEORIA J. STAR, Apr. 27, 2004, available at Westlaw.

122. *Id.*; see also, *Roe v. Wade*, 410 U.S. 113, 161 (1973).

123. See Zimmerman, *supra* note 120; see also Lee, *supra* note 121.

124. Along the same line, if one thinks that this entire comment is preemptively dealing with an issue that is not yet ripe because no one has proven that cloning humans is actually possible, then the anti-cloning ban itself would lack credibility for the same reason. By opening the door on this issue, both states and the international community have accepted that *legally* the issue is ripe even if *scientifically* it would require more research to prove.

that human clones will deserve human rights as much as any other human. There is much authority supporting this concept. While many unknowns still exist with how clones will physiologically and psychologically compare to "natural" born humans, it is probably acceptable to state that clones will be just like us.<sup>125</sup>

### 1. Scientists agree

Inherent in the definition of a human clone is that it will be the product of an attempt to biologically replicate a human being; it will be a twin. While there may be health issues unique to clones,<sup>126</sup> scientists have not really differed over whether clones would be *homo sapiens*.<sup>127</sup> Scientists have either found that cloning should be allowed or that it should be barred due to ethical concerns, such as concerns over medical experimentation on humans and potential abnormalities in clones.<sup>128</sup> In fact, it is hard to argue why, scientifically, the humanity of the clones would be an issue at all. As clear as this may be to scientists, the issue here is a legal one, not a scientific one.

### 2. Theologians agree

The cloning debate also raises many critical issues that have strong religious implications and that could be influenced by the major faiths in the world.<sup>129</sup> The NBAC prepared a commissioned paper in order to include a religious analysis in their report.<sup>130</sup> Generally, the different perspectives ranged from ignoring the issue of whether the clones would be people to expressly recognizing that a clone would be a distinct, individual person.<sup>131</sup>

125. See *UDHGHR*, *supra* note 84. After the UDHGHR, if someone were to attempt to alter an existing genome, a difference of that nature would clearly be recognized as inappropriate for discrimination. Concerns about the creation of a genetically superior super-race are reflected in both the UDHGHR and in pop culture. See, e.g., *GATTACA* (Columbia/Tristar Studios 1997).

126. See Katz, *supra* note 17, at 28.

127. It is more debated whether with current technology, it is even possible to clone humans. *ABA Report*, *supra* note 113, at 3.

128. See, e.g., EISEMAN, *supra* note 18.

129. Is cloning a way of "playing God?" Where does a soul come from?

130. See COURTNEY S. CAMPBELL, NATIONAL BIOETHICS ADVISORY COMMISSION, *CLONING HUMAN BEINGS: RELIGIOUS PERSPECTIVES ON HUMAN CLONING* (1997), available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning2/cc4.pdf> (exploring the reactions of ten of the largest religious groups in the US).

131. See, e.g., *id.* at D23 ("Individuals can begin their lives in many ways,' including but not limited to human sexual generation").

While many different religions can be and have been surveyed, it is always possible that someone's individual religious belief would conflict with the doctrinal representations in those studies. Other scholars addressed religions' approaches to cloning such as Judaism,<sup>132</sup> Christianity,<sup>133</sup> and Islam.<sup>134</sup> Whether or not cloning seems compatible with religious beliefs, there does not seem to be any major religious authority that says that clones would *not* be human.

The Holy See even submitted a position statement to the Ad Hoc Committee.<sup>135</sup> It is clear from the statement that the Vatican views cloning as wrong, but that clones would be persons (i.e. human beings) to be afforded all the rights humans possess.<sup>136</sup> The Vatican also recognizes that human clones would face the prospect of being treated as imitations and things rather than people in their own right.<sup>137</sup> Once again, the issue here is not theological, but legal.

### 3. Legal scholars agree

In most scholarly works, the fundamental question of whether clones are legally human is skipped.<sup>138</sup> They discuss fascinating questions, for example, whether clones can be patented,<sup>139</sup> and the constitutionality of parents to reproduce by cloning.<sup>140</sup>

Other scholars, drawing a parallel between human cloning and babies produced using other reproductive technologies such as

132. See, e.g., Elliot N. Dorff, *Human Cloning: A Jewish Perspective*, 8 S. CAL. INTERDISC. L. J. 117 (1998) (finding that regulated cloning could be consistent with Jewish values and that a clone would need to be recognized as a person).

133. Stephen J. Werber, *Cloning: A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions*, 30 SETON HALL L. REV. 1114, 1161-1180 (2000) (examining Catholic, Methodist, Southern Baptist, Reformed Presbyterian, Greek Orthodox, and mainstream nonsectarian Christian perspectives on cloning).

