

**THE NAKED CLONE: HOW CLONING BANS THREATEN OUR
PERSONAL RIGHTS**

BY JOHN CHARLES KUNICH
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I. OVERVIEW

The specter of cloning, first given corporeal form in the infamous figure of Dolly the lamb, has been the progenitor of cults, pseudo-science horror scenarios, and heated political debates that have stirred the emotions and inspired the imagination. In recent months, the reported creation by Korean scientists of the first cloned human embryos¹ as well as the dismissal of two open supporters of embryo research from the President's Council on Bioethics² have ensured that

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1. See Tim Radford, *Korean Scientists Clone 30 Human Embryos*, 328 *BMJ* 421 (2004), available at <http://bmj.bmjournals.com/cgi/reprint/328/7437/421>.

2. Elizabeth Blackburn and Janet Rowley were dismissed from the President's Council on Bioethics on February 27, 2004, sparking allegations that President George W. Bush was trying to stack the Council with opponents of embryo research. See Rick Weiss, *Bush Ejects Two From Bioethics Council*, *WASH. POST*, Feb. 28, 2004, at A6. The two had recently written and submitted for publication a critique exposing the bias of two reports released by the council, including "Monitoring Stem Cell Research." The critical essay was published in *PLoS Biology*. See Elizabeth Blackburn & Janet Rowley, *Reason as Our Guide*, *PLoS BIOLOGY*, Apr. 2004, at 1, at http://www.plosbiology.org/archive/1545-7885/2/4/pdf/10.1371_journal.pbio.0020116-p-L.pdf; see also Gareth Cook, *President's Panel Skewed Facts, 2 Scientists Say*, *BOSTON GLOBE*, Mar. 6, 2004, at A1.

the controversy will not soon abate. Much of the moral, ethical, and political debate thus far has centered on therapeutic cloning, or cloning done for research purposes. Proponents and opponents of therapeutic cloning disagree violently about whether the potential benefits of such research outweigh the dangers of treating human embryos in a utilitarian fashion. Because reproductive cloning, or the cloning of an individual's genetic material to create another person with identical genetic material, has generated the most fear and distaste among the general public, banning it is less controversial. Stem cell researchers and religious conservatives alike agree on the need for such a ban.³

In this atmosphere, John C. Kunich's⁴ well-written and very accessible *The Naked Clone*⁵ provides an honest and refreshing advocacy for reproductive cloning. Unlike a scientist who might choose to shun the cause of reproductive cloning to avoid alienating potential supporters of therapeutic cloning, Kunich openly supports the cause of what he calls the "naked clone." As he explains in his preface, the naked clone is the child of cloning who could be born to potential, loving parents but whose existence is threatened by the passage of restrictive laws or outright bans; it is thus "naked and alone, in the legal sense."⁶

As he makes clear in the opening, there are serious stakes to the cloning debate. While the costs of banning or restricting reproductive cloning may seem to pale in comparison to the costs of banning therapeutic cloning in terms of lost development of medical treatments and technology, Kunich would leave that evaluation to scientists and politicians. From Kunich's legal perspective, the reproductive rights implicated in reproductive cloning mean that a ban on this type of cloning has the potential to wreak far more havoc on our constitutional liberties than a ban on therapeutic cloning.

Thus, Kunich's main concern, as indicated by the title, is reproductive cloning. Kunich addresses therapeutic cloning but is more concerned about reproductive cloning, not only because it potentially implicates due process rights, but also because it has been subject to greater prejudice and misconceptions. Setting out to reorient the debate, he begins by reconceptualizing the use and purpose of reproductive cloning as another means of reproduction for couples or individuals who might not otherwise be able to reproduce with their

3. Although the scientific community supports at least a temporary ban of reproductive cloning, it has been careful to articulate mainly health and safety rationales rather than ethical and moral arguments. See NAT'L ACADS.' COMM. ON SCI., ENG'G, AND PUB. POLICY, SCIENTIFIC AND MEDICAL ASPECTS OF HUMAN REPRODUCTIVE CLONING I (2002).

