

Essay

Reflections on the Cloning Case

BERNARD SIEGEL

THIS PAPER EXPLORES THE EVENTS surrounding the Raelian cloning claim and the first and only legal case ever filed to protect the rights of a cloned human being. I was the lawyer who filed that case. Four years ago, societies were burdened with the fear that very soon cloned persons would walk among us. In a charged political climate, cloning was the popular culture issue blurring the line between legitimate science and science fiction. In the age of the 30-second news bites, how was the public to understand the difference between the real scientists, seeking understanding and cures through research in developmental biology, and the provocateurs, posing as legitimate scientists, making irresponsible and outlandish claims?

Bill McKibbin's book *Enough: Staying Human in an Engineered Age* explores the darker edges of biotechnology. His opening paragraph underscored the world's angst at a particular moment in time concerning an astonishing claim that the first cloned baby had been born. He wrote:

As this book goes to press in January 2003, the world is still waiting to find out if the Raelian UFO cult has produced Earth's first cloned child or if that prize will go to one of the other teams of rogue scientists racing toward that goal. But the question of who will be the first is, in the course of things, unimportant; the real issue is what will follow? Will this news open the gate to a "posthuman" world that the people described in this book now imagine—people who, at first glance, appear far more rational and sober

than Rael's colleagues? Or will it be instead the news that rallies us to ward off a future filled with far more insidious developments than the Raelian's baby Eve?

As a trial attorney for nearly 30 years, I had drafted a thousand lawsuits in my career but none like the true case of "first impression" that I filed on December 31, 2002 in the Broward County Circuit Court in Fort Lauderdale, Florida. I was seeking a guardian for the alleged cloned child.

In the matter of baby Eve, no governmental authority chose to take action, so in my capacity as an officer of the court and private citizen, I decided to do what I knew best. I sued.

Although the case was not ultimately resolved on the merits, the truths discovered would ultimately defuse the cloning hysteria and would impact the debate over human cloning and nuclear transfer in ways well beyond my imagination at the time.

I first learned of the human cloning claim on December 27, 2002. CNN broke in upon a live press conference. Dr. Brigitte Boisselier, the scientific director of the self-proclaimed human cloning company, Clonaid, went before a microphone at a Holiday Inn in Hollywood, Florida and confidently proclaimed, "I am very pleased to announce that the first baby clone is born . . . she is fine."

She continued in a rambling fashion to describe Eve as being born to a 31-year-old American woman by a process in which one of the woman's skin cells was implanted into an enucleated egg, also donated by the mother. An electrical impulse was initiated. The embryo was then transplanted back into the mother.

The couple was infertile, but the mother had been previously pregnant. Eve had an older sister (but in the confounding world of cloned persons defining familial relationships is not all that clear). She promised that the baby would be revealed in 3 days and that an “independent expert” would oversee a DNA test and the world would have its proof in 10 days. A former science correspondent from a major television network confirmed that he would participate in the oversight of the DNA tests and that added legitimacy to the claim.

Pundits and experts immediately took to the airwaves. Who was Clonaid? Was Eve for real? After millions of years of evolution had humankind reproduced asexually? In a year-end slow news cycle, the birth of the first clone hit the front page of nearly every newspaper in the world.

One was reminded of the news of the birth of Dolly the sheep and the immediate speculation that human reproductive cloning was the next step. In 1997, Dolly’s birth was celebrated also by banner headlines. The New York Times greeted the news with “Researchers Astounded . . . Fiction Becomes True and Dreaded Possibilities Are Raised.”

In the wake of the Dolly announcement in the United States, laws impacting cloning practices were passed in 14 states (as of 2005), and several went beyond bans of reproductive cloning. Six (or seven, subject to statutory interpretation) also banned nuclear transfer, some states imposing severe criminal penalties.

In 2002, the generally held view was that the first cloned birth was inevitable and imminent. That Dr. Boisselier and Clonaid had any credibility was due, in part, to the United States Congress and National Academy of Sciences. Both eminent institutions provided these would-be human cloners with a public platform to publicize their activities.

On March 28, 2001, Dr. Boisselier and Claude Vorilhon, a/k/a Rael, the mastermind of Clonaid and leader of the Raelian Movement, were invited to testify before the House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations on “Issues Raised by Human Cloning Research.” Congressman James C. Greenwood of Pennsylvania was the chairman and as he called the hearing to order, he addressed some of the alarming concerns regarding human cloning:

Nearly 80 years ago, Aldous Huxley wrote his literary masterpiece *Brave New World*. In that book, he posited a future where genetic engineering is commonplace and human beings, aided by cloning, are mass produced. Controllers and predestinators replaced

mothers and fathers. The words themselves were considered smut.

