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# The Road to Eugenics

JAMES E. BOWMAN<sup>†</sup>

All animals are equal  
But some animals are more equal than others<sup>1</sup>  
-George Orwell  
*Animal Farm*

## Introduction

People are not born equal, nor do they live or die equal. Religion, race, class, nationality, and many other categories have been the source of stigmatization, discrimination, and conflict through the centuries. Inhumanity based on perceived inequality is ubiquitous. This paper is about genetic inequality and how it has been and may be used to foster eugenics—under the mantle of human or medical genetics. But what is eugenics?

Eugenics<sup>2</sup> espouses the reproduction of the “fit” over the “unfit” (positive eugenics) and discourages the birth of the “unfit” (negative eugenics).<sup>3</sup> Francis Galton introduced the word *eugenics* in 19th-century Great Britain.<sup>4</sup> He attempted to document the concentration of genius and high achievement in his family and in families of his peers, and disparaged the intellectual abilities of the “masses.”<sup>5</sup>

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1. George Orwell, *Animal Farm* 90 (Secker & Warburg 8th ed 1987).

2. Pocket Oxford Dictionary, *eugenics* (Oxford 8th ed 1992).

3. See Mark H. Haller, *Eugenics: Hereditarian Attitudes in American Thought* 77-78 (Rutgers 1963); Kenneth M. Ludmerer, *Genetics and American Society: A Historical Appraisal* 2 (Johns Hopkins 1972).

4. See generally Francis Galton, *Hereditary Genius: An Inquiry into its Laws and Consequences* (Appleton 1875).

5. Id.

### The Fit and the Unfit

The delineation of the "fit" from the "unfit" is ancient. Ancient Greeks proposed to control mating among the guardian (upper) class to ensure that the offspring would produce the "best and the brightest."<sup>6</sup> In Plato's *Republic*, Socrates explores the idea that "a life spent in the doctor's hands is not worth having," that medicine should only be practiced on those who have healthy constitutions and healthy habits; and "weak" parents should not be allowed to have "weak" children.<sup>7</sup> The American Eugenics Movement in the 1920s targeted as "unfit" individuals with epilepsy, criminals, the crippled and deformed; persons who were mentally defective or who had low intelligence; patients with communicable diseases such as syphilis, tuberculosis, or leprosy; alcoholics and drug abusers; poor people; and Eastern European immigrants to the United States. The Nazis marked Jews, Gypsies, and other so-called non-Aryan peoples, individuals who were mentally defective, and persons with incurable or mental illnesses—to name a few. In the heyday of eugenics, sterilization, infanticide, euthanasia, or a variety of "final solutions" were tools for the prevention or elimination of the "unfit."

Today, scientific advances in genetics have improved the prospects for negative genetics through the initiation of population screening, testing of individuals and families who are perceived at risk for genetic disorders, presymptomatic testing for late onset genetic disease, preimplantation genetic diagnosis, in vitro fertilization, genetic counseling, prenatal diagnosis, with the option for selective abortion of affected fetuses, with potentially thousands of genetic disorders, and even innocuous genetic variations. There also have been persistent attempts to link genetics with abusers of alcohol or drugs and with perpetrators of violent crime with sophisticated scientific techniques that were not available during the heyday of the American Eugenics Movement.

Today, however, we are concerned not only with persons with genetic disease who may be stigmatized as unfit but also with those who are carriers of recessive genetic disorders, pregnant women, newborns and, in fact, everyone. We all have at least five recessive genes,<sup>8</sup> but this may be just the tip of the iceberg. When the human genome<sup>9</sup> is mapped, many more potentially harmful genes—recessive and otherwise—will be unveiled in each of us. Psychoses, hypertension, diabetes, early-and late-appearing cancers, degenerative disorders, susceptibility genes for communicable diseases, genes for various mental deficiencies, aging genes, and other variations and disorders will be ascertained. Consequently, in this day of rapid advances in genetics, we all are

6. Plato, *Republic* 98-100 (Norton 1942) (I.A. Richards, trans).

7. *Id.* at 66, 98-100.

8. In genetics, noting a trait due to a particular allele that does not manifest itself in the presence of other alleles which generate traits dominant to it. *Stedman's Medical Dictionary* 1328 (Williams & Wilkins 25th ed 1990).

9. The total gene complement of a set of chromosomes found in higher life forms. *Id.* at 641.

potentially able to pass "unfit" disorders to subsequent generations. Since we are now in the same boat, scientific advances in the understanding of the human genome *may* be one of the best defenses against a coercive eugenic society. We rarely discriminate against those who are "like ourselves."

### The Privileged Unfit

Interestingly, however, "white collar" criminal activities, such as embezzlement, insider trading in the stock market, and the Savings and Loan Association's siphoning off of hundreds of millions of dollars from its members have not been objects of study—which suggests that classism, or racism, or both are contributory factors to the linking of genes with crime. Holtzman and Rothstein perceptively alluded to an example of the selectivity of eugenicists.<sup>10</sup> They quoted Lancelot Hogben in referring to hemophilia in the royal families of Europe, saying, "[n]o eugenicist has publicly proposed sterilization as a remedy for defective kingship."<sup>11</sup> Apparently, not only kings and queens but also Fortune 500 executives are exempt from eugenic scrutiny. Consequently, eugenics is directed invariably to the poorer classes—to the defenseless.

### Active Eugenics, Passive Eugenics

Although eugenics has traditionally been divided into positive and negative eugenics, I interject two different categories: "active eugenics," which includes positive and negative eugenics, and "passive eugenics," which is more subtle. Passive eugenics is the denial of appropriate medical care for more than 37 million Americans. Passive eugenics is the societal neglect of vaccination programs for millions of poor children, many of whom will die of preventable diseases. Passive eugenics is the dumping of poor patients in public hospitals by so-called not-for-profit medical centers, even though some patients will suffer irreparable harm—including death. Passive eugenics is not the storming of abortion clinics and the murder of health care workers, but rather voting against welfare relief for children by the same anti-choice activists. Passive eugenics is the societal hypocrisy about a health care system that is inferior to that of all major industrialized countries, even though politicians and corporate czars of our health care and insurance industries equivocate in proclaiming that our health care system is the best in the world. These and other hoaxes are governing considerations, because a society that countenances passive eugenics provides fertile ground for both clandestine and overt active eugenics.

Laurie Abraham has pointed out that no one is made to take responsibility for these health care inequities and quoted medical ethicist, Larry Churchill:

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10. N.A. Holtzman and M.A. Rothstein, *Eugenics and Genetic Discrimination*, 50 *Am J Human Genetics* 457 (March 1992).

11. *Id.*

Access to health care is mostly contingent on having a way to pay for it, either out of one's own resources or with some form of insurance . . . . The essential point is that [this] allocation by price is a rationing scheme—one which we have easily accepted in health care as an extension of a basic economic philosophy, and one which largely absolves any particular person from responsibility for the results. Since no one actually decided to exclude the poor (as it is their lack of money that excludes them, not our actions) no one is responsible and no one is to blame.<sup>12</sup>

### The Mythology of the "End of History"

It is evident, except to conspirators in health care inequity, that advances in health biotechnology have not been translated into improved health care for the poor in the United States. It is well to be reminded of this while the West celebrates the "End of History."<sup>13</sup> Francis Fukuyama, borrowing from Hegel, used this phrase to claim the triumph of the West—of the Western idea—over that of Communist ideology. He stated:

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such: that is, the end point of man's ideological evolution and the universalization of Western liberal democracy as the final form of human government.<sup>14</sup>

But is the final form of human government to sanction homelessness for several million people with their families—the freedom to live under bridges and to beg in the streets—poverty for one-third or more of African-Americans, inadequate to no health care for millions of Americans, a maternal and infant mortality rate among African-Americans which is the highest of the major industrialized countries, and far higher than that of Cuba? Consequently, the declaration of "The End of History" is yet another reminder to poor Americans that they are part of our cryptic mythology. Those who have power often are so imbued with their own freedom that they disremember those who are disadvantaged.

