

Of bread and caviar

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From the Womb to the Tomb: Issues in Medical Ethics
Hugh V. McLachlan and J. Kim Swales
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From the Womb to the Tomb: Issues in Medical Ethics is less a book than a collection of essays spanning three decades and many journals. The actual authorship of the essays is initially a source of confusion. Although the book's cover proclaims Hugh V. McLachlan and J. Kim Swales as joint authors, it appears that 14 of the 24 chapters are written by Dr McLachlan alone, although this becomes apparent only by scrutinising the footnotes at the end of each chapter.

While the title may be taken to imply a chronological progression through a range of bioethical issues, the collection actually focuses on three large areas: Embryology and Human Cloning, Surrogate Motherhood, Health and Health Care. Each of these topics contains half a dozen subheadings, but it quickly becomes apparent that they do not focus on specific areas of controversy within these topics, but rather represent pretty much the entirety of McLachlan's output on these topics, listed (usually, though not invariably) in chronological order, and apparently unedited from their original journal appearances. The result is a rather piecemeal and often repetitive assortment of overlapping observations and arguments; sometimes incisive and persuasive, but lacking much in the way of progression or development of the ideas therein.

The degree of repetition is a source of mild irritation. To the reader coming across McLachlan's work as it was published, over a number of years and a number of journals, it would be useful to be reminded of his basic assumptions and the examples he uses to illustrate them. Reading his work in one sitting, one quickly develops a sense of *déjà vu* when exactly the same point about clones/identical twins having different fingerprints is repeated three times in fairly short order (pp. 59, 69, 81), while other analogies and examples – the fact that we do not criminalise adultery, the claim that a foetus is a partially developed human body – also recur throughout the book.

It would be churlish to make too much of this – if anything, it is a criticism of this *type* of collection, rather than this specific example – but the irritation is perhaps exacerbated by the fact that certain of these claims are repeated without being developed. The claim, for instance, that the deceased retain certain rights (pp. 5, 42, 53) is not unproblematic. In law, the dead have no protection from defamation. In ethics, though attempts have been made to construct theories around 'surviving interests'¹ and 'critical interests'², the notion that the deceased can be *rights-bearers* has attracted less support.

Nonetheless, there is nothing conceptually incoherent about such an approach, though it would have been interesting to see McLachlan develop it further. (Do all such rights derive from promises made while the rights-bearer was alive? The suggestion that Donald Dewar retains a posthumous right not to be slandered by anyone [p.53] suggests otherwise, but McLachlan does not elaborate on what non-promise-derived rights the deceased retain.) More problematic, though, is his attempt to infer from this putative 'duty to the dead' some sort of 'duty to non-existent persons':

"We might say that the person whose body a foetus might develop into has rights and that, correspondingly, we have duties towards him whether or not he is an actual living person or ever will become one." (p.5)

The inference itself is questionable. Duties to the dead might derive either from promises made during their lives, or from something like 'surviving interests' – if your greatest wish is to be buried at sea, maybe you have some sort of 'surviving interest' in having that wish carried out, and maybe someone who promised to see that it

is done even has a duty to fulfil that promise. It is much harder to establish any duties to the 'never alive' from this basis, as they will never have harboured any sort of wants and preferences, and will never have been in a position to have promises made to them.

Of course, it may be intelligible to attribute rights to putative future people, insofar as some of our decisions now will predictably impact on interests they will later possess. Thus, if a procreative act was destined to give rise to a life "of abject misery" (p.5), it may be that we have a duty to refrain from that act; at least, it isn't obviously illogical to say so. But from that, it doesn't follow that we have a corollary duty to bring into existence a currently non-existent individual, which is what McLachlan seems to imply when he writes:

"We might say that in some, although not necessarily all, cases there is either a duty to abort or a duty not to abort where this duty corresponds to a non-existent person's right." (p.10, my emphasis)

It may be prudent, or even obligatory, to act in a manner that will respect the rights and interests that future people will have once they come into existence. If I act so as to pollute the planet, or deplete its resources, in a manner that almost guarantees that future lives will be impoverished, then actual people will, some day, suffer unnecessarily. Their actual lives will go less well, their actual interests will be thwarted, maybe even their actual rights will be violated.

