Perfecting Procreation

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Judith Daar, **The New Eugenics: Selective Breeding in an Era of Reproductive Technologies** (2017).

Understood etymologically simply as "well born," the term "eugenics" has over time evolved to take on different meanings in legal and bioethical debates surrounding reproduction. Eugenics originally referred to the set of practices that controlled—and grossly limited—reproduction during late-nineteenth and early-twentieth-century America. (Pp. 28-53.) More recently, eugenics has described the use of embryonic screening technologies by prospective parents purportedly driven by a desire to master nature and perfect procreation. (Pp. 184-93.) Historically, our understanding of eugenics focused mostly on the state's coercive power over its citizens' reproductive choices through nefarious practices like mandatory sterilization. By contrast, the more recent appeal to eugenics, known as "liberal eugenics" or "neoeugenics," captured instead private procreative decision-making in a world of rapidly advancing alternative reproductive technology (ART). (P. 185.)

In *The New Eugenics: Selective Breeding in an Era of Reproductive Technologies*, Judith Daar argues for a different understanding of eugenics, one which, as Daar's title suggests, she calls the "new eugenics." The new eugenics, Daar argues, comprises the contemporary state and private practices that either actually or effectively exclude certain populations from accessing—and therefore forming families through—alternative reproductive technologies like *in vitro* fertilization, alternative insemination, and surrogacy. Daar's "new eugenics" exhibits some of the aspects of the early eugenics program in the United States, representing as it does a set of practices that are "fueled" by concerns relating to science, tradition, and economics—concerns that often are "celebratory of majoritarian values, messaging that minority populations and their offspring are less deserving of access to fertility care." (P. 52.) Moreover, Daar is careful to distinguish her conception of the "new eugenics" from neoeugenics. Critics of neoeugenics, she says, equate the voluntary procreative decision-making of prospective parents today with the coercive reproductive programs of former times. (P.185.) ((*See, e.g.*, Michael J. Sandel, **The Case Against Perfection: Ethics in the Age of Genetic Engineering** 70 (2007) (arguing that "even where no coercion is involved, there is something wrong with the ambition, be it individual or collective, to determine the genetic characteristics of our progeny by deliberate design").)) In so doing, she contends, these critics miss "the *true* eugenic nature of modern reproductive technologies," namely, "the inability of a significant number of would-be parents" to access them and thereby "achieve parenthood." (P. 185, note 1.) (Emphasis added.)

After discussing the alternative "reproductive revolution" in chapter 1 (Pp. 1-27) and situating it briefly within "our eugenics past" in chapter 2 (P. 28-53), Daar proceeds in the next four chapters of her book to catalogue and elaborate on the contemporary barriers that curtail reproductive access and that together amount to a "new eugenics" comprised of acts both state and private, formal and informal, intentional and unintentional. (P. 26.) She starts in chapter 3 with perhaps the most significant barrier to reproductive access: the cost barrier, or what she calls "the eugenics of cost."(P. 70.) Resulting in "stratifying access to ART along socioeconomic lines," (P. 70) the ART cost barrier is the result of state action (very few states mandate health insurance for fertility treatment, and those that do include in their laws a number of exclusions and conditions that screen many individuals out (Pp. 63-70) no less than private action (ART providers routinely turn away patients "who derive some or all of their income

from public sources," (P. 71) and some surrogacy agencies will not accept women receiving state assistance as eligible surrogates (P. 73)). The three succeeding chapters turn to formal and informal barriers to ART access that result in stratification by race and ethnicity, by marital status and sexual orientation, and by disability, respectively. Together, these forms of exclusion harm individuals as well as society more generally, depriving the former of constitutionally-guaranteed procreative liberty (Pp. 52-60) and degrading the latter by reflecting and reproducing a system that is "dangerously reminiscent of our eugenics past." (P. 180.)

In addition to providing a comprehensive taxonomy of the myriad forms that exclusionary reproductive practices assume, Daar's book nicely develops a eugenics lens or "trope" that helps bring into focus precisely why certain alternative reproductive regulation is harmful: because such regulation attempts to *perfect procreation* by *restricting reproductive liberty*. (P. 180.) Such a lens is useful in critiquing laws requiring intended parents in surrogacy contracts to be married, (P. 129) as those laws subject alternative procreators to a procreative ideal—marital reproduction—from which sexual procreators are exempt. ((That is, no state requires sexual procreators to be married in order to procreate—nor punishes them for procreating outside of marriage when they do.)) It is also an important vantage point for assessing fertility clinic practices that exclude same-sex couples from reproductive services, as such practices subject alternative procreators to a procreative and parenting ideal of dual-gender parenthood. Indeed, such a lens is helpful in *critiquing the critique of* contemporary ART as neoeugenic, as it allows us to see that arguments denouncing alternative reproduction for attempting to perfect procreation in eugenic ways themselves rest on a particular vision of what procreation *ought to look like*: (somewhat) random and fully accepting of the "unbidden." ((Sandel, *supra* note 1, at P. 46.))

As scholars increasingly uncover the extent which traditional family norms and ideals constitute the basis for contemporary (alternative) reproductive regulation, ((*See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 **Yale L.J.** (forthcoming 2017); Melissa Murray, *Family Law's Doctrines*, 163 **U. Pa. L. Rev.** 1985 (2015); Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 **U.C. Davis L. Rev.** 183 (2015).)) Daar's eugenics trope offers an illuminating way to appraise that regulation's ethical and constitutional infirmities. Laws that restrict surrogacy to married couples, or fertility practices and state insurance laws that screen out individuals on the basis of cost, disability, marital status, and/or sexual orientation, raise serious ethical and constitutional concern in an era of sexual orientation equality, familial pluralism, and robust reproductive liberty—norms that emerge from recent constitutional and family law jurisprudence relating to intimate and family life. Much scholarly appraisal of alternative reproduction has criticized it for attempting to perfect procreation through technologies and practices like preimplantation genetic diagnosis, rigorous sperm and egg donor selection, and gene editing. Daar's framework offers us a promising opportunity to shift the focus in that debate by centering on the *regulation*, actual and proposed, of alternative reproduction—regulation that burdens alternative procreators, and only alternative procreators, with an ambition to perfect procreation and the parent/child relationship in ways and for reasons that are uncomfortably suggestive of our nominally repudiated "eugenics past."

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