4. John Charles Kunich is a Professor of Law at Roger Williams University School of Law.

5. JOHN CHARLES KUNICH, *THE NAKED CLONE* (2003).

6. *Id.* at ix.

own genetic material. With this backdrop, Kunich explains that there are no legally cognizable differences between reproductive cloning and other existing means of reproduction. This connection between reproductive cloning and general procreative rights means that a strike at the former undercuts the personal autonomy and privacy rights that support the latter.

The Naked Clone is broken into six chapters. The first chapter provides scientific and social context by discussing the history and facts of cloning along with many arguments for and against cloning. Chapter 2 introduces the legal background with an overview of the status of anticloning laws in the United States. Chapter 3 continues along the same lines with an exposition of international management of and legislation concerning cloning. Although international laws are not directly related to the discussion of constitutional jurisprudence in the United States, Kunich presents them as a comparative basis for assessing U.S. laws and their alternatives. The preliminaries thus completed, chapter 4 begins the legal discussion with an analysis of the First Amendment implications of banning therapeutic cloning. Having disposed of therapeutic cloning, the book then reaches its *raison d'être* in chapter 5 with a discussion of the constitutional implications of reproductive cloning. Chapter 6 is a short concluding chapter posing possible alternatives to legislative bans extant in state statutory regimes.

Overall, Kunich's book is a clean read. Conscious of writing to a lay audience, he avoids both scientific and legal jargon. Although his note that "readers who have not enjoyed the dubious benefit of attending law school may be surprised to learn that obtaining the answer to First Amendment questions is not as simple as looking it up in some cookbook-like, well-indexed reference book"⁷ is somewhat patronizing, his generally accurate and succinct overviews of the mechanisms of cloning and constitutional jurisprudence should be well received.

Furthermore, Kunich is funny. While some might find his humor campy, most readers should appreciate Kunich's attempts to maintain a light treatment of a topic on which impassioned authors can get overbearing. For example, his first chapter opens with a quote by Jimmy Cricket from the film *Pinocchio*.⁸ The footnote for the quote provides the punchline: "Despite persistent rumors, there is no credible evidence that Pinocchio himself was a clone of his maker, Geppetto."⁹ This sort of understated, self-aware humor adds to the readability of the book and suggests that the author had fun writing it. Well-placed

7. *Id.* at 88.

8. *Id.* at 1.

9. *Id.* at 22 n.1.

humor throughout the book enhances rather than detracts from Kunich's message.

While *The Naked Clone* is commendable in terms of breadth, accessibility, and organization, it is notable more for its thoroughness than for its insight. Although Kunich may be one of the few voices publicly and pointedly embracing reproductive cloning, the legal arguments he relies upon for support are not particularly novel. A reader seeking complex legal analysis would do better with any number of law review articles.¹⁰ However, Kunich is not writing exclusively for an experienced legal audience, and it is perhaps more important that Kunich has articulated a cogent, comprehensively researched argument that is a good primer for those who might otherwise not consider the legal issues surrounding reproductive cloning.

II. CLONING BACKGROUND

To write about cloning, Kunich must first describe what it is. In the opening chapter, "Cloning in Science and Science Fiction," Kunich does a good job summarizing the more interesting, and perhaps lesser known, pre-Dolly points on the cloning timeline. Kunich also explains both embryo splitting, or the cloning of an embryo through division and cultivation of the cells of an early embryonic blastomere,¹¹ and Somatic Cell Nuclear Transfer ("SCNT"), or the creation of a cloned embryo through the manipulation of a somatic cell for insertion into an enucleated egg cell.¹² To dispel the myth of clone hordes, Kunich emphasizes that both embryo splitting and SCNT do not instantaneously create fully formed individuals; instead, there is normal gestation, birth, and development.

