

THE PROHIBITION ON EUGENICS AND REPRODUCTIVE AUTONOMY

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European Union leaders at the Nice summit in December 2000 signed the *Charter of Fundamental Rights of the European Union*¹ to strengthen the protection of fundamental rights. Chapter I of the Charter, entitled 'Dignity', prohibits, inter alia, eugenics as well as live birth human cloning.² Similarly, the *Opinion of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission*, in its statement on the ethical aspects of human cloning techniques at paragraph 2.6, affirms that 'considerations of instrumentalisation and eugenics render any such acts ethically unacceptable'.³ Nonetheless, there are those who hold that the labelling of something as 'eugenic' functions 'primarily as a rhetorical device by which to condemn by mere association any selection activities of which the labeller disapproves'.⁴ Others reject use of the terminology as, at best, meaningless and, at worst, an illegitimate interference with scientific progress and reproductive liberty. It is the contention of this paper, however, that the use of the term 'eugenics' is neither meaningless nor so narrow as to be futile. A broader critique of the new reproductive technologies is beyond the scope of this paper. There is, nonetheless, every reason to believe that the new reproductive technologies are peculiarly susceptible to eugenicist abuse, as well as being open to more fundamental objections that remain beyond our remit. This is, in part, because of the secrecy and anonymity that surrounds them. The fact that individuals using

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1 *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1 ('*Charter*'). The *Charter*, created by 'solemn proclamation' at the European Council in Nice on 7 December 2000, was not incorporated into the Treaties establishing the European Union. The *Charter* has been incorporated as the second part of the draft European Constitution, which is in the process of ratification by the 25 Member States of the European Union. Consequently the Charter is not yet a binding legal document: see Justice and Home Affairs, *Charter of Fundamental Rights: Frequently Asked Questions*, European Commission <http://ec.europa.eu/justice_home/unit/charte/en/faqs.html#1> at 17 July 2006.

2 *Charter* art 3.2.

3 'Ethical Aspects of Cloning Techniques', *Opinion of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission* (No 9, 28 May 1997) European Group on Ethics in Science and New Technologies <http://ec.europa.eu/european_group_ethics/docs/opinion9_en.pdf> at 17 July 2006.

4 Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (2001) 152.

these services may become unwittingly or negligently involved in eugenic programs makes this possibility no less offensive and even more likely.

John Harris, for example, criticises the European Parliament's 'waft in the direction of human rights and human dignity' and rejects its suggestion that 'human cloning violates the principle of equality since "it permits a eugenic and racist selection of the human race"'.⁵ He argues that, by parity of reasoning, so too do 'pre-natal and pre-implantation screening, not to mention egg donation, sperm donation, surrogacy, abortion and human preference in choice of partner'.⁶ Conflating the techniques mentioned (ie, human cloning, egg donation, etc) with human preference in choice of a partner, he holds that reproductive liberty must be the operative principle in determining what ought to be prohibited by law in the realm of human reproduction. He makes two assumptions. His first is that there is no difference in kind between services offered by fertility and other clinics, on the one hand, and individual choice of a mate, on the other. Both the activities of individuals and the activities of such clinics, he believes, should be subject to the principle of reproductive liberty. Put crudely, if people are permitted to conceive naturally in the throes of passion, more responsible folk seeking out fertility services should be permitted to conceive children without their service providers needing to fear the long arm of the law. Harris' second assumption is that there is nothing morally problematic about the interventions he cites (eg, donor conception, pre-natal and pre-implantation screening, abortion, surrogacy etc) because they already occur routinely. Harris' two assumptions are significant because they render ineffectual any putative prohibition on eugenics or, at the very least, limit the practical impact of any such ban.