In a reply to Fukuyama, Himmelfarb elaborated on Fukuyama's claim that the future of liberal democracy is assured because it has succeeded in resolving the "class issue" and that the social problems that remain, such as black poverty are not a function of liberalism but the historical legacy of premodern conditions—slavery and racism.<sup>15</sup> Himmelfarb argued that, "[h]istory has a

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12. Laurie Kaye Abraham, *Mama Might be Better Off Dead: The Failure of Health Care in Urban America* 34 (Chicago 1993).

13. See generally Francis Fukuyama, *The End of History?*, 16 *National Interest* 3 (Summer 1989).

14. *Id.* at 4.

15. Gertrude Himmelfarb, *Responses to Fukuyama*, 16 *The National Interest* 19, 26

habit of bequeathing to us disastrous legacies, bombs that can explode at any time and any place."<sup>16</sup> Himmelfarb further stated that black poverty and the poverty of the underclass is not the relic of an old problem but a new problem, and that black poverty may be subversive because liberal democracy does not understand it, let alone how to cope with it.<sup>17</sup> In our democratic market system of government, inequality, paradoxically, is cardinal. There is no Utopia.

### Anxiety About Technology

Even so, I do not join in apprehension about new genetic technology. With each scientific discovery, instant ethical experts appear on television and inundate the news. Meanwhile, scientists quietly make new discoveries, the full impact of which they may be oblivious to. As long as humans explore the unknown, consequential foresight is often impossible. The wheel, and its derivative, the automobile, and aircraft have been more destructive to humankind than genetic advances ever will be, but anyone who would propose that these discoveries be discarded—or not utilized—would have no audience.

We often forget that we live in a world with potential for scientific advances on every continent; thus, many of our prohibitions in the United States are mere feathers in a tornado. Accordingly, even though eugenics has thrived intermittently since the times of Ancient Greece, I will not be fashionable and disparage the development of genetic technology that could potentially foster eugenic ends, nor will I concoct policies to limit scientific inquiry. Such a policy could, or would, result in the demise of molecular biology, genetics, biochemistry, anthropology—in short, science—which is nonsensical.

Marc Lappe had a different view. He was concerned, for example, that the discovery of bipolar disorders linked to DNA markers on chromosome 11 could be used to abort fetuses with potential manic depressive illness.<sup>18</sup> He also asserted that such a prenatal program could deprive us of great poets like Sylvia Plath or politicians like Winston Churchill, each of whom may have suffered from bipolar manic depression.<sup>19</sup> Lappe postulated that "uncovering genes that regulate human vulnerability to grave illnesses such as Huntington chorea or Alzheimer disease could increase the incidence of suicide as well as selective abortion," and wondered what limits, if any, should be imposed on the acquisition of such knowledge.<sup>20</sup> Lappe's remarks are typical of the incertitude of reactions to discoveries throughout history. There have been numerous abuses of genetic testing, but most discoveries sporadically fall prey

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(Summer 1989).

16. Id.

17. Id.

18. See generally Marc Lappe, *The Limits of Genetic Inquiry*, 17 Hastings Center Report 5 (Aug 1987).

19. Id. at 5.

20. Id.

to the seduction of charlatans; however, knowledge should not be sacrificed because of this fear. On the other hand, the concerned reservations of scientists like Lappe are a buffer to a coercive eugenic public policy.

### Public Policy

But what is public policy? From early childhood we are taught that the “people” make decisions in a democracy. A contradictory view is that public policy is merely what those who have power decide. Even morality has been placed in this category. Variations of this theme are ancient. In Book I of Plato’s *Republic*, the Sophist, Thrasymachus, maintained that laws serve only to protect the interest of those in power.<sup>21</sup> Scholars of the Critical Legal Studies movement, which I analyze later, profess that the law is not neutral, but is guided and dictated by political considerations.<sup>22</sup> I now review some ethical theories that are incompatible with eugenics and others that are congenial with eugenics.

We often associate ethics with morality, good, nonmaleficence, beneficence, justice, rights, and other acceptable concepts. How could ethical precepts be associated with doctrines that historically are notorious for peoples who are at a disadvantage because of race, class, religion, or diseases that over which they have no control, but inherited from their parents. We do not choose our parents. We are born into race, ethnic groups, and even class, and religion—or no religion. It is appropriate that we begin with Kant, probably the most quoted and revered of philosophers since Socrates, Plato, and Aristotle.

### Kant

Immanuel Kant, in his *Groundwork of the Metaphysics of Morals* asserted that one should treat humanity always as an *end* and never as a *means*.<sup>23</sup> Consequently, Kant’s philosophy is inconsistent with eugenics precepts in that eugenics manipulates people as a *means to an end*. Further, Kant’s categorical imperative dictated that one should never act in a manner that the agent could not also will that the maxim be universal law. Kant maintained that the attainment of the supreme principle of morality cannot be obtained by studying generalizations from example as derived from experience.<sup>24</sup> Kant postulated (or, better, dictated) that examples cannot replace moral principles, nor can they be a foundation upon which moral principles are derived. There must first be the moral principles, and then and only then can we judge whether an

21. Plato, *Republic* 24 (cited in note 6).

22. See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv L Rev 563 (1983); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard 1986).

23. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 95 (Hutchinson’s 1948) (H.J. Paton, trans).

24. Id at 75-76.

example is one of moral goodness. Accordingly, we return to the premise: moral principles must be *a priori*.<sup>25</sup> It follows that Kant's maxim, the categorical imperative, not only takes precedence over religion but all claims, be they individual, family, clan, or political. Thus eugenics would die in a Kantian society. Yet, there are problems. Even though, as I indicated earlier, Kant's ethical concepts are incompatible with eugenics, Kant's ethics are not compassionate.

### Utilitarianism

A major proponent of utilitarianism was John Stewart Mill. Utility, or the Greatest Happiness Principle, asserted that actions are right in proportion as they tend to promote happiness, and wrong as they tend to produce the reverse of happiness.<sup>26</sup> "By 'happiness' is intended pleasure, and the absence of pain; by 'unhappiness,' pain, and the privation of pleasure."<sup>27</sup> Utilitarians profess that laws and social arrangements should be so constructed as to place the interests of everyone, as much as possible, in keeping with the interests of society.<sup>28</sup> Education should be constructed as to instill in all an association between one's own happiness and that of the whole.<sup>29</sup> There must be implanted in everyone an impulse to promote the general good.<sup>30</sup> Utility, however, requires that the rightness or wrongness of an action should be evaluated by the complete spectrum of intrinsic values that result from the action and not merely happiness or pleasure.<sup>31</sup>

Arguments for and against utilitarianism were provided by Smart and Williams.<sup>32</sup> The most persuasive argument in favor of utilitarianism is that the dictates of deontological ethics may lead to misery that utilitarianism could have prevented. Smart asserted that this increases the attractiveness of a utilitarian ethic because it is flexible, but it also increases the difficulty of applying such an ethic.<sup>33</sup> Further, Smart suggested that even though utilitarianism has consequences which are incompatible with a common moral consciousness, so much the worse for the common moral consciousness.<sup>34</sup>

Williams, like Smart, treated utilitarianism as a system of personal morality rather than one of social or political decision-making.<sup>35</sup> Instead of talking

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25. *Id* at 79-80.

26. Ethel M. Albert, Theodore C. Denise and Sheldon P. Peterfreund, eds, *Great Traditions in Ethics* 233 (Am Book 2d ed 1969).

27. *Id*.

28. *Id*.

29. *Id* at 242.

30. *Id*.

31. *Id*.

32. *Id*.

33. See generally J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge 1973).

34. *Id* at 62.

