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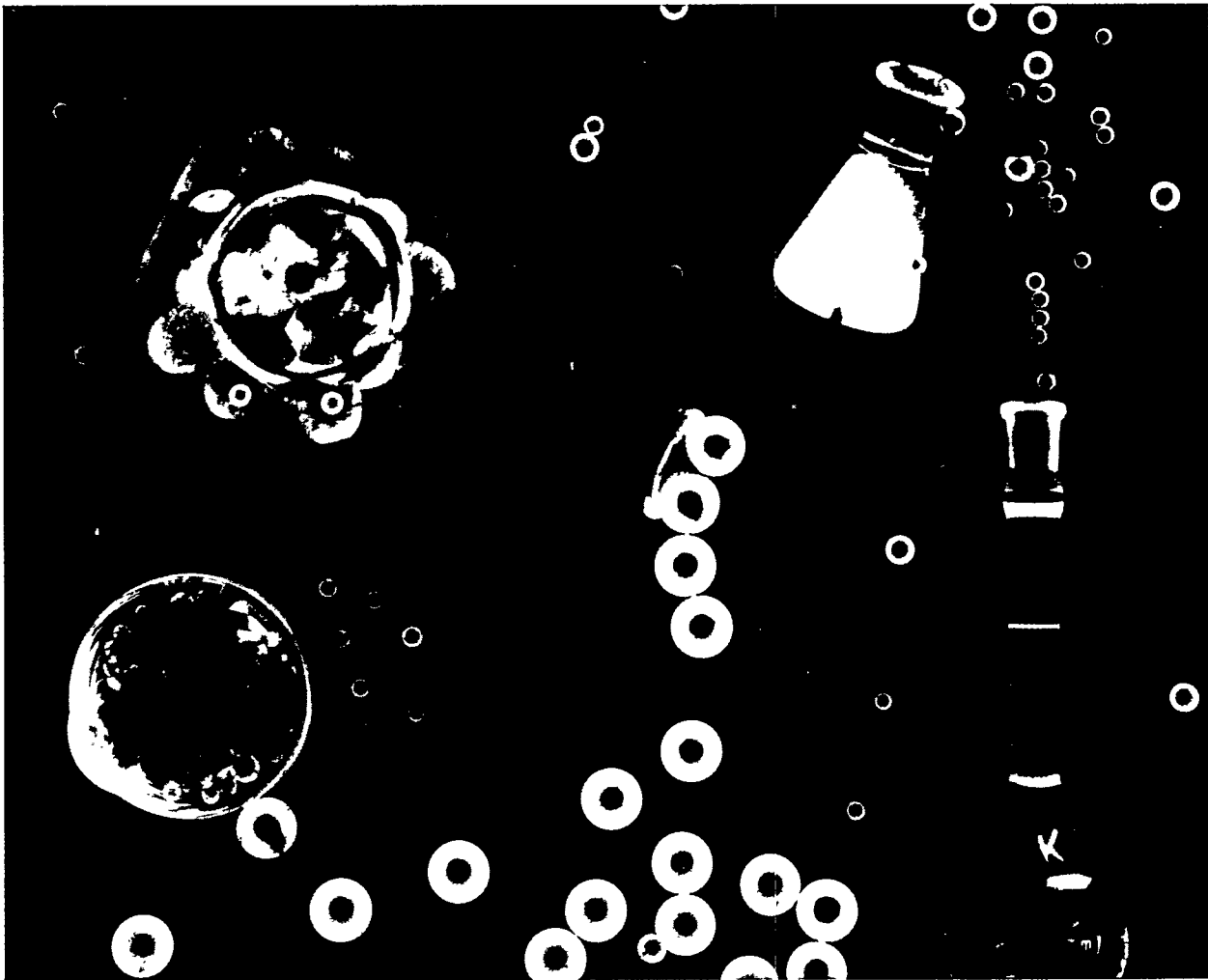
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## Reproduction with Technology: The New Eugenics

Cover Page Footnote

Illustration by Joe Boinski



*Joe Boinski*

# REPRODUCTION WITH TECHNOLOGY: THE NEW EUGENICS?

Margaret Phillips\*

## INTRODUCTION

Reproductive technologies provide more than reproductive choice for women; they provide a means to control who procreates and what types of babies are born, a means of eugenic control. Although the eugenic goal of bettering American society by purging it of the growing numbers of immigrants and mental "defectives" supposedly has been rejected, the rush toward technological methods of procreation suggests the survival of eugenic ideas. For advocates of both eugenics and reproductive technology, procreation is a cure for societal "ills" such as mentally or physically challenged humans. As long as the idea of solving social problems through biological transformation retains a foothold in American consciousness, reproductive technologies must be evaluated according to their potential for achieving the biological transformation visualized by eugenicists - a homogeneous, white, middle and upper class population. Reproductive technologies such as prenatal screening, artificial insemination by donor (AID) and in vitro fertilization (IVF) make having a baby like taking a trip to the mall: we can choose the best baby by choosing the best sperm, the best ova, or by choosing to abort a child that is "defective." Choosing the "best baby" is a profoundly political choice, exposing our biases and shaping the issue of reproductive freedom.

In Part I, I give an overview of eugenics and the early birth control movement which demonstrates how issues of reproductive control were originally influenced by the racist and classist biases of eugenics. In Part II, I discuss the most common types of prenatal screening and how our prejudice against the disabled can contribute to a eugenic use of screening procedures. This discussion illustrates how our use of technology can be grounded in political beliefs such as stereotyping the disabled as useless and costly - which then contributes to eugenic practices. In Part III, I explore the eugenic appeal of artificial insemination and in vitro fertilization. In Part IV, I discuss how economic and legal barriers deny access to reproductive technologies to women of color, the disabled, gays and lesbians, and the poor. Whether denial of access is implicit or explicit, it serves to perpetuate surviving eugenic ideals by preventing procreation of the "defectives." Finally, in Part V, I explore some directions for policies that could reduce the eugenic impact of reproductive technologies.

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## I. EUGENICS AND BIRTH CONTROL

Eugenic control of procreation was inspired by the belief that the country was facing the "twilight of the American mind" and "the dusk of mankind."<sup>1</sup> The control of procreation was a biological solution to the biological problem of physically and mentally defective human beings. Francis Galton, who coined the term "eugenics" in 1883, believed that social ills were caused by innate defects in humans.<sup>2</sup> Inspired by the philosophy of Social Darwinists, who believed that society improved through biological evolution, Galton developed the theory of heredity to explain how undesirable traits were passed on from generation to generation. Heredity was the foundation of eugenics, defined by Galton as "the science which deals with all influences that improve the inborn qualities of the race...[and] develop them to the utmost advantage."<sup>3</sup> When Mendel discovered biological determiners (later called genes), he gave credibility to the eugenicists' argument that traits were purely biological.<sup>4</sup> Genes were perceived as the locus of social problems, and thus biology, specifically procreation, became the avenue for reform.

Controlling procreation was particularly appropriate at the turn of the century, when overpopulation became a concern. This concern was precipitated by the work of Thomas Malthus, who not only predicted that the world would become overpopulated, but that overpopulation would cause widespread poverty.<sup>5</sup> The white upper class of England and the United States, removed from poverty and painfully aware of their own declining birth rate,<sup>6</sup> interpreted the work of Malthus to mean that the poorer classes were procreating uncontrollably and would overrun their countries.<sup>7</sup> Fear spread that the superior members of society were rapidly becoming extinct, causing "race suicide" to occur.<sup>8</sup> This was compounded by the growing numbers of immigrants from Southern and Eastern Europe, who unwittingly served to exacerbate the fear that the privileged were losing their

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<sup>1</sup> LOTHROP STODDARD, *REVOLT AGAINST CIVILIZATION: THE MENACE OF THE UNDERMAN* 21 (1922). Lothrop Stoddard was a Harvard professor and theoretician of the eugenics movement.

<sup>2</sup> Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420 (1981).

<sup>3</sup> *Id.* at 1420.

<sup>4</sup> *Id.*

<sup>5</sup> T. MALTHUS, *THE PRINCIPLES OF POPULATION* (1807).

<sup>6</sup> Davis, *Racism, Birth Control and Reproductive Rights*, in *ALL AMERICAN WOMEN* 244 (J. Cole ed. 1986).

<sup>7</sup> P. SPALLONE, *BEYOND CONCEPTION: THE NEW POLITICS OF REPRODUCTION* 140 (1989). One of the early manifestations of this concern was "The Poor Laws" of 1838 and 1872 in England which forced the most destitute of the population into poor houses where married women and their husbands were separated. This means of population control was one of the early manifestations of eugenics. *Id.*

<sup>8</sup> Davis, *supra* note 6, at 244. The concept of race suicide was popular and even espoused by President Theodore Roosevelt, who publicly equated the native-born falling birth rate with "race suicide," and advocated that "race purity be maintained" in a 1905 speech. He admonished upper class white women in a 1906 State of the Union Address for "willful sterility-the one sin for which the penalty is national death, race suicide." *Id.* Lewis Terman, chief engineer of I.Q. testing, also interpreted the declining birth rate as a type of race and class suicide: "[T]he fecundity of the family stocks from which our most gifted children came appears to be definitely on the wane... It has been figured that if the present differential birth rate continues 1,000 Harvard graduates will, at the end of 200 years, have but 56 descendants, while in the same period, 1,000 S. Italians will have multiplied to 100,000." RUTH HUBBARD, *THE POLITICS OF WOMEN'S BIOLOGY* 182 (1990).

hegemony.

The social climate was ripe for a solution to "race suicide." Galton expanded upon the ideas of Malthus to address not only quantity, but quality of population. He believed that matters of reproduction should be left to scientists, and emphasized that eugenics should be used to reinforce and perpetuate the current social order.<sup>9</sup> Eugenics became well known as a reform movement which could both halt the effects of "race suicide" and further social evolution through positive and negative eugenic practices.<sup>10</sup>

Positive eugenics aimed to improve the gene pool by encouraging procreation among the white, educated, upper classes: those who possessed "socially desirable" traits. Negative eugenics accomplished the betterment of the gene pool through compulsory sterilization of the "socially undesirable," which included the feeble-minded, tramps, beggars, alcoholics, criminals, the insane, epileptics, physically deformed, the blind and the deaf.<sup>11</sup> Sterilization was the logical solution since reformers believed that the traits rendering people "socially undesirable" were genetic and inevitably passed down through the generations.

