



NOTRE DAME LAW SCHOOL
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Douglas Johnson
Legislative Director
National Right to Life Committee
512-10th Street, N.W.
Washington, D.C. 20005

Dear Mr. Johnson

Here is my analysis of S1909, the cloning bill which passed the New Jersey Senate in December, 2002.

As I believe you know, I have taught constitutional law for twenty years. My scholarly articles have appeared in dozens of journals. I have testified many times in Congress as a constitutional expert concerning human life issues, including testimony on federal cloning legislation.

The analysis is brief, and leaves aside evaluation. I describe below some certain effects of S1909. Those effects are breathtaking, unprecedented, and widely regarded as morally disastrous. These effects include, most notably, a commercial market in the body parts of fetuses, and the birth of an unlimited number of "cloned" babies.

First, the market in what the legislation calls "cadaveric fetal tissue." The bill may appear to outlaw such traffic; at least, it would ban certain transactions for "valuable consideration." But the stipulated definition of "valuable consideration" – "financial gain or advantage" *excluding* "reasonable payment" for "removal, processing, disposal, preservation, quality control, storage, transplantation, or implantation of embryonic or cadaveric fetal tissue" – renders the ban toothless. *There is no meaningful difference between "valuable consideration" and "reasonable payment" for such varied services having no objective market value.*

In fact, S1909 authorizes commercial traffic in the body parts of human beings "cultivated" (the bill's word) up to the moment of birth. The bill explicitly authorizes the creation of human embryos by genetic replication, or cloning. It authorizes "cultivation" of such embryos at least until birth. Since the only way to "cultivate" embryos so long is by implantation in a woman's womb, the bill expressly authorizes payment for "implantation" and "transplantation" of embryos. Presumably, contracts between cloning entrepreneurs and gestating women will specify the stage of pregnancy at which the woman agrees to have an abortion, and then turn over "fetal cadaveric tissue" to the entrepreneur. The bill imposes no subsequent limits upon the entrepreneur's liberty to dissect, dismember, and otherwise repackage the remains. The bill sets no limit upon his liberty to market the remains for research purposes, save for the meaningless "valuable consideration" proviso.

I turn to another certain effect of S1909, the birth of cloned human beings.

The bill makes “cloning” a crime of the first degree. “Cloning” is defined in the proposed legislation, however, in an extraordinary fashion: “cultivating” the cell “through the egg, embryo, fetal *and newborn stages into a new human individual.*” [Emphasis added.] This means that “cloning” would not occur, and no crime would be committed, before a child was “through” – that is, past or beyond or done with – the “newborn stage”. “Newborn” is not a legal term of art, and the bill provides no definition of it. “Newborn” is by itself a vague term, admitting a range of reasonable definitions. So, because the proposal establishes “knowingly” as an element of the crime, “cloning” would be committed only where a prosecutor proved, beyond a reasonable doubt, that a defendant *knew* a child was past *any* reasonable definition of “newborn.” The crime of “cloning,” according to S1909, would not occur until a child was weeks, or perhaps months, old.

To avoid the crime of “cloning,” a putative defendant would have to kill the child in the first weeks (or months) after birth. But this would be murder. Since no one may be convicted for conduct avoidable *only* by committing murder, the crime of “cloning” is therefore non-existent. By authorizing genetic replication in the first place, and by thus defining the crime of “cloning,” this bill effectively authorizes the creation of new people through cloning.

It might be said that few, if any replicated individuals will be “cultivated” all the way through to birth. It might be said that the common pattern will be to “cultivate” new individuals for a limited time in the wombs of willing host women, who will have agreed to abortions before the onset of the “newborn stage.” In other words, the whole idea is to create a market in fetal body parts. Thus there need be no concern, it might be said, about cloned infants being protected by the homicide laws.

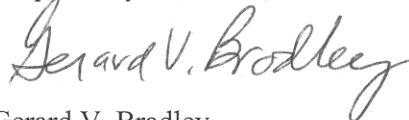
The problem with this response is that agreements to abort are absolutely unenforceable. The right to choose to have a baby or not is guaranteed to the individual pregnant woman – and to her alone – by *Roe v. Wade*. This right is inalienable, and exercisable up to the moment of birth. There is no chance whatsoever that any court would order specific performance of a contract to abort, or that any other enforcement agency would force a woman to have an abortion. Doing so would amount to a government assault upon the woman, and to state-mandated feticide as well.

Once any cloned embryo is implanted in any women, the law is utterly powerless to prevent the birth of that child. To a statistical certainty some number – in principle, unlimited – of implanted cloned embryos will be born, notwithstanding any contract or stated public policy of New Jersey.

Make no mistake about it: S1909 puts New Jersey on course to be the first jurisdiction in the world to count cloned babies among its inhabitants.

Mr. Johnson, you have my permission to publish and otherwise circulate this legal opinion.

Respectfully submitted,



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