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## Response to Michael Sandel

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## *Response to Michael Sandel*

BY STEPHEN F. SMITH<sup>+</sup>

### *I. Introduction*

Professor Michael J. Sandel has treated us to an elegant argument against efforts by athletes to use medicine to “enhance” their bodies or by parents, in effect, to genetically engineer their children.<sup>1</sup> I cannot agree with him more that “playing God” (my phrase, not his) in these ways is fundamentally an exercise in *hubris*, a rejection of the gifts that we have been given. I cannot improve on Professor Sandel’s presentation of his argument. Unlike some Supreme Court Justices, I know that I am not a philosopher. Having said that, one of the joys of being a law professor is that, when important philosophical issues come up (such as the acceptability of abortion, cloning, or physician-assisted suicide), those philosophical issues almost invariably are left to the legal system to resolve. So, lawyers who are not competent by training to address broad philosophical issues, such as “what is it to be human?” and “when does life begin?,” do so anyway. I proceed in the same vein here today, mindful of my professional incompetence in the area that I address but utterly undeterred by that limitation.

### *II. A Secular Argument “Against Perfection”?*

As I understand it, Professor Sandel’s project is to provide a secular account of what is objectionable about the “designer” or “enhancement” mentality. This mentality, for example, leads athletes to take performance-enhancing drugs or parents to try and genetically engineer their children.<sup>2</sup> I certainly agree that there is something undesirable—and, I would add, perhaps even sinister—about that mentality. Nevertheless, I have a nagging suspicion that the argument against the “designer” or “enhancement” mentality may constitute, at least to some extent, an exercise in futility. That is to say, those of us who believe in God are much more likely to condemn a mentality that gives humans the right, in effect, to play God. This is because, for us, there is a God and only He gets to do that. How likely is it that the atheist or agnostic, who has no use for God or theological arguments, will see

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<sup>1</sup> MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* (2007).

<sup>2</sup> *Id.* at 1-5, 45-62 (arguing that parents should not “choose” their children’s genetic traits in order to have “champions” and citing examples of parents using genetic engineering, some which generated public outcry and others that were considered acceptable).

anything wrong with using medicine or genetics to “enhance” our abilities or those of future generations—in other words, to play God? Sadly, not very likely, I think.

For the nonreligious, the concept of being “open” to our gifts, even if they come in packages different from those that we would have chosen, may not be very convincing. If our abilities and traits are viewed as the product of randomness—the genetic lottery, so to speak—instead of an act of God, why not reject those gifts? In everyday life, we do this all the time—which is why, for example, some of the busiest days at shopping malls are the days *after* Christmas, with people flocking to stores to return or exchange gifts that they received. The nonreligious are much more likely to treat our human gifts just as we treat tacky Christmas presents—as things to be traded, exchanged, or otherwise disposed of, as we see fit. For them, individual autonomy, choice, and privacy are likely to be the governing moral yardstick in this area.

The best proof of this propensity comes, I think, from the disturbing resurgence of eugenics in contemporary liberal thought.<sup>3</sup> As Professor Sandel has noted elsewhere, a surprising number of scholars, including John Rawls, believe that the problem with the first eugenics movement was not that it involved “playing God” through actions that humans have no right to take.<sup>4</sup> To the contrary, they believe that the stated goal of the eugenics movement—to improve humanity—was (and is) entirely sound and proper.<sup>5</sup>

In the view of such thinkers, the problem with the first experiment in eugenics was that it utilized the wrong means to the eugenicists’ lofty end.<sup>6</sup> As practiced in the early twentieth century, eugenics operated through the coercive power of the state and concentrated on disadvantaged segments of society, such as the poor and minority groups.<sup>7</sup> In this view, coercion and discrimination made eugenics, as previously conceived, objectionable and not the ultimate aim of improving the human species.<sup>8</sup>

Seen in this light, a voluntary, generally applicable program of human “enhancement”—and the “designer” or “enhancement” mentality reflected by such a program—would be perfectly acceptable. Indeed, for some, it might even be morally obligatory.

<sup>3</sup> *Id.* at 63-83 (finding that modern commentary on eugenics by scholars shows some support for liberal eugenics because it is distinguishable from the “old” eugenics utilized by the Nazi regime).

<sup>4</sup> *Id.* at 69-79 (finding that the issue with the first eugenics movement was due to the coercive nature of it, that is, individuals were forced to undergo biologically-altering procedures or even killed to change the human genetic makeup).