Eugenic reformers found evidence of "socially undesirable" traits through current scientific means, such as the I.Q. test.<sup>12</sup> The I.Q. test was originally developed in France to judge "natural" mental capacity and to define standards of mental development in order to target children who needed extra help. However, because the I.Q. test was developed within the same societal context that fostered the eugenic movement, it was subject to the same eugenic biases. Consequently, it was used in the U.S. to create a social hierarchy.<sup>13</sup> Anyone judged mentally defective was socially undesirable. Mental "defectiveness" and "social undesirability" became the core of social problems, which could be solved if procreation could be controlled enough to eliminate the "bad" genes. Often, the people judged as "mental defectives" were poor people, ethnic minorities and people of color.<sup>14</sup>

The eugenic reform movement was strongest between 1905 and 1935, influencing women's reproductive patterns and legislation. Upper class women were urged to procreate by organizations such as the American Eugenics Society in New Haven, which published material advocating that families best able to contribute to American life have more children.<sup>15</sup> Eugenicists Henry Goddard and Harry Laughlin were two of the most instrumental leaders of the legal reform movement. They gained much of their financial support from the Eugenic Records Office, the center of power and influence of the

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<sup>9</sup> SPALLONE, *supra* note 7, at 140.

<sup>10</sup> HUBBARD, *supra* note 8, at 192.

<sup>11</sup> D. SMITH, MINDS MADE FEEBLE: THE MYTH AND LEGACY OF THE KALLIKAKS 138 (1985).

<sup>12</sup> *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981) (discussing how scientific standards, such as the I.Q. test, are often construed to conform with societal prejudices).

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

<sup>14</sup> Lewis Terman, who introduced the I.Q. tests in the U.S., found that an I.Q. between 70 and 80 is "very common among Spanish, Indian and Mexican families... and also among Negroes. Their dullness seems to be racial or at least inherent in the family stocks from which they come... from the eugenic point of view they constitute a grave problem because of their prolific breeding." COREA, THE MOTHER MACHINE 18 (1985). Also, in 1912, the I.Q. tests found that 87% of the Russians, 83% of the Jews, 80% of the Hungarians, and 79% of the Italians tested were feeble minded, and thus sent back to their homelands. *Id.* at 27.

<sup>15</sup> AMERICAN EUGENICS SOCIETY, A EUGENICS PROGRAM FOR THE UNITED STATES 5 (no date) [hereinafter A EUGENICS PROGRAM].

American eugenics effort.<sup>16</sup> The two men began a campaign to pass laws mandating sterilization of anyone who fell into the category of "socially undesirable" or "mentally defective."<sup>17</sup> The first was passed in 1907 in Indiana, and by 1938, thirty states had followed and more than 27,000 compulsory sterilizations had been performed.<sup>18</sup> In 1927 the Supreme Court legitimized this effort when it upheld the right of the state to enforce sterilization against the will of a woman judged to be defective.<sup>19</sup> Laughlin and Goddard found another source of "mental defectives" in the rising numbers of immigrants arriving in the United States. They sought to halt the influx of "defectives" by lobbying for the passage of the Immigration Restriction Act.<sup>20</sup> Passed in 1924, the act resulted in the increased deportation of newly arrived immigrants.<sup>21</sup>

Unfortunately, the idea of improving the population and eliminating poverty through control of reproduction was also gradually embraced by the birth control movement.<sup>22</sup> Margaret Sanger, who coined the term "birth control," was the famed crusader for its acceptance. Although, initially, the movement for reproductive control was principally supported by Socialists, Sanger eventually severed herself and the birth control movement from the Socialist Party when she saw that the issue of reproductive freedom was not going to be a central issue for the left. The birth control movement could rally more political support from the eugenicists, who quickly understood that birth control could serve their purposes.

Thus the birth control movement became influenced by the eugenic danger of "race suicide."<sup>23</sup> In an article Sanger published in 1919, she defined the chief issue of birth control as "more children from the fit, less from the unfit."<sup>24</sup> The birth control movement began to advocate for the end of "race suicide" by the introduction of birth control among

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<sup>16</sup> SMITH, *supra* note 11, at 3.

<sup>17</sup> *Id.* at 138.

<sup>18</sup> *Id.* at 139.

<sup>19</sup> *Buck v. Bell*, 274 U.S. 200 (1927). In this famous decision, Holmes declared that "three generations of imbeciles are enough" when he allowed the compulsory sterilization of Carrie Buck. *Id.* at 207. Many years later it was discovered that Carrie Buck had been committed to a state institution because of her teenage pregnancy, and that both she and her only daughter had been of average intelligence. Stephen Jay Gould, *Carrie Buck's Daughter*, 7 NATURAL HISTORY (1984).

<sup>20</sup> Goddard directed the I.Q. testing at Ellis Island, and concluded that most immigrants were of low intelligence, completely denying or ignoring the possibility of bias in the test, or fatigue on the part of the immigrants. Smith, *supra* note 11, at 6. Laughlin was one of the most important lobbyists and witnesses at the Congressional hearing that preceded passage of the Immigration Restriction Act and was appointed "expert eugenical agent" of the House Committee on Immigration and Naturalization. HUBBARD, *supra* note 8, at 84.

<sup>21</sup> HUBBARD, *supra* note 8, at 84. Specifically, the Immigration Restriction Act was designed to decrease the proportion of poor immigrants from Southern and Eastern Europe so as to give predominance to Americans of British and northern European descent. This was accomplished by restricting the number of immigrants allowed into the U.S. from any one country in each calendar year to at most 2% of U.S. residents who had been born in that country, according to the Census of 1890. This date was chosen because it established as a baseline the ethnic composition of the U.S. population prior to the major immigration from eastern and southern Europe, which began in the 1890's. *Id.*

<sup>22</sup> L. GORDON, *WOMAN'S BODY WOMAN'S RIGHT* 207 (1977). The American birth control movement started around 1914.

<sup>23</sup> *Id.* at 284.

<sup>24</sup> *Id.* at 281.

Blacks, immigrants and the poor.<sup>25</sup> Sanger also articulated the movement's approval of compulsory sterilization, which was embraced as another means to reduce race suicide.<sup>26</sup>

The concept of "race hygiene," formulated by the eugenicists, became the basis of Nazi political philosophy and was the justification for a sterilization law in 1933 which later grew into a genocide law.<sup>27</sup> The Nazi eugenics program was directed against Jews, gypsies, lesbian and gays, and anyone else who could be defined as "inferior," racially or otherwise. After Hitler had demonstrated the tragic potential of eugenic ideas, the public became disenchanted with a movement which by then was based more on zeal and rhetoric than scientific principles.<sup>28</sup>

However, eugenics didn't disappear. Instead, it became recast as genetics.<sup>29</sup> The Eugenics Quarterly became the Journal of Social Biology; Annals of Eugenics became the Annals of Human Genetics.<sup>30</sup> People stopped talking about the improvement in human stock, and started talking about the improvement of the gene pool. Discussion of DNA and genes replaced talk of race and hereditary traits.<sup>31</sup> In addition, former eugenicists found a means to achieve their ends through a renewed and ostensibly less discriminatory movement for population control in the 1940s and 1950s.<sup>32</sup> Yet, the message was the same: genetic advances and control of reproduction will benefit society by eliminating the social and economic burdens caused by the unfit.

Eugenic principles easily lend themselves to reproductive technologies. In 1961, several elite members of the international scientific community espoused Galton's idea that human intervention was necessary for evolution, and that scientific authority should lead the

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<sup>25</sup> Davis, *supra* note 6, at 245. She writes that:

By 1919 the eugenic influence on the birth control movement was unmistakably clear. ...[T]he American Birth Control League heartily welcomed the author of *The Rising Tide of Color Against White World Supremacy* into its inner sanctum. Lothrop Stoddard, Harvard professor and theoretician of the eugenics movement, was offered a seat on the board of directors. In the pages of the ABCL's journal, articles by Guy Irving Birch, director of the American Eugenics Society, began to appear. Birch advocated birth control as a weapon to "prevent the American people from being replaced by alien or Negro stock, whether it be by immigration or by overly high birth rates among others in this country." [footnotes omitted]

*Id.* at 247.

Feminist historian Linda Gordon provides extensive proof of the confluence of the birth control and eugenic movements. She reports that eugenics became a constant dominant theme at the conferences organized by birth control activists, that the propaganda of the American Birth Control League became increasingly focused on eugenics, and the periodical "Birth Control Review" reflected the influence of eugenics from its inception in 1917. GORDON, *supra* note 22, at 116-301.

<sup>26</sup> Davis, *supra* note 6, at 248. Sanger proclaimed in a radio address that "Morons, mental defectives, epileptics, illiterates, paupers, unemployables, criminals, prostitutes and dope fiends" ought to be sterilized. The Birth Control League was an organization formed to further the movement toward acceptance of birth control, and also approved of the use of compulsory sterilization. *Id.*

<sup>27</sup> See HUBBARD, *supra* note 8, at 184-191.

<sup>28</sup> See SMITH, *supra* note 11, at 8. See also Cynkar, *supra* note 2, at 1425-26.

<sup>29</sup> See generally P. SPALLONE, *supra* note 7 (arguing that genetics and reproductive technologies were developed in the context of a eugenic science which persisted after World War II).

<sup>30</sup> *Id.* at 143.

<sup>31</sup> *Id.*

<sup>32</sup> COREA, *supra* note 14, at 19, 20.



direction of evolution.<sup>33</sup> Twenty years later, with the advent of "new" reproductive technologies, an advocate for in vitro fertilization (IVF) wrote a defense of the technology, also echoing Galton's idea. He argued that in order to engineer the future of the species, "women's reproduction" must be placed in the hands of scientists.<sup>34</sup> Scientist Gregory Pincus had already acted on the scientific community's concern for evolution. Concerned with the "problem" of overpopulation, he pursued research on a hormonal contraceptive, and developed the birth control pill. He was fulfilling what many geneticists had begun to argue was a moral imperative: the ethical duty to invent the type of evolution man desires with the aid of reproductive technologies.<sup>35</sup>

Even without reproductive technologies or genetic engineering, eugenics survived in the form of sterilization abuse. Twenty states still have compulsory sterilization laws on the books.<sup>36</sup> The Federal Department of Health, Education and Welfare (HEW) estimated that in 1972 between 100,000 and 200,000 sterilizations had been funded by the federal government.<sup>37</sup> One study, a few years later, estimated that 20% of all married Black women and 20% of Chicana women had been permanently sterilized, with a total of 43% of all women sterilized through federally subsidized program being Black.<sup>38</sup> Although HEW issued guidelines in 1974 to prevent involuntary sterilization, an ACLU survey of teaching hospitals in the United States found that 40% did not know of the HEW regulations.<sup>39</sup> Evidently, compulsory sterilization is yet another eugenic practice that has continued with the help of federal funds. Feminist Angela Davis points out that although one aspect of real reproductive control became impossible for poor women when the government stopped funding abortions, "[s]terilization continues to be federally funded, and free, to poor women, on demand."<sup>40</sup>

Evidence of scientists with eugenic beliefs, eugenic organizations, and continual sterilization abuse, should not be construed as an alarmist cry, harkening the downfall of society from the conspiracy of a few. The evidence does show, however, that reproductive

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<sup>33</sup> SPALLONE, *supra* note 7, at 141.