134. See, e.g., Mohammad Fadel, *Islam and the New Genetics*, 13 ST. THOMAS L. REV. 901 (2001) (finds that Islam rejects cloning, but ambiguous as to whether a clone would be a person).

135. *Considerations of the Holy See on Human Cloning*, U.N. GAOR 6th Comm., 59th Sess., Agenda Item 150, U.N. Doc. A/C.6/59/INF/1 (Oct. 7, 2004).

136. "Cloning would, indeed, bring a *person* to life . . . the manner in which a cloned human being has been brought into the world would mark that *person* more as an artifact rather than a fellow human being, a replacement rather than a unique individual. . . ." *Id.* at 3 (emphasis added).

137. *Id.* at 4.

138. See Nash, *supra* note 19, at 309-310 (assuming that there is a need to legally protect the clones).

139. See *id.*; see also Buckley & Lesko, *supra* note 19, at 56.

140. E.g., Shikai, *supra* note 16, at 278-282.

in vitro fertilization, predict that clones would have no legal status problems at all.<sup>141</sup> “Whatever the flaws in the legal response to developments in reproductive technology, and there are many, denying complete status as human beings to these children is not one of them.”<sup>142</sup> As shown above, this assumption should be rejected. The legal reaction to human cloning cannot be predicted by the previous reactions to other ARTs. Technological differences, the use of identical DNA, the international and national calls to ban cloning, and other distinctions all highlight how human cloning is perceived as in a category by itself.

The first legal step before addressing issues such as property inheritance rights, citizenship, and the like should be to confirm that *legally*, clones are included in the “human family.” Numerous scholars have made the assumption that clones would be included, but they have not noted that it is a critical first step.<sup>143</sup>

Admittedly, the answers to other questions give clear indications as to how those authors would react to the question of whether human clones were human beings. The answer is overwhelmingly a clear “yes.” Even those arguing against the principle of cloning often rest some of their arguments on an assumption that clones would be humans with rights. For example, they often couch their arguments in concern for the psychological welfare for the children.<sup>144</sup>

The American Bar Association appears to be the only legal body that has addressed in detail the need to affirm the legal rights of clones.<sup>145</sup> In August 2004, its House of Delegates recognized that the need to affirmatively recognize a “live birth” resulting from reproductive cloning would produce “a person, legally separate and distinct from its biological progenitor, with all rights accorded to any other live born human being under existing law.”<sup>146</sup> The report accompanying the resolution clearly noted that therapeutic cloning held back the UN in addressing this issue.<sup>147</sup> In sum, those

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141. See Katz, *supra* note 17, at 19.

142. *Id.*

143. This is often simply an assumption. See, e.g., Nash, *supra* note 19, at 309-310.

144. E.g., Meghan Talbott, Note, *The Kentucky Human Cloning Prohibition Act of 2002 and the Future of Cloning in Kentucky*, 42 BRANDEIS L.J. 823, 833 (2004). Obviously, if they are concerned about the psychological welfare of the children, their concerns imply a view of clones that recognizes them as distinctly human.

145. ABA Report, *supra* note 113.

146. *Id.*

147. ABA Report, *supra* note 113, at 6.

in the legal world who have addressed the issue agree that human clones would have human rights and the rest of the scholarship on cloning indirectly supports that premise.

In addition, it is important to look back at the basic principles upon which the United Nations and Human Rights law were premised. To argue that clones are not automatically included in the UDHR does not mean they *should* not be included. The idea that clones would have human rights seems quite logical and simple when compared to the idea that other primates would be given such rights.<sup>148</sup> It is consistent with international human rights norms that prohibit treating people as property (slavery) and medically experimenting on people against their will.

### *E. If Everyone Agrees, Why is it an Issue?*

Persuaded by the apparent legal, scientific, and theological consensus that human clones would have the same rights as other humans, a reader might question the need to state something so obvious. Unfortunately, what is obvious to even the majority of humanity may not be obvious to all. In the past century alone, the world has witnessed enough atrocities and human rights abuses to belie the truth of any such assumption. Take, for example, the obviousness that genocide and involuntary medical experimentation on fellow humans is an abomination.<sup>149</sup> Whether it was logical or not, scientists and doctors have been able to justify to themselves, and even sometimes to their governments, these horrendous acts. More recently, in places such as Rwanda,<sup>150</sup> Sudan,<sup>151</sup> and Bosnia,<sup>152</sup> neighbors have been willing to kill

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148. See generally, *Ten Years of Animal Law at Lewis & Clark Law School: Remarks: The Evolving Legal Status of Chimpanzees* 9 ANIMAL L. 1 (2003) (transcript of panel discussion).

