

Natural Law, Comparative Law and Eugenics

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INTRODUCTION

The comparative legal experience of the twentieth century demonstrates, in certain jurisdictions and at diverse periods, efforts to institutionalise and implement laws that recognised and promoted the practice of eugenics. Germany's well-known program aimed at an improvement in the racial stock through a variety of measures and laws all thought progressive at the time and designed to limit the 'degenerate', 'diseased', 'depraved' and 'undesirable.' These categories famously included the disabled, Jews, gypsies, political dissidents, homosexuals and numerous others. Nigh on half a million people were sterilized against their will, while 70,000 were killed under Action T4, a euthanasia program. Untold millions were killed either for their ethnicity, creed, race, medical inheritance, sexuality or political views.

The laws, regulations, programmes and social practices which permitted this outcome were real human constructions and conventions. This essay takes a comparative analysis of some of these historic legal realities, highlighting the need of a natural law approach in explaining efforts by way of positive international and domestic law to prohibit eugenics in spite of a variety of competing legal approaches. European Union leaders at the Nice summit in December 2000, for example, signed the *Charter of Fundamental Rights of the European Union*¹ to strengthen the protection of fundamental rights. Chapter I of the Charter, entitled 'Dignity', prohibits, *inter alia*, eugenics as well as live birth human cloning.² Similarly, the *Opinion of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission*, in its statement on the ethical aspects of human cloning techniques at paragraph 2.6, affirms that 'considerations of instrumentalization and eugenics render any such acts ethically unacceptable'.³

¹ *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1 ('Charter'). The Charter, created by 'solemn proclamation' at the European Council in Nice on 7 December 2000, was not incorporated into the Treaties establishing the European Union. The Charter has been incorporated as the second part of the draft European Constitution, which is in the process of ratification by the 25 Member States of the European Union. Consequently the Charter is not yet a binding legal document: see Justice and Home Affairs, *Charter of Fundamental Rights: Frequently Asked Questions*, European Commission available at: <http://ec.europa.eu/justice_home/unit/charte/en/faqs.html#1> at 17 July 2006.

² *Charter* art 3.2.

³ 'Ethical Aspects of Cloning Techniques', *Opinion of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission* (No 9, 28 May 1997) European Group on Ethics in Science and New

Nonetheless there are efforts to promote a new progressive, liberal eugenics.⁴ On this view while there is undoubtedly bad eugenics, not all eugenics is bad. The New Eugenics, it is proposed, is unlike its forebears in that it is not coercive, has no links with Nazism or fascism and is, in fact, benign. The new eugenics however, while rejecting any natural law approach, seeks to open up a moral and financial space for new activities aimed at biological enhancement using agencies of human control. This dominion proffered by the new eugenicists permits a bio-engineered genetically enhanced future of better or best individuals. Human cloning for live birth, higher status trans-humans and euthanasia of the weak, unwanted and unproductive are all regarded as maximific outcomes that proffer new technological possibilities and better outcomes for mankind.

This essay aims first to show that comparative legal history demonstrates that at times practices that appear to be progressive turn out to be human rights abuse. A consideration of the comparative legal history of slavery and certain eugenics practices of the twentieth century is raised as a reminder of the limits of positive law's bindingness. Significant features of the natural law tradition are outlined.

A second section examines proposals for a new eugenics. Insofar as they are plausible these are themselves predicated on an informal rejection of the idea that there are no timeless and universal moral laws. The very idea of a bad eugenics involves implicit recognition that consensus, legality and state sanction are no arbiter of justice. The concept of a bad eugenics is rooted in an unstated admission that certain kinds of human laws are universally and timelessly unjust. To this extent efforts to propagate a plausible new eugenics are entrenched in certain significant aspects of the natural law tradition though proponents might reject any such link.

It is common now to discover eugenicists caricaturing discussion of novel forms of oppression and genocide as a kind of conceptual red herring, an 'argumentum ad Hitlerum', which they regard as a harsh misreading of their position. I argue that the experience of the twentieth century and the power of financial, political and medical interests suggest that the new eugenics, deprived of logical access to fundamental natural law precepts, conceptually collapses into its older unacceptable version. Further, the institutionalised deception that attends much of what is now marketed as progressivist and maximific merely highlights the obvious though unacknowledged cost to innocents both now and intergenerationally. The dignity of the human being and the universal and timeless nature of justice demand a critical approach to the new eugenics and a keen memory of laws and times that challenge their reality. The natural law tradition permits the conceptual apparatus that allow that critique.

Technologies available at: <http://ec.europa.eu/european_group_ethics/docs/opinion9_en.pdf> at 17 July 2006.

⁴ Agar, N (2004) *Liberal Eugenics* Blackwell; Hari, J (2006) 'Why I Support Liberal Eugenics' *The Independent* 6th July 2006; Kanamori, O 'Relief and Shadow of New Liberal Eugenics' University of Tokyo, Unpublished Paper; Pearce, D (2004) *Liberal Eugenics: In Defense of Human Enhancement* Blackwell; Lynn, R (2001) *Eugenics: a Reassessment* Greenwood Publishing Group; Silver, Lee M (1998) *Remaking Eden: Cloning and Beyond in a Brave New World* Harper Perennial; Agar, N (2007) 'Whereto Transhumanism? The Literature Reaches a Critical Mass' (37) *Hastings Center Report* 12. Stock, G (2003) *Redesigning Humans: Choosing Our Children's Genes* Profile Books; Bostrom, N (2003) 'Human Genetic Enhancements: A Transhumanist Perspective' (37) *The Journal of Value Inquiry* 493; Green, RM (2007) *Babies by Design: The Ethics of Genetic Choice* Yale University Press; Glover, J (2006) *Choosing Children: Genes, Disability, and Design* Oxford University Press; and Agar, N (2004) *Liberal Eugenics: In Defence of Human Enhancement* Blackwell.

A BRIEF NOTE ON CENTRAL FEATURES OF THE NATURAL LAW TRADITION

Before considering the question of eugenics in the context of international comparative law it is worth bearing in mind certain aspects of the natural law tradition. These arguably form the foundation for much positive human rights law and explain the effort to articulate laws prohibiting genocide and torture, for example. In order to understand how it is that efforts to propagate a plausible new eugenics may be entrenched in certain significant aspects of the natural law tradition it is necessary to be able to recognize some of its fundamental features: the idea of timeless, universal, immutable and knowable moral laws that bind the human conscience.

One feature of the natural law tradition is that morality is regarded not merely as a social construct. Nor is it regarded as a matter determined by consensus. Nor is it seen as that which produces the most pleasure. The pre-Christian Cicero says of the natural law: 'For there is a true law: right reason. It is in conformity with nature, is diffused among all men, and is immutable and eternal; its orders summon to duty; its prohibitions turn away from offense [...] To replace it with a contrary law is a sacrilege; failure to apply even one of its provisions is forbidden; no one can abrogate it entirely.'⁵ These laws govern not merely the physical universe but the moral. Both Plato and Aristotle are representative of the classical natural law tradition, Plato because of his metaphysics rooted in an eternal law, having implications for the soul and for the eternal, timeless and immutable world of the forms including the good, the beautiful and the true and Aristotle because of his teleological analysis.

The natural law tradition affirms that the end does not justify the means. In its classical form, the natural law tradition also boasts a robust rejection of unjust instrumentalisation. For classical theorists, the end does not always justify the means. 'It is better to suffer than to do evil', Socrates proclaims before being executed rather than capitulating to the injustice of his time. The natural law tradition is not utilitarian in character and does not contain any general principle of good-consequence-maximisation, preference maximisation or pleasure maximisation. Justice, therefore, is not reducible to pleasure or utility maximisation. Much depends on the means used to achieve putatively good ends. On the contrary, the natural law tradition elevates doing good and avoiding evil rather than maximising consequences however maximific. The very hedonic calculus used by utilitarians and maximisers is criticised as potentially undermining justice. Likewise, Aristotle's teleological metaphysics suggests purpose and order in the universe knowable by man. Neither consensus nor pleasure nor consequence maximisation nor utility is arbiter of the right and the true.