As the new authors of human life in an uncompromising search for human happiness and stability, the possibility of human individuality had been entirely jettisoned. For most of its 80 years, *Brave New World* could be seen as a disturbing work of science fiction. That is no longer the case. The possible cloning of human beings is now relegated to the world—not relegated to the world of fiction. The question we must ask is this: What should we do with this science? That is what brings us here today.

This memorable hearing presented 15 witnesses from the fields of science, academia, biotechnology, bioethics, and patient advocacy. From the world of would-be cloners (the so-called “rogues”) were Dr. Boisselier, Rael, and Kentucky “sperm expert” Dr. Zavos Panos.

When it was her turn to testify, Dr. Boisselier represented that Clonaid was actively engaged in reproductive cloning experiments. She suggested that her work was humanitarian in nature, stating that Clonaid could provide an infertile couple with the ability to reproduce. She tried to be reassuring. “We have no intention to step over dead bodies or deformed babies to accomplish this.”

She rejected safety concerns and the low success rate in cloning animals. She told the lawmakers, “Clonaid scientists were well-trained and have been perfecting the egg enucleation and heteronuclear transfer which makes us very confident about the outcome of this endeavor.”

Rael, outfitted in full Raelian regalia befitting the deity he claimed to be, boasted that he had asked Dr. Boisselier to create the first human cloning company in America. He provided a recitation of the Raelian creed that science should be mankind’s religion.

At that time, there was speculation that the Raelian Movement had many followers who were willing young women, eager to supply the necessary human oocytes for the experiments to begin.

Given that “cloning” is such a sledgehammer word, it was not very surprising that shortly after the Congressional hearing, the U.S. House of Representatives passed its first human cloning ban. In July 2001, the Weldon-Stupak “Human Cloning Protection Act” was approved 265–162. The bill proposed Draconian penalties to those engaged in nuclear transfer, imposing penalties on researchers of imprisonment of up to 10 years and \$1 million fines. Even patients could face the same penalties. There was no distinction between cloning babies and cloning

for biomedical research. A leading bioethicist suggested that realistic chances of cloning a baby were very tiny and opined that the bill was like using a “nuclear bomb to kill a mosquito,” but to a solid majority of the House, cloning, including the technique of nuclear transfer, would march society down the slippery slope ending in the *Brave New World*.

A moderate amendment proposed by Congressman Greenwood to regulate therapeutic cloning was rejected.

By 2002, the press was on full alert, looking for the breaking word that humanity had entered the cloning age. Science writer Brian Alexander generated speculation in an article in *Wired* where he reported the supposed banter among researchers on how easy it would be to clone humans. “If you had a cell biologist, you could do this in a small closet for only \$50,000.”

The article quoted the president of an animal cloning company, who attended what was described as a “secret summit of cloning experts.” The executive revealed that “one evening after dinner, some of us were talking, and there was not one of us [who] believed it had not already happened. It is too easy. Too bloody easy.”

In the immediate aftermath of Clonaid’s stunning announcement, the press coverage was laced with skepticism and suspicion that the whole thing might be a publicity stunt. If nothing else, Clonaid’s presentation was a lesson in public relations. Rather than producing the child, they *promised* to produce the child. As a result, the spotlight was on the cloning company rather than the baby. Furthermore, the subject matter tapped into mankind’s greatest hopes and fears. Our collective hope that the beneficence of science might lead to the banishment of human suffering, along with the suggestion of immortality, and the fear that we might have crossed a boundary reserved for God.

My own view, I am sure shared by many, was the oddity that this group had not produced scientific evidence of the claims. Where were the white-jacketed scientists? Where were the scientific papers backing up the cloning work? Most worrisome, where was the actual child seemingly exploited by some outlandish group? And why had they made this incredible announcement in Florida?

In my legal career, I was an advocate for children’s rights and had served as a director of a parent support group for victims of parental kidnappings. I pondered whether there was any legal remedy to test Clonaid’s claim and possibly protect an endangered child. From my personal perspective, I had once helped my daughter with a high school paper on Dolly the sheep,

and I remembered reading a paper published in the journal *Science* stating that it was unsafe and unethical to perform human reproductive cloning.

As a cancer survivor, I believed in legitimate scientific research for cures and I could see how a publicity-seeking organization like Clonaid could negatively impact the public’s perception of nuclear transfer. Indeed, how could most folks with our limited science background hope to understand complex issues in developmental biology relating to cloning and regenerative medicine?