149. See Katz, *supra* note 17, at 18 (citing both the Nuremberg trials and the Tuskegee experiments). See generally TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, Nov. 14, 1945 – Oct. 1, 1946, available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm>; and President William Jefferson Clinton, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>.

150. See *Rwanda: How the Genocide Happened*, BBC News, Apr. 1, 2004, available at <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm>.

151. See *In Bosnia, Ethnic Cleansing Scars Are Difficult to Heal*, CNN, Aug. 31, 1997, available at <http://www.cnn.com/WORLD/9708/31/bosnia.pml/>.

152. *U.N. Plans Meeting in Africa on Sudan*, N.Y. TIMES, Oct. 24, 2004 at A8 (describing the human rights abuses in Darfur).



neighbors. Would a person willing to kill another human being because of an ethnic difference necessarily hesitate before doing the same to an artificially created being? The distinction seems negligible.

Other similarly obvious human indignities persist despite laws against them.<sup>153</sup> Prudence requires that the human rights status of clones be secured through explicit recognition.<sup>154</sup> Significantly, conceptions of clones in pop-culture literature imply that not everyone feels that the humanity of clones would be obvious. Otherwise, it would be hard to explain the phenomena of the persistent fears expressed in them. The literature, embodying our preconceptions, has placed a negative connotation on the word "clone" itself, which might indicate how people would react to them.<sup>155</sup>

Additionally, it is possible that an international legal tribunal would be able to confirm the intent of the states that participated in the drafting of the convention. That court might find that the humanity of clones was not in question as the treaty was being drafted. The issue, however, would only be brought before such a tribunal after egregious human rights violations already occurred. By failing to state the "obvious," the international community would be inviting someone to test the extent of the convention's meaning.

#### IV. PROPOSED SOLUTION TO THE PROBLEM

The solution could have been to simply insert a clause into the anti-human cloning declaration. The clause would recognize that the product of an illegally cloned human would be "a person, legally separate and distinct from its biological progenitor, with all [human] rights accorded to any other live born human being under existing law."<sup>156</sup> The ABA uses the term "live birth" to specify that

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153. See, e.g., Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 606-608 (2004).

154. This is not in the naïve presumption that if clones have human rights, they won't be abused or mistreated. It is clear, however, that *without* those rights, the harms done to them will likely happen- possibly unchecked and unpunished.

155. Compare with the way 'illegitimate' children have been treated in different cultures in various points in history. If the label 'clone' takes on the same stigma, there is no predicting what sorts of human rights violations would evolve. See Shapiro, *supra* note 7, at 6-7 (comparing cloned children and illegitimate children).

156. *ABA Report, supra* note 113. The ABA resolution may not go far enough because it fails to contextualize the incredible and potentially horrendous consequences of *not*

the distinction is solely reserved for post-natal clones.<sup>157</sup> This would circumvent the issue of embryos which seems to be holding up the UN convention. It should be noted that the language need not definitively define "human being." It would suffice to only include *live born clones* among humanity; leaving the question of defining the outer limits of "human being" for another day.

Since the declaration passed before the publication of this article, an amendment to the declaration, a clause included in a possible future convention following the declaration, or a separate convention on clones' rights are all options. In a convention on clones' rights, it would be ideal to include guiding language in terms of determining parentage, nationality, and other legal issues that would arise, so that all nations would accord uniform treatment to their clones.<sup>158</sup>

It should be noted that since human cloning is theoretical, it is possible that human clones will be less than we imagine. Some obstacles with cloning humans may never completely be overcome. All attempts to clone a human being may fail, or at least end in imperfection due to the large number of developmental abnormalities that commonly occur with clones.<sup>159</sup> Human clones conceivably would fail to develop properly and would survive birth with severe mental and physical limitations. Just as we do not question the humanity of the most severely developmentally disabled of our children, we should not be forced to question when a cloning was "successful" enough to call a live birth clone a human being. This is an issue for another day which, hopefully will never come. It seems better, at least more humane, to start off being generous with the status of "human" and later make revisions, than it does to withhold that status until someone who deserves it has suffered. Also, other legal issues, in the area of family law, for example, may benefit from the presumption of humanity.

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including clones as humans. Also, inherent in *human* rights (as opposed to legal) is the implication of protections that humanity must extend to its members.

157. *ABA Report*, *supra* note 113.

158. It is important to proactively assign an existing legal forum or to create an international legal forum to specifically deal with unique issues arising from the addition of human clones to society.