⁵ Cicero, (1998) *The Republic, The Laws* (trans. N Rudd) Oxford University Press Rep. III, 22,33. See also: Aquinas Supp Q49 Art 2 Aquinas, T (1920) *The Summa Theologica of St. Thomas Aquinas Literally Translated by Fathers of the English Dominican Province* Burns Oates and Washbourne Ltd. Aristotle (1955) *The Ethics of Aristotle: The Nichomachean Ethics* (rev. ed) (Thomson, JK trans) Viking 104. Aristotle (1961) *Metaphysics* (Rowan, JP trans) Augustine in *City of God and On Free Will* (Holmes, P and Wallis, RE trans) revised by Warfield, BB. (1887) *From Nicene and Post-Nicene Fathers, First Series*, Vol. 5 Edited by Philip Schaff, Buffalo, Christian Literature Publishing Co. Plato (1967) *Plato in Twelve Volumes* Vol. 3 (Lamb, WRM trans) Harvard University Press & William Heinemann Ltd, p.469a.

These ideas may be summarised as the inviolability principle (a principle protecting the innocent), principle against instrumentalisation (or prohibiting using unjust means to achieve good ends) and the principle of just autonomy (which elevates human freedom but only within the bounds of justice). In recent times, the natural law tradition has insisted on an equal dignity principle (which sees all humans as having an inherent value). It has not always done so to be sure, for on any plain reading of the classical and enlightenment period, chattel slavery was regarded as acceptable for example. Nonetheless, the principle of equal dignity is one that motivates modern versions of the natural law tradition.

Much could be said about these principles but ours is not to analyse the whole natural law tradition so much as to see its application in the context of eugenics. With these basic ideas we can proceed to consider eugenics in the context of international comparative law. We will be greeted with some of these principles again in the later stages of our analysis of the new eugenics.

COMPARATIVE LAW AND EUGENICS

Positive laws differ according to time and place. Eugenics and euthanasia, though diverse practices, are now infamous features of Spartan and Roman life. The practice of exposing weaker newborn children in an effort to produce a class of genetically superior individuals appears in the Twelve Tables of Roman Law, for example,⁶ which promoted the elimination of weak and disabled children. Fathers in Roman society were given the discretionary right to abandon their babies. Drowning the child in the Tiber was the Roman method of choice.

A paradigm of eugenicist fervour was that demonstrated in Nazi Germany with the persecution and extermination of millions on grounds of racial hygiene. What is less well known is that the idea in its modern form had its intellectual roots in the 19th century with Sir Francis Galton, Charles Darwin's cousin, defining it as 'the study of all agencies under human control which can improve or impair the racial quality of future generations.' In 1883 in his *Inquiries into Human Faculty and Its Development*, he defined 'eugenic' as: 'good in stock, hereditary endowed with noble qualities.' For his purposes the word was equally applicable to plants, animals and humans.

We greatly want a brief word to express the science of improving stock, which is by no means confined to questions of judicious mating, but which, especially in the case of man, takes cognizance of all influences that tend in however remote a degree to give to the more *suitable races or strains of blood* a better chance of prevailing speedily over the less suitable than they otherwise would have had. The word eugenics would sufficiently express the idea; it is at least a neater word and a more generalized one than viticulture which I once ventured to use.⁷

The effort to produce genetically superior human stock found legislative expression in a number of countries including the US. Connecticut in 1896 enacted the first marriage laws with eugenic criteria, prohibiting anyone who was 'epileptic, imbecile or feeble-minded' from marrying. These laws did not derive from a concern for the maturity of the parties to a marriage contract. There are, after all, sound reasons to determine whether parties

⁶ Du Plessis, P (2010) *Borkowski's Textbook on Roman Law* (4th ed) Oxford University Press at 5–6, 29–30.

⁷ Galton, F (1883) *Inquiries into Human Faculty and its Development* Macmillan at 17 fn 1.

have *capacity* to marry (six year olds, for example, have no right to marry for the sound reason that they lack maturity to raise a family). The anxiety that led to the legislation was entirely eugenicist in character. Such moves were driven by a genetic perfectionism. By 1907, twenty seven states in the US had sterilization and marriage prevention laws. Those judged 'idiotic', 'imbecilic', 'moronic' or 'insane' were forcibly physically mutilated and rendered infertile. For example, whereas the State of Indiana was one of the first to introduce sterilization laws, it was also one of the first to rule them unconstitutional. The Laws of the State of Indiana, Passed at the Sixty-Fifth Regular Session of the General Assembly in 1907 announced that:

Whereas, Heredity plays a most important part in the transmission of crime, idiocy and imbecility;

Penal Institutions – Surgical Operations.

Therefore, Be it enacted by the general assembly of the State of Indiana, That on and after the passage of this act it shall be compulsory for each and every institution in the state, entrusted with the care of confirmed *criminals, idiots, rapists and imbeciles*, to appoint upon its staff, in addition to the regular institutional physician, two (2) skilled surgeons of recognized ability, whose duty it shall be, in conjunction with the chief physician of the institution, to examine the mental and physical condition of such inmates as are recommended by the institutional physician and board of managers. If, in the judgment of this committee of experts and the board of managers, procreation is inadvisable and there is no probability of improvement of the mental condition of the inmate, it shall be lawful for the surgeons to perform such operation for the prevention of procreation as shall be decided safest and most effective.

In *Buck v. Bell* 274 U.S. 200 (1927), the social progressivist and American Realist Oliver Wendell Holmes upheld state legislation on compulsory sterilization of the 'unfit', including the mentally disabled, 'for the protection and health of the state'. Holmes held that this in no way violated the due process clause of the Fourteenth Amendment to the United States Constitution and explained that:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Three generations of imbeciles are enough.*⁸

Compulsory sterilization laws were not reconsidered until the mid-20th century.⁹ Eugenics historian, Stefan Kühl estimates that 60,000 Americans were compulsorily sterilized in that period.¹⁰ Indiana's compulsory sterilization laws were struck down by

⁸ 274 U.S. 200 (*Buck v. Bell*)

⁹ Some like Jeffrey Ghent plausibly argue that in certain respects they continue to retain their validity: Ghent, JF (1973) 'Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives' (53) *American Law Reports* 3d 960.

¹⁰ Kühl, S (1994) *The Nazi Connection: Eugenics, American Racism, and German National Socialism* Oxford

the Indiana Supreme Court in *Williams v. Smith* relatively early on in 1921.¹¹ A variety of state jurisdictions followed suit.

The source of the interest in eugenics stemmed from research emanating from laboratories at Cold Spring Harbour. Charles B. Davenport founded the Station for Experimental Evolution, the Eugenics Record Office (ERO) opened in 1910 and Davenport and Harry H. Laughlin began to promote eugenics. Eighteen solutions were explored in the 1911 'Preliminary Report of the Committee of the Eugenic Section of the American Breeder's Association to Study and to Report on the Best Practical Means for Cutting Off the Defective Germ-Plasm in the Human Population.' A sign of things to come, Point No. 8 was euthanasia. The most commonly suggested method of eliminating defective germ plasm in the United States was a 'lethal chamber' or public, locally operated gas chambers. In 1918, Paul Popenoe, co-author of the textbook, *Applied Eugenics* urged, 'From an historical point of view, the first method which presents itself is execution [...] Its value in keeping up the standard of the race should not be underestimated.'¹² A chapter entitled 'Lethal Selection,' suggested the naturalness of 'the destruction of the [defective] individual by some adverse feature of the environment, such as excessive cold, or bacteria, or by bodily deficiency.'¹³

Some states sterilized 'imbeciles' for much of the 20th century. A favorable report on the results of sterilization in California, the state with the most sterilizations by far, ie around 20,000, was published in book form by the biologist Popenoe and used by the Nazi government as authority for their own sterilization programs.¹⁴ At the Nuremberg Trials after World War II, Nazi administrators justified the 450,000 sterilizations performed under their aegis by citing the United States as their inspiration. Closely connected were Hitler's race purity laws and the eventual genocide of the Holocaust.