The rest of the chapter focuses on a thorough discussion of most of the major arguments involved in the cloning controversy. Kunich begins by presenting arguments against cloning, with his counterarguments, then discusses why people might choose to pursue reproductive cloning, taking care to mention and downplay some of the more distasteful scenarios. He presents the arguments against cloning in categories, the first being religious, moral, and ethical grounds. Next are some legal objections mostly centering around questions of the rights of the cloned child and issues with inheritance and family lineage. He then poses what he terms the "slippery-slope" arguments

10. See, e.g., Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647 (2000). Like Kunich, Foley discusses both First Amendment and due process considerations for cloning. Kunich cites a number of other law review articles in the footnotes to chapters 4 and 5.

11. See KUNICH, *supra* note 5, at 4-5.

12. See *id.* at 5.

about mass production of humans and genetic engineering. Last are the “psychosocial” arguments, which involve the speculative psychological harm to the cloned child who might feel less than fully human or might be otherwise subject to unhealthy expectations about his or her development. All the reasons why people might want to clone are lumped together under a subheading, but the discussion is comprehensive. Kunich discusses hypotheticals, such as cloning as a method to memorialize a beloved dying relative and cloning as a method for same-sex or otherwise infertile couples to create embryos from their genetic materials.

Overall, this chapter is a solid presentation of what is found in most literature on the cloning debate. One minor critique is Kunich’s almost bizarre attachment to the concept of mitochondrial DNA (“m-DNA”). Kunich notes that the nuclear DNA and the recipient egg cell used for cloning may be from different donors. If so, the cloned embryo will have nuclear DNA and m-DNA from different donors. Each time an argument mentions the reproduction of an individual, he reminds the reader that the m-DNA of the cloned child will be different from the m-DNA of the nuclear DNA donor. For example, in his section on the psychosocial grounds for opposing cloning, he writes about the feelings of a cloned child on knowing that “someone else has the identical complement of nuclear DNA (albeit not m-DNA).”¹³ In his original presentation of m-DNA, there was no discussion of how m-DNA affects genetic inheritance or disposition. In many of the places where he emphasizes the m-DNA difference, including the above cited example, it is certainly valid to raise the point to demonstrate yet another misconception of those who fear the generation of human photocopies. However, it more often seems like a tangential point that does not contribute substantively to the argument on either side. It seems unlikely that the cloned child who would be otherwise distressed about his origins would find it wholly comforting that he had m-DNA from the donor of the enucleated egg. Furthermore, it is possible that the m-DNA and the nuclear DNA were contributed by the same person, in which case Kunich’s parenthetical would require another parenthetical.

A more substantive critique is Kunich’s emphasis on public policy despite his purported disavowal of such arguments. In the introduction to this chapter, he states explicitly that “this book is definitely *not* intended to be yet another public policy polemic devoted to supposed moral, ethical, and philosophical problems related to human cloning.”¹⁴ He stresses that he is instead focused on the *legal* issues

13. *Id.* at 13.

14. *Id.* at 2.

presented by cloning bans.¹⁵ However, as he proceeds through this chapter and the book as a whole, he makes a number of moral, ethical, or other public-policy-based arguments. Certainly, public policy arguments based on morals and ethics are almost unavoidable in First Amendment and due process jurisprudence as well as in the cloning arena. Furthermore, Kunich has not attempted to hide his policy orientation in any way, and as he presents the case against cloning, it is fair for him to present his counterarguments to avoid undercutting his own agenda. However, it seems either disingenuous or particularly crafty that under the guise of disinterested legal advisor, Kunich asserts assumptions as facts that might otherwise be hotly contested.

As one example from this chapter, one of Kunich's arguments supporting cloning is that "the majority of people exploring the cloning option would comprise infertile heterosexual couples, single persons, and homosexual life partners, just as they do for the more well-established alternatives to conventional reproduction."¹⁶ It may be fair to say that after the furor dies down, cloning will be just another reproductive technology used in much the same way as in vitro fertilization ("IVF") and by much the same population. Nonetheless, one of the main concerns of cloning opponents is that cloning will not be used as just another form of assisted reproduction like IVF, but that it will instead be used by particular subpopulations for insidious uses. It is not enough for Kunich to just assert this fear away.