35. *Id* at 68.



about amounts of happiness, however, Williams preferred the economic language of increases or decreases in one's utility—people's desires or preferences and getting what they want or prefer. Williams believes that utilitarianism makes integrity as a value more or less unintelligible.<sup>36</sup> Utilitarians often suggest that we should forgo integrity in preference to such things as concern for the general or common good. Most importantly, however, "[w]e must face the fact that sometimes, as the world goes, peoples' interests clash. Sometimes the common good is served only at some individuals interests."<sup>37</sup>

Utilitarianism, according to Williams, is a system of social decision that is indifferent to issues of justice or equity and has less to worry about than one that is not indifferent.<sup>38</sup> Further, utilitarians view society and have an effect on it, but they do not belong to it. Williams believes that in the field of personal morality it is possible to survive under utilitarianism, but the demands of political reality are so complex that the simplemindedness of utilitarianism disqualifies it totally.<sup>39</sup> Williams postulated a society in which there is a harmless minority that does not confer any benefits on that society. As often happens, the majority group is so prejudiced that they find even the presence or knowledge of this group abhorrent.<sup>40</sup> Plans are made to remove them. Consequently, Williams believes that a minority group would be foolish to accept utilitarianism, for it could very well endanger their survival. (Here, minorities could be racial, ethnic, religious, or persons affected with disabling genetic and other disorders.) In contrast to Kant's philosophy, eugenicists would embrace utilitarianism.

Mackie asserted that the precept "Though shalt love thy neighbor as thyself" is a delusion because people will not put the interests of their neighbors on an equal footing with their own interests, or those who are near and dear to them.<sup>41</sup> Mackie bemoaned that moralists and preachers have thought it worthwhile to propound rules that have so little chance of being followed, because to identify morality with an ethics that will not be followed is to bring ethics to contempt.

### Justice and Injustice

Aristotle asserted that the lawless man is considered to be unjust and the law-abiding man just, and further, all lawful acts are just acts, because the acts laid down by the legislature are lawful.<sup>42</sup> Further, acts that are just are those that foster and preserve happiness and its components for society.<sup>43</sup> Interest-

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36. Id at 77.

37. Id at 118.

38. Kai Nielsen, *Ethics without God* 122 (Prometheus 1990).

39. Smart and Williams, *Utilitarianism: For and Against* at 137 (cited in note 33).

40. Id at 150.

41. Id at 129-134.

42. Aristotle, *The Nicomachean Ethics* 107-108 (Oxford 1980) (David Ross, trans).

43. Id at 108.

ingly, Socrates committed suicide on orders of the citizens of Athens because he believed that he had a duty to obey the state, and not flee—as he could have.<sup>44</sup> Nevertheless, all lawful acts are not just. (Admittedly, *just* may be in the eyes of the beholder.) Justice is analogous to complete virtue in the Aristotelian sense. The individual not only applies it to himself but to his neighbors. Even so, eugenics, historically recognized in ancient Greek society, is probably of even more ancient origins.

### John Rawls

Rawls developed *A Theory of Justice* in an attempt to resolve some of the major objections to utilitarianism.<sup>45</sup> In so doing he examined a social contract mechanism that was an outgrowth of previous social contracts as outlined by Rousseau and Kant. Rawls argued that justice denies that the loss of freedom for some is compensated by a greater good shared by others, injustice is only permitted when it is necessary to eschew an even greater injustice.<sup>46</sup> A just society is not only designed to foster the good of its members, but is regulated by a public impression of justice.

Rawls acknowledged that in existing societies, perceptions of what is just and what is unjust are often controversial and that even “[t]hose who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.”<sup>47</sup>

The heart of Rawls’ theory is that the participants must begin under a “veil of ignorance.”<sup>48</sup> Agents, under such a veil of ignorance, certainly would not construct a society that would discount the interests of the poor because they might be in that position. Since utilitarianism espouses the sacrifice of some persons in order to promote the happiness of others, or the majority, Rawls’ precepts patently oppose eugenics.

### Judith Shklar: Justice, Injustice, and Misfortune

Judith Shklar indicated that the normal model of justice maintains that any political society is governed by rules, which set out the status and entitlements to its members.<sup>49</sup> This is distributive justice. Shklar further argued that the rules of society are just if they correspond to the most basic ethical beliefs of the society.<sup>50</sup> Shklar prefers the term primary rather than distributive justice,

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44. Plato, *Apology* (Bolchazy-Carducci 1981) (John Burnet, trans).

45. John Rawls, *A Theory of Justice* (Belknap 1971).

46. *Id.* at 3-4.

47. *Id.* at 5.

48. *Id.* at 136.

49. Judith N. Shklar, *The Faces of Injustice* 17 (Yale 1990).

50. *Id.*

which is more neutral, and emphasized that no legal system can be just unless it is managed by officials who are fair, impartial, and committed to the task of defending the legal order that gives the society its whole character.<sup>51</sup> Most important, however, when these norms are not followed injustice results.

Shklar distinguished injustice from misfortune.<sup>52</sup> For example, in regions where thousands are killed during earthquakes, such tragedies are often considered misfortunes. On the other hand, when it is discovered that there would have been few casualties if the buildings had been properly constructed, the disaster is an injustice. Misfortunes are unpreventable, but injustice is preventable. Whenever demand exceeds supply, some will be unfortunate (suffer misfortune), but others will suffer injustice, a common problem, for example, in organ transplantation—except for prominent wealthy public figures. Unfortunately, inequality, injustice, and the accompanying unequal distribution of opportunities—and the basic goods necessary to life—are rife in most economic and political systems, a fertile ground for eugenics.

### Thomas Nagel: Class Stratification is Evil

Communism tried but so far has failed to create a classless society.<sup>53</sup> Nagel developed the thesis that class stratification is evil: “How could it not be an evil that some people’s life prospects at birth are radically inferior to others’?”<sup>54</sup> Further, “if people could become different so that they would support a thriving system of economic equality freely, they would . . . not have to submerge all their personal motives and concerns beneath a desire for the common good.”<sup>55</sup> Such a “change in most people’s character is hard to imagine, except perhaps through the effect over many generations of social institutions that have not been invented yet.”<sup>56</sup> Thus, Nagel emphasized the central problem of reconciling what is collectively desirable with what is individually reasonable.

### Joseph Fletcher and Situation Ethics

Joseph Fletcher espoused Situation Ethics as more useful in resolving moral dilemmas. He postulated that moral judgments are made by following one or the other of two choices: rule ethics or situation ethics. Rule ethics involves what one ought to do *a priori*, examples of which are various divine command philosophies or deontological ethics as espoused by Kant.<sup>57</sup> In act or situation ethics, the individual is central. It is up to the individual to judge what is best

51. Id at 18.

52. See generally id at 55-82.

53. Thomas Nagel, *Equality and Partiality* 28 (Oxford 1991).

54. Id at 28.

55. Id at 29.

56. Id.

57. Joseph Fletcher, *Humanhood: Essays in Biomedical Ethics* 2-4 (Prometheus 1979).

under the circumstances and make a decision. This is the *a posteriori* approach. Collect the facts; examine the circumstances; look at the individual, the family, the economic conditions, society and any other factors that may bear on the situation. One seeks, as in utilitarianism, the greatest good for the greatest number. A correct decision in one situation may be nonsensical in another.<sup>58</sup> As Joseph Fletcher indicated, physicians are probably more comfortable with situation ethics, for its precepts are what the clinician subscribes to in daily practice.<sup>59</sup> Most physicians do not judge what is best for their patients according to a categorical imperative or a religious dogma.

With the advent of new technology, considerable attention is directed to the question: "What is a person?" Fletcher believed that in order for one to qualify as human, or a person, the following criteria should be weighed:

- Minimum intelligence; An IQ of less than 40 places the individual in the questionable category; an IQ of less than 20 indicates that the individual is not a person. To quote an aphorism from Fletcher: "*Homo* is indeed *sapiens* to be *Homo*."<sup>60</sup>
- Self-awareness; self-control; a sense of time; a sense of futurity; a sense of the past; the capability to relate to others; concern for others; communication; control of existence; curiosity; change and changeability; balance of rationality and feeling; idiosyncrasy—the human being is idiomorphous, a distinctive individual; neocortical function.<sup>61</sup>

Eugenicists would be quite comfortable with situation ethics.