First, it is questionable to claim that there is no distinction between artificial reproduction and natural reproduction. The former admits of third party intervention, oversight and control. Artificial reproduction permits virtually invisible implementation of eugenicist programs in a way that natural reproduction does not. The implications for people born of eugenic techniques are profound; for not only may they be subject to the usual losses occasioned by the vicissitudes of life (like death of parents and siblings), they are subject to novel forms of control, loss and separation betrayed by the manner of their conception. The very fact that it is impossible to distinguish one embryo and its parentage from another with the naked eye makes it impracticable to locate abuse, particularly where young human life is subject to the same kinds of mass storage techniques as are supermarket commodities. Add to this the fact that the use of anonymous donors is both endemic and characterised by shame and often dishonesty (about the identity, whereabouts and concerns of biological parents and siblings of a child conceived by in-vitro fertilisation) and the circumstances are ripe for the routine practice of eugenics. This in turn introduces new kinds and measures of control over the lives and fortunes of people so conceived, as well as cultures, races and human types more generally.

5 John Harris, *On Cloning* (2004) 51

6 Ibid.

Could it be that natural choice of a 'fit' mate is a form of eugenics as Harris supposes? The first thing to notice about the techniques mentioned is that some of them are straightforwardly destructive of young human life deemed unfit (eg, pre-implantation screening followed by destruction of unsuitable embryos). Choice of a mate on grounds of perceived fitness is not, per se, a destructive act and thus is not subject to the potential charge that it involves the use of an immoral means to an arguably good end. Secondly, individual choice of a mate deemed 'fit' enough may also be undertaken in addition to use of new reproductive techniques of the kind mentioned, so any putative eugenic attitude revealed in the former case is exacerbated by undertaking the latter. Thirdly, the cluster of problems that surround the new reproductive techniques, given the third party control and oversight over who gets born, is unlike that which surrounds natural choice of a mate. Typically attempts to affect who reproduces naturally and what kind of person gets born are more visible and detectable than are techniques like cloning, sex selection, pre-implantation genetic diagnosis for the gametes of the unfit, use of anonymously donated gametes of the more 'fit' in artificial reproduction and so on. This is not to say that a government program to ensure that only 'fit' individuals reproduce naturally would not be eugenic, and so offensive. It would, however, suggest that such programs would be more visible and that individual choice of a mate for natural procreation is systematically different from the same kind of 'individual' choice (often by a third party clinician) in the context of, for example, donor insemination, human cloning, pre-implantation diagnosis and so on.

Finally, and perhaps most importantly, Harris' point fails to recognise that the natural choice of a mate undertaken within the context of love, marriage, passion, commitment and unconditional love and acceptance of one's young, is distinct from the depersonalised and clinical acts that characterise the first moments of the lives of people born by artificial reproduction. The choices made by third parties governing who, and what kind of person, should be born suggest precisely the same conditional acceptance that characterises the eugenics the framers of the *Charter* sought to prevent. A child born as part of a eugenic program is subject to forces and controls, *ceteris paribus*, not expected of those conceived naturally. Unconditional love and acceptance of one's young is abandoned in the very activity of selection and destruction of those young perceived as unsatisfactory for whatever reason.

If there are indeed systematic differences between artificial and natural reproduction there is every reason to expect prohibitions on fertility techniques that are not called for in the case of natural reproduction. Moreover, it should not be supposed that reproductive liberty must be the operative principle in determining what should be prohibited by law in the realm of human reproduction generally, and that of artificial human reproduction more particularly. It ought to be remembered that, even in the case of natural reproduction, there are, in most societies, prohibitions on incest and marriage within certain degrees of blood relationship. The reasons these prohibitions are permitted relate to the good of the next generation and, more generally, to the

common good.⁷ Incest is regarded as both a threat to the health of the child so conceived and an abuse of power by those in a position of care. If use of the new reproductive technologies permits novel and profound abuse of power and has ramifications for the next generation, upon cultures, races and types, there is every reason to desire legal prohibitions in this putative realm of human reproduction. Both the wellbeing of the next generation and the common good are at stake.

John Harris may be wrong to conflate individual choice of a mate in natural procreation with eugenics practiced either intentionally or unwittingly by users and practitioners of artificial reproduction; but he is undoubtedly right to point out that eugenics may be practiced in ways other than by cloning. Thus, the techniques Harris cites such as pre-implantation genetic diagnosis with destruction of unsuitable embryos, gamete donation, abortion for disability and so on, may well be regarded as eugenic techniques.