Kunich's footnote for this statement reveals that he has no empirical or statistical data supporting his assertion that cloning will be used by the same population that uses IVF. He makes his claims based on statements by gay and lesbian activists that support cloning.¹⁷ There may certainly be a substantial gay and lesbian population looking forward to the development of reproductive cloning technologies that will enable them to reproduce using their own genetic material. Nonetheless, 90% of people surveyed in a May 14, 2003, Gallup poll reported that they found human cloning morally wrong.¹⁸ It is therefore unclear whether the population willing to consider cloning is substantially similar to the population willing to consider IVF.

15. *Id.* at 3.

16. *Id.* at 18.

17. *Id.* at 28 n.93.

18. Ctr. for Pub. Opinion Research, Cloning Gallup Poll (May 14, 2003) (on file with author).

III. CLONING LAW IN THE UNITED STATES

Chapter 2 provides a straightforward breakdown of existing and proposed state and federal legislation. Cloning legislation is relatively new, so Kunich is able to present statutes from only six states: California, Rhode Island, Michigan, Louisiana, Virginia, and Iowa. He summarizes the relevant provisions, and the text of the statutes is printed in an appendix to the chapter. He also cites then-pending legislation from nineteen other states. Federal legislation regarding cloning has not yet been passed, so Kunich discusses the Human Cloning Prohibition Act proposed in 2001 along with competing legislation, including the Brownback-Landrieu bill. Outside the statutory context, Kunich also mentions the authority the FDA has assumed, perhaps questionably, to regulate human cloning.¹⁹

Kunich's treatment of the law is fine for illustrative purposes, but his analyses of the laws of each state are not particularly thorough. For example, when state statutes are ambiguous, such as those of Michigan and Louisiana, he relies upon the interpretation of the President's Council on Bioethics, which may not be the best source for either objective or legal analysis.²⁰ There is no reference to any other source of legal interpretation. However, since he cites the laws mainly to illustrate general trends in state and federal laws — movement toward legislating cloning policies, common choices of permanent rather than temporary bans, general confusion about different methods of cloning, and differentiation between reproductive and therapeutic cloning — there is no real need for detailed analysis. Yet for this same reason, this chapter's extensive state-by-state discussion seems overdone and unnecessary.²¹ Not only is Kunich's targeted lay reader unlikely to care about reading specific statutes, but the rapidly shifting landscape of both federal and state legislation means that this section of the book becomes dated far more quickly than if it merely posed in general terms the broad outlines of different state policies.²²

19. "The legitimacy of the FDA's assertion of this jurisdiction over cloning research is dubious." KUNICH, *supra* note 5, at 42.

20. Of the council's eighteen members, three have law degrees. See The President's Council on Bioethics, Council Members, available at <http://bioethics.gov/about/members.html> (last visited Mar. 9, 2004). For discussion of the council's alleged lack of objectivity, see *supra* note 2.

21. Interestingly, Kunich's law review article on which this book is based does not contain the same detailed breakdown of state laws. It would seem that the law review article would be more likely to have a readership interested in statutory text and interpretation, though in corollary, that readership might be better able to find the statutes on their own. See John Charles Kunich, *The Naked Clone*, 91 KY. L.J. 1, 14–15 (2002).

22. See Nat'l Conference of State Legislatures, State Human Cloning Laws, at <http://www.ncsl.org/programs/health/genetics/rt-shcl.htm> (last modified Jan. 6, 2004)

As a descriptive chapter, Kunich's breadth of coverage is certainly adequate. In particular, his discussion of the FDA's non-legislated assumption of regulatory authority demonstrates a thorough treatment of the government's response to cloning. It might, however, have been interesting to include a discussion of the federal funding provisions concerning both reproductive and therapeutic cloning.²³ While the end goals of therapeutic and reproductive cloning may differ, neither will see fulfillment without research in these early stages of investigation. Given this context, the government's ability to withhold funding of therapeutic cloning as a punishment for pursuing reproductive cloning has notable ramifications on the actualization of cloning and may, in itself, have the sort of First Amendment implications discussed in chapter 4.