<sup>34</sup> *Id.* at 142. FROM CHANCE TO PURPOSE: AN APPRAISAL OF ETERNAL HUMAN FERTILIZATION was written by Clifford Grobstein. He is a respected expert witness to investigative committees for reproductive technologies, and has written for prestigious medical and scientific journals on these issues. Clifford Grobstein was not alone in his philosophy. When IVF pioneer Robert Edwards delivered the keynote Galton Lecture, named after Francis Galton, to the Eugenic Society Symposium in London in 1982, he, too, placed the new reproductive technologies among the tools of eugenics. *Id.* at 135.

<sup>35</sup> *Id.* at 141. This parallels the rhetoric of eugenics as articulated by Julian Huxley, who claimed that it was man's duty to further evolution. Huxley was a leading English eugenicist who continued to advocate for compulsory sterilization of all "mental defectives" during the Holocaust. HUBBARD, *supra* note 8, at 182.

<sup>36</sup> HUBBARD, *supra* note 8, at 183.

<sup>37</sup> Davis, *supra* note 6, at 252.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Davis supplies a tragic example: In 1973 the media exposed the tragedy of the Relf sisters, two Black girls aged twelve and fourteen from Montgomery, Alabama, who were surgically sterilized without their consent or their mother's consent. The girls and their mother were not informed what type of surgery was to be performed. Mrs. Relf assumed that the operation was connected to the continued injection of Depo-Provera, a birth control drug administered to the girls. The surgery had been ordered by a government funded community group after it was discovered that Depo-Provera caused cancer in animals. *See also* Relf v. Weinberger, 565 F.2d 722 (D.C. Cir. 1977).

technologies are more than a vehicle for the feminist goal of reproductive choice and can be used to achieve extremist goals of eugenics if we ignore what history has taught us. Reproductive technologies can share an aspect of eugenics by using medical science to fulfill social agendas. Like eugenics, reproductive technologies are about what sort of babies women will have; about influencing the quality as well as the quantity of the product, Galton's original goal.<sup>41</sup>

## II. PRENATAL SCREENING: SEARCHING FOR THE "PERFECT" BABY

### A. Types of Prenatal Screening

Negative eugenic decisions - decisions to abort children that will be born with a disability - can be made with the help of prenatal screening. The types of prenatal screening currently available and discussed here are amniocentesis, ultrasonography and chorionic villus sampling (CVS). Over 100 disorders can be detected, including cystic fibrosis, Down Syndrome, hemophilia, Huntington's disease, some types of muscular dystrophy, sickle-cell anemia, spina bifida, and Tay Sachs disease.<sup>42</sup> The power of prenatal testing is often misunderstood to mean that all women can now choose whether or not to give birth to a

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<sup>41</sup> Pregnant women and their babies are becoming increasingly commodified. Gena Corea supplies evidence of how women's babies are considered a product in current obstetrical literature:

For example, in attempting to justify a phenomenal rise in cesarean sections (almost quadrupling from 5% in 1968 to 18.5% in 1982), physicians argue - without supporting evidence - that they are getting "better babies" through surgeries. One doctor reported in 1976 that "Obstetricians today are much more interested in the product they deliver than the cesarean section rate." Another stated "What we have to do now is concentrate on quality control" in his explanation of a preconceptual counseling program.

COREA, *supra* note 14, at 74.

<sup>42</sup> Asch, *Reproductive Technology and Disability*, in REPRODUCTIVE LAWS FOR THE 1990s, at 82 (N. Taub & S. Cohen eds. 1989). Cystic fibrosis is the dysfunction of secreting glands, causing respiratory and digestive problems. THE CYSTIC FIBROSIS FOUNDATION, QUESTIONS AND FACTS ABOUT CYSTIC FIBROSIS; Down Syndrome is a chromosomal disorder that results in wide variations of mental retardation and about 1/3 of the time is accompanied by heart defects. NATIONAL INFORMATION CENTER FOR CHILDREN AND YOUTH WITH HANDICAPS, DOWN SYNDROME; Hemophilia is the inability of the blood to clot, and usually occurs in men, with women being the carriers. THE COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS, COMPLETE HOME MEDICAL GUIDE (1985); Huntington's disease is a neurological disease whose symptoms only occur in the middle of life; the symptoms begin as loss of motor and sensory control, progressively worsening and causing an early death. HUNTINGTON'S DISEASE FOUNDATION OF AMERICA, INC, HUNTINGTON'S DISEASE: AN OVERVIEW; Muscular dystrophy is a term that designates a group of muscle destroying disorders which vary in symptoms. THE COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS, COMPLETE HOME MEDICAL GUIDE; Sickle cell anemia is a blood disorder which deprives tissues and organs of oxygen, causing painful "sickle cell crises" and a shortened life span. *Id.* Spina bifida is a neurological disorder where the spinal cord forms abnormally, causing varying degrees of paralysis and usually bowel and bladder problems; 90% of all people affected with spina bifida have a long life span, and many live self-sufficiently. THE SPINA BIFIDA ASSOCIATION OF AMERICA, NOT SO TRIVIAL PURSUIT OF INFORMATION ABOUT SPINA BIFIDA; Tay Sachs disease is a fatal disorder that causes the progressive destruction of the central nervous system, causing the child to eventually lose all motor skills and senses, and to die by the time it reaches 4 or 5 years of age. THE NATIONAL TAY SACHS ALLIED DISEASES ASSOCIATION OF NEW YORK STATE, WHAT EVERY FAMILY SHOULD KNOW.

baby with a disabling condition. This overlooks the reality of disability. Most disability is not hereditary,<sup>43</sup> and most disabling conditions are caused by age, work environments, and accidents.<sup>44</sup> In addition, most of the infants born with a permanently disabling condition could not have had that disabling condition diagnosed before birth.<sup>45</sup> Thus, the existence of prenatal testing will not eliminate disabilities.

The type of prenatal testing often used to monitor pregnancy and, therefore, most easily used for eugenic purposes is amniocentesis. Amniocentesis is the drawing of amniotic fluid that surrounds the fetus in the womb by inserting a hypodermic syringe and needle near the pregnant woman's navel. The sample is then tested for specific chromosomal or neurological disorders in the fetus.<sup>46</sup> It can not be performed before 16 or 18 weeks of pregnancy, so results are not obtained until approximately the 20th week of pregnancy.<sup>47</sup> Ultrasound is used during amniocentesis to monitor the position of the fetus and the placenta while inserting the needle. Ultrasound uses high-frequency sound waves directed into the abdomen of the pregnant woman to produce an image of the fetus.<sup>48</sup> Used alone, ultrasound can reveal anatomical malformations of the fetal skeleton, nervous system, kidneys and other organs. Used with amniocentesis, ultrasound can detect over 100 disorders.<sup>49</sup> Both amniocentesis and ultrasound can determine the sex of the fetus by the second trimester.<sup>50</sup> Upon obtaining any undesired results, the woman may obtain a second trimester abortion, provided this is legal in the state where she lives.

In the last five years, physicians have used the prenatal images of the fetus to develop surgical procedures to correct disorders in the fetus.<sup>51</sup> Although most researchers still define these procedures as "experimental" and the procedures carry high risks to the mother, they are nonetheless used to correct such deformities as hydrocephalus ("water on the brain"), intestinal blockage, or an obstructed urinary tract.<sup>52</sup> Not only do the increasing rights of the fetus as patient have enormous implications for pregnant women's autonomy,<sup>53</sup> but the availability of a consistent monitoring device allows physicians to develop norms for

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<sup>43</sup> Finger, *Claiming All of our Bodies: Reproductive Rights and Disabilities*, in TEST-TUBE WOMEN 284 (R. Arditti, R. Klein & S. Minden eds. 1984). See NATIONAL INSTITUTE ON DISABILITY AND REHABILITATION RESEARCH, DATA ON DISABILITY FROM THE NATIONAL HEALTH INTERVIEW SURVEY 1983-85, at 32-33 (1988)[hereinafter DATA ON DISABILITY].

<sup>44</sup> See *infra* notes 76-78 and accompanying text.

<sup>45</sup> Asch *supra* note 42, at 82.

<sup>46</sup> HUBBARD, *supra* note 8, at 154.

<sup>47</sup> HUBBARD, *supra* note 8, at 154. The procedure entails a small risk of injury to the fetus or the placenta from the inserted needle, as well as a risk of spontaneous abortion of one out of every three or four hundred women tested. *Id.*

<sup>48</sup> R. BLANK, REDEFINING HUMAN LIFE: REPRODUCTIVE TECHNOLOGIES AND SOCIAL POLICY 60 (1984).

<sup>49</sup> See *supra* note 42.

<sup>50</sup> BLANK, *supra* note 48, at 60.

<sup>51</sup> Henifin, Hubbard and Norsigian, *Position Paper: Prenatal Screening*, in REPRODUCTIVE LAWS FOR THE 1990S, at 181 n.29 (N. Taub & S. Cohen eds. 1989).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Robertson, PROCREATIVE LIBERTY AND THE CONTROL OF CONCEPTION, PREGNANCY AND CHILDBIRTH, 69 VA. L. REV. 1105 (1983) (arguing that once a woman decides to carry out her pregnancy, she acquires legal obligations to ensure its well being).

fetal "behavior" past the recognition of abnormalities.<sup>54</sup> Given the example of how the original purpose of the I.Q. test - to help diminish developmental differences - was later distorted by social values,<sup>55</sup> the development of a standard for embryos could have dangerous ramifications.

Chorionic villus sampling (CVS) is a procedure still used experimentally, where the physician collects fetal cells by inserting a probe through the cervix into the uterus and snipping a small sample from the membranes surrounding the fetus.<sup>56</sup> The test must be performed during the first trimester, between the eighth and tenth weeks of pregnancy. The results are ready in a couple of days, as opposed to the two to four weeks for amniocentesis.<sup>57</sup>

Because CVS allows earlier results than amniocentesis, a woman could undergo a first trimester abortion. First trimester abortions are more likely to be legal and involve considerably less risk to the woman, so the decision to end the pregnancy may be easier. Although CVS is not yet commonly used, if it becomes a safe procedure performed routinely, its eugenic uses would be enhanced because of the speedier results. As techniques for prenatal screening become increasingly widespread and less risky, we will be forced to confront the dilemmas posed by being able to "choose" our babies.

### *B. Attitudes and Economics: Examples of Eugenic Influences*

Defining the abortion of a potentially disabled child as a negative eugenic practice is problematic since many women who make that choice are motivated by a lack of financial, emotional, or physical resources. Ending a pregnancy because of a potentially disabled child is a traumatic decision for most women, and they must be allowed to make it in a society where they will almost always be the ones attending to that child's special needs.<sup>58</sup> But an unquestioned acceptance of a woman's decision to abort does not have to mean an unquestioned acceptance of bias against the disabled that can shape her choice for abortion, especially since this bias can actually serve to limit a woman's reproductive choice by precluding the consideration of giving birth to a disabled child. The implications of judging a fetus "defective" and aborting it are enormous for our perceptions of the disabled, and for

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<sup>54</sup> HUBBARD, *Personal Courage Is Not Enough: Some Hazards of Childbearing in the 1980s*, in TEST-TUBE WOMEN 349 (R. Arditti, R. Klein & S. Minden eds. 1984).