### Critical Theory

Critical theory, critical legal theory, and critical social science are constantly evolving with special attention to how established sources of power shape peoples' lives and promote their collusion in their own oppression by obeying power in automatic and uncritical ways. In David Kairys' view, law and the state are not "neutral, value-free arbiters, independent of and unaffected by social and economic relations, political forces, and cultural phenomena. Traditional jurisprudence largely ignores social and historical reality, and masks the existence of social conflict and oppression with ideological myths about objectivity and neutrality."<sup>62</sup> In essence, the law often reflects and enforces dominant power sources by means of individuals who may honestly believe in their own neutrality.

Further, in the United States, at least, the law is a highly respected force for the perpetuation of existing power relations by the consent of the gov-

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58. Id.

59. See generally Paul Ramsey, *Fabricated Man: The Ethics of Genetic Control* (Yale 1970).

60. Fletcher, *Humanhood* at 12 (cited in note 57).

61. Id at 12-16.

62. David Kairys, ed, *The Politics of Law: A Progressive Critique* 3 (Pantheon 1982).

erned: the lower and the middle classes. Accordingly the law confers a legitimacy on a social system and ideology that cloaks itself in ideology, science, with an occasional reference to God that is dominated by a corporate elite—a very effective means of control.<sup>63</sup> This thesis is not necessarily associated with evil intent, nor a master player who pulls on the strings of those who are powerless. Unfortunately, some if not many of those who have power may not even be aware of their potential, not only for *good*, which they may honestly profess, but for *harm*—a dangerous situation for the powerless. It is far easier to combat malevolent individuals who know what they are doing than to censure persons who sincerely are unaware that they too are culpable.

On the other hand, this account of the law is not the dominant view. We cloak ourselves in the Constitution and consistently profess to speculate on the intentions of the Founding Fathers—translated: white, male, upperclass, Protestants, some of whom were slaveholders, and who did not intend to confer equality on the non-propertied classes, women, or slaves. The government that they imagined was reminiscent of that of ancient Athens during the time of Socrates and Plato, a society in which these masses were not, by any stretch of the imagination, looked upon as worthy of participation.

Kairys concluded that the ideological role of precepts like legal reasoning is only one segment of a larger, general social phenomenon. Social and political judgments become sacrosanct from the appearance of expertise and analysis that falsely purport to be neutral, objective, and quasi-scientific. As Kairys succinctly stated, “If religion is the opiate of the masses, it seems that objectivity, expertise, and science have become the tranquilizers.”<sup>64</sup>

### Dame Mary Warnock and The Mythology of Common Values

A perennial moral cliché is that society's problems stem from a retreat from common values. This lofty archetype is incongruous with a pluralist society. The mythology of common values or a shared moral view was recently argued in Great Britain. Lord Devlin stated in his objections to the Warnock Committee Report that a shared moral view is the cement that binds society together.<sup>65</sup> The Committee argued in favor of in vitro fertilization and surrogate motherhood under certain conditions.<sup>66</sup> Lord Devlin argued that the law could not permit acts that contravened shared morality. Dame Mary Warnock replied that a “common morality” is a myth.<sup>67</sup> Even so, the sanctity of a common morality is often used as an excuse for discriminatory public policy. It is far better for those who have power to delude people to voluntarily lead

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63. Id at 5.

64. David Kairys, *Legal Reasoning* in David Kairys, ed, *The Politics of Law* 3, 17 (Pantheon 1982).

65. Lord Devlin, *The Enforcement of Morals* (Oxford 1959).

66. See generally Mary Warnock, *A Question of Life* (Blackwell 1959).

67. Id at xi.

themselves to the chopping block by embracing policies adverse to their interests.

### Amartya Sen: Economics and Ethics

Amartya Sen asserted that the needs of policy require that something must be done, even nothing for nothing is a decision.<sup>68</sup> Nevertheless, Sen maintained that there should be sufficient reason for choosing one policy rather than another. Even so, the need for decision may not resolve conflicts. Consequently, institutional public decisions may appear to be based upon only partial justifications. Nevertheless, Sen has stated that there is no departure from rational choice. He gives the classical example of Buridan's ass which died because he could not decide which of two haystacks was the better.<sup>69</sup> The poor animal could have chosen either rather than dying from lack of food. Even so, the poor ass had no reason to choose one over the other. Sen postulated that rational public decisions must come to terms with such partially justified choices. Much of decision-making and public policy with respect to the individual versus the so-called common good is of this nature, particularly when confronted with the conundrum of autonomy, individual interest and the perceived public interest—as we travel down the slope to follow.

### The Limitation of Health Care for Elderly Persons

Daniel Callahan, the former President and Founder of the Hastings Center, the preeminent center for bioethics in the United States, has proposed age-based rationing of health care for elderly persons to alleviate escalating health care costs.<sup>70</sup> Pain relief would be in order, but not life-saving measures, including nutrition. In short, aged individuals past their late seventies or early eighties should go quietly into the night in order that the generation to follow would have access to health care—in their early years. Although, Barry and Bradley assembled numerous health care experts to refute Callahan's proposal,<sup>71</sup> Callahan's policy fills ancient folklore. However, this subject may be skirted in Callahan's proposal. The aged are doomed to premature death, and it does not come with dignity.

### The Police Power of the State

The doctrine of the police power of the state, as decreed in the landmark Supreme Court decision of *Munn v Illinois* is an example of fundamental

68. Amartya Sen, *On Ethics and Economics* 67 (Blackwell 1987).

69. *Id.* at 67-68.

70. Daniel Callahan, *Setting Limits: Medical Goals in an Aging Society* (Simon & Schuster 1987).

71. Robert L. Barry and Gerard V. Bradley, eds, *Set No Limits: A Rebuttal to Daniel Callahan's Proposal to Limit Health Care for the Elderly* 117-28 (Illinois 1991).

utilitarianism.<sup>72</sup> This ruling established that the private interests of the individual must be subservient to the public interest, and formed the basis for the constitutionality of such diverse edicts as mandatory vaccination, seat belt, and sterilization laws.<sup>73</sup> In short, whatever the state deems critical for the public good is supported by the umbrella of the police power of the state, provided, of course, that the law does not negate the Constitution. The abrogation of *Munn*, however, would obliterate some of the most basic tenets of our democratic society. Paradoxically, the doctrine that the private interests of the individual must be subservient to the public interest is in accordance with both totalitarianism and democracy. Consequently and disturbingly, eugenics may prosper under disparate systems of government.

### Mandatory Sterilization

I now move from a landmark unintentional decree that facilitates eugenics, *Munn v Illinois*, to one that was deliberately and patently eugenic: the Supreme Court's decision of *Buck v Bell* in 1926, which established then—and still today—the constitutionality of the right of the States to mandate sterilization of women and men to protect the “public welfare.”<sup>74</sup> Unfortunately, Coogan found that Carrie Buck, her mother, and her daughter were probably not even mentally retarded, but the product of a hopeless environment.<sup>75</sup>

Undoubtedly, local attitudes also influence sterilization practices. In a poignant article, Herbert Aptheker cited some tragic examples of sterilization of poor blacks.<sup>76</sup> Aptheker records that in July 1973, Mr. and Mrs. Lonnie Relf complained to the Southern Poverty Law Center of Montgomery, Alabama, that two of their daughters, age 12 and 14, had been surgically sterilized without their knowledge.<sup>77</sup> Another daughter, age 17, had escaped sterilization only because she had resisted. Prior to the sterilizations, these three children had also been injected with an experimental drug to prevent conception. When tests found the drug to be carcinogenic, authorities in the Federal Government ordered the investigation stopped. The Montgomery officials then ordered the sterilization of the children.

Other cases came to light. Aiker County Hospital records showed that of 34 deliveries paid for by Medicaid in 1972, 18 included sterilization; all 18 were black women; and all 18 were performed by the same physician who

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72. See generally *Munn v Illinois*, 94 US 113 (1876).

73. *Id.* at 126.

74. *Buck v Bell*, 274 US 200, 207 (1927).