IV. INTERNATIONAL CLONING LAW

Applying the same organizational structure as the previous chapter, chapter 3 addresses international responses to cloning. It begins with a discussion of group movements — the proposals and recommendations of bodies such as the World Health Organization and the United Nations. It then proceeds to outline in general terms legislation undertaken by various countries, including the United Kingdom, Germany, Japan, Australia, and New Zealand. As before, the full text of the statutes is in the appendix to the chapter. Kunich surveys the international field to demonstrate the general worldwide apprehension about cloning and to provide examples of a range of actions that governmental bodies have taken in response. In his final chapter on legislative recommendations, he refers to New Zealand's law as a recommended model.²⁴

Again, Kunich's detailed treatment of these different states seems largely unnecessary. Furthermore, the great number of statutes surveyed in this chapter may confuse more than clarify. It would have been more efficient to categorize and summarize the legislation of the various countries. In addition, as a matter of time-space allocation, rather than doing the overview it would have been more worthwhile to extensively analyze the socio-legal context allowing for the permis-

(tracking state laws on human cloning); Nat'l Insts. of Health, Pending Stem Cell Research and Cloning Legislation, at <http://stemcells.nih.gov/fedPolicy/pendingLegis.asp> (last modified May 13, 2003) (tracking proposed federal legislation).

23. See Nat'l Insts. of Health, *supra* note 22.

24. See KUNICH, *supra* note 5, at 151.

sive laws of New Zealand and the comprehensive ones of the United Kingdom.²⁵

V. CLONING AND THE FIRST AMENDMENT

Entitled "Galileo in Modern Chains and the Banning of Scientific Research," chapter 4 presents the case for First Amendment protections of cloning research. In this chapter, Kunich does an excellent job of describing the ambiguities of First Amendment jurisprudence without confusing or frustrating the reader. Demonstrating an adept handling of case law, he begins with a primer of the First Amendment. What does it say and what does that mean? He then undertakes its specific application to the research context, explaining how actions can constitute expressive conduct that is afforded speech protections. Citing a number of the more scintillating First Amendment cases, including a nude dancing case,²⁶ he makes a convincing and interesting argument for a broad reading of First Amendment protections.

One of the most striking devices of the chapter, however, is its title. Kunich's evocation of Galileo is perhaps the most compelling argument for applying the First Amendment to any research context. Even the most skeptical reader must admit the force of the image of Galileo, called in front of the Inquisition to deny the truth of a discovery we now hold to be self-evident. Although Kunich does not make the explicit comparison until midway through the chapter, naming Galileo in the chapter title serves as at least a subtle prodding throughout the stream of the argument for the reader to remember the close ties between scientific research and expression. The mention of Galileo also reminds the reader of the value of objective scientific discovery and the way truth wins out over time.

While a manifest faith in science as a selfless pursuit of truth may be forgiven in the Galileo context, Kunich overstates the cause of science later in the chapter. To support his argument that a compelling state interest should not be found in the banning of cloning research, he posits that scientists are essentially self-regulating in terms of irresponsible experiments.²⁷ As an example, he cites the lack of production of human-animal chimeras despite the technical ability to do so as proof that scientists do not need outside regulation.²⁸ This again is an

25. The Human Fertilisation and Embryology Authority of the United Kingdom is one comprehensive regulatory authority overseeing reproductive issues. See President's Council on Bioethics, Staff Background Paper on the British Regulatory System, at <http://www.bioethics.gov/background/background3.html> (last visited Apr. 2, 2004).