<sup>55</sup> *Id.*

<sup>56</sup> HUBBARD, *supra* note 8, at 148.

<sup>57</sup> Henifin, *supra* note 51, at 161. Often CVS detects abnormalities of many fetuses that would abort spontaneously as the pregnancy progresses. *Id.* It involves a slightly greater risk of spontaneous abortion than does amniocentesis. It also included a greater chance of incorrect diagnoses because the cells that are removed from the fetal membranes do not always have the same chromosomal constitution as the fetus itself. HUBBARD, *supra* note 8, at 154.

<sup>58</sup> See generally B. ROTHMAN, *THE TENTATIVE PREGNANCY* (1986) (exploring the experiences of women who undergo prenatal screening and their reasons for deciding for or against abortion); see also Rapp, *XYLO: A True Story*, in TEST-TUBE WOMEN 302 (R. Arditti, R. Klein & S. Minden eds. 1984) (author gives first hand account of obtaining an abortion after learning that her fetus had Down Syndrome).

the disabled community.<sup>59</sup> The very existence of prenatal testing implicitly tells the disabled community that "we have enough like you."

To avoid perpetuating negative beliefs and stereotypes about the disabled, decisions to abort must be informed by the reality of disability. Although a woman's choice to abort should remain private, her choices are influenced by the information given or withheld, the current social mores, and pressure from physicians, friends, and relatives. This public domain can comprise a eugenic force, painting disabilities as worse than death which render humans useless and create a huge financial drain on the public fisc.<sup>60</sup> People are not always educated about the differences between diseases, nor the chances that a child may still grow into a happy, productive adult, despite a disabling condition. For example, the likelihood of a child being born with spina bifida or Down Syndrome can be predicted with certainty, but the severity of the condition cannot.<sup>61</sup> Ninety-five percent of Down Syndrome people have moderate to mild retardation;<sup>62</sup> consequently, most Down Syndrome children can be educated, trained for a job, and live independently. As disability rights advocate Adrienne Asch argues, "[T]he social construction of disability, like that of gender, demonstrates that it is the attitudes and institutions of the non-disabled, even more than the biological characteristics of the disabled, that turn these characteristics into handicaps."<sup>63</sup> In a social climate which tries to deny the existence of people with disabilities, and discriminates against them when this doesn't succeed, women and couples are pressured to abort less than perfect fetuses.

The pressure to abort often comes from obstetricians and genetic counselors. For example, in a study based in London, three-quarters of the obstetricians interviewed claimed that they generally require women to agree to termination of an affected pregnancy before proceeding with amniocentesis.<sup>64</sup> This poses problems for women unwilling to undergo abortion, as well as women who may welcome the birth of a disabled child but would like the results of amniocentesis to forewarn them of the event so they may prepare. Although in the United States it is generally understood that women are free to refuse both the amniocentesis and the abortion, there is strong encouragement from the medical establishment to have amniocentesis, as well as a strong presumption that the procedure is a standard part of prenatal care.<sup>65</sup> When women decide to forego amniocentesis, their

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<sup>59</sup> See generally Finger, *supra* note 43. Finger points out that many reproductive rights advocates argue for a use of the technologies that furthers the oppression of the disabled. Embryos and fetuses with disabling conditions are called "bad," the right not to have a "bad" fetus remains unquestioned, and the possibility of making reproductive technologies available for disabled women is virtually ignored.

<sup>60</sup> One example of attitudes about people with disabilities was found in an informal study where doctors were asked what things would be worse than death and their answers were: being paraplegic, being deaf, partially sighted, or not having both arms. Finger, *supra* note 43, at 288.

<sup>61</sup> Asch, *supra* note 42, at 82.

<sup>62</sup> Finger, *supra* note 43, at 288.

<sup>63</sup> Asch, *supra* note 42, at 72-73.

<sup>64</sup> Farrant, *Who's for Amniocentesis?: The Politics of Prenatal Screening*, in *THE SEXUAL POLITICS OF REPRODUCTION* 96, 113 (H. Homans ed. 1985). The author explains that this policy "reflects the medical and administrative view that the whole purpose of prenatal screening is the abortion of an abnormal foetus, and if the woman is not going to agree to an abortion then it is a waste of resources. As one obstetrician put it: 'It's a waste of money if she's not going to act on the information.'" *Id.* at 113.

<sup>65</sup> ROTHMAN, *supra* note 58, at 49-85 (1986).

decision can currently be viewed as socially acceptable because of the risk the procedure poses to the fetus, but as the procedure is refined or replaced by potentially safer technology women's decisions may be increasingly controlled by the medical establishment.<sup>66</sup>

Subtle control can be implemented through genetic counselors, who play an increasingly instrumental role in prenatal care and in influencing women's decisions to abort.<sup>67</sup> At risk women<sup>68</sup> are usually referred to genetic counselors at the beginning of prenatal care to explain prenatal screening procedures. The counselors inform women of problems detected through amniocentesis, often failing to inform them of the exact characteristics of the physical disability, the support available in the community for such a child, and resources for parents with disabled children.<sup>69</sup> In a 1973 study, genetic counselors proclaimed to use non-directive counseling,<sup>70</sup> yet 85% considered it important that counseling achieve prevention of disease or abnormality.<sup>71</sup> In a 1986 study, many proclaimed to be aware that their personal biases would inevitably be reflected in the advice they gave.<sup>72</sup> Nearly all of the genetic counselors would themselves abort for Down syndrome; half would abort for a disability that required use of a wheelchair (such as spina bifida); half would abort for blindness and one-third would abort for deafness.<sup>73</sup> Bias against those with disabilities could be fueled by the type of training they receive. Counselors are trained in the science of genetics and techniques of counseling, usually without adequate information about the reality of living with a disability.<sup>74</sup> But the attitudes of genetic counselors and obstetricians do not exist in a vacuum; their attitudes reflect biases against the disabled community held by much of society.

The justification for discriminating against the disabled is often supported by a cost efficiency argument. Disabled people are said to be a drain on society because they cannot lead a productive life that will contribute to society, and because the social cost of providing services for them is great.<sup>75</sup> The pervasiveness of these ideas undoubtedly contributes to women's anxiety in having a "perfect" baby, and influence their choices whether to abort.<sup>76</sup>

But economic arguments lose weight when we consider the widespread indifference

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 35. Genetic counselors are frequently used during the process of amniocentesis, and will ultimately reach everyone who seeks prenatal care. *Id.*

<sup>68</sup> Women are defined as "at risk" of giving birth to a disabled child when they are over 35, or when they are from families with histories of birth defects.

<sup>69</sup> Asch, *supra* note 42, at 89. Anne Finger argues that women considering aborting a disabled fetus should have the opportunity to talk to disabled people and the parents of disabled children. *See* Finger, *supra* note 43, at 288.

<sup>70</sup> Non-directive counseling is presenting information to clients while allowing them to reach their own decisions. ROTHMAN, *supra* note 58, at 40.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See* Asch, *supra* note 42, at 91, for a proposal of a non biased genetic counseling program.

<sup>75</sup> For example, Fletcher, a philosopher of ethics, writes "People free from genetic disorders would finally be able to live full lives and contribute a great deal more to society" (quoted in Asch, *supra* note 42, at 83). Many physicians argue that it is "morally irresponsible to give birth to children knowing they will be handicapped"; however, trying to prevent the birth of a handicapped child invades a woman's reproductive autonomy. Wachbroit, *Making the Grade: Testing for Human Genetic Disorders*, 16 HOFSTRA L.REV. 583, 595 (1988).

<sup>76</sup> Farrant, *supra* note 64, at 99.

to the causes of disability that occur after birth. Disability is strongly linked with increased age, with 50% of Americans over 65 having disabilities, compared to 10% under 21.<sup>77</sup> Most disability doesn't occur until mid or late adulthood and is caused by accidents, illness, stress, or workplace and environmental toxins.<sup>78</sup> The most frequent causes of work disability are heart disease, arthritis, back impairments, intervertebral disk disorders, and impairments of the lower extremities,<sup>79</sup> all of which are conditions that can be prevented. The United State's high rate of infant mortality and low birth weight could be greatly reduced with better prenatal care,<sup>80</sup> but is not. Moreover, the estimated costs of providing services to the disabled often presumes institutionalization,<sup>81</sup> when in reality institutionalization is not always a necessity. Overlooking disabilities arising from work or from low birth weight, along with their entailing costs, render the cost efficiency argument weak and inconsistent.

Cost efficiency arguments also lose weight because they parallel the economic justifications used by eugenic reformers. Authors of eugenic proposals in the United States pointed to the economic drain on society of the feeble-minded, the weak, the poor, and the handicapped, characterizing them as "useless eaters" and "superfluous people."<sup>82</sup> Mental deficiency was discovered to be at high levels in America's jails and slums, as well as among prostitutes, unwed mothers, and immigrants.<sup>83</sup> The notion that "defectives" were numerous

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<sup>77</sup> DATA ON DISABILITY, *supra* note 43, at 32-33. The likelihood of having a work disability is strongly related to age. Persons in the 55 to 64 age group are about four times as likely as persons in the 25 to 34 age group to have a work disability, and they are about five times as likely to have a severe work disability. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, LABOR FORCE STATUS AND OTHER CHARACTERISTICS OF PERSONS WITH A WORK DISABILITY (1989)[hereinafter LABOR FORCE STATUS]. These statistics are also important in the discussion of the cost of providing for the disabled, for the same survey showed that as the age of men with work disabilities rose, the rates of their participation in the workplace lowered. *Id.* at 7.

<sup>78</sup> See generally, LABOR FORCE STATUS, *supra* note 77 (providing statistics on various causes of disability and how the disability affects people's participation in the work force).

<sup>79</sup> Heart disease ranks first, causing 12.2% of work disability, followed by arthritis at 11.6%, back impairments at 9.8%, disk disorders at 6.1%, and impairments of the lower extremities at 5.1%. DATA ON DISABILITY, *supra* note 43, at 21.

<sup>80</sup> In 1985, the U.S. infant mortality rate was ranked nineteenth in the world. The U.S. Black infant mortality rate was ranked twenty-eighth, behind Cuba and Bulgaria, and equal to Costa Rica. AMERICAN HEALTH LAW 924 (Annas, Law & Rosenblatt, eds. 1990). In 1985, the U.S. experienced an increase in the proportion of infants born with low birth weight, infants born prematurely, and infants born with no prenatal care. *Id.* at 925. Low birth weight accounts for 2/3 of all infant deaths; it is widely recognized as the primary factor of the high infant mortality rate, and could be drastically cut by early and comprehensive prenatal care. Care of low birth weight and premature infants is costly, and if they survive they have been found to have a higher incidence of learning disabilities. *National Health Law Program - Cost Effectiveness of Prenatal Care*, 19 CLEARINGHOUSE REVIEW 259, 260 (1985).

<sup>81</sup> See, e.g., BLANK, *supra* note 48, at 80-81, citing the results of a study that claimed the cost of diagnosing one handicapped fetus is estimated to be less than one twelfth the cost of maintaining a resulting abnormal child in a public institution for 10 years. See also Farrant, *supra* note 64, at 100.