Harris' second presupposition is that because these practices are routinely undertaken there can be nothing morally problematic about them. On the contrary, it should not be supposed that because a practice has become routine it is, ipso facto, acceptable. The fact that the killing of the disabled became routine in tyrannical regimes of the 20th century makes those killings no more morally acceptable for their ubiquity. Likewise, it cannot be assumed that because the techniques Harris mentions have become widespread, they are therefore morally justifiable. A practice may be widespread and still immoral.

It is often argued that there is good eugenics and bad eugenics. The bad kind includes forced sterilisation, forced mating and overt genocide. What is bad in the practice of eugenics, it is argued, is the use of overt and visible force. It is personal liberty that is at stake, so the argument goes. This reasoning is unsuccessful. Eugenics can be practiced by unwitting agents who willingly collaborate in programs whose purposes are unknown or unimportant to them. Even in the tyrannical regimes of the 20th century there were examples of individuals and families who willingly offered their disabled young for experimentation, and ultimately death.⁸ It cannot be assumed that what is unacceptable in the practice of eugenics is merely the overt coercion used to implement the program. The program itself may be offensive. But, if it is indeed possible that eugenics be practiced through cooperation, in insidious programs, by those who are ignorant or reckless as to the existence of such programs, it is equally possible that the new reproductive technologies allow a vast extension of the political power of those who would control the techniques.

7 Jacqueline A Laing, 'Law, Liberalism and the Common Good' in David Oderberg and Tim Chappell (eds), *Human Values: New Essays on Ethics and Natural Law* (2004).

8 Michael Burleigh, *Death and Deliverance: Euthanasia in Germany, c. 1900–1945* (1994) 97–177. See especially Part 2, 'Gods in White Coats'.

The *Universal Declaration of Human Rights*⁹ was adopted in 1948 shortly after it became clear that disregard and contempt for human rights, at least in part by way of eugenics, had resulted in 'barbarous acts which ... outraged the conscience of mankind'. Abuse of power, illicit discrimination against the disabled and a widespread social Darwinism threatened natural human affection with catastrophic implications for whole classes of people.¹⁰ It has long been recognised that there are abusive ways of bringing people into the world, ways that inspire systematic dishonesty by those who practise them, and loss and confusion for the people so created. A wider discussion of the implications of incest, rape and other human behaviour that threatens both this and future generations, would emphasise the fact.¹¹ The eugenic dimension in the realm of artificial reproduction introduces new avenues of abuse for mankind.

The new reproductive technologies invite us into a world in which disability may be ruthlessly eliminated and some perceived form of perfection imposed, using destructive, manipulative and mendacious means. The political control involved and the means used to achieve this alleged better end are both questionable. Screening out disability by means that destroy the disabled young, or by means of dehumanised and depersonalised acts of gamete selection where love between the biological father and mother cannot be taken for granted, or even by means of human cloning for specific kinds of live children, involve problems of abuse of power and illicit discrimination against the disabled. They also challenge the principle of the equal and inherent dignity of every human being outlined in the *Universal Declaration of Human Rights*. Reproductive liberty cannot be the operating principle in matters surrounding the use of the new reproductive technologies. Harris' assurances concerning these reproductive technologies do little to establish the proposition that a prohibition on eugenics is meaningless or futile.

9 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (1948). The Preamble recognises 'the inherent dignity and ... the equal and inalienable rights of all members of the human family' as the foundation of freedom, justice and peace in the world, while article 1 affirms that 'All human beings are born free and equal in dignity and rights'. Programs that foster a climate of conditional acceptance of one's young particularly in the context of the new reproductive technologies arguably challenge this fundamental tenet. A broader analysis would permit a discussion of these issues.

10 Richard Weikart, *From Darwin to Hitler: Evolutionary Ethics, Eugenics, and Racism in Germany* (2004).

11 Jacqueline A Laing, 'Artificial Reproduction, Human Identity and Blood Relatedness', *The Monist*, forthcoming; Jacqueline A Laing and David S Oderberg, 'Artificial Reproduction, the "Welfare Principle" and the Common Good' (2005) 13 *Medical Law Review* 328.