Under the law, it would be abuse to willfully act or threaten to act in a way that either results in physical or mental injury or would be likely to cause a child’s physical, mental, or emotional health to be impaired. Eve, the alleged baby clone, surely appeared to be a child at risk and in harm’s way. “Harm” is a legal term. Eve could be facing harm if someone was inflicting or allowing to be inflicted upon her physical, mental, or emotional injury; neglecting her by failing to supply her with adequate health care; or making her unavailable for the purpose of impeding or avoiding protective investigation or by negligently failing to protect her from physical or mental injury caused by the act of another.

Boisselier had represented that Eve was a human clone, which we knew from scientific literature based upon animal experiments would be brought into the world facing a substantial risk of harm to her health and well-being. Clonaid admitted it had not done a DNA test, so how could they determine whether she might require some sort of specialized care? Boisselier also stated that the medical caregiver attending birth was denied knowledge that Eve was a clone.

There is a clear mandate under Florida law, and indeed in every state, to protect children from harm. So it seemed obvious to me that Eve, if she really existed, needed a guardian. A guardian *ad litem* program is an important component of the American legal system to protect children at risk. The law allows a judge to appoint a guardian, who is independent of the state agency to protect children, to independently investigate the child’s circumstances. The child’s safety, parents, home, and medical and emotional condition are reported back to the court with recommendations of what must be done to protect the child and act in the child’s best interest. The rationale for guardians makes sense because in at-risk situations a child’s rights could be easily overlooked. The law recognizes that children are powerless and at a disadvantage in the adult world and need someone to protect their best interests.

I knew that the Department of Children and Families filed 99.5% of all dependency cases in Florida, but the law provides for “any person” with

knowledge of such a child to petition the court to have the at-risk child declared dependent.

I was a stranger to Eve, but Dr. Boisselier had invited the entire world to Eve's birth announcement, and as I saw it, if the potential abusers were coming to my backyard to make such an announcement, it was an invitation to court scrutiny. By taking everything Clonaid said as true, the inescapable conclusion is that there was a child at great risk. The epiphany was that I could be the person to petition the court to appoint a guardian.

On December 30, I made the fateful decision to file such a petition in the juvenile court, basing on what was in the public record, recognizing that the court would take judicial notice of the press conference and public furor. Depending on what we learned from the legal proceedings, the world could determine the truth, and should Eve prove to be real, the court could protect her.

I styled the case "In the Interest of "A.B." D/O/B: December 26, 2002. I named myself as petitioner.

The Verified Dependency Petition and Motion to Appoint Guardian Ad Litem named the interested parties as respondents including "Jane Doe" mother, address unknown, the putative mother; Bridgitte Boisselier, president of Clonaid; Claude Vorilhon a/k/a Rael, founder of Clonaid and the group Raelians, and Clonaid, a/k/a Valiant Venture, Ltd., a company doing business in Florida.

The petition recited the following allegations, which I had gathered from press reports and public record:

- *On or about December 26, "A.B.," a baby girl, was born, alleged to be the first cloned human being.*
- *The birth of the child was announced in a heavily publicized press conference. Boisselier represented that the baby is in fact a human clone of an American woman who donated her DNA for the cloning process. The baby, who Boisselier nicknamed Eve, was represented to be genetically identical to her mother.*
- *Boisselier is an adherent of a group called Raelians, who claim space aliens created human life through cloning. Clonaid is a foreign company that is seeking investors in Florida through their Web site. Clonaid has failed to properly register to do business in Florida.*
- *Clonaid claims to be the first human cloning company in the world. It seeks to commercially exploit cloning and plans to charge potential customers \$200,000 for a clone. The founder of the company, Rael, represents that the company's goal is to make as much money as possible.*

- *In furtherance of a scheme to commercially exploit the minor child, Clonaid and Boisselier have declared their intention to perform medical tests on the child to determine whether the child is a clone and to prove that their dangerous medical experiment was a success. The child is in effect a human "guinea pig."*
- *Human cloning has not been sanctioned or approved by the U.S. Food and Drug Administration, and regulations forbid human cloning without prior agency permission. Despite this, the respondents proceeded with this dangerous medical experiment, subjecting the minor child to potentially permanent, serious, life-threatening medical problems.*
- *That this child is at risk of having permanent genetic defects, imperfections, and mutations, with the possibility of mutations only noticeable at birth. The minor child requires specialized medical care.*
- *That the minor child may undergo emotional stress and have significant psychological risks attendant to being a cloned human being.*
- *That the respondents may have already engaged in tortious conduct against the minor child including, but not limited to, negligently inflicting on the child severe, permanent, and possibly fatal birth defects and deliberately invading the privacy of the child by intruding on the child's seclusion, publicly disclosing private facts about the child, and seeking to commercially exploit property value belonging to the child.*
- *That the respondents know the whereabouts of the child but are secreting her, preventing her from receiving proper medical attention, while at the same time seeking maximum publicity and commercially exploiting her.*
- *No human life should be exploited for benefit of another.*
- *Inherent conflicts of interest exist between the mother and the minor child.*

