



# Department of Justice

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**STATEMENT**

**OF**

**DANIEL J. BRYANT  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGISLATIVE AFFAIRS**

**BEFORE THE**

**SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY  
AND HUMAN RESOURCES  
COMMITTEE ON GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES**

**PRESENTED ON**

**MAY 15, 2002**

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OF  
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OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM

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Mr. Chairman and Members of the Committee, thank you for this opportunity to submit this written statement about the feasibility of the criminal law provisions of the various human cloning legislative alternatives that have been proposed. The following observations are necessarily tentative, and may have to be reassessed with further study and further development of the relevant science.

The task of enforcing a general ban on human cloning for any purpose does not seem to pose insuperable challenges to law enforcement. Such a ban would clearly define the exact activity to be banned, which is the use of the procedure known as somatic cell nuclear transfer to produce human embryos. The activity involves certain visible steps and sophisticated equipment, and can be distinguished from the usual process of in vitro fertilization (IVF). The cloning procedure uses complete nuclei extracted from body cells, not sperm, and requires additional steps (e.g., extraction of the egg's existing nucleus, chemical or electrical stimulation of the egg after transfer of the nuclear material) to produce an embryo. The eggs used in the procedure would have to be donated by women for reasons other than lawful reproductive goals. We understand that any pursuit of clinical research based on cloning would require harvesting a great many eggs from these women. These visible human activities and interactions are not different in kind from those which law enforcement is ordinarily

called upon to detect and address. Those participating in the activities could be questioned and, with sufficient evidence gleaned from such interviews and from the physical evidence involved, prosecuted as the legislation provides.

Enforcing a modified cloning ban would be problematic and pose certain law enforcement challenges that would be lessened with an outright ban on human cloning. For example, the Human Cloning Prohibition Act of 2002 (S. 2439) is designed to “protect” certain cloning activities when they are conducted for the purpose of research. The Act seeks only to forbid “implanting or attempting to implant the product of nuclear transplantation into a uterus or the functional equivalent of a uterus.”

As an initial matter, the prohibited activity “transfer of an embryo to a uterus” is an activity that is otherwise permitted now in all states and is performed thousands of times a year in fertility clinics. This legislation obviously is not intended to establish a broad prohibition on such lawful activity. However, the transfer of an embryo to initiate a clinical pregnancy is presumably the same regardless of whether the embryo involved was originally produced by cloning or fertilization. Hence, there is no visible difference between the prohibited activity and the permitted activity, both of which would presumably be conducted within the privacy of a hospital or medical office. Entrusted with enforcing such a limited ban, law enforcement would be in the unenviable position of having to impose new and unprecedented scrutiny over doctors in fertility clinics and/or research facilities to ensure that only fertilized embryos were being transferred to would-be mothers. Assuming that law enforcement authorities had the inclination or the resources to undertake such an effort, this would be a formidable task in light of the number of embryo transfers performed in fertility clinics across the country every year.

Additionally, at the point when embryo transfer occurs, which is at the blastocyst stage (about 5-6 days after the embryo is produced), there does not seem to be any reliable means for determining the difference between a fertilized embryo and a cloned embryo. For all we know, these embryos are biologically indistinguishable. Moreover, if a researcher mixed cloned and fertilized embryos in culture and then implanted only some of these embryos, there would simply be no way for a prosecutor to prove that the implanted embryos were the ones which arose from cloning. Even after the fact, it is not clear how one could determine that the fetus in utero was originally produced by cloning, unless one could demand a prenatal genetic profile and show that this profile is genetically virtually identical to a particular pre-existing individual. Therefore it is not clear how, upon hearing that someone may be engaging in the activity prohibited under the Act, law enforcement personnel could determine that it was taking place, even if they were present and observing the activity firsthand.

Anything short of an outright ban would present other difficulties to law enforcement. In one of the proposals currently before you (S. 2076), clonal implantation would only be prohibited if it were done "for the purpose of creating a cloned human being." This language is ambiguous and implies that a clonal implantation would not be unlawful if done for some other purpose. Presumably, the requisite intent to violate the law would have to exist at the time of the clonal implantation. In the absence of a confession, it would be exceedingly difficult for law enforcement authorities to establish that those performing a clonal implantation did so with the requisite mens rea at the time the procedure was performed, even if the ultimate result is the birth of a cloned human being. Additionally, we note that S. 2076 does not appear to prohibit the exportation of cloned embryos, thereby raising the possibility that cloned embryos could be exported and used to produce cloned human beings abroad, without violating the law. Such an obvious

“loophole” would undermine the apparent goals of the legislation and would cause difficulties and confusion in enforcing such a statute.

We also note that S. 2439 contains a criminal forfeiture clause that would apply to “[a]ny property, real or personal, derived from or used to commit a violation or attempted violation” of the ban on implantation. If read literally under this clause, a cloned embryo, which is referred to in the Act as the “product of nuclear transplantation,” that has been implanted and is developing as a cloned fetus could theoretically or conceivably be forfeitable to the United States again raising extremely serious legal, moral, and practical issues.

Further, except in those exceedingly rare instances when the parties involved announced their intention to engage in unlawful activity in advance, it is difficult to envision how law enforcement officials could effectuate the stated goals of S. 2439 of preventing the birth of cloned infants. For example, once a pregnancy were established, any government-directed attempt to terminate a cloned embryo in utero would create problems enormous and complex.

### **Conclusion**

Mr. Chairman, the Department of Justice thanks you again for this opportunity to submit a statement about the issues surrounding the enforcement of the pending bills pertaining to human cloning. As stated at the outset, these thoughts are preliminary based upon our current understanding of the various ongoing legislative proposals and current understanding of the applicable science. The practical issues surrounding the enforcement of any legislation in this important area is a matter that should be given careful thought.