The Eugenicist Mindset

American eugenicist and founder of Planned Parenthood, Margaret Sanger, and Harry H. Laughlin who wrote the Virginia model statute together supplied what was to prove the foundation for the Nazi Ernst Rudin's Law for the Prevention of Hereditarily Diseased Offspring. For this Laughlin won an honorary doctorate from Heidelberg University in 1936.¹⁵ Ernst Rudin also wrote articles on eugenics for Margaret Sanger's Birth Control Review.

In her *Pivot of Civilization*, Sanger rails against 'morons, imbeciles and borderline cases'¹⁶, 'defectives, delinquents and dependents,'¹⁷ 'biological waste'¹⁸ whose accumulation¹⁹ is a

University Press.

¹¹ 131 NE 2 (Ind.), 1921

¹² Popenoe, P and Jonson, RH (1918) *Applied Eugenics* Macmillan at 184

¹³ Popenoe and Jonson *Applied Eugenics* supra note 12 at 118.

¹⁴ See Black, E (2003) *War Against the Weak: Eugenics and America's Campaign to Create a Master Race* New York, Four Walls Eight Windows, and Stefan Kühl's work, *The Nazi connection: Eugenics, American Racism, and German National Socialism* supra note 10.

¹⁵ Available online at: <<http://www.hsl.virginia.edu/historical/eugenics/exhibit4-6.cfm>>.

¹⁶ Sanger, M (1922) *Pivot Of Civilization* at 41

¹⁷ Sanger *Pivot Of Civilization* supra note 16 at 49. See also 41, 42, 46, 47 for references to the problem of 'defectives.'

¹⁸ Sanger *Pivot Of Civilization* supra note 16 at 59.

¹⁹ Ibid

problem best solved by sterilization and ultimate elimination as the 'unfit' in that 'cradle competition between the fit and the unfit.'²⁰ Her writings were central to the propagation of new laws, thought advanced at the time, dedicated to introducing mass sterilisation and birth control for the 'unfit and unproductive'. In order to understand the mindset it is worth considering some of her words.

Her writings betray an abundance of vitriol and bigotry on grounds of race, creed, disability, skin color, wealth, social status and religion. In *Pivot of Civilization*, in a chapter entitled 'The Fertility of the Feeble-minded', she starts out by holding that '[t]here is but one practical and feasible program in handling the great problem of the feeble-minded [...] the moron, the mental defective, the imbecile.' These are the sterilization and contraception programs she helped to organize. Indeed these programmes turn out to be the answer to everything from insanity, epilepsy, criminality, prostitution, and poverty to mental disability: 'Modern studies indicate that insanity, epilepsy, criminality, prostitution, pauperism, and mental defect, are all organically bound up together and that the least intelligent and the thoroughly degenerate classes in every community are the most prolific. Feeble-mindedness in one generation becomes pauperism or insanity in the next.'²¹

Sanger also viewed charity as a symptom of a social disease: 'Organized charity is the symptom of a malignant social disease [...] increasing numbers of defectives, delinquents, and dependents. My criticism, therefore, is not directed at the 'failure' of philanthropy, but rather at its success.'²² She concludes the chapter by arguing that philanthropy and charity is a 'sentimental and paternalistic' strategy 'increasing the dead weight of human waste'.²³ She says: 'Instead of decreasing and aiming to eliminate the stocks that are most detrimental to the future of the race and the world, [philanthropy] tends to render them to a menacing degree dominant.'²⁴

A redoubtable racist, she was guest speaker at a Ku Klux Klan rally in Silverlake, New Jersey in 1926 to foster faith in a plan called the 'Negro Project' that was designed to sterilize black Americans. Planned Parenthood denies that their founder was racist but her words betray her time and again. In *What Every Girl Should Know* she has this to say of the Australian Aborigines:

It is said that a fish as large as a man has a brain no larger than the kernel of an almond. In all fish and reptiles where there is no great brain development, there is also no conscious sexual control. The lower down in the scale of human development we go the less sexual control we find. It is said that the aboriginal Australian, the lowest known species of the human family, just a step higher than the chimpanzee in brain development, has so little sexual control that police authority alone prevents him from obtaining sexual satisfaction on the streets.²⁵

She recommended a decrease in the number of the feeble-minded so as to promote a lessening of the weight upon the shoulders of the fit:

²⁰ Sanger *Pivot Of Civilization* supra note 16 at 47, 74, 76.

²¹ Sanger *Pivot Of Civilization* supra note 16 at 38.

²² Sanger *Pivot Of Civilization* supra note 16 at 49.

²³ Sanger *Pivot Of Civilization* supra note 16 at 53.

²⁴ Ibid.

²⁵ Sanger, M (1920) *What Every Girl Should Know* at 47

It now remains for the U.S. government to set a sensible example to the world by offering a bonus or yearly pension to all obviously unfit parents who allow themselves to be sterilized by harmless and scientific means. In this way the moron and the diseased would have no posterity to inherit their unhappy condition. The number of the feeble-minded would decrease and a heavy burden would be lifted from the shoulders of the fit.²⁶

She quotes eugenicist Austin Freeman with approval: 'Compared with the African negro,' he writes, 'the British sub-man is in several respects markedly inferior. He tends to be dull; he is usually quite helpless and unhandy; he has, as a rule, no skill or knowledge of handicraft, or indeed knowledge of any kind'.²⁷

With population control concerns outlined in her book, *Woman and the New Race*, she asserts that the 'most merciful thing that a large family does to one of its infant members is to kill it'.²⁸

Eugenics and Race

Sterilization laws were promoted in many technologically advanced states internationally, in Scandinavia, Japan, Korea, China and the United States. Indeed, at that time, eugenics was part and parcel of the progressivist mindset. But it was also a foundation for the idea of white racial purity in existing US state laws banning interracial marriage: the so-called anti-miscegenation laws. These too were real laws, real social constructions permitting and indeed implementing and systematizing discrimination. The most famous example of the influence of eugenics and its emphasis on strict racial segregation on such 'anti-miscegenation' legislation was Virginia's Racial Integrity Act of 1924. The U.S. Supreme Court finally and after much consideration, overturned this offensive law, once a hallmark of progressivism, in 1967 in *Loving v. Virginia*, and declared anti-miscegenation laws unconstitutional.

With the passage of the Immigration Act of 1924, eugenicists for the first time played an important role in the political debate as expert advisers on the threat of 'inferior stock' from eastern and southern Europe. The reasons were no longer cultural but were genetic in character.

Eugenics Laws Internationally

The Social Darwinist thrust of the eugenics mindset swept the Western world. In Canada, the eugenics movement was implemented by law in two provinces. The Sexual Sterilization Act was enacted in 1928, for the compulsory sterilization of the mentally disabled. As always an 'agency' or Eugenics Board was set up to provide safeguards in the implementation of the eugenics goal. Women's groups were in the vanguard of supporting these measures. These groups rather than coming to the aid of the vulnerable set themselves up as arbiters

²⁶ Sanger, M (1926) 'The Function of Sterilization' (10) *Birth Control Review* 299.

²⁷ Sanger 'The Function' supra note 26 at 59. Quoting from Austin Freeman see Freeman, A (1921) *Social Decay and Regeneration* Constable.