<sup>82</sup> SMITH, *supra* note 11, at 165.

<sup>83</sup> In Boston, a study of criminals found that less than 8% had normal intelligence; a Kansas prison reported that over 68% of the white inmates and more than 90% of the black inmates were morons; a jail in Virginia found that 64% of the inebriates and criminals arrested were feeble-minded...A study in Albany indicated that at least 85% of the local prostitutes were feeble-minded. A Pennsylvania field worker found that 98% of the

and dangerous to progress was supported by reformer Henry Goddard's seminal work on the Kallikak family.<sup>84</sup> The seriously flawed study created the concept of "the menacing moron," and concluded that morons were the cause of all social ills.<sup>85</sup> The idea was popular, believed even by social workers, since Goddard's primitive analysis and tools made his conclusion easily substantiated.<sup>86</sup> The eugenic reformers thus had much supporting evidence for their argument that defectives thwart human progress and cost the public an enormous sum for their care.<sup>87</sup>

Belief in the social and economic costs of mental defectives or morons was fundamental to eugenics. Mental defectiveness was largely defined by social norms and the desire for a societal scapegoat. As America industrialized, there was less room for those who had physical or mental limitations to adapt their work environment to their needs, and the disabled began to lose their formerly visible social roles.<sup>88</sup> Today the disabled have been cast as a social threat, just as the moron was a social threat during the era of eugenics. Just as eugenics is now perceived as incorrect, racist and classist, we should be skeptical about the search for the "perfect" baby.

### III. AID AND IVF: A EUGENICIST'S DREAM

Positive eugenic decisions can be made with the help of artificial insemination by donor (AID) and in vitro fertilization (IVF). With artificial insemination and in vitro fertilization, control of sperm in reproduction is surrendered to human choices and technology. The "power of the seed" was a recurrent theme in the eugenics movement, with the prevailing message being that ignorance, poverty and social pathology exist and are perpetuated through the seed.<sup>89</sup> It is questionable whether this belief has really disappeared with the advent of sperm banks holding only "good" seed from Noble Prize

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unwed mothers she studied were morons. *Id.* at 135.

<sup>84</sup> For a thorough examination and critique of Goddard's famous study see SMITH, *supra* note 11.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* Gradually criticism arose of Goddard's methods when it was discovered that his field worker, Elizabeth Kite, who was not a psychologist, physician, nor trained in any social science, made diagnostic decisions about the mental ability and personality characteristics of living or dead members of the Kallikak family. Goddard believed that, after a couple weeks of experience, his field workers could recognize the presence and degree of feeble-mindedness.

<sup>87</sup> See generally A EUGENICS PROGRAM, *supra* note 15.

<sup>88</sup> Finger, *supra* note 43, at 284. Finger explains:

Our history as disabled people has yet to be written. But from what I have been able to glean, I believe that in rural societies disabled people had far more of a social role than they have had in the more urban and industrialized world. The fact that folk tales and rhymes refer to "the simple"; that "the village idiot" was a stock figure; that blind and other disabled people appear in the myths and legends of many places, all indicate that in the past, disabled people had more of a daily presence in the world.

*Id.*

Finger goes on to describe the industrialization of our society, suggesting that the more standardized our work became, the more standardized the qualifications for workers became. Thus the disabled were excluded from the labor market, as well as the public eye.

<sup>89</sup> ROTHMAN, *supra* note 58, at 32-33.



winners.<sup>90</sup> The founder of the sperm bank, Robert Graham, wrote a book in which he proclaimed that the upper and middle classes should be encouraged to procreate, for they are the "repositories of every nation's intelligence and wisdom"; while the poor should be discouraged from continuing to produce their "deficient offspring."<sup>91</sup>

Artificial insemination is the fertilization of a woman with sperm through artificial means other than copulation. Frequently common items such as the famed turkey baster or a drug store syringe are used when the procedures are done privately. Since it is not a complicated procedure and can be performed without a physician, it is difficult to estimate how many babies are born as a result of AID. An estimate developed in 1984 puts the figure at 20,000 children conceived each year through artificial insemination.<sup>92</sup> That is up from an estimate of 6-10,000 children in 1979.<sup>93</sup> Approximately 1,500 of the children conceived through artificial insemination are born to unmarried women.<sup>94</sup> Its non-technological nature can be seen in its common use before physicians were regularly involved in the process. In 1959, thousands of women were estimated to have used AID because of their husband's infertility.<sup>95</sup>

When physicians are involved in AID, as many state laws mandate, they tend to control the quality of the sperm.<sup>96</sup> A 1979 survey of AID practitioners found that 80% of physicians use medical students or hospital residents as sperm vendors all or most of the time.<sup>97</sup> These and other sperm vendors "are a select group with presumably above-average health and intelligence," researchers noted in the *New England Journal of Medicine*.<sup>98</sup> Medical school professors also sell their sperm. They and younger medical personnel "are traditional donors and preferred because of their understanding the biologic need of the

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<sup>90</sup> In 1976, a businessman in California established a sperm bank called J. Muller Repository for Germinal Choice, which collected the sperm of Nobel prize winning men. The sperm bank was named after Dr. Hermann J. Muller, a Nobel prize winning geneticist, who in 1935 advocated a positive eugenics program through the establishment of sperm banks which would provide only "superior" sperm for artificial insemination. COREA, *supra* note 14, at 20-25.

<sup>91</sup> R. GRAHAM, *THE FUTURE OF MAN* 69-79 (1981).

<sup>92</sup> Vetri, *Reproductive Technologies and United States Law*, 37 INT'L. & COMP. L. Q. 505, 507 (1988).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> COREA, *supra* note 14, at 22.

<sup>96</sup> Vetri, *supra* note 92, at 518. No state mandates that the physician perform any screening tests. Donor selection is usually done by the donor, not the patient, and again, most donors are medical students. A certain amount of donor screening may be necessary to prevent the mother from contracting infectious diseases. *See* L. Andrews, *Alternative Modes of Reproduction*, in *REPRODUCTIVE LAWS OF THE 1990S*, at 376 (N. Taub & S. Cohen eds. 1989) (describing the problem of women who had been inseminated with donor sperm and then developed venereal diseases). Although some may like to see genetic testing of sperm mandated, this would significantly raise the cost of the procedure. *Id.* One approach would be to inform the woman of genetic testing capabilities so they can make an informed decision as to whether they would like these tests performed. Vetri, *supra* note 92.

<sup>97</sup> COREA, *supra* note 14, at 20 (citing a study by Curie-Cohen in 300 *NEW ENGLAND JOURNAL OF MEDICINE* 585, 585-590 (1979)).

<sup>98</sup> *Id.*

program, accessibility and selection with regard to health and intelligence."<sup>99</sup> In addition, recipients of this choice sperm must also meet certain qualifications. Fertility clinics often require that women requesting AID be married, emotionally stable, and have enough income to raise her child well. Thus, AID can be used to ensure that both biological parents are in the middle or upper class: the father, a medical student, and the mother, with enough of an income to satisfy the requirements of a physician.<sup>100</sup>

Unlike artificial insemination, IVF is a highly technical procedure that requires a physician, and as a result is much more costly. The procedure involves collecting eggs from the woman through surgery, placing them in a solution with freshly ejaculated sperm, incubating the mixture at the proper temperature, and waiting for fertilization. After the eggs have been fertilized and the resulting embryos have begun to divide, some of them are transferred into the woman's uterus.<sup>101</sup>

The possibilities for eugenic control with IVF are many, for not only can the quality or donor of the sperm be controlled, but so can the eggs and the uterus into which the eggs are planted be chosen. In a book of essays published as the result of the Eugenic Society Symposium in 1982, the editor, a Eugenic Society member, discusses a potential strategy to achieve negative eugenic goals through in vitro fertilization.<sup>102</sup> He states that it will be possible to determine the sex of the embryo before it is implanted into the mother's uterus, and suggests that only embryos of the desired sex be implanted. He believes a female embryo should not be implanted in a woman uterus when the female embryo's genetic father is affected with hemophilia, making the embryo a carrier of hemophilia who would pass the disease on to her male children, but never suffer from it herself!<sup>103</sup> This is tantamount to saying that if a woman is not going to bring perfect sons into the world, she will also be denied an existence.

IVF also lends itself to parenting by contract arrangements, known as surrogacy, which were introduced to the American public with the *Baby M* case.<sup>104</sup> Although it is beyond the scope of this paper to analyze the political complexities of surrogacy arrangements, surrogacy is certainly included as one of the reproductive technologies that has eugenic potential. Because it is a contracting arrangement performed for money, it conjures up the nightmare of Margaret Atwood's *Handmaid's Tale*, where working class women were

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<sup>99</sup> COREA, *supra* note 14, at 20 (quoting a 1980 American Fertility Society report). She also reports:

George Annas, chief of the health law section of Boston University School of Public Health, fired off a stinging criticism of the practice in 1979. Annas believes the physicians, in spreading their genes far and wide, are serving their own needs and not those of AID children. Lawyers, he believes, would likely choose law students as sperm vendors. Generals would view military academy cadets as superior human specimens. .."There can be little debate that physicians... are making eugenic decisions - selecting what they consider 'superior' genes for AID," Annas writes "in general they have chosen to reproduce themselves (or those in their professions)."

*Id.*

<sup>100</sup> *Id.* at 21.

<sup>101</sup> HUBBARD, *supra* note 8, at 200.

<sup>102</sup> Carter, *Eugenic Implications of New Techniques*, in DEVELOPMENTS IN HUMAN REPRODUCTION AND THEIR EUGENIC, ETHICAL IMPLICATIONS: PROCEEDINGS OF THE NINETEENTH ANNUAL SYMPOSIUM OF THE EUGENICS SOCIETY 205 (C.O. Carter ed. 1983).

<sup>103</sup> *Id.* at 209.

<sup>104</sup> In the Matter of *Baby M*, 537 A.2d 1227 (1988).

designated as the "breeders" or "wombs" for elite women.<sup>105</sup>

The process of IVF can potentially incorporate genetic engineering or therapy of the human embryo before it is implanted into the woman's uterus. The sophistication of genetic engineering has been largely misunderstood as being advanced enough to alter almost any human characteristic, including intelligence, by working on human embryos. In reality, the possibilities for genetic engineering are just beginning to be understood. Gene therapy is currently impossible for chromosomal disorders such as Down Syndrome, and the technique is much too rudimentary at this point to alter characteristics such as intelligence or physical strength. Although scientists have proclaimed that we are a long way off from incorporating genetic engineering into IVF procedures on a regular basis, both science and governmental communities recognize that the distinctions between genetic technology and eugenics will blur as the technology becomes more sophisticated and commonplace.<sup>106</sup>

#### IV. MORAL IMPLICATIONS OF REPRODUCTIVE TECHNOLOGIES

The eugenic potential of the reproductive technologies discussed above does not reside in the technologies themselves, but in the limits of our social thought and the stratifications of our social systems. Although women may welcome the arrival of more reproductive choices, and a new means to create alternative family structures, feminists have not welcomed the advent of reproductive technologies wholeheartedly, but have scrutinized the opportunities for further oppression.<sup>107</sup> Feminist criticism is warranted because, for the most part, it is not currently feminists who have the decision-making power over the use of these technologies.<sup>108</sup> To discover how the technologies can be used to provide choices without furthering inequities caused by class and race barriers and stereotypes about the disabled, we can ask the following questions: Why do we need reproductive technologies? How accessible are they financially and legally? What solutions can we advocate to minimize the eugenic potential of the technologies?