The legal action sought several remedies. It demanded that the whereabouts of the child be disclosed, the parties including the child be brought before the court, that upon determination by the court that the child be in danger that the child be placed in temporary legal custody of the Florida Department of Children and Family Services and that the court appoint a temporary guardian to protect the legal rights of the child.

I think it is safe to suggest that the respondents did not expect a court challenge.

The news of the petition to appoint a guardian set off a further media frenzy that was unabated for the entire time the case was pending. Rael announced

that Clonaid would not provide the DNA test they had promised the world because of the Florida case and the lawyer who was “trying to take the baby away from her mother.”

I was thrust in front of the media as an expert on the dangers of reproductive cloning and was called upon to provide dozens and dozens of media interviews.

Most memorable for me was the evening I squared off to debate Rael on *Connie Chung Tonight* on CNN. Connie Chung breathlessly described the case as a “custody battle” and a story “unlike any other in human history.” I faced searing media scrutiny as to my own motives and the case was intensely followed and reported around the world, from “The People’s Daily” to the “Vanguard of the Mahdi.”

Before the court could make a determination, it was necessary to serve the court papers on the respondents through a court-approved process server. That possibility seemed fairly remote, because Clonaid was not registered to do business in Florida or any of the 50 states. None of the other individuals, Boisselier or Rael, had residences in Florida. It would take a lucky break to actually serve papers. That break arrived when an investment conference promoter called to inform me that on January 11, the vice-president of Clonaid, Thomas Kaenzig, was scheduled to provide a keynote address at an conference in Fort Lauderdale, seeking to raise capital for their cloning venture.

At the conference, when it came Kaenzig’s turn to speak, the process server handed him witness subpoenas and notice of hearing for an arraignment hearing on January 22. The legal matter was thus joined and thus ratcheted the case into a serious and contested matter. The media attention that day was extraordinary. Clonaid was compelled to come to court or be held in contempt. Headlines around the world read “Clonaid Ordered to Reveal Clone.”

Clonaid wasted no time and hired two respected Miami criminal lawyers. Their strategy was to seek immediate dismissal of the proceedings on jurisdictional grounds, arguing that the cloned baby had never been in Florida. Dr. Boisselier signed an affidavit supporting the contention. Several technical motions pertaining to discovery and jurisdiction were filed and argued.

I countered that jurisdiction in Florida was based on the Uniform Child Custody Jurisdiction Act, under its “default” and “emergency” provisions. The court may exercise jurisdiction if it appears no other jurisdiction is in a position to do so. Should Clonaid decline to reveal the whereabouts of Eve, Florida courts could have jurisdiction based upon Clonaid’s appearances in the state.

My strategy was to rely on a fundamental principle of common law that a court has “jurisdiction to determine its own jurisdiction.” If my view prevailed, Clonaid’s affidavits would be insufficient and the respondents would be required to supply a live witness in order to establish their allegation of nonresidency. I would have the opportunity to cross-examine that witness to test their claim of nonresidency and more.

Kaenzig failed in his efforts to secure a protective order, so the court proceeding moved forward. On January 22, 2003, the arraignment hearing commenced in a packed central courtroom, filled with world media, officials from the State of Florida Attorney General’s office, and the Department of Children and Families. It was a contentious 2-hour hearing. I finally had the opportunity to question a representative of Clonaid, in this case the disembodied voice of Thomas Kaenzig, Clonaid’s vice-president, who appeared by telephone from his home in Las Vegas. Strangely, he could not answer rudimentary questions about Clonaid or even the existence of baby Eve. Judge John Frusciante was a no-nonsense judge, and he directed that Kaenzig be personally present at a second hearing scheduled 1 week later and warned him that someone from the company had better be prepared to answer questions. The judge also granted my motion that I be allowed to take Kaenzig’s deposition (sworn statement taken before a court stenographer).

During the deposition, the Clonaid story developed some large cracks. Kaenzig admitted that Clonaid lacked a board of directors, bank accounts, and a street address. Essentially, Clonaid consisted of Dr. Boisselier and a group of persons interested in cloning. On the record, their counsel admitted that Clonaid was not a company.