²⁸ Sanger, M (1920) *Woman and the New Race* Available at: <<http://infomotions.com/etexts/gutenberg/dirs/etext05/7wmnr10.htm>>.

of mutilation of their sisters. What never occurred to one of these progressivists was that if a person was not mature enough by reason of disability to marry and have children, she was not mature enough to be subject to what could only be described, given the emotional maturity of the vulnerable participant, as sexual abuse (which the grievously invasive procedure of sterilization would conceal).

It may be suggested (and indeed a peer reviewer has proposed) that sterilization is not an invasive procedure because it is quite simple and swift. But by parity of reasoning, a homicidal lethal injection is not invasive because it is quite swift and simple. The suggestion is testimony to how morally questionable medical procedures can come to be known as 'simple' and thus take on a horrifying and barbaric institutional life of their own. The simplicity of the transaction is no guarantee of its moral rectitude. In truth, the moral obligation of the family and community always was to keep vulnerable people from abusers and molesters. The severely mentally disabled were not emotionally mature enough for all the consequences of sexual activity. Just as it is inappropriate for a child to engage in sexual activity, it is inappropriate for a profoundly intellectually immature person to engage in it. Alternatively, if a person is mature enough to marry and have children, she should be permitted to have children – and not compulsorily sterilized.

Stephen Jay Gould²⁹ observes that many women who were sterilized were not intellectually disabled at all. Gould points out that Carrie Buck (see Oliver Wendell Holmes' decision in *Buck v. Bell* mentioned earlier) was not mentally disabled. This reality, however, should make little difference to the justice of what was done to victims of eugenics. That the victims were vulnerable people only aggravated the wrong perpetrated.

Canada's indigenous peoples were compulsorily sterilized in a social hygiene initiative thought forward-thinking at the time. In 1928 the Sexual Sterilization Act enacted in the province of Alberta allowed the sterilization of defective individuals. This included a power by school principals to sterilize native Indian women. Several thousand Indian women were sterilized under this law. The Great Depression proved an opportune moment in Canada's history to implement sterilization programmes in the interests of minimizing cost and maximizing advantages. Despite the lessons of Nazi Germany the Sexual Sterilization Acts of Alberta and British Columbia were not repealed until 1972.

Somewhat tangentially since it raises the question of social engineering rather than eugenics in its simple sense, Australia had its own legal experience with the Stolen Generation, a programme of moving children of Aborigines to white families who would nurture them out of their kin's underdeveloped ways. The accusation is subject to vigorous denial in some quarters but the reality of the systematized separation emphasizes the pain many families endured. I have discussed the needs of people, particularly children, for their own kin and the significance of blood and cultural relatedness, all things being equal and the demands of genuine necessity aside, elsewhere. Suffice to say, Australia's recent past suggests a needless social experiment in improving 'nature' by altering the 'nurture' of children.

Social Darwinism was entertained in Japan in the 19th century. The promotion of pure blood and racial hygiene were among the motivating factors. In 1948, a Eugenic Protection

²⁹ Gould, SJ (1984) 'Carrie Buck's Daughter' (93) *Natural History* 83: 307 and in (1985) *The Flamingo's Smile* WW Norton & Company 307.



Law replaced the National Eugenic Law of 1940.³⁰ The legislation permitted surgical sterilization of women, when the woman, her spouse, or any family member within 4 degrees of kinship had a genetic disorder. Safeguards were promised by the ominously titled Prefectural Eugenic Protection Council. It is unsurprising that with sterilization, abortion and other elimination procedures normalized in countries that see eugenics as advantageous, low birth rates should soon also become the norm. Japan, like many other nations that have enacted eugenics legislation, now sports a catastrophically low birth rate. In China, a state that famously supports a one child policy, eugenics is built into the Maternal and Infant Health Care Law 1993. Infanticide and selective abortion are routinely practiced in a bureaucratic top-down effort to eliminate the unwanted, costly or disabled and to place curbs on population growth. For reasons of sex discrimination (where girls are seen as less desirable), China is now known for its gender gap of 120 boys to 100 girls with vast numbers of Chinese men never likely to find a wife.

Germany's eugenics programme

German eugenics programs were indeed a racial science and an effort at maximisation. They sought to eliminate those regarded as sub-optimal and maximise utility by employing 'retrograde' stock in scientific experiments and executing the remainder. Laws, regulations, institutions and procedures normalised these outcomes. The calculus was a simple one: maximise the advantageous and minimise the disadvantageous. Genetic hygiene was the impetus for Hitler's Action T4 euthanasia programme in Nazi Germany with an estimated 400,000 deaths of disabled people caused. The unspeakable Jewish genocide emerged soon enough as an extension of the racial hygiene policy. Political dissidents were routinely slaughtered or thrown into concentration camps. Hitler's ambition was eugenicist in character: 'to promote the victory of the better and the stronger and demand the subordination of the inferior and weaker.'³¹ For the good of the state, the Nazis asserted, homosexuality had to be eradicated. Their manner of accomplishing this task was efficient if nothing else. The Holocaust Museum estimates that around 100,000 homosexual men were arrested in the twelve years after 1933. Half of these were sentenced and between 5000 and 15000 men lost their lives in concentration camps.³² The regime's eugenicist rationale for attacking homosexuality was to purge society of its genetic defects. The Nazi philosophy of persecuting society's 'inferior and weaker' elements was supported by social constructs that purported to have the status of laws and regulations and thus appeared to bind citizens and officials alike.

³⁰ Robertson, J (2002) 'Blood Talks: Eugenic Modernity and the Creation of New Japanese' (13) *History and Anthropology* 191.

³¹ Hitler, A (1972) *Mein Kampf* Hutchinson at 348. John Glad, in his book *Jewish Eugenics*, argues Hitler's programme was one of attempting to eliminate the genetically superior Jewish people and was thus a dysgenic practice. The argument accepts the moral legitimacy of the practice of eugenics but regards it as ill-judged in the case of the Jews. Needless to say, this pro-eugenics approach has not proved popular. It appears to play to the view that there are indeed classes of people that should be targeted for elimination which, upon deeper reflection, ought not to include the Jews. One wonders which races Glad has in mind as sub-optimal. The idea remains something of an embarrassment and elicits little praise even among doyens of the liberal eugenics movement that dominates contemporary bioethics. Whatever John Glad's personal views, what cannot be doubted is the horrific outcome of Nazi eugenics practices for Jews across Europe. Glad, J (2011) *Jewish Eugenics* Wooden Shore Publishers at 464

³² available at: <<http://www.ushmm.org/museum/exhibit/online/hsx/>>

Those who were particularly vulnerable, like children, were among the first to be targeted for reasons of racial hygiene, lack of productivity, and social utility in the context of experiment. Thus the children of groups regarded as politically undesirable would be selected for use in experiments or death. This act of selection was itself a source of delight for those involved in the process of killing and around 1.5 million children, the Holocaust Museum suggests 'over a million Jewish children and tens of thousands of Romani (Gypsy) children, German children with physical and mental disabilities living in institutions, Polish children, and children residing in the occupied Soviet Union.'³³

Eugenics, Social Darwinism and the Slave Trade

The practices of eugenics and social Darwinism may find their roots in the slave trade³⁴ but not all slave-trading is connected to eugenics. Eugenics, it should be added, is less a feature of the Arab slave trade which burgeoned for centuries under the Ottomans and Moghuls but it does appear to emerge out of the Western version of the practice perhaps for independent reasons relating to the Enlightenment.³⁵ The attitudes and laws necessary for the capture, kidnap, incarceration and transfer of vast numbers of people, many of whom died en route, for compulsory labour and other socially advantageous activities, on farms and plantations in the New World, must give even the most plastic moral relativist pause. Although this longstanding practice was thought acceptable at the time, if we wish to hold on to the idea that it was timelessly and universally unacceptable, we will need to jettison our moral relativism (or accept the conclusion that slavery was acceptable for those who practiced it, is no longer acceptable but may become acceptable at a later date when favoured by a greater consensus. I do not presume to challenge this outlook, only to mention it in discussing the issue with anyone interested in the subject).³⁶

Of Eugenics Laws

Many more examples of eugenics laws aiming at improving 'human stock' via agencies of social control, could be gathered together to form a general historical treatise. Such is not our purpose here. The discussion is intended primarily as a reminder of man's capacity for avoidable and systematised legally entrenched wrongdoing. Further it is an aide memoire of how iniquitous practices can become institutionalised promoting, first, a spirit of denial and secondly, the manipulation of those complicit in the activity. Slavers themselves would have regarded themselves as decent citizens promoting the general good.