To some extent the eugenic nature of the technologies will continue as long as our society denies social and economic power to the poor, people of color, the disabled, and gays and lesbians. But if we consider the technologies and the purported "choice" they offer to women within the rubric of history, namely eugenics, we may be able to minimize the eugenic potential of the technologies. This discussion attempts to serve as a stepping stone for forging a humane policy which can reconcile two feminist goals: providing increased reproductive choice for women and avoiding the creation of a new human race.

##### A. *Why do we need them?*

Two reasons frequently given for needing reproductive technologies are a rise in the rate of infertility, and the unavailability of babies for adoption. Both reasons are not completely true. The overall incidence of infertility remained relatively unchanged between

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<sup>105</sup> See ATWOOD, *THE HANDMAID'S TALE* (1986).

<sup>106</sup> U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *HUMAN GENE THERAPY* (1984).

<sup>107</sup> See, e.g., G. COREA, *MAN MADE WOMEN* (1987).

<sup>108</sup> Both Ruth Hubbard and Gena Corea point out the power and the bias of the scientific community regarding the use of these technologies. See generally COREA, *supra* note 14; HUBBARD, *supra* note 8.

1965 and 1982 (the last date that compiled statistics are currently available).<sup>109</sup> There may be a perception that infertility has risen as the baby boom generation came of childbearing age, but this doesn't reflect a per capita increase in infertility.<sup>110</sup> Only one group experienced an increase in infertility: couples where the woman was between age 20 and 24.<sup>111</sup> This increase is linked to an increase in gonorrhea in this age group, a rate that tripled between 1960 and 1977.<sup>112</sup>

The number of babies available for adoption has not dropped. Stated more accurately, the problem is that, while there has always been a shortage of white infants compared to the need, now the number of white babies available for adoption is even smaller.<sup>113</sup> This shortage could result from the legalization of abortion in 1973,<sup>114</sup> and the increased accessibility of birth control for single men and women.<sup>115</sup>

But neither the unavailability of adoption nor any slight increase in infertility speak to a strong, if more mysterious, need for the reproductive technologies: the need to have one's "own" children. Desire for one's "own" children is accepted at face value in our culture and in most of the literature concerning infertility.<sup>116</sup> It may certainly seem pointless to explore motivations for the acts of childbearing and parenting, processes portrayed as a mystical and universal experience. However, within this desire lies the grain of truth in the eugenics movement: children's inheritance of their parents' characteristics. Although the eugenicists were wrong in their belief that every human characteristic is inherited, and certainly overzealous in their attempt to purge the human race of all "bad" genes (an impossible goal),<sup>117</sup> the fact remains that certain traits are genetic and inherited. Accuracy does exist in the belief that one's children retain at least some of their parents'

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<sup>109</sup> OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY, MEDICAL AND SOCIAL CHOICES, SUMMARY 1 (1988) [hereinafter INFERTILITY SUMMARY].

<sup>110</sup> *Id.*

<sup>111</sup> There was an increase from 3.6% infertile in 1965 to 10.6% infertile in 1982. *Id.* at 2.

<sup>112</sup> *Id.*

<sup>113</sup> Plumey, *Adoption: Where have all the babies gone?*, N.Y. Times, Apr. 13, 1980, § 6 (Magazine), at 34, col. 1.

<sup>114</sup> *Roe v. Wade*, 410 U.S. 113 (1973). From 1972 to 1985, the number of abortions for women aged 15-44 rose from a rate of 13.2 per 1,000 women to 28.0 per 1,000 women. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 66 (1990).

<sup>115</sup> Contraception for unmarried people was legalized with the Supreme Court decision *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>116</sup> *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES(1988)[hereinafter INFERTILITY].

<sup>117</sup> Geneticists now understand that negative eugenic policies, such as compulsory sterilization of the "socially undesirable," were inspired by the tendency to misapply the principles of inheritance to disorders which are the result of "a complex of genetic and environmental factors." WHEALE AND MCNALLY, *GENETIC ENGINEERING: CATASTROPHE OR UTOPIA?* 267 (1988). One example is the work of scientist Kallman, who argued that schizophrenia can be attributed to a recessive disorder in a single gene. He advocated the sterilization of schizophrenics and of relatives who were supposedly carriers of the genes, to "purge" the human race of schizophrenia. However, the frequency of carriers of the recessive genes (such as schizophrenia) is quite high compared to the frequency of the disorder. Complete eradication of the defective gene responsible for the condition would require the sterilization of one-fiftieth of the population. In addition, each of us carries between three and eight genes for lethal recessive disorders, which means that eradicating all recessive genes, a goal once espoused by the eugenicists, would threaten the survival of the human race. *Id.*

characteristics, which contributes to the cultural longing to give birth to one's "own" children. As one philosopher of ethics has argued, it is this cultural desire that the reproductive technologies are fulfilling, which is separate from an actual medical problem.<sup>118</sup> The actual medical problem is infertility, which remains unsolved even after the advent of reproductive technologies.<sup>119</sup> The cultural desire becomes a social problem when a desire to have one's "own" children is widely recognized as affecting the general population, but rarely discussed in relation to the disabled, gays and lesbians, the poor, or people of color.<sup>120</sup> Instead, the supposedly universal desire has become a luxury, available only for those who can afford it, and for those who enjoy recognition by the law.

*B. Who has economic access?*

Access to reproductive technologies is effectively denied to most people because of the cost. Like many sought after services and commodities, reproductive technologies are so high-priced that only the upper middle class is guaranteed access. For example, IVF costs \$2,000 to \$5,000 per attempt, with a maximum 30% success rate per attempt.<sup>121</sup> Surrogate motherhood costs approximately \$25,000, with an average of \$10,000 being paid to the surrogate, \$10,000 to the lawyer or other facilitator, and \$5,000 going toward miscellaneous costs such as medical expenses.<sup>122</sup> Even artificial insemination, the least technical procedure, can be costly. Insemination under the supervision of a physician costs approximately \$100 per insemination, with two or three inseminations done per month.<sup>123</sup> Clinics vary, taking an average of anywhere from 2.5 to 9.5 months for conception (thus ranging from \$500 to \$2850).<sup>124</sup> Even if a woman finds her own donor and performs the artificial insemination herself, she may wish to have medical screening (e.g., for AIDS), which can cost up to \$2,000.<sup>125</sup>

Equal access to prenatal screening is also precluded by its price. Estimates of the cost of amniocentesis range from \$400 to \$1000.<sup>126</sup> Amniocentesis for poor women is funded by Medicaid in all states, but, abortion is available through Medicaid in only 14 states. Many women who do not have private health insurance are also ineligible for Medicaid, and thus

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<sup>118</sup> These are the thoughts of Leon Kass, summarized in T. SHANNON, *WHAT ARE THEY SAYING ABOUT GENETIC ENGINEERING?* 64 (1985).

<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., *INFERTILITY*, supra note 116. *But see* Note, *Developments - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (discussing the availability of reproductive technologies such as AID to lesbians and gay men).

<sup>121</sup> L. ANDREWS, *FEMINIST PERSPECTIVES ON REPRODUCTIVE TECHNOLOGIES*, Appendix A at 4 (1989). This success rate is an estimate from the information provided by the clinics, many of whom count as successes pregnancies that end in miscarriage or "pregnancies," where the sperm fertilizes the egg, but a successful implantation into the woman never occurs.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

cannot afford amniocentesis.<sup>127</sup> Thus, poor women are denied the choice seen as crucial for the class of women that can afford both amniocentesis and abortion: the chance not to have a "defective" baby.<sup>128</sup> The subtle emphasis on healthy babies for those who can afford it echoes the urging of the American Eugenics Society for the "best" families to have more children,<sup>129</sup> since the "best" families will have "better" children. Since poverty disproportionately affects women of color and disabled women, many of these women are effectively denied access not only to prenatal screening, but to the other reproductive technologies as well.

Stereotypes about poor women - such as the misperception that poor women of color are having too many babies, furthering their own poverty and our welfare expenses - justify the denial of economic access to poor women. Poor women, especially poor women of color, are seen as needing contraception, not technology to aid reproduction. The current debate over the uses and abuses of Norplant, a newly released long-term birth control device which is implanted under the woman's skin, serves as a fine example. Shortly after FDA approval of the device had been made public, the *Philadelphia Inquirer* published an editorial advocating the use of Norplant as a way of reducing the welfare burden caused by the high fertility of the African-American underclass.<sup>130</sup> The resulting public uproar, as well as dissension among the newspaper's staff, eventually prompted the head of the editorial board to retract the editorial, conceding that the editorial had been too divisive.<sup>131</sup> This is a far cry from a meaningful apology, suggesting that the author of the article holds fast the eugenic notion that the underclass cause their own poverty and create a financial drain on society.

Norplant has also recently been ordered as punishment for an Afro-American woman found guilty of child abuse.<sup>132</sup> Such action is arguably another version of compulsory

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<sup>127</sup> Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in *REPRODUCTIVE LAWS FOR THE 1990S*, at 31 (N. Taub & S. Cohen eds. 1989).

<sup>128</sup> This is further illustrated by the failure of Medicaid to pay for adequate prenatal care, contributing to the occurrence of more low birth weight babies for black women than for white women. Between 1960 and 1987 the total percentage of babies born with low birth weight has lowered, from 6.8% to 5.7% for white women, and from 12.8% to 12.7% for black women. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE U.S.* 66 (1990).

<sup>129</sup> See *supra* note 15 and accompanying text.

<sup>130</sup> *Philadelphia Inquirer*, Dec. 12, 1990, at 18A, col. 1.

<sup>131</sup> ACLU Reproductive Freedom Project, *Philadelphia Inquirer Retracts Norplant Editorial*, Vol. III, No. 1 of Reproductive Rights Update (1991). See Sheldon Segal, *Norplant Developed for All Women, Not Just the Well-To-Do*, N.Y. Times, Jan. 6, 1991, Letters to the Editor, Editorial Page, col. 4. Sheldon Segal invented the implant contraception, and in his letter to the Times decried any mandatory classist, racist use of Norplant.