159. Stephen S. Hall, *Specter of Cloning May Prove a Mirage*, N.Y. TIMES, Feb. 17, 2004, at F1, available at 2004 WLNR 5452226.

### *A. Added Benefits of the Proffered Solution*

In addition to protecting innocent children, the inclusion of the human rights status of clones within a ban would have residual effects. First, it would extend the scope of the ban to third parties. Third parties means individuals<sup>160</sup> who might join a project involving cloning after the cloning was completed. Scientists who benefit from the creation of the clones, but who had no part in their production, would not seem to be criminally liable under the Costa Rica proposal.<sup>161</sup> Additionally, the deterrence factor would increase if anyone who associates with an illegal cloning project is subject to further criminal liability for all subsequent human rights violations against the clones. As such, if proof of who is responsible for the cloning is unclear, those responsible might still be punished for their culpability under other human rights conventions and laws.<sup>162</sup>

### *B. Some Limitations of the Solution Proposed*

Adding a clarifying statement to a ban expressly recognizing the human rights of human clones would not solve all potential problems for clones. It would not give clones any special status, or create a specific mechanism for protection of clones. While making significant advances since the UDHR was drafted, international law has only partially succeeded with human rights issues that *already* exist. Nonetheless, extending human rights status to clones would give them more far more protection.

Additionally, the Costa Rica proposal—and any likely convention that may be created in the future—calls for domestic laws to be passed criminalizing human cloning.<sup>163</sup> While not necessarily binding on domestic lawmaking bodies, the declaration and any future convention will be looked to by local legal authorities when they are striving to formulate their own policies. Since it would be the only international agreement referring specifically to clones, it seems likely that a ban's language could carry significant weight in the minds of leaders making policy decisions, even if their country does not sign and ratify the ban.

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160. 'Any person', other than the overseeing scientists and doctors, who might benefit from the mistreatment of clones including customers, trainers, tourists, technical support staff, etc.

161. Costa Rica Letter, *supra* note 12, at Annex I, Art. 2-4.

162. *E.g.*, U.S. CONST. amend. XIII.

163. *See* Costa Rica Letter, *supra* note 12, at Annex I, Art. 3.

Hopefully, even a country that would not sign the ban because it chooses not to ban human cloning would recognize the humanity of clones. This explicit statement in the ban could conceivably still have the effect of clarifying the meaning of “clone” so that there are no divergent interpretations.

This solution is obviously a first step in the future of clone treatment policies. As with other areas of heightened concern to human rights advocates around the world, special organizations, committees, and other apparatuses could conceivably be created to combat the mistreatment of this unique subset of humanity.<sup>164</sup> This may not, however, be necessary if measures taken by the international community are effective enough to limit the number of clones to a relative few. If that is the case, surely the general human rights entities, and fora that have been established already, will be able to deal with any issues that might arise.

*C. Is the Inclusion of the Clarifying Statement Counter to the Purpose of a Cloning Ban?*

Some might argue that the inclusion of this statement in a ban on cloning would be counterproductive to the intent of the document. After all, the point of the actions of the United Nations on this matter is to discourage cloning, not to encourage it. A clarifying statement on the humanity of clones might be interpreted as a sort of acceptance of cloning if a clandestine attempt is successful. Surely, this might weaken the harshness of the admonitions of the ban, but the alternative is to potentially subject innocent individuals to intolerable conditions and unacceptable treatment.

This slight weakening of the language should not be a concern since the goal of the ban is not to take away human rights. As the current trend of the debate is progressing, there is a danger that it might lead to that. If there are too many objectors who believe a convention against human cloning is an inappropriate document to include the recognition of human clones as humans, then an alternative is to draft a concurrent document for submission to the UN General Assembly. Considering the scientific, theological, and legal consensus, it seems probable that such a document, if limited

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164. *E.g.*, The U.N. Committee on Torture, at <http://www.ohchr.org/english/bodies/cat/index.htm> (last visited Nov. 12, 2005).

to the issue of simple humanity<sup>165</sup> would have as much, if not more, support as the ban itself.

#### V. CONCLUSION

Given that clones will likely one day be among us regardless of a ban on cloning, it behooves the international community to extend the blanket of protections that the rest of us have. Without such a protection, the ways in which mankind might abuse them are limited only by imagination. Since the United Nations has completed its declaration on human cloning, hopefully the issue of clones should be a settled one for near future. If it is not, then it will be our responsibility to protect clones and treat them as we would our own children.

*Adiv Zelony\**

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165. As opposed to the other legal questions that might arise such as family relations, citizenship, and the like.

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