75. J.E. Coogan, *Eugenic Sterilization Holds Jubilee*, 177 *Catholic World* 44, 46 (1953).

76. Herbert Aptheker, *Sterilization and Imperialism* in Herbert Aptheker, *Racism, Imperialism, and Peace: Selected Essays by Herbert Aptheker* 143 (MEP 1987).

77. *Id.*

stated that his policy was to require sterilization after a woman on welfare had had three children.<sup>78</sup>

Aptheker further pointed out that in 1974, 14 states were in the process of considering legislation that would require women on welfare to submit to sterilization.<sup>79</sup> He cited Garrett Hardin in his book, *Exploring New Ethics for Survival*, as proposing that "if a state supports children, it should have the power to legally divest potential parents of such children of the capacity to reproduce."<sup>80</sup>

In 1966, Elyce Ferster asserted that there was indeed growing support for the restriction of costs of welfare by involuntary sterilization.<sup>81</sup> Ferster concluded with a statement that should serve as a reminder to those who maintain that public policy will not take this route:

Proponents of involuntary sterilization, both in the past and today seem to imply that those who oppose these laws place the right of procreation above the welfare of society. It is possible that the day will come when this statement is accurate. The hereditary nature of these conditions may be established, or all reasonable attempts at improving the environment and rehabilitation of the disabled may fail, or food and air shortages may become so severe that there might not be enough to bear the burden of any further growth in population, then, there will be a choice between sterilization and the rights of the individual. If the time comes when any of these conditions exists, and if efforts at birth control fail, and if we can decide who should be sterilized and who is qualified to make this decision, then perhaps legislation authorizing involuntary sterilization could be justified.<sup>82</sup>

Eugenic precepts in the United States often are firmly imbedded in legislation and in court decisions, including the Supreme Court. Accordingly, the intent of some legislative and court edicts may not have been to promote bigotry, racism, classism, or anti-Semitism, but they have had that effect. Although Nazi Germany is often held up to public execration—and is a model whipping post for the atrocities of eugenics—the paradigm for Hitler's final solution was the American eugenics movement of the 1920s, in which geneticists were major players in the initiation of a eugenics public policy. And the same jurists who made Germany repeal its mandatory sterilization laws returned home to similar laws on the books of many states.

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78. Id at 145.

79. Id at 146-47.

80. Id at 147. See generally Garrett Hardin, *Exploring New Ethics for Survival: The Voyage of the Spaceship Beagle* (Viking 1972).

81. Elyce Zenoff Ferster, *Eliminating the Unfit: Is Sterilization the Answer?*, 27 Ohio St L J 591, 623-625 (1966).

82. Id at 624-625.



### Marriage and the Family

The police power of the state also invades marriage and the family. Family definitions and marriage restrictions also open the door to eugenics, because many of the prohibitions against marriage—particularly those against consanguineous mating—are far less defensible biologically than the mating of carriers with identical traits for genetic disorders. The banning of consanguineous mating facilitates the interdiction of mating of carriers for sickle cell disease, Tay-Sachs disease, cystic fibrosis, and eventually the mating of carriers of several thousand genetic disorders, once the techniques for early diagnosis in utero are developed.

In the early 1970s students representing “Science for the People” came to my office quite excited about a revision of the Illinois Domestic Relations Act proposed by the Chicago Bar Association—and rightfully so. In essence the Bar Association was concerned about children being born with severe genetic defects. The remedy? It was proposed that before a couple could marry, appropriate tests should be made to ensure that children with severe birth defects could not be born from the union.<sup>83</sup> Of course, such a prohibition was nonsensical because all marriage in Illinois would have been banned—Holy, or otherwise. After much persuasion through a friend who was on the committee of the Bar Association, this and several other odd prohibitions were withdrawn.

### The Right Not to Procreate and Abortion Inequity

The expanding field of prenatal diagnosis could not have been developed without the landmark Supreme Court decision of *Roe v Wade*, which established the right for a woman to have an abortion—under certain conditions.<sup>84</sup> This decision was preceded by *Griswold v Connecticut*, which, by establishing the right of married couples to use contraceptives, thereby established the right not to procreate.<sup>85</sup> Although abortion is legal, the Supreme Court decisions of *Maher v Roe* and *Harris v McRae*, and the Congressional legislation known as the “Hyde Amendment” established that even if abortion is legal—under certain conditions—the state has no obligation to pay for abortion.<sup>86</sup>

### Limited Resources and Health Care Eugenics

Several states have decreased benefits for parents receiving Aid to Families with Dependent Children (AFDC).<sup>87</sup> California, Connecticut, Delaware, Geor-

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83. James E. Bowman, *Genetic Screening Programs and Public Policy*, 38 *Phylon* 117, 136-138 (June 1977).

84. *Roe v Wade*, 410 US 113 (1973).

85. *Griswold v Connecticut*, 381 US 479 (1965).

86. *Maher v Roe*, 432 US 464 (1977); *Harris v McRae*, 448 US 297 (1980); Hyde Amendment, Pub L No 94-439, 90 Stat 1434 (1976), codified at 42 USC § 2000d (1988).

87. Christopher Jencks, *Can We Put a Time Limit on Welfare?*, *The American Prospect*

gia, Illinois, Iowa, Maryland, Ohio, Tennessee, Mississippi, North Carolina, and Virginia have all supported punitive action against those who might in the future conceive a child out of wedlock, and some even attempted to mandate the imprisonment or sterilization of women who have more than one child born out of wedlock.<sup>88</sup> More recently, President Clinton suggested during his 1992 campaign that no one be allowed to collect AFDC for more than two years.<sup>89</sup> As a follow-up, Clinton supported Wisconsin legislation to impose a two-year limit on indigent families with children. All of these measures have the sanction of the highest Court in the land. In 1970, the Supreme Court in *Dandridge v Williams* upheld the legality of a Maryland law which set a maximum welfare grant of \$250 per month no matter how many children were in the recipient family.<sup>90</sup> An extension of this precedent to include the restriction of the birth of children who have severe birth defects would certainly be more cost effective than the interdiction of the birth of children who do not have birth defects.

As noted earlier, laws and practices with eugenic implications are often designed for other purposes. For instance, universal health care may operate to discourage the birth of children with genetic defects, because of their perceived burden on public funds. The limit to state support of children born of mothers who are on welfare is a policy that has eugenic implications for poor mothers who repeatedly bear children with "preventable" genetic disorders. Scientific advances in genetics create a fertile ground for eugenics, because inequities in the delivery and costs of health care have led to plans for additional rationing of health care under the rubric of broadening the base of our market health care system to include the millions of Americans who are mere bystanders to decent preventive health care and health. If health care resources are indeed scarce—a euphemism for "health care resources are scarce for the poor"—economic pressures to reduce health care costs may (will) one day restrict the birth of children with "preventable" severe genetic disorders by indirect coercion or by mandatory legislative and court prohibitions. Accordingly, I suggest that eugenics may re-enter public policy under the guise of "limited resources." The recurring theme of "limited resources" coincides with an explosion of scientific advances in genetic testing from ova to spermatozoa, to blastulae, to fetal and trophoblastic cells in pregnant women, to fetuses, to newborns, to children, to adults, and even to ancient remains of the dead.

Even though health care resources are parroted as scarce, this myth is belied by the practices of many health maintenance organizations (HMOs) that are supposed to bring savings to our health care system. Woolhandler and Himmelstein indicated that these systems pressure doctors to exploit patients'

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32 (Fall 1992).

88. See generally Rickie Solinger, *Wake up Little Susie: Single Pregnancy and Race Before Roe v Wade* 53-57 (Routledge 1992).