<sup>132</sup> ACLU Reproductive Freedom Project, *California Judge Orders Woman to Take Norplant*, Vol. III, No. 1 of Reproductive Rights Update (1991). The Project reports:

On January 3, 1991, California Superior Court Judge Howard Broadman ordered Darlene Johnson, a Black woman convicted of child abuse, to serve one year in jail and three years of probation. As a condition of her probation, Judge Broadman ordered the surgical implantation of Norplant, the long-lasting contraceptive recently approved by the FDA....The ACLU Reproductive Freedom Project, which is assisting Ms. Johnson's counsel, opposes the sentence on the grounds that it violates constitutional protections of privacy, liberty, reproductive choice, and bodily integrity.

sterilization for the "socially undesirable," suggesting that a eugenic and unjust system of punishment has prevailed. Abuses of Norplant dramatically illustrate how control of procreation can become a tool to achieve political goals, such as the punishment or deterrence of child abusers, or a reduction in welfare expenditures. Thus, while Norplant may bring increased reproductive choice to some women, for poor women of color, Norplant is used to bar reproductive choice.<sup>133</sup>

By contrast, lack of economic access for the disabled seems justified by the virtual silence of any public debate on the issue of the disabled as parents. The beliefs that the disabled don't want children, cannot be good or capable parents, and should not be genetic parents and pass down "undesirable" characteristics serve to legitimate financial barriers to reproductive technologies.<sup>134</sup> The undervaluation of reproductive freedom for the poor, women of color, and disabled women is furthered by not only the high prices of reproductive technologies, but by societal stereotypes as well.

### C. Who has legal access?

Legal access to resources is always a political issue, no less so when the resources are reproductive technologies. Perhaps access to reproductive technologies is inherently more political because the issue implicates the future of the race, giving people a very powerful method to act out their biases against the poor, the disabled, lesbians and gays, and people of color. In spite of the profound questions these technologies raise, they are not regulated by the government, and have earned only scant attention from the courts.<sup>135</sup>

One of the principle eugenic aspects of artificial insemination is the limited availability to alternative families, such as lesbian couples and single women.<sup>136</sup> While all the state statutes sanction the use of AID by married women, most states have statutes which can be interpreted as disapproving the procedure for unmarried women or as leaving the question open.<sup>137</sup> The large majority of statutes require that artificial insemination be done by a

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<sup>133</sup> I understand the argument that these women sentenced to Norplant had a "choice" between Norplant or a prison sentence, but I am not willing to believe that this "choice" is of the same caliber as a reproductive choice where there is no element of coercion or imprisonment.

<sup>134</sup> Asch, *supra* note 42, at 102.

<sup>135</sup> The exception is genetic engineering, which is not per se a reproductive technology. The Federal Government has considered policy issues in this area. *See, e.g.*, PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *SPLICING LIFE: THE SOCIAL AND ETHICAL ISSUES OF GENE ENGINEERING WITH HUMAN BEINGS* (1982).

<sup>136</sup> My use of the word "alternative" to describe family arrangements of single women or lesbians is not meant to imply that this type of family organization is truly unusual or new, or that a heterosexual nuclear family is more "normal."

<sup>137</sup> Vetri, *supra* note 92, at 512. The statutes expressly limiting artificial insemination to married women are CONN. GEN. STAT. ANN., § 45-69g(b) (1990); KAN. STAT. ANN., § 23-128 (1990); OKLA. STAT. TITLE 10, § 551 (1991). *Id.* The following statutes provide for the artificial insemination of women who are not married to the donor: OR. REV. STAT., § 677.365 (1989); WASH. REV. CODE ANN., § 26.26.050 (1990); N.J. STAT. ANN., § 9:17-44(b) (West 1990); TEX. FAM. CODE ANN., § 12.03 (Vernon 1991). Specifically, these statutes deny a man who has donated sperm to a married woman any parental rights. One commentator has listed these statutes as providing for the use of artificial insemination by unmarried women. *See Vetri supra* note 92, at 512. This could be because the words used referring to the participants are not wife and husband (*See e.g.*, ILL. ANN. STAT. ch. 40, para. 1453 (Smith-Hurd 1990)). However, my reading of the statute is that they provide use of artificial

physician or under the supervision of a physician. Others encourage the use of doctors by limiting the benefits of the law to those who use doctors.<sup>138</sup>

While denial of legal access may seem of little practical consequence to single or lesbian women, given that the procedure can be performed at home, their exclusion can cause perplexing legal problems. One of the original purposes behind the state laws was to protect the woman from paternity claims from the sperm donor. The laws achieve this by specifying that the legal husband of the woman undergoing insemination is also the legal father. This recognizes only one type of family arrangement, and limits legal protection to these legally sanctioned arrangements. Ironically, it is because single women or lesbians do not fall into the legally recognized family structure that they are more likely to need this type of technology if they wish to have children, and may be more likely to be vulnerable to a challenge by a donor.

For example, in *Jhordan v. Mary K.*,<sup>139</sup> when an unmarried woman inseminated herself with a donor's sperm, the court decided that the donor had the rights and the responsibilities of a father, in spite of the woman's testimony that she never wanted the donor to fulfill the role of father.<sup>140</sup> The court based their decision on the fact that the woman had not used the services of a physician, which is mandated by the statute; thus, the woman was not afforded any legal protection, and the donor was allowed the rights of a father.<sup>141</sup> However, the California statute, by specifying that a wife must deliver a donor's sperm to a physician, makes no provision for unmarried women.<sup>142</sup> The denial of legal recognition or protection for an unmarried woman is in effect almost a proscription against self-insemination, since the law doesn't acknowledge or respect her desired family arrangement.

This lack of legal protection may unfairly cause some unmarried women to think twice about undergoing the procedure. Although denying single women and lesbians legal access may not affect either their ability or propensity to undergo the procedure, the refusal of AID laws to recognize alternative family structures perpetuates the myth that there is only one type of family. The laws further negative beliefs about any alternative family structure through the implicit message that lesbians or single women cannot cope with parenthood, or that these women will pass on some socially undesirable or unacceptable lifestyles or beliefs.

In vitro fertilization per se is barely regulated by the state or federal governments. Some state laws regulating AID or embryo research could be applied to IVF, although not intended to regulate that procedure. For example, AID laws could regulate relationships with a donor of semen; surrogacy laws could regulate relationships with the woman who

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insemination for women unmarried to the donor, not necessarily to all unmarried women. The exception to this could be the Oregon statute, which reads: "Artificial Insemination shall not be performed upon a woman without her prior written request and consent and, *if she is married*, the prior written request and consent of her husband." OR. REV. STAT., § 677.365 (1989)(my emphasis).

<sup>138</sup> Vetri, *supra* note 92, at 518.

<sup>139</sup> 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (Cal. App. 1986).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> CAL. CIV. CODE § 7005(a)(West 1990).



carries the child; and fetal research laws could regulate the status of the fetus.<sup>143</sup> A few states mention IVF as a health benefit that must be included in health insurance packages,<sup>144</sup> or which does not have to be included.<sup>145</sup> Most states have not explicitly dealt with the existence of IVF. The potential legal issues concerning IVF are many and complicated, for the procedure allows for the manipulation of the sperm, the ova, and the gestator.

One emerging issue that seems particularly apt for eugenic manipulation is the status of the embryo. This issue has been touched on by the Louisiana legislature and a Federal Ethics Advisory Board. The Louisiana law considers an embryo created through IVF a juridical person until implantation so that in any disputes over the embryo, the courts must decide what is in the best interest of the embryo.<sup>146</sup> Given that the only legal structure courts have for defining an embryo's interest is the slippery standard of the "best interest of the child," it seems predictable that courts will continue to interpret a child's "best interest" as being a member of a legally sanctioned family arrangement. For example, the Louisiana statute allows the genetic parents to renounce their rights to the embryo, but only to another married couple.<sup>147</sup> In addition, the courts may be required to play an increasingly active role now that embryos can be frozen or stored.<sup>148</sup> The status of these "extra" embryos can cause conflicts during a divorce or a custody battle, thus inviting legal intervention.<sup>149</sup> Until alternative family arrangements are recognized as legitimate by the courts, it seems unlikely that either single women or lesbians will be allowed access to this technology.

Another example of how the legal definition of family limits access to IVF is found in the original stipulations of the Ethics Advisory Board of the Federal Department of Health, Education, and Welfare. The Board concluded that IVF and embryo transfer research would be federally funded so long as embryos were not kept for more than 14 days, and embryo transfers<sup>150</sup> were done only if the ovum and the sperm were provided by married couples.<sup>151</sup> The Board was dissolved when President Reagan came into office and was not

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<sup>143</sup> Twenty-five states have passed laws restricting fetal experimentation, but many of the laws would not necessarily affect IVF because the laws discuss the fetus in the context of abortion, such as restricting research after an abortion. Vetri, *supra* note 92, at 523.

<sup>144</sup> See ARK. STAT. ANN. § 23-85-137 (1990) (mandating coverage of IVF under disability insurance); HAW. REV. STAT. § 431:10A-116.5 (1990) and TEX. INS. CODE ANN. § 3.51-6 (Vernon 1991) (mandating coverage of IVF under insurance policies which include pregnancy related benefits).

<sup>145</sup> See CAL. HEALTH & SAFETY CODE § 1374.55 (West 1990) and MD. ANN. CODE art. 48A, § 354DD (1990) (mandating the exclusion of IVF under health insurance policies). See also KY. REV. STAT. ANN. (Baldwin 1990) § 311.715 (providing that no public funds shall be used for IVF).

<sup>146</sup> LA. REV. STAT. ANN. § 9:121-133 (West 1990).

<sup>147</sup> *Id.*

<sup>148</sup> Vetri, *supra* note 92, at 524. This refers to frozen embryos kept in storage, usually at IVF clinics.

<sup>149</sup> Davis v. Davis, 1991 West Law 32311 (Tenn. App.), is a case where a couple in the middle of divorce is litigating about which of them can claim as their own seven frozen embryos they engendered together.

<sup>150</sup> Embryo transfer is a process by which an embryo is removed from a woman and implanted into another woman.

<sup>151</sup> ETHICS ADVISORY BOARD, U.S. DEPT. HEALTH, EDUCATION AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER (1979).

reconstituted until late in 1988. To date there has been no federally funded IVF of embryo research, nor has any federal policy been articulated.<sup>152</sup>

Recently, however, a Congressional Committee has held hearings on consumer protection for users of IVF, and commissioned a survey of the 146 IVF clinics in the United States.<sup>153</sup> This illustrates who merits legal protection: the consumers. In the case of IVF, the consumers are not the poor, single or lesbian women, women of color, or the disabled - groups without legal power or significant recognition. The consumers belong to the class and race of people that the eugenicists spent a great deal of energy encouraging to procreate during the eugenics movement - the white, upper and middle class. With the exception of the few state statutes mentioning IVF, there is no existing mechanism regulating the goods or services of the IVF clinic, except the clinics themselves and the high cost of the services. Both the high cost and the tendency to allow only the legally sanctioned families to benefit from this procedure contribute to the eugenic potential of IVF.

