

MICHAEL J. BROYDE

Cloning and the Noahide Legal Code

The Noahide code was intended to be a practical legal code, and to form a system that satisfied the social, legal and religious needs of peoples outside the framework of Judaism.¹ Jewish law is not the ideal legal code for all—only for Jews. This point is frequently overlooked in discussions of bioethics and Jewish law. Some Jewish legal doctrines concerning bioethics—as well as other areas of Halakhah—might be relevant only to Jews. Consider, for example, the remarks of Rabbi Judah Loewe of Prague (Maharal) concerning the halakhic prohibition of crossbreeding in animals. He states:

The creativity of people is greater than nature. When God created in the six days of creation the laws of nature, the simple and complex, and finished creating the world, there remained additional power to create anew, just as people can create new animal species through inter-species breeding. . . . People bring to fruition things that are not found in nature; nonetheless, since these are activities that occur through nature, it is as if it entered the world to be created. . . . There are those who are aghast at the interbreeding of two species. Certainly, this is contrary to Jewish law which God gave the Jews, which prohibits inter-species mixing. Nonetheless, Adam (the First Person) did this. Indeed, the world was created with many species that are prohibited to be eaten. Inter-species breeding was not prohibited because of prohibited sexuality or immorality. . . . Rather it is because Jews should not combine the various species together, as this is the way of Jewish law. As we already noted, the ways of the

MICHAEL J. BROYDE is Associate Professor of Law at Emory University and rabbi of the Young Israel of Toco Hills in Atlanta, Georgia. He has published widely on topics in Jewish law.

Jewish law, and the [permissive] ways of the world are distinct. . . . Just as the donkey has within it to be created . . . but was left to people to create it [and was not created by God]. Even those forms of creativity which Jewish law prohibits for Jews, are not by definition bad. Some are simply prohibited to Jews.²

What flows most clearly from this passage is that there is nothing intrinsically wrong with crossbreeding, even though it violates Jewish law; indeed, Rabbi Loewe nearly states that such conduct by Gentiles is good. It was prohibited by Jewish law because it was not part of the Divine mission for the Jewish people. Jewish law is not a general ethical category governing the conduct of all. Its scope and application is limited to Jews, not merely jurisdictionally, but even theologically. This point of view would seem apparent from the general attitude that the Jewish tradition takes to a number of issues pertaining to proselytizing.

The same may be said to be true of cloning: even if one were to flesh out a valid Jewish law doctrine that prohibited cloning, such a doctrine would not affect the propriety of 99.999% of the world from engaging in cloning, as such a doctrine would not have, for sure, any foundation in the Noahide code; and, as Rabbi Loewe notes, many things prohibited through Jewish law to Jews are perfectly acceptable to Gentiles.

I do not feel, however, that Jewish law itself prohibits cloning to Jews. I have addressed the general issues related to cloning at some length in three different articles.³ I suggest that three separate and distinct areas of analysis are needed to understand cloning: (1) Is cloning an intrinsically good, bad or neutral activity? (2) Is the clone human, and who are his or her relatives? (3) Will cloning lead down the slippery slope towards other ethical violations, and if so, what are they? I shall propose some tentative responses to these issues.

The first issue—is cloning an intrinsically good, bad or neutral activity?—would seem to be part of the general debate about assisted reproductive technology. There are a host of such activities that manipulate the normal reproductive process. They vary from simple artificial insemination of the husband's sperm (which was done 2,000 years ago) to surrogate motherhood and its close cousins zygote intrafallopian transfer (ZIFT) and gamete intrafallopian transfer (GIFT). While some religious and ethical traditions, most notably Roman Catholicism, view all tampering with nature in the reproductive area as wrong, that is by no means true of most religious or ethical traditions, and is not true of Judaism in particular. Many traditions view all assisted reproductive technologies, when modestly performed in cases of infertility, as a proper way for peo-

ple to seek to “be fruitful and multiply,” and to enjoy parenthood, all of which are good acts. Indeed, one is hard-pressed to find a religiously neutral reason why cloning would be intrinsically bad in cases where other means of treating infertility would not work. Indeed, consider what is most likely to be the first use of this new technology, the donation of an oocyte to a woman who has a mitochondrial disease, where her embryo is transplanted into a disease-free oocyte, thus eliminating the mitochondrial disease from the fetus. Why should that be opposed?