But all of this is contingent on these potential lives becoming *actual* lives. If I act to ensure that these potential lives never become actual lives, then there will be no interests to be thwarted, no people to suffer unnecessarily, no lives to go less well than they might have. It makes no sense to speak of an obligation borne out of rights that – by virtue of our decision – will certainly never exist. There is nothing in McLachlan's – entirely plausible – thesis that we can owe duties to future generations that undermines what he calls the "extreme liberal" position on abortion.

This failure to present a truly coherent view of our duties to future persons means that even an uncontentious claim – that we should not destroy the planet – is weaker than it might be. "We might," McLachlan maintains, "fulfil our obligations towards the members of future generations by failing to destroy the world without knowing who such people are." (pp.8-9)

I personally would find it a great shame to learn that human life was doomed to extinction, but I'm not sure there is a moral aspect to this. The notion of a duty to create new lives *ab initio* is problematic for all sorts of reasons. To whom is this duty owed? The Universe? Posterity? How many such lives should we create? Would it be enough that there was some conscious being left to remember us and appreciate our achievements? Or is it a case of the more the better?

None of which is to say that there would be nothing wrong in obliterating the planet; aside from the harm done to presently existing people, some ingenious attempts have been made to construct theories of non-person-affecting harms, acts that cause things to go better than they should have gone, but which harm no individual people. McLachlan offers no such account (and certainly doesn't respond to the problems with such attempts suggested by, among others, Derek Parfit and David Heyd), appearing instead to ground his objection to global annihilation on the putative rights of those who might have lived.

McLachlan is on considerably safer ground when he expresses scepticism about the widespread opposition to reproductive cloning. He first sets about demolishing the 'dignitarian' claim that cloning presents a threat to some sort of right to genetic uniqueness or identity:

"It is insulting and antithetical to human dignity to

suggest that the (supposed) physical uniqueness of their bodies is a condition of the inherent moral worth of individual people." (p.77)

As he persuasively argues, the fact that we do not regard the birth of monozygotic (sometimes erroneously called 'identical') twins as any sort of tragedy suggests that we should feel no more concerned for the children of reproductive cloning. As for the burdens associated with their unusual origins, these rather pale when we consider what the options were for *this particular* child:

"It might be tough to be a clone, but this is no reason for making human cloning a criminal offence. It is tough to be a human being of any sort, or it can be: it is still, I would suggest, better to have been born than not to exist, in all or virtually all circumstances. One is hardly doing a clone a favour by sparing him the hardships of life." (p.75)

McLachlan's rather bluff writing style lends itself well to this type of knockdown argument, and it is difficult to conceive of any sort of sensible child-centred retort to this contention.

The same non-identity argument³ is used to defend the practice of commercial surrogate motherhood (CSM) from the criticism that children born through such arrangements would be somehow 'commodified', or have their dignity compromised:

"...it is surely better to be born with one's dignity violated than not to be born at all. If the only way that a particular person could be born is through becoming an object of barter then no obvious favour is being done by that person by failing to allow him to become an object of barter." (p.121)

In fact, McLachlan – this time writing with Swales – argues quite persuasively that, although the parties to CSM contracts may erroneously view them as such, these children are not in reality reduced to the status of commodities. Their rights and freedoms will be no less than those of any child born by more conventional means.