Even though Clonaid marketed itself as the “human cloning company,” in actuality it was nothing more than a “sham.”

On January 29, in a moment of high courtroom drama, Dr. Boisselier came to court to defend herself. I called her as a witness and she swore an oath to tell the truth. When I asked her where the baby was born, she defiantly refused to answer. Judge Frusciante directed her to answer. She insisted the child was a clone and was born in Israel. She also testified that she had only seen the clone on videotape. “I can tell you that this baby is not in the United States and has never been in the United States.”

When I sought additional information about the cloning labs, there were strenuous objections from Clonaid’s attorneys. They argued that Clonaid had produced the live witness testifying that the baby was

never in Florida, and therefore, unless there was evidence to the contrary, there was no jurisdiction.

Judge Frusciante ruled that he had no jurisdiction. He did request that the government and child agencies in Israel look into the child's welfare.

The judge lectured the witness, "You cannot pursue human cloning with impunity. All of us must not overlook the weakest among us." He also referenced President Bush's condemnation of cloning in his State of the Union Address the night before.

He congratulated me on my resourcefulness in bringing the case and suggested that if I wanted to proceed further, I would need to file a lawsuit in Israel. Case dismissed.

Counsel for Clonaid was exuberant, telling the media that the case was "patently preposterous. There's a cloned sheep, a cloned cat, why not a cloned baby?"

At that point, one might imagine the case would have simply been forgotten, but there was still shelf life in the story.

The media rightfully concluded that Clonaid and the Raelian threat was all hype and a moneymaking scheme. Boisselier and Rael claimed more than a dozen cloned births, but the world only yawned or laughed. The bubble had burst for the Raelians and the so-called "human cloning company." Their claim was a wild fantasy foisted on the world by publicity seekers. The legal case brought the curtain down on their stunt.

The case was unusual because it took human cloning seriously as a legal matter, and not a theoretical bioethical or theological debate. Should there ever be a cloned child, the principles of child protection and guardianship would likely be available. That in itself could prove a deterrent to would-be cloners.

In the broadest sense, I would suggest that the real value of the case was that it dispelled the unfounded fear that human reproductive cloning was imminent and inevitable. Society does have time to thoughtfully regulate the cloning technologies that hold promise of understanding, treatment, and possible cures of a host of medical afflictions.

The Raelians were merely cartoon mad-scientists. The foes of embryonic stem cell research exploited their strangeness, and placed them in the spotlight to exacerbate the public fear of cloning and to demonize legitimate science. The Raelians not only disgraced themselves, they even undermined the credibility of other rogue cloners, who have also been collectively dismissed by the public and media as publicity seekers,

Because reproductive cloning is not considered very likely in the near future, research foes have lost the

momentum and no longer have the impetus to stampede lawmakers to enact overly broad cloning bans.

During the case, I had reached out to scientists around the world seeking expert opinions on the likely truthfulness of Clonaid's claims. Almost universally, the scientists applauded that someone had stepped forward to defend legitimate science against the charlatans. Some suggested that I continue working in the field, to fight for freedom of scientific research. Thus, the Genetics Policy Institute was founded and became my fulltime vocation.

In 2003, the United Nations took up a debate to pass a treaty that not only would have called for a ban and morally condemned reproductive cloning, but banned nuclear transfer as well. Proponents of stem cell research, the patients, and researchers joined forces, organized, and weighed into the debate. The Genetics Policy Institute played a pivotal role in educating the UN on these issues and ultimately the treaty proposal was derailed altogether, thanks to successful lobbying by scientists, patients, and other stakeholders.

Laws sending researchers to jail no longer seem a likely option. There now exists a full-fledged world patient movement, the "Pro-Cures Movement," demanding that stem cell research advance. Much of the public now views stem cell research, including nuclear transfer, as a critical personal and public health issue.

In place of bans, we now see concerted efforts in the United States to advance the research on a state level, with voters in California enacting Proposition 71, dedicating \$3 billion for the field and protecting nuclear transfer in the California constitution. Even Missouri, the socially conservative bellwether state, voted in 2006 to make stem cell research a fundamental protected constitutional right.

My intervention in the cloned baby case changed the flow of events, by diverting attention from pseudoscience and cartoon scientists and refocusing attention to real science and the hope for cures. It is a legal footnote in the scientific saga of cloning and stem cell research.

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Address reprint requests to:

Bernard Siegel, J.D.

Genetics Policy Institute

11924 Forest Hill Boulevard, Suite 22

Wellington, FL 33414 E-mail:

bernard@genpol.org