³³ Ibid.

³⁴ Hanson, C (2013) *Eugenics, Literature and Culture in Post-War Britain* Routledge.

³⁵ Interestingly, there were no prohibitions of interracial marriage in Spanish law in the sixteenth century. Laws of 1514 and 1515 explicitly permitted intermarriage with Indians. 1527 marks a change of approach and by a Spanish royal decree of 11 May recommends slaves take spouses of their own race 'with marriage and their love for wives and children and orderly married life they will become more calm and much sin and trouble will be avoided.' Presumably the realisation that slavery demanded that the two classes be separate so as not to undermine the relationship of domination by the creation of children who would compromise the social control plausibly prompted the change of law.

³⁶ See also Laing, J (2006) 'A Certain Kind of Moral Scepticism and the Foundations of Human Rights' (157) *Law and Justice* 39.

Some acts then, are intrinsically unjust. Some laws, if laws we may call them, are intrinsically unjust. Indeed some of these edicts may be so oppressive that it would be stretching language to call them true laws at all. It is precisely this idea that demonstrates how it is that a comparative approach to law must take place against a natural law background if we are to retain the conceptual apparatus with which to reject certain outcomes as unjust. Further, as we shall see, revised versions are open to the kinds of objection to which old versions of eugenics were also subject.

IMPROVING HUMAN STOCK AND THE NEW EUGENICS

Eugenics, we have already observed, was described by Francis Galton as the 'study of agencies under social control that may improve or impair the racial qualities of future generations, whether physically or mentally.' Agencies under social control, both for Sanger and other eugenicists included intervention at some or all of the following stages of human life: at the beginning of life, by screening and abortion / infanticide of the disabled unborn, germ-line gene manipulation; during life, with contraception and sterilisation of the 'unfit', use of gametes of the 'eugenically fit' in the use of artificial reproduction, pre-implantation genetic diagnosis, donor conception, human cloning of ideal types, selection of the fit for reproduction, genetic enhancement and also by induced death by means of euthanasia of the 'unfit.'

Most recently, John Harris and Julian Savulescu, proponents of a new eugenics, argue that parents are morally obliged to create a future of genetically enhanced individuals. They elevate human cloning as a means of child creation and emphasise the need for a better populace. This maximisation takes place by way of new reproductive technologies. There are internal debates among the new eugenicists about whether the duty is to create the best children who are our own biologically or not but the maximific imperative is nowhere questioned.³⁷ Call this *repro-eugenics*. They also recommend euthanasia for those subjects who desire it as well as for those who do not but who deserve it owing to their status as lower quality lives. This agency of social control involves a way of eliminating the unfit and unwanted. This strategy involved killing the unfit. Call this *necro-eugenics*.

They are among the most vocal of a new brand of pharmaceutically subservient and industrially oriented eugenicists among whom are Gregory Stock, Lee Silver, Ronald Green, Jonathan Glover, and, to some extent too, Nicholas Agar. Pointing to the undeniable potential that genetics has for alleviating human suffering, the new eugenicists argue for the idea that eugenics is unproblematic as long as the choice of whether, and how, to use these technologies is left up to individual customers and users.

They argue that a 'liberal' eugenics, which would be open to user selection, based on what they describe as 'good science', concerned with the welfare of individuals, and respectful of the rights of individuals, should be distinguished from the 'old' eugenics, which was perfectionist, founded, it is said, on bad science, concerned with the health of the 'race,' and coercive. According to the campaigners for the new eugenics, the injustices of the old eugenics are a thing of a by-gone era or, at least, can be dealt with by safeguards. John Harris, for example, argues that a proper concern for the welfare of future human

³⁷ Savulescu J and Kahane G (2009) 'The Moral Obligation to Create Children with the Best Chance of the Best Life' (23) *Bioethics* 274.

beings implies that we are morally obliged to pursue enhancements, and Julian Savulescu has argued that we are morally required to use genetic (and other) technologies to produce the best children possible. Forgetting (or perhaps knowing only too well) that it is *logically* and *empirically* possible to commit genocide by effective birth control, Harris and Savulescu lull us into believing that *consumer choice* is what prevents genetic enhancement, mass human cloning, multiple parenting, procreation using multiple biological parents, from being unethical in character.

The New Eugenics and its Natural Law Presuppositions

Proposals for the new eugenics are themselves founded on a rejection of any form of moral relativism. Earlier we observed some key features of the natural law tradition. The very idea of a bad eugenics involves implicit recognition that consensus, opinion, legality (understood in a purely positivist sense) and state sanction are no arbiter of morality. Nor is widespread acceptance of a practice. Chattel slavery, however well regarded at the time, was fundamentally unjust.³⁸ The very idea of a bad eugenics is rooted in an unstated admission that certain kinds of laws are universally and timelessly iniquitous. Accordingly, when a thinker appeals to the concept of a bad eugenics, he implicitly rejects the view that acceptance, consensus and received wisdom or practice is the touchstone of justice. Even where there is normalisation of injustice, this normalisation can only explain the actions of the perpetrators. It cannot make the activity itself just. To this extent, efforts to propagate a *new* eugenics are entrenched in aspects of the natural law tradition though proponents might reject any such link.

The language of human rights is steeped in the idea that human rights and human dignity are irreducible concepts that do not involve arbitrary and discriminatory notions of human value. One of the central ideas behind the new eugenics is that it is benign unlike its crude forebears. The thought here is that if eugenics is practiced without force, it will indeed become acceptable. But as we shall see, the assumption that freely chosen eugenics is therefore unproblematic is itself flawed. Indeed, the old eugenics itself depended upon misinformation, propaganda, gross discrimination, and the undermining of fundamental notions like the inviolability principle, the equal dignity principle, the principle against instrumentalisation and the principle of just autonomy. If this is true, the essentially offensive characteristics of any new eugenics that claims to jettison these ideas, will not have altered. Liberal, allegedly acceptable and free eugenics, deprived of key precepts of the natural law tradition, I suggest, is bound to collapse into new versions of the old human rights abuse.³⁹ If we are to make any sense of human rights at all, scientific endeavour will need to be understood as applying doctrines of inviolability, principles of equal dignity and a sound understanding of the principle of just autonomy. These ideas,

³⁸ Slavery has been practiced by many people at different points in their history. Man's capacity for this iniquity across time, cultures and peoples should never be underestimated whether now or in the past. Chattel slavery is to be distinguished from such practices as forced labour qua criminal punishment, wage slavery and other categories of disputed human activity.

³⁹ Recently Robert Sparrow, like this author argues, in Sparrow, R (2011) 'A Not-So-New Eugenics: Harris and Savulescu on Human Enhancement' (41) *Hastings Center Report* 32, that Harris and Savulescu's ethics collapses into the eugenics of old.

central to traditional morality and the natural law tradition will need to be understood properly if we are to avoid novel versions of earlier injustice.

Necro-eugenics, Repro-eugenics, and the Freedom Assumption

As already suggested, one persuasive thought behind the new eugenics is that it is benign unlike its forebears. What was wrong with the old eugenics was that it was coercive. And so, it is assumed (call this the Freedom Assumption), if the coercive element can be expelled from the practice of eugenics it might be fruitful and, all things being equal, morally unproblematic. This analysis fails for a variety of reasons. The fact that injustice is freely chosen by its practitioners does not launder the wrong involved.