89. Jason DeParle, *Wisconsin to Impose a 2-Year Limit on Welfare*, Louisville Courier-Journal 2A (Nov 9, 1993).

90. *Dandridge v Williams*, 397 US 471 (1970).

trust for financial gain.<sup>91</sup> Doctors' incomes are tied to curtailing service. Meanwhile, the chief officers of these plans demonstrate the advantages (not to the patients) of a market system of health care. For example, Woolhandler and Himmelstein pointed out that the 2.4 million-member U.S. Healthcare organization spends only 74.4 percent of revenues on medical care and \$1 million per day goes to profits, adding to its \$1.2 billion cash reserve.<sup>92</sup> The chief executive officer of this plan made \$20 million in a single year and holds \$534 million in company stock.<sup>93</sup>

### The Sickle Hemoglobin Fiasco<sup>94</sup>

Sickle hemoglobin testing was initiated in the early 1970s following the commercialization of a solubility test for sickle hemoglobin by a major pharmaceutical company.<sup>95</sup> Although widely advertised, this test did not delineate sickle cell trait from sickle cell disease. In addition, most educational brochures implied that sickle cell anemia is confined to blacks despite its prevalence in other populations including Greeks, Southern Italians, Arabs, Southern Iranians, Asian Indians, and descendants of these groups.

By June 1977, at least twelve states passed mandatory sickle hemoglobin screening laws, usually under pressure from black community organizations.<sup>96</sup> Many laws imposed testing of particular groups—blacks and specified pre-school and school children, couples before marriage, and, in one case, inmates of mental and correctional institutions. Major corporations began selectively screening blacks. For example, black flight attendants who tested positive for sickle hemoglobin were discharged.<sup>97</sup> The majority of the major life insurance companies raised rates as much as 25 percent on persons with sickle cell trait, even though the life expectancy of individuals with sickle cell trait is the same as the life expectancy of those who do not have sickle hemoglobin.<sup>98</sup>

Sickle cell organizations proliferated and vied for funds, many replicating the misinformation available in black communities until the passage of the National Sickle Cell Anemia Control Act.<sup>99</sup> Although the Act's title, "The National Sickle Cell Anemia Control Act," was unfortunate because the "control" of sickle cell anemia is only possible through eugenic practices reminiscent of Nazi Germany, the Act created a National Sickle Cell Disease Program with

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91. Steffie Woolhandler and David U. Himmelstein, *Extreme Risk—The New Corporate Proposition for Physicians*, 333 NE J Med 1706 (Dec 21, 1991).

92. *Id.*

93. *Id.*

94. For a fuller description of "The Sickle Hemoglobin Fiasco," see Bowman, 38 *Phylon* at 117-142 (cited in note 83).

95. *Id.*

96. *Id.* at 126.

97. *Id.*

98. *Id.*

99. National Sickle Cell Anemia Control Act, Pub L No 92-294, 86 Stat 136 (1972), codified as amended at 42 USC § 300 (1994).

support of community education, testing and counseling programs, Comprehensive Sickle Centers with education, testing, counseling and research components, and Program Projects which conducted research.<sup>100</sup> Along with federal guidelines for education, testing, and counseling programs, the program rebutted the equation of sickle cell trait with sickle cell disease.

Nevertheless, the federally supported screening and education clinics were directed to perform mass population screenings of up to the unrealistic goal of 20,000 subjects per year.<sup>101</sup> The personnel needed to care for the educational and other needs of the target populations was not available. As I have stated before, the ostensible objective of these programs was to enable the community to make informed decisions about reproduction. "But what were the options before the advent of prenatal diagnosis? They were somewhat distasteful: abstinence, artificial insemination, genetic roulette, or abortion."<sup>102</sup>

The development of techniques for newborn screening, and the prenatal diagnosis of sickle cell disease, began a new phase of hemoglobin screening. Thus, the major accomplishment of the National Sickle Cell Disease Program became screening of newborns to reduce morbidity and mortality rates in infants with sickle cell disease through treatment with penicillin prophylaxis to prevent infections, particularly those of pneumococcal origin.<sup>103</sup>

#### Prenatal Diagnosis for Sickle Hemoglobin<sup>104</sup>

In 1991, a team of physicians lead by Peter Rowley published their investigation of the feasibility of prenatal education, testing, and counseling of pregnant women from black, white, Asian, and other ethnic groups for hemoglobinopathies.<sup>105</sup> The study uncovered several important issues. Among them, the study asked if programs for prenatal testing for hemoglobinopathies should include only populations at high risk, such as blacks, peoples of Mediterranean origin, Middle Easterners, Asians, or Southeast Asians? Apparently not, given that at least 7 percent of the subjects with sickle cell trait were not black, and 22 percent of individuals with  $\beta$ -thalassemia trait were not Mediterranean, black or Asian.<sup>106</sup> The authors concluded that *all* women should have prenatal hemoglobinopathy screening, rather than only those of high-risk groups.<sup>107</sup>

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100. Id.

101. James E. Bowman, *Invited Editorial: Prenatal Prescreening for Hemoglobinopathies*, 48 Am J Hum Gen 433, 434 (1991).

102. Id.

103. Marilyn H. Gaston, et al, *Prophylaxis with Oral Penicillin in Children with Sickle Cell Anemia: A Randomized Trial*, 314 NE J Med 1593 (June 1986).

104. For a fuller description of prenatal diagnosis for sickle hemoglobin, see James E. Bowman, 48 Am J Hum Gen 433 (cited in note 101).

105. Peter T. Rowley, et al, *Prenatal Screening for Hemoglobinopathies*, 48 Am J Hum Gen 439 (1991).

106. Id at 441.

107. Id.

### Out-Of-Wedlock Births

Lamentably, an escalating out-of-wedlock birth rate in the black community is frequently ignored in federal and community programs, and in premarital sickle hemoglobin state testing mandates.<sup>108</sup> Genetics programs are usually constructed on the basis of the classical description of the family. The testing of couples before marriage and of marriage partners is emphasized, but reality is ignored. William Julius Wilson investigated family patterns and out-of-wedlock births in the black community.<sup>109</sup> The proportion of women married and living with their husbands decreased from 52 percent in 1947 to only 34 percent in 1980.<sup>110</sup> The jobless rate for black males is a major factor in the out-of-wedlock birth rate, because black women see little advantage in marrying a man who has little prospect for contributing to family support.<sup>111</sup> Nationally, out-of-wedlock black births in 1970 accounted for 37.4 percent of black births and in 1987, 62.2 percent.<sup>112</sup> The lessons are obvious. A genetics program that depends on the cooperation of putative fathers and partners who are readily available places the pregnant woman who does not wish to have a child with sickle cell disease in an untenable position, and discounts the quandary of the majority of the target population.

Lippman asserted that with the advent of prenatal diagnosis, a woman's pregnancy becomes both a social and a biological pregnancy.<sup>113</sup> She becomes separable into two, herself and her fetus. Accordingly independent interests may now be assigned to the fetus and the mother. A woman can be subject to rules and regulations and duties as a result of the potential for fetal abuse. A woman's pregnancy now becomes the potential domain not only of herself and her husband or mate, but the family, other children, the community and that vague entity—society. The woman who bears a child with a preventable serious genetic disorder now becomes a *problem*, particularly if she is poor and must seek public assistance.

### Wrongful Birth; Wrongful Life

Once medical advances become part of the public domain, the courts have invariably supported their use, and expect patients to be made aware of them.

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108. James E. Bowman, *Is a National Program to Prevent Sickle Cell Disease Possible?*, 5 Am J Ped Hematol 367, 370 (1983).

109. William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* 66-73 (Chicago 1987).

110. *Id.* at 68.

111. *Id.* at 91.

112. National Center for Health Statistics, *Health United States 1989* (GPO 1990) (DHHS Pub No (PHS) 85-1232).

113. Abby Lippman, *The Genetic Construction of Prenatal Testing: Choice, Consent, or Conformity for Women?* in Karen H. Rothenberg and Elizabeth J. Thomson, eds, *Women and Prenatal Testing: Facing the Challenges of Genetic Technology* 9, 21-22 (Ohio St 1994).