The potential for prenatal screening to be legally regulated is not commonly discussed. Yet the legal status of prenatal screening, whether it's mandated or whether it remains inaccessible to many women, can have a eugenic impact. One ethical philosopher suggests that prenatal screening be mandatory, worrying that most people are too distracted with the vicissitudes of daily life to really pay any attention to the future of the human race.<sup>154</sup> Mandatory prenatal screening would have somewhat obvious ramifications on women's ability to choose, for it is doubtful that this type of screening would be mandated without at least implicit, if not explicit, coercion to abort the "defectives." Another commentator recognizes the implementation of state laws mandating prenatal testing as limiting freedom of women, but suggests that prenatal testing be mandated indirectly by imposing tort liability on women whose failure to use it results in harm to their children.<sup>155</sup> A California appellate court illustrated this form of legal coercion in *Curlender v. BioScience Laboratories*,<sup>156</sup> where they suggested that a mother can be sued by her child for not preventing its birth if she had prior knowledge of the probability of its being born "defective."<sup>157</sup> The court reasoned that it saw no "sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."<sup>158</sup> Although this reasoning has not yet been adopted in an actual decision, it articulates beliefs about people with disabilities and the responsibilities of pregnant women to have the "perfect" baby.

Underlying the legal and economic issues of access to reproductive technologies are the prejudices of social values. Without any formal legal equality for groups traditionally without power - women who are disabled, poor, lesbians, Black or Hispanic - reproductive

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<sup>152</sup> HUBBARD, *supra* note 8, at 201.

<sup>153</sup> *Consumer Protection Issues Involving IVF Clinics: Hearing Before the Subcommittee on Regulation, Business Opportunities, and Energy of the Committee on Small Business*, 101st Cong., 1st Sess. (1989).

<sup>154</sup> G. SMITH, *THE NEW BIOLOGY: LAW, ETHICS AND BIOTECHNOLOGY* 75 (1989).

<sup>155</sup> Robertson, *supra* note 53, at 448. The author cites as precedent *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1980), where a child successfully sued his mother for negligence because she took tetracycline while pregnant, causing him to be born with discolored teeth.

<sup>156</sup> 106 Cal. App.3d 811, 165 Cal. Rptr. 477 (1980).

<sup>157</sup> *Id.* at 829, 165 Cal. Rptr. at 488.

<sup>158</sup> *Id.*

technologies will continue to be regulated according to social ideas reflecting deeply rooted eugenic notions. Groups of women without a political voice will effectively be denied the fulfillment of a desire seen as universal - to have one's own children. On an individual level, this may not seem compelling. However, in a broader social context denying access to these women is a form of eugenics, where selective procreation becomes a political tool for weeding out those with "socially undesirable" traits.

## V. DIRECTIONS FOR POLICY

Two perspectives should be considered in an attempt to minimize the eugenic potential of reproductive technologies. First, more equitable approaches exist for solving the problem of infertility, such as laws that recognize the existence and right of alternative family structures to have children, the improvement of adoption services, or the education of genetic counselors as to the realities of living with a disability. Second, and perhaps more complicated, is confronting the societal reluctance to regulate these technologies, as well as trying to answer some of the profound questions they pose.

Making birth control devices safer and educating the public about sexually transmitted disease would be a step toward a more equitable approach to diminishing the problem of infertility. A significant percentage of infertility is linked to sexually transmitted diseases, and thus can be prevented. Sexually transmitted diseases are a principle cause of blocked or scarred fallopian tubes, which accounts for 20% of infertility among women.<sup>159</sup> Infection from intrauterine devices is also attributed to a cause of infertility. Studies have shown that women who have used intrauterine devices at some point in their life were twice as likely to suffer from tubal infertility than women who never used the device.<sup>160</sup> Most infertility is of undetermined cause in both males and females. If funding is increased for research, additional causes of infertility could be revealed, and consequently additional preventive measures could be identified.<sup>161</sup>

The United States Office of Technology Assessment has outlined methods to combat infertility, such as amending the Public Health Service Act<sup>162</sup> to authorize funds for the prevention of infertility; evaluating Federal efforts to prevent infertility; establishing a demonstration project for identification of risks for infertility; and enhancing education in reproductive health.<sup>163</sup> Ironically, it is the Office of Technology Assessment that is wrestling with problems of infertility, and not an office of Health and Human Services. This aptly illustrates how reproductive technology is responsible for bringing infertility to the forefront of public concern. The suggestions made by the Office are worthwhile, yet they extend a caveat: although the Secretary of Health and Human Services has the authority to support and develop such programs, "[s]uch activities have not been prominent...and in the

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<sup>159</sup> INFERTILITY SUMMARY, *supra* note 109, at 4.

<sup>160</sup> INFERTILITY, *supra* note 116, at 67.

<sup>161</sup> *Id.*

<sup>162</sup> 42 U.S.C. § 247(c). This statute authorizes federal funding for the control and prevention of sexually transmitted diseases.

<sup>163</sup> INFERTILITY SUMMARY, *supra* note 109, at 17-18.

absence of Congressional action this situation is likely to continue."<sup>164</sup> Congressional action is necessary if the government wishes to avoid the hypocrisy of calling infertility "an important personal and societal problem" that "frustrates the most basic human desire," while reserving action only for the protection of IVF consumers.<sup>165</sup>

The Office of Technology Assessment also considered issues of access, discussing the barriers posed by high costs. Among the policy options outlined are amending the existing Federal Medicaid Program to add a new reimbursement category for services related to the diagnosis and treatment of infertility, and facilitating adoption.<sup>166</sup> Currently, under the Medicaid program, it is possible to receive reimbursement for infertility diagnosis and treatment if a person fulfills the requirements of "needy," and if the State has a policy which allows reimbursement for these claims. Most states do not have such a policy. Amending Medicaid coverage would establish a consistent national policy for infertility diagnosis and treatment. This would have its primary impact on poor women.

An improvement in services for the disabled could occur through a revision of the Medicare program. The Office of Technology Assessment pointed out that it is possible to receive reimbursement for infertility diagnosis and treatment if a person has received Social Security disability benefits for more than two years and consequently was entitled to Medicare coverage.<sup>167</sup> No information was available as to how many disabled individuals of reproductive age have actually sought or received this coverage. It's possible that infertility treatment is not commonly sought since Medicare procedures do not identify which infertility procedures are covered and how much they cost.<sup>168</sup> No amendments to Medicare were suggested.

Amendments to Medicare or Medicaid which incur extra cost are probably not feasible in today's political climate. With the cost of the war in the Persian Gulf,<sup>169</sup> the huge state and federal budget deficits, and the inclination to view social programs more conservatively, i.e. as a waste of money, devising a new category for Medicaid or Medicare reimbursement would likely fail to garner widespread political support. This holds true even though the Office of Technology conceded that "[i]f Congress takes no action, then access to physicians and diagnostic and medical care for infertility will continue to be determined by individual financial resources and geography. This may lead to an inequitable distribution of infertility services among socioeconomic classes. . . ."<sup>170</sup>

A more viable solution for providing children to couples who desire a family could be the facilitation of adoption. Currently, adoption through a public agency can entail a wait of two to ten years and stringent eligibility criteria and private, independent adoption can

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<sup>164</sup> *Id.* at 17.

<sup>165</sup> *Id.* at 1.

<sup>166</sup> *Id.* at 20, 21.

<sup>167</sup> *Id.* at 20.

<sup>168</sup> *Id.*

<sup>169</sup> Pear, *The Federal Budget: The Overview; President Submits Spending Package Tied to Optimism*, N.Y. Times, Feb. 5, 1991, at A1, col. 1. President Bush submitted a budget to Congress with the estimated cost of the Persian Gulf war at \$12.8 billion. However, the war is estimated to cost at least \$500 million a day, which far exceeds the budget's assumptions. *Id.*

<sup>170</sup> INFERTILITY SUMMARY, *supra* note 109, at 20.

be expensive and take from six months to five years.<sup>171</sup> Options posed by the Office of Technology Assessment for Congress to facilitate adoption include creating a national data base of adoptable children, and removing barriers to the adoption of children with physical or mental handicaps, older children, or children of a different race.<sup>172</sup> The Office notes that many children are never adopted because individuals find the prospect of an interracial family, a difficult adjustment period for an older child, or a lifetime of care for a handicapped child to be too daunting. Supportive services could make the process of adoption for such families more appealing.<sup>173</sup> However, just as IVF services are limited to married couples with a stable income, the availability of adoption services provided by the government could be limited to families that conform to the legally sanctioned family arrangement.

Implementing any of the policies outlined above requires the confrontation of deeply held biases. Changing the legal structure in order to recognize the existence of alternative family arrangements ultimately depends on some degree of change in social values and the social acceptance of alternative family arrangements. Likewise, for more education about the disabled to exist, and for doctors and genetic counselors and the public to regard prenatal screening as more than insurance against a "defective" baby, the disabled must be accepted. Laws that recognize alternative family structures and education about the lives and abilities of the disabled are crucial in lessening the eugenic impact of reproductive technologies, but accomplishing these goals challenges persistent prejudices and eugenic beliefs. A public scrutiny of these prejudices and beliefs is necessary in order for our legislatures to begin consideration of such policies.

However, any reluctance to implement the policies mentioned goes beyond prejudice against alternative family arrangements and the disabled. The way we think about these technologies is inextricably linked to acceptance of economic privilege in our society, along with notions of progress and a belief that scientific discoveries bring a politically neutral and positive progress. But science necessarily exists in and consequently perpetuates the economic and social stratifications of our society. We are trapped in an economic and social system that dictates progress at all costs, and ensures freedom, in this case reproductive freedom, for those who can afford it. Although we may recognize that the technologies only increase reproductive choice for certain members of our society, our society holds any type of freedom so dear that we are hesitant to deny it to anyone, even the privileged. Although I would like to argue that research and development of reproductive technologies halt altogether, or at least until we have a thoughtful policy, I do not believe this is possible any more than a return to a non-nuclear world. Instead, I urge us to examine the inequities created by the reproductive technologies as an illustration of the flaws in our notions about economic privilege and the sanctity of science.

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<sup>171</sup> *Id.* at 21.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

## CONCLUSION

The point of discussing reproductive technologies in the context of eugenics is to spark awareness of the power of our stereotypes and prejudices. Although prejudice always is politically powerful, in the case of reproductive technologies, prejudice has the power to create a homogeneous, white, middle and upper class population. It may be far-fetched to predict the extinction of the entire population of the poor, the disabled, people of color and gays and lesbians; but eugenics should remind us of the political nature of reproduction, and highlight the oppressive potential of reproductive technology. Our attitudes about the disabled cause pregnant women to worry about the "perfect" baby, and encourage unquestioning acceptance of the label "defective" or "flawed" for a fetus. The power of the dollar and a belief that poor women and women of color have too many babies contributes to an acceptance of the market as regulator for IVF. Attitudes about single women or lesbians lead us to accept unchallenged laws limiting the use of AID to married women. Technology to reproduce is not neutral or harmless, but deeply intertwined with these ideas. We must purge ourselves, not of people labeled "defective," but of one of the true sources of defectiveness - our eugenic biases and our acceptance of rights inherent in economic privilege.