26. See KUNICH, *supra* note 5, at 91 (discussing *Barnes v. Glen Theatre*, 501 U.S. 560 (1991)).

27. See *id.* at 107.

28. See *id.* at 107-08.

example of Kunich assuming rather than arguing public policy issues; furthermore, it is not a fair assumption here. A quick review of medical ethics literature reveals a fair number of irresponsibly or unethically conducted experiments, most notoriously, the Tuskegee Studies, in which life-saving antibiotics were denied to African-American men in order to complete a longitudinal study of syphilis.²⁹ In a discussion promoting more expansive research, it is important to remember the limits that sometimes must be placed on scientific research to prevent the erosion or destruction of human autonomy and dignity. Although scientific research is often pursued by individuals or institutions rather than governmental bodies, the close financial ties between government and research mean that the government does have a stake in regulating the responsible conduct of research.³⁰

Kunich's point that even a compelling governmental interest in regulation should not translate into a full ban on a particular line of research is well taken. He marshals many of the strongest arguments supporting therapeutic cloning, including the possible moral obligation to permit research that could save many human lives,³¹ the spontaneous abortions of embryos during the course of natural pregnancies,³² and the analogies to IVF.³³ Again, in veering from strict legal doctrine, this discussion of morality and ethics bears more resemblance at times to a typical public policy debate than the fair legal analysis Kunich purports to deliver. However, given that compelling governmental interest is an articulated factor in First Amendment jurisprudence, these morality and ethics-based public policy arguments might well be determinative in a court's assessment of a ban on cloning.

VI. OTHER CONSTITUTIONAL PROTECTIONS FOR CLONING

Despite or perhaps because of the buildup for chapter 5, Kunich's discussion of possible non-First Amendment constitutional protections for reproductive cloning is somewhat disappointing. It reads as more of a mishmash of various arguments about the human dignity and individualism of the cloned child, the true parental interests of would-be cloners, and the possible political manipulations of pro-

29. See Emma Cave & Søren Holm, *Milgram and Tuskegee — Paradigm Research Projects in Bioethics*, 11 HEALTH CARE ANALYSIS 27 (2003).

30. See Protection of Human Subjects, 45 C.F.R. §46 (2004) (applying federal regulations to research involving human subjects); see also Nat'l Insts. of Health, Regulations and Ethical Guidelines, at <http://www.nihtraining.com/ohsrsite/guidelines/graybook.html> (last visited Mar. 17, 2004).

31. See KUNICH, *supra* note 5, at 103.

32. See *id.* at 106.

33. See *id.*

lifers in shaping cloning bans, than as any sort of coherent due process analysis.

Kunich begins by explaining his best case scenario for an attack on anticloning legislation: the “naked clone” situation, in which “well-meaning, loving, child-focused people are barred from cloning despite being motivated by some of the best, most altruistic, most basic human impulses.”³⁴ In a footnote explaining the semantic differences between calling a child a “naked clone” and a “cloned child,” Kunich reveals himself to be deliberate and thoughtful.³⁵ In his overview of basic due process constitutional jurisprudence, he continues to demonstrate clarity and ease of expression. As with his explanation of the First Amendment, Kunich’s summary does an excellent job of shaving down the vagaries of the Supreme Court’s due process jurisprudence. He explains that the Court has found due process protections for certain rights or liberty interests involving zones of privacy that invoke personal autonomy, that legislation can impinge on these rights only if it serves a compelling governmental interest and is narrowly tailored to further that interest, and that the court employs a number of different tests to determine whether fundamental rights exist.³⁶ This simplified framework provides a clean and clear starting point for further discussion; unfortunately, Kunich checks in at the launchpad and takes off on a tangent.

Rather than some strong statement about the inherent and necessary connection between reproductive cloning and other reproductive personal choices, Kunich’s main argument in this chapter seems to be that love is the true parent of the clone. Certainly, if children are cloned out of love and a desire for biologically related progeny, then cloning is much closer to the normal reproductive choices that are protected by due process than some detached scientific procedure. However, Kunich’s focus seems to be much less on the legal appeal of the argument and much more on the emotional appeal of the plight of the childless parents who are looking longingly at an open window of opportunity whose shutters might be slammed, locked, and blocked.³⁷ The final sentence of this chapter is an oddly emotive and perhaps cheesy conclusion for a book that purported to be focused on *legal*

34. *Id.* at 118.