Accordingly, failure to inform patients of medical advances has been a source of litigation—which leads to the discussion of wrongful birth and wrongful life. One of the first wrongful life cases, *Gleitman v Cosgrove*, dismissed a woman's malpractice claim against the doctors who failed to inform her that she would bear a child with severe birth defects.<sup>114</sup> Gleitman sued on the theory that she should have been allowed to decide to have an abortion. The judge rejected Gleitman's argument because abortion was illegal, and therefore the physician was under no obligation to suggest an illegal act. On appeal, the Supreme Court of New Jersey rejected the legality issue and instead based its ruling on the grounds that Gleitman's child "would almost surely choose life with defects as against no life at all."<sup>115</sup>

Interestingly, even though abortion is now legal—under certain conditions—Congress and the courts have repeatedly decreed that the state is under no obligation to fund abortions for poor women. Nevertheless, the states generally pay for Medicaid recipients who choose to undergo tubal ligation, a form of voluntary (indirectly coercive) sterilization for poor women.<sup>116</sup> Accordingly, sterilization as an option to prevent future children with genetic disorders now has a more scientific rationale, but will disproportionately, as always, be limited, mainly, to poor women.

A variety of bacteria, viruses, chemicals and other agents (and now, AIDS) are harmful to the fetus and the newborn. The reduction in neonatal gonorrhea ophthalmia and syphilis was due, in part, to litigation, which employed concepts from contract, negligence, and battery law, all of which formed the basis for the common law of malpractice. The improvement of contraceptive procedures and of methods for prenatal and postnatal genetic diagnosis induced courts to make these discoveries available (within limits) and to sanction liability. Of course, the women whose cases pioneered this litigation could not have foreseen the rapid development of prenatal diagnosis, and the potential for direct or indirect coercion to have "perfect" children.

In a wrongful birth action, the physician or another person or organization is sued by the parent for failure to prevent the birth of an unwanted child, or to prevent the birth of a child with a genetic or other disease. In a wrongful life action, the child, or the parent sues (on behalf of the child) and claims that the child would have been better off by not having been born.<sup>117</sup> But this allegation has serious problems. Tedeschi pointed out that the act of the parent which the child claims injured him is the very act but for which the child would not exist.<sup>118</sup>

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114. *Gleitman v Cosgrove*, 49 NJ 22, 227 A2d 689 (1967).

115. *Gleitman*, 49 NJ at 30.

116. Information confirmed by Planned Parenthood, Chicago Office, for *The University of Chicago Law School Roundtable*, Nov 13, 1996.

117. Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 Colum L Rev 618, 632-660 (1979).

118. G. Tedeschi, *On Tort Liability For "Wrongful Life"*, 1 Israel L Rev 513, 528-30 (1966).

Margery Shaw's arguments could indicate the direction of human genetics policy.<sup>119</sup> Shaw maintained that the right to reproduce is not absolute and cited state prohibitions against certain types of marriage.<sup>120</sup> But Shaw went further and asserted that genes, like infectious agents, are transmissible units, and that the law can impose quarantine and compulsory vaccination in order to control communicable diseases. Shaw also offered comparisons between genetic and infectious diseases: both are transmitted to others; both vary in their rate of "contagion"; both are unequally distributed among populations; and both vary in morbidity and mortality.

Shaw argued that since recovery for fetal injuries is legal, children may sue their parents for prenatal injury.<sup>121</sup> Shaw indicated that in most situations the defendant would be the mother, because the mother is the only one who has direct control over the fetus. Thus negligent exposure to noxious chemicals, drugs, refusal to accept genetic counseling and prenatal diagnosis, refusal of prenatal therapy, or failure to take a modified diet for phenylketonuria could be the basis for action.<sup>122</sup> *Smith v Brennan* was quoted in defense of this position: "the child has a legal right to begin life with a sound mind and body."<sup>123</sup> In other words, the child's right to a healthy life takes priority over the right to reproduce. Shaw used as precedent child abuse statutes. She would compel parents and prospective parents to enter alcohol and drug rehabilitation programs that would take custody of the fetus to prevent mental and physical harm.<sup>124</sup>

Shaw was prescient. The rights of the fetus (if there are any) are now pitted against maternal duties and rights. Pregnant women who drink alcohol or who are cited for drug abuse have been censured, and, in South Carolina pregnant cocaine users have even been incarcerated.<sup>125</sup> Fetal abuse is equated with child abuse. It is inescapable, however, that there is no greater fetal abuse than abortion. Yet, it has been suggested that charges of genetic neglect may follow women who elect to have children affected with preventable congenital and genetic disorders.<sup>126</sup> Accordingly, family, community and societal pressures could open a path to eugenics by questioning the discretion of women who elect to have children with preventable genetic disorders. Not surprisingly, since risk analysis is a major factor in insurance and employment, recent

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119. Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J Leg Med 63 (1984).

120. Id at 93.

121. Id at 94.

122. Id at 95.

123. *Smith v Brennan*, 31 NJ 353, 364, 157 A2d 497, 503 (1960); Shaw, 5 J Leg Med at 95 (cited in note 119).

124. Id at 98-104.

125. Editorial, *Jail for Pregnant Cocaine Users in US*, 303 Br Med J 873 (Oct 12, 1991).

126. Shaw, 5 J Leg Med at 90-95 (cited in note 119).

advances in genetic prediction may be taken into account in acceptability for health and life insurance and employability.

### Insurance and Employment

Although prenatal diagnosis and abortion are acceptable, and offered with alacrity, health and life insurers and companies often deny insurance or jobs to those who have genetic disorders or who are at risk for having children with severe genetic disorders. On the other hand, employers and insurance companies only reflect our market system of government. Even The Americans with Disabilities Act of 1990 does not restrict insurers or any agents that administer benefit plans from underwriting risks that are based on or not inconsistent with state law.<sup>127</sup> Unfortunately, employers, often have no choice but to follow their insurance companies in their hiring policies.

Indirect and direct coercion in health and life insurance and employment is an almost inevitable path to cryptic eugenics. Employers should have access to the health status of applicant employees in order to establish whether health status may have an effect on job performance. Consider a small company in which the health status of even a few individuals or families could affect other employees or the survival of the entire company. A company provides not only health coverage but voluntary genetic testing with informed consent at no charge to the employee. A couple who is at risk for having a child with sickle cell anemia, or thalassemia, or cystic fibrosis may find that the fetus is affected following prenatal diagnosis. Nevertheless, after stating that they will abort if the fetus is affected they relent and decide to have the affected child, with consequent prohibitive cost. Or, an upcoming young executive with the company has a father with Huntington disease. He has a 50 percent chance of developing a severe neurological disorder in his middle years with dementia. He refuses to be tested and soon becomes affected, with prohibitive insurance costs. Collins pointed out that the discovery of the *BRCA1* gene may place women who have an increased risk for breast cancer in danger of losing their health insurance for women whose insurance is derived from plans funded by their employers.<sup>128</sup>

It could be argued that there are rights to procreation or that individuals have a right not to submit themselves to genetic testing that may compromise their insurance or employment. On the other hand, to borrow from Richard Epstein, in cases of limited exemptions for senior citizens from discrimination, the Unruh Act of California began with a declaration of the freedom and equality of all persons and proceeded as if it followed that discrimination by private parties on the basis of race, sex religion, blindness, other physical disability and other factors be banned.<sup>129</sup> Epstein indicated that "[t]he second

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127. Marvin R. Natowicz, et al, *Genetic Discrimination and the Law*, 50 Am J Hum Gen 465, 471 (1992).

128. See generally F. Collins, *BRCA-1 Lots of Mutations, Lots of Dilemmas* 334 NE J Med 186 (1995).

129. Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Dis-*



part does not follow from the first, for all are free and equal only when they trade on terms of mutual advantage.”<sup>130</sup> Accordingly, from Epstein’s model the preferences of the other employees are ignored. And even worse at the next round of insurance evaluation, insurance costs for all could either be prohibitively increased, or the insurance company could drop the company from its list, or it could selectively drop families with prohibitive costs. Someone pays. Who? Is such a practice eugenics by indirection? Or, does it not behoove us to recognize social responsibility, lest we all find ourselves in a coercive eugenic society?