Consider the following example of what I shall call necro- and repro-eugenics. A repro-eugenicist controls better outcomes by reference to methods that improve the stock of people being reproduced. A necro-eugenicist controls outcomes by killing the weak and unfit. In what follows we consider the example of the Mozart Maximiser. The example is designed to challenge the prevalent assumption (the Freedom Assumption) that an outcome freely chosen if it involves no immediate harms to others is an outcome that is ethically unproblematic. In what follows we observe that the Freedom Assumption is no guarantee of the moral rectitude of acts and systems. The assumption often merely obscures deeper problems surrounding the commercialisation of inherently questionable practices. These may well merely incentivise iniquitous practices and open up a financial space for the morally unscrupulous.

The Freedom Assumption

Part of the problem here is the Freedom Assumption, the assumption that an outcome freely chosen and one that involves no immediate visible harms to others is an outcome that is ethically unproblematic. But the assumption is apt to lead astray. First, the harm to others principle needs to be properly understood. Many laws, even now, involve no harm to others. Drug possession offences, parking offences, seatbelts and safety legislation, for example, are all offences that involve no immediate harm to others. These are laws that exist for reasons of public or community interest.

A second assumption is that wrongs may not be perpetrated by one generation upon another if they are committed by a previous generation willingly and freely. But this is simply false. The idea that the better outcome, could by virtue of being freely chosen, avoid the charge of injustice is implausible. The fact that one freely chooses to give one's children away into slavery or medical experimentation or to clone oneself a hundred times, or to create animal human hybrids for the purposes of experiment, is no bar to the action's being at odds with human dignity and intergenerational justice. Freely creating animal-human hybrids for the purposes of scientific experiment does not discharge the act of all questions of intergenerational justice.

Thirdly, there is an unstated assumption that bad, old eugenics was always performed under the auspices of physical coercion and as we shall soon see, this is not true. At a very simple level, schemes like genocide (whether necro- or repro-genocide) are perfectly realizable by willing participants using effective marketing techniques, law reform and altered mind-sets. Importantly, misinformation, propaganda and behaviour modification techniques used and promoted by advertisers, entertainers and defence strategists, are

well-known ways of getting people to do foolish, mistaken or vicious things apparently freely and willingly. Family members can perpetrate injustice upon their own young willingly. Social attitudes may be altered and consensus manufactured. War crimes have been committed in a spirit of freedom, choice and willingness on those regarded as non-persons. Obvious physical forms of coercion, in such cases, may be absent yet the crime proceeded. It cannot be assumed then that just because repro- or necro- eugenics is freely chosen, it is morally permissible either in itself, for the victims it involves or for the attitudes they transmit.

Although coercion characterises much of the pain, sorrow, murder and genocide of the twentieth century, coercion is not the essential characteristic of injustice. Wrongs can be perpetrated by the ignorant upon the unaware. People can perform crimes freely but in ignorance of their implications. Ignorance and misunderstanding typically explains much wrongdoing. Indeed, ignorance typifies much of the intergenerational injustice that passes for freedom now. I will venture to say at this point that men who freely create hundreds of children in their capacity as sperm donors rarely understand the implications of their actions for their offspring. Although this is not commonly regarded as any form of intergenerational injustice now, as I have argued elsewhere, it is nonetheless a form of injustice. It is one that will be recognised as such in the course of history rather as chattel slavery came to be understood to be injustice.

Because eugenicists typically define the young, the weak and the disabled out of their moral universe so that they are regarded as non-persons, it is common to find genetic maximisers blind to the coercion involved in taking the life of the disabled, the young or elderly. Since this category of humanity, in their view, lacks moral status, by definition, there can be no coercion in taking their lives. Dehumanised victims make psychologically easy prey. Depersonalising ethics liberates the actor to kill all the more freely. Desensitised, his acts become a form of scientific high-mindedness, the duty of the enlightened progressive.

Coercion, then, need not be the hallmark of injustice. The Freedom Assumption, which holds that an outcome freely chosen if it involves no immediate visible harms to others is an outcome that ethically neutral or even necessary, is a false one. On the contrary, the Freedom Assumption is apt to obscure deeper problems surrounding the commercialisation of iniquitous deeds opening up a financial space for the vicious and unscrupulous.

The Example of the Mozart Maximiser.

Consider the following thought experiment. Imagine a repro-eugenicist who used the new technologies freely and autonomously to create a more musically brilliant populace using human cloning with willing repro-customers. The fact that all parties to the transaction are operating freely need not imply that the parties are therefore ipso facto engaged in a morally unproblematic activity. The fact that all parties to the Mozart-maximisation policy are themselves volunteers does not morally remedy the programme. Not only do children born for this purpose suffer from having been born to achieve certain *further ends* set by repro-eugenicists, there are additional questions about the clinical nature of their origins, kinship and parentage. These questions are of enormous importance to the people so designed and reproduced. They bear on their very identity and self-understanding. These profound implications for the people they create appear to defy many proponents of the new reproductive technologies, but the very fact that deception and falsehood attends

almost all use of these technologies suggests that both the technicians themselves and clients alike (those aware of the further ends served by the contracts that create their offspring) know that there is unjust dominion and sorrow deliberately and avoidably caused to the children that they create. I have outlined elsewhere the moral concerns surrounding the variety of uses of the new reproductive technologies, for example, the unjust dominion, illicit third party oversight, control of a person's very identity, genealogical bewilderment and the implicit human commodification involved in the contractual arrangement to produce them. The further problem of having been reproduced intentionally to satisfy a set criterion, in this case, the demand of musicality simply adds one more form of illicit dominion over the offspring produced.⁴⁰

Multiple Parenting, the Mass Human Cloner and the Hybridizer

However freely one enters into the business of mass biological parenting (where one gamete donor is used to parent hundreds biological offspring), mass human cloning and animal human hybrids likewise do not become ethically neutral activities for having been chosen freely by parties to the reproductive contract.⁴¹

Equally, a eugenicist who freely and autonomously settles on a strategy of eliminating disability by either convincing willing parents and guardians to kill their disabled young (whether by infanticide or screening and abortion, or by PGD) or using genetic design techniques that eliminate disability, is not necessarily engaged in an act of philanthropy however cleverly he propagates his enterprise. There are long-standing questions about the morality of using an unjust means to achieve his greater end, in this case killing an innocent. The genetic design of human beings itself creates questions about the domination and control of a person's very identity. Finally, the activity and its institutionalisation foster a spirit of loathing of disability. This itself undermines the power of the group by making life intolerable more generally. One central feature of a eugenicist society is that it is fiercely perfectionist. Insofar as it puts about so brutal a vision of infirmity it erodes human kindness and thus the capacity for robust survival intergenerationally. It is a contingent feature of eugenicist societies that they have trouble reproducing and need to resort to replacement migration and other techniques to endure socially. This may be because they lack the robust vision of life necessary for intergenerational survival. I have discussed problems associated with low birth rates, ageing populations and replacement migration elsewhere and do not propose a fuller analysis.⁴² For our purposes and in this context, the new liberal eugenics is far from ethically innocuous not only for reasons relating to the

⁴⁰ Laing, J and Oderberg, DS (2005) 'Artificial Reproduction, the "Welfare Principle", and the Common Good' (13) *Medical Law Review* 328. Laing, J (2006) 'The Prohibition on Eugenics and Reproductive Liberty' (29) *University of New South Wales Law Journal* 261. Laing, J (2006) 'Artificial Reproduction, Blood Relatedness and Human Identity' (89) *Monist: International Journal of General Philosophical Enquiry* 548.

⁴¹ Ibid.