The second issue—is the clone “human” and who are his or her relatives—is the one that attracts the most interest, but in fact has the least substance to it. Clones would be born from an ovum/egg that was stimulated to divide after its DNA was removed and replaced with another’s DNA. This egg would then be implanted into a woman’s womb and be carried to term like any child. This child would have a birth mother, and would bear no resemblance to the artificial people some are writing about, who we are afraid would be used for spare parts or slave labor. Clones would be human—born from a human mother—and entitled to the same rights as humans to which we all are. Of course, we must all resist the temptation to label some people as “less human” than others, since terrible immorality can issue from that posture. However, as this century has taught us, that danger is not unique to cloning. Just as the animal named Dolly was a sheep—a cloned sheep, but really just a sheep—so too cloned humans are humans too, and there is no basis for thinking they are not.

The question of who would be the clone’s mother/father/sister brother is a good one. One could view the gestational mother as the mother, and the gene donor—when he is a man and not a woman—as the father. One could view the gene donor as the mother, when she is a woman, and label the gestational mother as of no significance. Indeed, I suppose one could consider the gene donor a sibling, if one wanted to stretch a bit. All of these are possible, and at least within the Jewish law tradition that I am most familiar with, all except the last theory have their adherents. However, the fact one is not sure exactly what the family tree looks like is no reason to stop the process in its tracks. Surrogate motherhood also has its uncertainties about who is the mother, yet it serves a valuable role in allowing those unable to reproduce naturally to have children. Cloning will serve the same function and should not be prohibited because of this uncertainty.

Finally, some worry about the ethical slippery slope. Cloning, the argument goes, is not a problem, but it could lead to other problems.

Notwithstanding the Luddite character of this type of reasoning, the unknown should cause all ethical people to stop, pause and examine what potential slopes our society—ethically and religiously fragmented as it is—might slip down. However, once we recognize that clones are full humans—not organ farms, not slave labor, not automatons—we also recognize that cloning is no more likely to lead down the ethical slippery slope than is any other assisted reproductive technology, which we generally permit to treat infertility. Does that mean full speed ahead? The answer is that with appropriate supervision, cloning can be proper and should not be banned.

Indeed, even the most common “nightmare” scenarios advanced by those hostile to cloning are really quite good. Consider the case of a person dying of leukemia and in need of a bone marrow transplant, with no donor available. The decision to clone the sick person, so that there will now be two people (one donor and one recipient of bone marrow) alive—each, to quote the biblical verse, in God’s image—seems to be ethically speaking vastly superior to the alternative that existed before cloning: that one will die and the other will never be born. Indeed, Jewish tradition might regard this procedure as involving two good deeds: having a child and saving a life.

In sum, cloning, like artificial insemination and surrogacy, has narcissistic possibilities. In reality, however, it will most frequently be used as a treatment for drastic infertility, and like all forms of assisted reproductive technologies has its place in one of the central missions of humanity: to make the world a better place for its inhabitants.

Notes

1. For more on this, see my “Public Policy and Religious Law: Assisting in a Deliberate Violation of Noahide Law that is Permitted by Secular Law,” *Jewish Law Association Studies VIII: The Jerusalem 1994 Conference Volume* (Atlanta, 1996), 11-20, and my “Jewish Law and the Obligation to Enforce Secular Law,” in *Tikkun Olam: Social Responsibility in Jewish Thought and Law*, ed. David Shatz, Chaim I. Waxman, and Nathan J. Diament (Northvale, NJ, 1997), 103-43.
2. Judah Loewe of Prague (Maharal), *Be'er ha-Golah* (Jerusalem 5731), 38-39.
3. “Cloning People: A Jewish View,” *Connecticut Law Review* 30 (1998): 503-535; “Cloning People and Jewish Law: A Preliminary Analysis,” *Journal of Halacha and Contemporary Society* No. 35 (1997): 27-65; and “The Cloning Controversy,” *Emunah Magazine* (Spring 1998): 15-17. Some of the material in this essay is drawn from those earlier studies.