An equally compelling, though predictably more contentious, suggestion is offered against the suggestion that CSM 'exploits' the surrogate mother. Accepting for the sake of argument the far from certain contention that surrogate mothers will generally be less educated and financially worse off than the commissioning parents who hire them, the authors challenge us to explain how a ban on CSM actually helps them:

"Why should the option of the lesser evil be denied to poor people? If relative poverty is wrong, then one should condemn that rather than the means of alleviating it." (p.130)

It is surely right that we ill-serve those with fewest options when we interfere only to reduce their options still further. If it bothers us that some woman are driven through desperation to CSM (or, for that matter, prostitution, with which surrogate motherhood is sometimes compared), the challenge for us is surely to present them with options sufficiently more enticing that they don't need to avail themselves of these 'alternatives'.

There is, though, scope for greater debate about McLachlan and Swales' fairly restrictive definition of 'exploitation', which seems to involve not merely taking advantage of, but actually creating, the desperate circumstances that drive people to take up such options:

"There is a difference between driving someone to the wall and transacting – perhaps fairly and non-exploitably – with someone who is already at the wall." (p.116)

While I doubt that many people would wish to argue that *any* transaction with a desperate person is inherently exploitative, it doesn't seem like a great distortion of the verb to suggest that an employer who takes advantage of workers' desperate fear of employment to pay them poverty wages, or expose them to unreasonably dangerous or humiliating working conditions, is 'exploiting'

them, even if the employer did not create the circumstances that rendered them vulnerable to such exploitation.

The challenge for those concerned about such employees – and perhaps also for those concerned about surrogate mothers – is to ensure that they are not exploited in the sense of being underpaid, or exposed to dangerous or humiliating working conditions, while at the same time not depriving them of the option of a job at all. This we might do in a number of ways, but one legitimate role for the law, we might think, is to ensure that surrogate mothers are paid a minimally decent, non-exploitative wage (it is perverse that the various reports on the subject have professed concern about payments being too *high!*) and that commissioning parents do not impose dangerous or humiliating conditions (such as a legally enforceable waiver of their right to abortion, or intimate examinations on demand) that we would find unacceptable in other employment situations. We should expect no gratitude from desperate women, though, if we outlaw the option altogether, driving them presumably to an even worse (from their point of view) alternative.

McLachlan (with or without his co-author) is perhaps at his best when clinically slaughtering ethical sacred cows. Again in relation to children born from CSM, he asks:

“Why should the interests of such children be paramount? Why should the interests of any particular category of people be paramount? In deciding whether or not, say, to join the Euro-zone, would one say that the interests of children should be paramount? Let us hope not. Children, after all, are not children for long but their interests, like they, outlive their childhood.” (p.159)

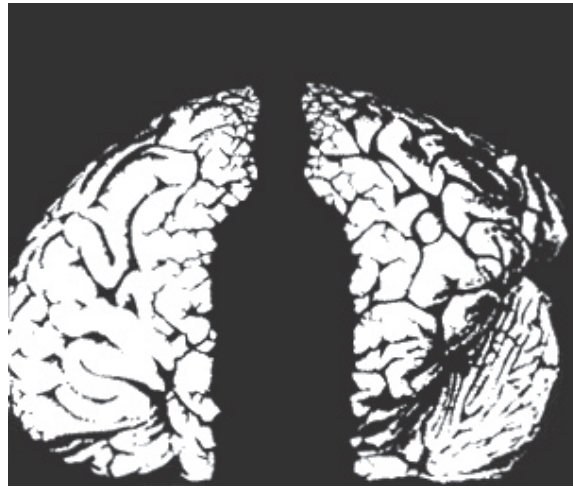
It is refreshing to see such questions asked. In much contemporary discourse, the interests or welfare of ‘the children’ is too often seen as a trump card, stifling further debate, rather than one valid consideration among many. McLachlan and Swales are right to point out the absurdity in a position that sees someone’s interests immediately devalued on their sixteenth birthday.