⁴² On undermining attitudes of care and protection of the innocent: Laing, Jacqueline A. (1996), 'Innocence and Consequentialism' in Oderberg, David S and Laing, Jacqueline A (eds) *Human Lives Critical Essays on Consequentialist Bioethics* Palgrave Macmillan 196. On undermining future generations see Laing, J (2004) 'Law, Liberalism and the Common Good' in Oderberg, DS and Chappell, TDJ (eds) *Human Values: New Essays on Ethics and Natural Law* Palgrave Macmillan 184. On attitudes to our young: Laing, J (2013) 'Infanticide: A Reply to Giubilini and Minerva' (39) *Journal of Medical Ethics* 336.

act of killing the innocent, but also for reasons relating to the callousness of the beliefs it engenders.

The Bad Science Objection

Another of the new eugenicist's dubious assumptions is to be found in what I call his Bad Science objection. This is the view that Nazi science was bad as science. If it had been good science it would have been acceptable as good eugenics. In this way the very possibility that liberal eugenics could prove grossly unjust is excised from the moral landscape. Modern eugenics becomes immune to objection by trading on the idea that it is unlike the bad eugenics of old. This argument functions by distraction. The reality of many of the Nazi experiments is that they *were* useful and productive.⁴³ Not only was much Nazi science brilliant, many of the findings that emerged out of torture and horrific human rights abuse was, in fact, useful and accurate. Their tobacco research was first-rate, in part because the Fuhrer was an opponent of smoking. The research has been cited subsequently, in part because of its utility and quality.⁴⁴ Understanding of the dangers of lead, mercury, asbestos and the V2 engine were a proud product of the Nazi science machine. Robert Proctor notes that it is 'poor scholarship and perhaps even dangerous to caricature the Nazis as irrational or anti-science.'⁴⁵ Proctor shows that Telford Taylor's Hobbesian argument in the Nuremberg 'Doctors' Trial' of 1946-7, that 'Neither science, nor industry, nor the arts could flourish in such a foul medium,'⁴⁶ is simply untrue. He also rejects Franz Neumann's claim that 'a most profound conflict'⁴⁷ exists between the magic and irrationalism of Nazi science and the good science of industry. Proctor demonstrates in contrast that much Nazi knowledge was devastatingly adept, useful and true.

On the Contrary, Much Nazi Science was Ingenious

Not only was research into asbestos, tobacco, V2 engines and cancer first rate, some of the finest ideas for space orbital weaponry comes to us by way of Nazi science. German Fascist science was neither mindless nor chaotic. The idea that it was both foul and foolish may be a comfort to the new eugenicists, steeped as they are in the spirit of scientism and in denial about its potential for injustice both immediate and intergenerational, but it is far from realistic. So obvious was the value of much Nazi science that a program, employed to recruit the scientists of Nazi Germany for work in the United States at the end of war, was

⁴³ Cohen, Baruch C The Ethics Of Using Medical Data From Nazi Experiments Jewish Law Articles, available at <<http://www.jlaw.com/Articles/NaziMedEx.html>>; Lifton, RJ (1986) *The Nazi Doctors, Medical Killing & The Psychology of Genocide* Basic Books.

⁴⁴ Proctor, RN (1988) *Racial Hygiene Medicine under the Nazis* Harvard University Press.

⁴⁵ Proctor, RN (1996) 'Nazi Medicine and Public Health Policy' (10) *Dimensions* 1; see also *Racial Hygiene Medicine under the Nazis* Harvard University Press.

⁴⁶ Taylor, T 'Opening Statement of the Prosecution, December 9, 1946,' reprinted in Annas GA and Grodin, Michael A (eds) (1992) *The Nazi Doctors and the Nuremberg Code* Oxford University Press 69.

⁴⁷ Neumann, F (1942) *Behemoth: The Structure and Practice of National Socialism* Oxford University Press at 471-472.

conducted with a view to monopolizing the best thinkers.⁴⁸ The skill behind the scientific work was never in doubt.⁴⁹

It might be suggested that this argument conflates diverse forms of Nazi science: that which is morally bad and that which is scientifically bad. But here again, even if we look more closely at experiments performed on non-consenting patients, we see that many of these continue to be useful and indeed, efforts have been made to republish them, in some cases successfully, with a view to pursuing the business of science in the spirit of frank and open enquiry. It should be understood that where 'non-persons' (those classified by the new eugenicists as not rational, self conscious or autonomous) are concerned, experiment and research with or without consent is positively encouraged. Such thinkers as Harris, Singer, Savulescu and numerous others routinely call for the non-consensual removal of organs and tissue from the non-person or the ill-informed (by opt-out organ retention) and so on. The unspeakable danger it presents to the vulnerable does not concern them. The opportunity and enticement to the researcher, corporate suppliers of human tissue and organs and the pharmaceuticals industry are of little interest to those who in virtue of their new found power we may call the New Eugenocrats. Blind to the gravity of the offence they invite, they supply the conceptual rationale for the systematized homicide sought by a catalogue of illicit political, medical and research interests.

Once a victim is dehumanised in the manner discussed, that is to say that he or she amounts, technically speaking, to a 'non-person,' it becomes a simple conceptual matter to justify using him in experimentation, and cadaver and tissue harvesting programmes. This moral inevitability is far from fanciful. Nazi experimentation, far from producing bad scientific results often produced *accurate and useful* scientific data. Baruch C. Cohen in 'The Ethics of Using Medical Data From Nazi Experiments' categorises several kinds of Nazi research: Medico-military research, ad hoc experimentation and race experiments.⁵⁰ Cohen outlines the horrifying freezing experiments which proved critical to medical research into hypothermia (proving that the best treatment is swift rather than slow warming of the body), the high altitude experiments (which demonstrated by means of vivisection on the brain that bubbles on the brain were associated with high altitude sickness), seawater experiments (which proved that man could drink seawater for six to twelve days without dying but suffering nonetheless, terrible thirst), sulfanilamide and deliberately inflicted TB experiments. There were many deliberately inflicted poisoning and wounding experiments and a variety of race and inheritance experiments. Some of the experiments were accompanied by sadistic torture that had no scientific purpose whatsoever and thus may be regarded as paradigmatic bad science. But many were constructive in that they did yield sound results. Carl Clauberg's artificial insemination experimentation on women in camps were both sadistic and ultimately of little value but his research into fertility in which 'women at Auschwitz were sterilized by injections of caustic substances into their cervix or uterus, producing horrible pain, inflamed ovaries, bursting spasms in the stomach, and bleeding [...] [and] [y]oung men had their testicles subjected to large doses of radiation and were subsequently castrated to ascertain the pathological change

⁴⁸ Johnson, B (1978) *The Secret War* Penguin at184

⁴⁹ Linda Hunt argues that NASA's veneration of Nazi scientists deserves moral scrutiny. Hunt, L (1991) *Agenda: The United States Government, Nazi Scientists and Project Paperclip, 1945-1990* St. Martin's Press.

⁵⁰ See also Freyhoffer, H (2004) *The Nuremberg Medical Trial: The Holocaust the Origin of the Nuremberg Medical Code* Peter Lang Publishing 28.

in their testes'⁵¹ produced results and were doubtless, despite their vicious nature, of some scientific value.

Mengele's infamous twin experiments on 3000 twins in the 1943 resulted in the deaths of thousands. Of these children, only 200 survived. Mengele was not the only researcher at Auschwitz. In fact, he was one of several lesser scientists there undertaking medical research under a Dr Eduard Wirths. the experiments involved stripping the twins and measuring them, taking blood putting caustic eye-drops into the eyes of the subjects, intentionally infecting of one twin, removing organs, amputating limbs and conducting follow up autopsies on the two dead twins:

One day, my twin brother, Tibi, was taken away for some special experiments. Dr. Mengele had always been more interested in Tibi. I am not sure why - perhaps because he was the older twin.