<sup>5</sup> *Id.* at 75-79 (illustrating government coercion in forced sterilization).

<sup>6</sup> *Id.* at 68-78.

<sup>7</sup> An example well known to American lawyers is *Buck v. Bell*, 274 U.S. 200 (1927). In that case, the Supreme Court entertained a constitutional challenge to a Virginia law pursuant to which a woman described as “feeble-minded” was forcibly sterilized. *Id.* at 205. The Court upheld the law in an unusually ebullient opinion by Justice Oliver Wendell Holmes, Jr. Holmes endorsed coercive government action to “prevent our being swamped with incompetence,” declaring that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Id.* at 207. After noting that the woman’s mother and daughter had also been adjudged “feeble-minded,” Justice Holmes wrote, in chilling terms rarely seen in the pages of the *United States Reports*, that “[t]hree generations of imbeciles are enough.” *Id.*

<sup>8</sup> SANDEL, *supra* note 1, at 63-83.

This leads me to think that, ultimately, those of us who oppose the “brave new world”<sup>9</sup> towards which we are now speeding must make a straightforward moral case for the dignity of human life. One of the strongest arguments in favor of cloning human beings and destructive embryonic stem-cell research is that they are compassionate efforts to find cures for diseases or illnesses, or to create tissues or organs that can be “harvested” to save human lives and restore normal bodily functions. All of us want to find cures for diseases and save human lives, and, of course, many treatment interventions designed to restore normal bodily function are entirely licit.

Nevertheless, we need to make the case—an unabashedly *moral* case—that “compassion” does not mean anything goes. Even the laudable goal of easing human suffering does not justify the use of morally impermissible means. Even if promising medical treatments or cures could have been discovered through the grotesque “experiments” that Nazi scientists performed on prisoners in concentration camps, we would presumably all agree that the search for treatments or cures could *never* justify such barbarous means, precisely because they are inhumane—fundamentally irreconcilable with human dignity. The challenge for opponents of human cloning and destructive embryonic stem-cell research is to make the case that those genetic interventions are similarly violative of human dignity.

This is the kind of moral argument that the Catholic Church advanced in its 1987 instruction *Donum Vitae*, or the “Gift of Life.”<sup>10</sup> In *Donum Vitae*, the Congregation for the Doctrine of the Faith, with the approval of the Holy Father, condemned human cloning and embryonic stem-cell research.<sup>11</sup> The “compassion” that supporters of those interventions advance as their justification cannot, in the church’s eyes, overcome the assault on human dignity that inheres in those interventions.<sup>12</sup>

In no uncertain terms, the Congregation declared that “what is technically possible is not for that very reason morally admissible”<sup>13</sup> and that “science without conscience can only lead to man’s ruin.”<sup>14</sup> The Congregation went on to reaffirm that, because “[e]very] [h]uman life must be absolutely respected and protected from the moment of conception,”<sup>15</sup> “[t]o use human embryos or fetuses as the object or instrument of experimentation constitutes a crime against their dignity as human beings having a right to the same respect that is due to the child already born and to every human person.”<sup>16</sup> Not only is this a crime against the embryo, but “[b]y acting in this way the researcher usurps the place of God; and . . . sets himself up as the master of the

<sup>9</sup> See ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932) (envisioning a futuristic society in which a fictional reproductive technology allows the State to exercise control over human reproduction and genetic traits).

<sup>10</sup> Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, 15 *ORIGINS* 699, 699-711 (1987).

<sup>11</sup> *Id.* at 703.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 700.

<sup>14</sup> *Id.* at 699.

<sup>15</sup> *Id.* at 701.

<sup>16</sup> *Id.* at 703.

destiny of others inasmuch as he arbitrarily chooses whom he will allow to live and whom he will send to death and kills defenseless human beings.”<sup>17</sup>

### *III. Conclusion.*

Many, of course, will (and do) reject moral arguments such as these, but I think ultimately that unabashedly religious argument is our only hope of staying off the slippery slope to the “brave new world.”<sup>18</sup> Trying to convince them on the essentially secular term, as Professor Sandel aims to do, of our “giftedness”<sup>19</sup>—with its corollary that we should not try to “enhance” ourselves through genetics or other extraordinary means—is a nice idea, but I am afraid it simply will not work.

<sup>17</sup> *Id.*

<sup>18</sup> HUXLEY, *supra* note 9 and accompanying text.

<sup>19</sup> Michael Sandel, *Mastery, Hubris and Gift: Biotechnology and the Human Good*, *ante*, p. 154.