The discussion of surrogacy sees McLachlan and Swales espousing a broadly Millian liberalism (though they apparently take issue to being described as Millian liberals; p142), that places the onus firmly with those who would support legal restriction of others’ choices to justify such interference. This is entirely reasonable; that the powerful – numerically, financially, or in any other way – should impose their values and preferences on the less powerful, arbitrarily, without justification, is surely objectionable. Our ‘Big Brother society’ may not be of the kind that Orwell anticipated, but the ubiquitous ‘Reality TV’ and ‘celebrity exposés’ encourage us to scrutinise the mundane minutiae of other people’s daily lives, in the most judgmental of ways. In such a context, it is well worth restating that, sometimes, what we decide and how we live is, frankly, our own business, and no-one else’s.

But ... there’s liberalism, and there’s liberalism. The last substantial section of the book sees McLachlan and Swales turn their attention to considerations of justice and equality in healthcare, and here their analysis is – to this reader at least – decidedly less satisfying. In an article critical of the Scottish Executive’s *Working Together for a Healthier Scotland* consultation (1998), the authors set out to show not – as one might have expected – that the Executive’s policy objective of tackling health inequalities was unrealistic, but that it was flawed even as an aspiration.

“It is not at all clear that the reduction of health inequalities *per se* is a reasonable or even a meaningful aim of governmental policy. It is not clear why, other than on grounds of social aesthetics or dogmatic egalitarianism, inequalities in health – whether between men and women, rich or poor, black or white or whatever – should in themselves be considered undesirable.” (p.208)

It is certainly part of the ethicist’s role to challenge sacred cows and shibboleths, and egalitarianism should receive no exemption from that treatment. Even the most progressive



advocate of distributive justice would do well to revisit his/her first principles from time to time, to ask what equality means in this context, and why it is valuable. Were this merely an invitation to do that, it would be unobjectionable. But the reference to “dogmatic egalitarianism” suggests that this is more in the way of a polemic against, than a forensic dissection of, the aspiration to equality. Why should egalitarianism, or the version that underpins the consultation, be regarded as any more ‘dogmatic’ than the liberal and deontological principles espoused by McLachlan himself throughout this collection? At root, all ethical arguments rely on acceptance of ‘moral axioms’, core principles that cannot themselves be justified by reference to any higher principle, and that probably (though attempts have been made) cannot be *proved* to be true. In that (trivial) sense, all ethical arguments are ‘dogmatic’.

It swiftly becomes apparent that McLachlan and Swales’ approach to justice and healthcare is an extremely restrictive one, whereby ‘justice’ requires only that the state – or anyone else charged with allocating healthcare – should remain scrupulously impartial:

“If the state provides health care then that health care should be distributed impartially by the state. If health and ill health are unequally distributed, even as a partial consequence of this equitable treatment, so be it. ... [The state] is not obliged to ensure that the outcome of its actions, in combination with a host of other factors, will produce a fair, or in any other respect a morally desirable distribution of health. The distribution of health is not the business of the state, or of its agents or agencies.” (p.247)

That is certainly one way of thinking about ‘justice’, but it is far from the only, and I would suggest far from the best, way of thinking about it. Yet the most influential alternative approaches are not acknowledged, far less refuted. Instead, the assault on the equality aspiration continues with the customary recourse to *reductio ad absurdum*. McLachlan and Swales point out that a devotion to health equality at all costs would seem to rule out a medical advance that would prolong the lives only of women; since, in the UK, women already – on average – outlive men, this would serve to widen the ‘health gap’, frustrating the aims of equality.

Similarly, they suggest that the committed egalitarian should welcome only medical breakthroughs that benefit *only* the worst off:

“Infant mortality rates are higher in Scotland in more socially deprived localities. It would certainly be good if the infant mortality rates in the poorest areas of Scotland were to be reduced. What if they were to be reduced and, at the same time, the infant mortality rates of the best-off area were also reduced? Would that not be better still, even if health inequalities were no reduced? Why the stress on reducing inequalities?”