### The Imperfect

Kay Jamison, Professor of Psychiatry at Johns Hopkins Medical School, who also serves on the National Advisory Committee for Human Genome Research, discovered an incidence of manic depressive illness among poets, composers, and other artists of from 30 to 50 percent.<sup>131</sup> If we are ever able to prevent manic depressive illness by prenatal diagnosis and abortion—or cure manic depressive illness—there could be a detrimental effect on creativity. Samuel Coleridge Taylor, Emily Dickinson, T. S. Eliot, Victor Hugo, Samuel Johnson, Edna St. Vincent Millay, Ezra Pound, Edgar Allan Poe, Alfred Lord Tennyson, Walt Whitman, Hans Christian Anderson, Honore de Balzac, Charles Dickens, William Faulkner, Hector Berlioz, Handel, Gustav Mahler, Rachmaninoff, Rossini, Tchaikovsky, Irving Berlin, Cole Porter, Charles Parker, Paul Gauguin, Vincent van Gogh, Michelangelo, and Jackson Pollock could have been on an unfit hit list.<sup>132</sup>

More recently, Jamison poignantly documented her own battle with manic-depressive illness since the age of seventeen.<sup>133</sup> When she was interviewed for an appointment at Johns Hopkins School of Medicine she felt that she should reveal to the Chairman of Psychiatry her manic-depressive illness. The Chairman assured her that he already knew that and that if they were to ban all who had manic-depressive illness, Johns Hopkins would lose some of its best faculty.<sup>134</sup>

### Eugenics, Disguised and Otherwise

IQ and aptitude tests in the United States and in Great Britain determine the course of the lives of children at an early age. Scholars still make a comfortable living substantiating over and over that poor, discriminated, under-

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*crimination Laws* 64 (Harvard 1992).

130. *Id.*

131. See generally Kay Redfield Jamison, *Touched With Fire: Manic Depression Illness and the Artistic Temperament* (Free Press 1993).

132. See generally *id.*

133. Kay Redfield Jamison, *An Unquiet Mind* (Knopf 1995).

134. *Id.* at 208-209.

nourished, unhealthy children, who live in substandard housing, with few, if any, books in the home do not achieve as well as the more affluent. (It would be incomprehensible if they did.) Nevertheless, the precepts of the old eugenicists are endorsed by some of our most distinguished scholars and leaders. For example, I quote from Ingle:

To be born into a culture that enslaves may be as much of a handicap to a child as to be born with defective genes. It is common for family histories to show parents, children, and grandchildren on welfare rolls. Some are there because they inherit low intelligence and possibly low drives. Some have poor health. Others come onto welfare and stay there because they have inherited a culture that does not respect education, job responsibility, the property of others, the law, and the rules of society. These social ills are just as contagious as some physical ills and should be quarantined to prevent spreading.<sup>135</sup>

In 1977, Blumenthal exceeded the fondest hopes of the American Eugenics Movement of the 1920s by stating that if China were to develop a selective breeding program, America should follow. Under this general program:

All prospective parents would be licensed. Some would be licensed to reproduce but not to rear children, others to rear but not to reproduce and still others both to beget and rear children. Licensed all-round parents should not have serious genetic defects; they should love children and want to be parents; they should know the rudiments of nutrition, child psychology and education; they should not have serious bad habits e.g. alcoholism and dope addiction and they should have a high probability of being able to provide economic support sufficient to enable their children to become happy and good citizens. The number of children that a couple could have would be determined by the state.<sup>136</sup>

### Dissent: Grad and Penrose

Frank Grad has offered a perceptive caution to those who espouse modifying future generations through eugenics:

It is clear, however, that the availability of new biologic techniques and their potential for eugenic controls—both positive and negative—may have a deep impact on family structure, on the relation of the family to the state, and on the decision-making and planning processes of government. It is unlikely that a society can simultaneously maintain both freedom of the person and an effective, i.e., compulsory, eugenic program. Even if a eugenic program were only voluntary, would not the

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135. Dwight J. Ingle, *Who Should Have Children?: An Environmental and Genetic Approach* 81 (Bobbs-Merrill 1973).

136. Albert Blumenthal, *Moral Responsibility: Mankind's Greatest Need* 257 (Rayline 1975).

individual's choice of a mate and of whether to procreate fall subject to some official persuasion as to what eugenic practices or standards are desirable?<sup>137</sup>

One of the most outspoken opponents of eugenics was the late Lionel S. Penrose, FRS, who ironically was the Galton Professor, University College London. When Penrose became Galton Professor, he also became Editor of the *Annals of Eugenics*. Much to the consternation of some geneticists, Penrose changed the name of the *Annals of Eugenics* to the *Annals of Human Genetics*.<sup>138</sup> Kevles succinctly summed up Penrose's disdain for eugenics:

Thoughtful people on both sides of the Atlantic agreed with Lionel Penrose, who declared a few years before his death that he 'would rather live in a genetically imperfect society which preserves human standards of life than in one in which technological standards were paramount and heredity perfect.'<sup>139</sup>

And today, IQ eugenics has once more reared its head in a best seller, *The Bell Curve* by Herrnstein and Murray.<sup>140</sup>

### Democratic Pluralism or Covert Eugenics?

Finally, we may continue to muddle through. Nevertheless, the specter of eugenics is alive and well. The application of genetic technology to eugenic ends is compatible with numerous court and legislative decisions — some of which had no eugenic intent. The assault on the poor, particularly poor unmarried mothers, and the perception that health care resources are scarce—no matter what system of health care — may eventually lead to the restriction of the birth of children with a variety of preventable genetic disorders, and to the institution of both subtle and draconian measures by insurance companies, employers, the family, and society to directly or indirectly coerce individuals and their families to conform.

Interestingly, anti-choice and the opposing pro-choice movements may serve as buffers to eugenics. The anti-choice movement opposes abortion, a modern tool to eliminate the "unfit," but the pro-choice movement fosters autonomy and freedom of women to choose or not choose abortion. If autonomy prevails, society will not be able to mandate abortion without alienating a powerful segment of our society. Interestingly, however, the state will pay for sterilization, which could encourage eugenics. On the other hand, to promote

137. Frank P. Grad, *New Beginnings in Life: A Lawyer's Response*, in Michael Hamilton, ed, *The New Genetics and the Future of Man* 64, 70 (Eerdman's 1972).

138. Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* 252 (Knopf 1985).

139. Id at 289.

140. Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press 1994).

public funding for abortion (as pointed out to me by Neil Holtzman many years ago) is to increase the likelihood of state-ordered abortion for eugenic reasons.

The path from medical genetics to eugenics is a continuum, with full knowledge that this assertion is anathema to many medical geneticists and genetic counselors. Rightfully, their principal concern is the patient and the family. They wish to ensure that decisions on procreation are voluntary and made with informed consent. On the other hand, once technology is developed, it usually is utilized. National Institutes of Health (NIH), or American Society of Human Genetics committees, or Institute of Medicine committees, or other organizations often meet and make scholarly pronouncements about the use and abuse of genetics, and produce scientific and ethical "guidelines." In this day of rapid communication, however, public policy may be determined by diverse groups—many with covert agendas.

### Jean Paul Sartre: Existentialism is Humanism

Jean Paul Sartre explored the dilemma of moral decision-making in his famous lecture, *Existentialism is Humanism*, delivered in Paris on October 29, 1945.<sup>141</sup> During the occupation of France a student came to Sartre for advice. The student's father favored collaboration with the Nazis, and the student's older brother had been killed in the German offensive. The father had left home. The student wished to avenge his brother's death, but his mother was now alone, was totally dependent on him, and lived only for him. The student wanted to go to England to join the Free French Forces, but he also wanted to stay with his mother and help her. Sartre posited that the student was torn between the morality of personal devotion and the morality of defending society. Sartre answered that Christian doctrine could not help him choose because both choices satisfy the criteria of Christian morality. Kantian ethics was to no avail, because the student could not consistently treat everyone as an end; someone would have to be treated as a means. Sartre told the student that the only answer that he could give was that he was free to choose. In other words, there is no system of ethics that could resolve these competing values.

Freedom to choose may prevail. But don't bet on it.

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141. See generally T.Z. Lavine, *From Socrates to Sartre: The Philosophic Quest* 366-367 (Bantam 1984).