35. Kunich explains that he deliberately chooses to use “clone” in “naked clone” to highlight the “negative prejudices, ignorant misconceptions, and pejorative use of quasi-scientific language that have so often accompanied the debate on the cloning of humans.” Otherwise, he prefers the phrase “child of cloning” or just “child” because it “emphasizes the personhood of the individual rather than the process by which he or she came into being.” *See id.* at 141 n.5.

36. *See id.* at 119.

37. *See id.* at 140–41.

issues:³⁸ “As in Brigadoon, with sufficient love, even miracles are possible.”³⁹

Indeed, Kunich’s major digression into the topic of love is not only an apparent refocusing of his original agenda, it is perhaps an overly optimistic view of human behavior on which to base a theory of constitutional jurisprudence. Again, given the abhorrence expressed by the general public toward cloning, it is unclear who these loving families dying for a cloned child are. Furthermore, there is no clear explanation of how today’s world of reproductive cloning as a theoretical possibility fits into a due process analysis of cloning as a viable means of reproduction.

Kunich follows a number of other discussions that could be related to a due process discussion, but ultimately seem like just another opportunity for him to explain how the cloned child is not so different from any other child, or, at the very least, another twin child. Once again, the shared humanity of the cloned child is certainly a valid argument for why cloning should be treated no differently than other constitutionally protected reproduction decisions, but Kunich’s varied and numerous arguments take on a life of their own and become unhooked from the due process framework. He seems more intent on emphasizing the individual personhood of the hypothetical cloned child than on creating an ironclad due process argument for the right to the opportunity to one day clone a child.

While the need to develop an argument for how cloning fits into an existing rights rubric might justify Kunich’s elaborate comparisons of cloning to existing means of reproduction, there is no real excuse for his failure to articulate a legally coherent explanation for how a regime permitting therapeutic cloning but forbidding reproductive cloning⁴⁰ might lead to an overturning of abortion rights. According to Kunich, such a regime would impose a legal duty on researchers to destroy embryos used for research. He states several times that the repugnance generated by a duty to destroy nascent human life might cause an overreaction that could threaten existing reproductive liberties, but it is not at all clear how the overreaction would operate legally.

Some attempted erosions of abortion rights have taken the form of granting rights to fetuses.⁴¹ One of the crucial holdings in *Roe v. Wade* supporting legal abortion is that a fetus is not a person under the

38. See *supra* note 15 and accompanying text.

39. KUNICH, *supra* note 5, at 141.

40. Kunich calls this a “split ban.” KUNICH, *supra* note 5, at xi.

41. See, e.g., William E. Buelow III, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963 (1998).

Fouteenth Amendment's due process clause.⁴² A holding that mandatory destruction of fetuses is constitutionally impermissible could be based on a finding that, contrary to *Roe v. Wade*, a fetus is a person with due process rights. Such a holding would significantly contract reproductive liberties. However, Kunich does not make this argument and it is not clear what his argument is. Since one of his main points is the importance of rejecting a cloning ban to protect other reproductive rights, he should articulate a more convincing story about the legal threat.

VII. CONCLUSION

The final chapter of *The Naked Clone* is an unsurprising advocacy of regulation or temporary restriction as an alternative for a total ban on cloning. Kunich achieves a succinct recapitulation of his major points, urging the reader not to fear cloning but to embrace it with open arms for the opportunities it represents. Asserting that cloning is on its way and will ultimately be achieved, no matter what the restrictions urged now, Kunich seems less worried about creating a favorable judicial climate for cloning than helping people feel comfortable with the technologies to come. If cloning will indeed be achieved despite any restrictions, Kunich's emphasis on the personal aspects of cloning, if not legally rigorous, may indeed be the better means of advocacy.

42. See *Roe v. Wade*, 410 U.S. 113, 158 (1973).