Although this may seem, on the face of it, a fair point, it succeeds as a criticism only of the authors’ ‘straw man’ version of egalitarianism, a version that corresponds to few if any of the versions seriously espoused in bioethical literature. For one thing, few egalitarians in fact do care *only* about equality – and even if they did, there would be no reason why we should follow. Ethical pluralists like Beauchamp and Childress⁴ certainly value fair distribution as an important ethical principle, but they are also concerned about, for instance, *beneficence* (doing good). In the example given, we might think that the imperative to save infant lives – among whatever cohort – should take precedence over the demands of egalitarianism, but this isn’t

the same as saying that the latter demands are entirely fanciful or trivial.

As McLachlan and Swales are surely aware, most influential models of egalitarianism are concerned about a decent minimum for all, rather than achieving equality at all costs; no-one is seriously arguing that health equality should be achieved by *worsening* the health of the currently fortunate, or even by spitefully depriving them of further health improvements if these improvements cannot be made available to all.⁵

Where concern for equality might guide our hand, though, would be in the allocation of scarce healthcare resources. On average, men in Glasgow die about eleven years younger than men in East Dorset.⁶ If a choice existed – perhaps due to finite resources – between a policy targeted at increasing life expectancy among either population, would it really be ethically incoherent to prioritise the Glaswegians? Would it really, as McLachlan and Swales contend, *violate* principles of equity to do so? Is deciding to ensure a minimum life expectancy for all, rather than an even longer lifespan for the already long-lived, actually impermissible? The sentiment behind the maxim “bread for all before caviar for any” may be a little simplistic, but it is not *obviously* flawed or unintelligible, or at least not as obviously as McLachlan and Swales seem to think.

As lecturers at Glasgow universities (respectively, Glasgow Caledonian and Strathclyde), one could certainly not accuse the authors of partisanship in this matter! But their treatment of healthcare and justice is let down by a failure to contend with the most influential models of distributive justice – those expounded by John Rawls⁷ and Norman Daniels⁸, for instance – and by regular reliance on assertion rather than attempt at persuasion or argument: maybe it’s right that the state should be concerned only with avoiding unfair methods of distribution, rather than with addressing existing unfairness, but I suspect there is little here that will persuade those not already attracted to that way of thinking.

Let me end, though, on an unreservedly positive note. It is refreshing to see that two of the entries in this collection appeared originally in *The Scotsman* newspaper. It is a recurring cause of consternation to me that academic research and thinking is often available exclusively to an elite band of matriculated students and journal subscribers. We professional academics still generally have our wages paid from the public purse, and it surely isn’t unreasonable that the public should be able to have access to what they are paying for. As open access publishing struggles to establish itself in the UK, and the ubiquitous shadow of the Research Assessment Exercise pushes academics towards targeting exclusive journals, McLachlan deserves considerable respect for taking the time to contribute not only his column, but frequently to online discussions on a wide range of subjects. Not all readers may be persuaded by all of his arguments, but it’s to his considerable credit that he is at least willing to put them up for public scrutiny.

Footnotes

1. Allen Buchanan, ‘Advance Directives and the Personal Identity Problem’, *Philosophy and Public Affairs*, Vol. 17, No. 4. (Autumn, 1988), pp. 277-302
2. Ronald Dworkin, *Life’s Dominion*, London, HarperCollins, 1995
3. The term was coined by Derek Parfit; see *Reasons and Persons*, Oxford: Clarendon Press, 1984.
4. Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, Fifth Edition, Oxford University Press, 2001.
5. As Jonathan Glover has recently written, “Few accept the ‘dog-in-the-manger’ version of egalitarianism according to which, if all cannot benefit, no one should.” Jonathan Glover, *Choosing Children: the ethical dilemmas of genetic intervention*, Oxford, Clarendon Press, 2006, p79.
6. Shaw, Smith and Dorling, ‘Health inequalities and New Labour: how the promises compare with real progress’, *BMJ* 2005;330:1016-1021 (30 April)
7. Rawls, *A Theory of Justice: Revised Edition*, Oxford: Oxford University Press, 1999
8. Daniels, *Just Health Care*, New York: Cambridge University Press, 1985