Mengele made several operations on Tibi. One surgery on his spine left my brother paralyzed. He could not walk anymore. Then they took out his sexual organs. After the fourth operation, I did not see Tibi anymore.

I cannot tell you how I felt. It is impossible to put into words how I felt. They had taken away my father, my mother, my two older brothers - and now, my twin.⁵²

Collections of dead preserved animals are found in many museums. They are, without doubt, of scientific interest. Doctor August Hirt, Professor of Anatomy at Strasbourg University, preserved the dead bodies of 115 Jewish victims of gassing in order to keep a scientific record of the racial and genetic characteristics of the Jews, the genetic type that had for years generated so much scientific and political speculation.

Much of this research far from proving useless was scientifically valuable, at least as useful as much routine scientific research that takes place now. Dr Robert Pozos, Director of the Hypothermia Laboratory at the University of Minnesota of Medicine at Duluth proposed republishing data from the hypothermia experiments such were their value to scientific research. The fact that this was vetoed by the editor, Dr Arnold Relman, of the New England Journal of Medicine only emphasises the actual scientific value of the research. Likewise John Hayward, biology professor at the Victoria University in Vancouver, Canada, has outlined his belief that the Nazi hypothermia experiments are vital to the greater understanding of the problem and has affirmed that although he did not want to use the Nazi data 'there is no other and will be no other in an ethical world [...] I use it with my guard up, but it's useful.'⁵³

The bad science objection fails. Science can be brilliant and its uses, entirely immoral. Nazi science need not be misrepresented as scientifically poor just because it suits the demands of a new industry in repro and necro-eugenics. The new eugenics may still prove grossly unjust. The means being used and the ends to which the proposed activity is put needs scrutiny. Further, as we have seen, the very distinction between a bad 'old eugenics'

⁵¹ Ibid.

⁵² Moshe Offer as quoted in Lagnado, Lucette Matalon and Dekel, SC (1991) *Children of the Flames: Dr. Josef Mengele and the Untold Story of the Twins of Auschwitz*, William Morrow and Company 71.

⁵³ Moe, K (1984) 'Should the Nazi Research Data Be Used?' (14) *Hastings Center Report* 5.

and the good 'new eugenics' proposed by the new traders operates on at least one natural law assumption.

Misrepresenting the Argument from Injustice

As we have already seen, at the heart of the bad science argument is the assumption that there is indeed some human endeavour that is bad per se. One aspect of the natural law tradition is that it is not altogether relativistic whether culturally or morally. The very idea of a bad eugenics involves implicit recognition that consensus, opinion, legality (understood in a purely positivist sense) and state sanction are no arbiter of morality. Chattel slavery, however well regarded at the time, was fundamentally unjust. The very idea of a bad eugenics is entrenched in the admission that certain kinds of laws are universally and timelessly iniquitous. Even where there is normalisation of injustice, this normalisation can only explain the actions of the perpetrators. It does not make the activity itself just. To this extent, efforts to propagate a new eugenics are entrenched in aspects of the natural law tradition. The very language of human rights is steeped in the idea that human rights and human dignity are irreducible concepts that do not involve arbitrary and discriminatory notions of human value.

There are other problems, however, with the utilitarianism implicit in other forms of eugenics. It is common now to discover bioethicists, caricaturing discussion of oppression and genocide as a kind of conceptual red herring which they regard as a cruel misreading of their genial position. Thus any objection both to moral relativism and to the widespread though distinct idea that there is nothing on earth that is timelessly and universally wrong, any protestation that refers to the horrors routinely and institutionally performed by men upon another (whether by way of forced labour, slavery, rape, child abuse or genocide) is simply ridiculed as an argumentum ad Hitlerum which no sensible utilitarian would recommend in any case. Again, reference to the manifest usefulness of some Nazi science and experimentation is conflated with the former caricature.

This brings us to another idea fundamental to the natural law tradition, namely, that the end does not always justify the means. But the question of injustice is far more worrying for the utilitarian than he is willing to let on. In reality, he is obliged by his own logic to use *any* means to achieve better ends so long as the action can be hushed up. Utilitarianism drives one to injustice precisely because of its fascination for bringing about better (or best) consequences. Even variations, designed to stall the argument from injustice, by way of rule utilitarianism cannot adequately answer the problem raised by Bernard Williams, Elizabeth Anscombe, David Lyons, Philippa Foot, David Oderberg and many others. Let us state the argument from injustice plainly for anyone who is unfamiliar with it, so there can be no doubt.

Maximising the best: Arguments from Injustice

Let us suppose ten people need organs and one homeless and unwanted⁵⁴ man can be used for his body parts. Assume that these ten must have organs as a matter of necessity.

⁵⁴ The feature of being unwanted is significant because utilitarianism often permits the counting of preferences of onlookers in the calculus of a potential victim's moral worth. A pop-star, then, would be an inappropriate

What possible utilitarian reason could there be against killing him and answering their needs? The utilitarian must accede, surely, to the slaughter of the innocent man in the interests of maximisation. There are possible utilitarian answers to this question. Rule utilitarianism would hold that the removal of organs could well lead to an erosion of faith in the law. Loss of confidence in the law against killing people is a serious matter it is warned. Thus, in the interests of longer term consequences, it is necessary to prohibit the killing of the innocent man whose death would maximise utility for the ten. This shift to rule utilitarianism however, does not account for the injustice of killing the homeless man secretly and without any consequent erosion of faith in the law. On this view, it would be equally necessary to kill the innocent man in the name of maximising organs of the ten others where that killing was performed entirely secretly. The trouble with this, however, is that it fails to do justice to the rights of the innocent, homeless man. The secrecy underpinning the killing of an innocent should make no difference to the rectitude of the act. The example merely highlights the moral bankruptcy of utilitarianism whether, act or rule, by showing that both theories are committed to seriously immoral consequences. However useful an innocent victim might be and however secret his homicide, what makes the killing of the homeless man unacceptable is the fact that he is innocent and has a value that is irreducible. Any secrecy surrounding the homicide makes the killing none the kinder. Yet, neither version of utilitarianism can give us any reason why we should not kill the innocent homeless man.⁵⁵

Take this argument further and we find ourselves on a path that commits us to better or best consequences, requires the creation of better creatures, morally enhanced species, better humans and more of them, as well as the elimination of lesser 'non-productives' so long as the secrecy criterion is not breached. Human enhancement by germ-line gene manipulation is now the subject of excited discussion between trans-humanists in the *Journal of Medical Ethics*. Forgetting that their theory gives us no clear reason why we should not kill the innocent in the name of bringing about better or best consequences, they have moved on to promote the creation of superhuman species, enhanced humans with fewer sub-men. The only argument canvassed to oppose the onwards-and-upwards trend toward supermen, is the thought that the poor creatures, alienated from their origins and manipulated from the outset to answer certain design criteria, might turn on and consume (ie, eat) their creators. The illicit dominion and control of their lives by men and women who regarded them as a mere social experiment, more often than not designed to be deprived of the love and support of those that created them and their blood kin, and to be denied fundamental information about their origins is not something that enters their deprived computations.

This is unsurprising. A similar debate about eugenics took place nigh on a century ago. H.G Wells at the turn of the twentieth century proposed a version of eugenics that appeared forward thinking a progressive. Wells' social Darwinism came under fire from the English Catholic Hilaire Belloc who engaged Wells in a spirited debate in 1926 in an essay entitled *Mr Belloc Objects To 'The Outline Of History'*, (1926) and after an extended defence of his position by Wells, the essay *'Mr Belloc Still Objects'* (1927). G.K. Chesterton

subject for organ harvesting on this account as he or she would have a higher moral status than the homeless man. This very idea is at odds with the equal dignity principle favoured by natural law theorists.

⁵⁵ Smart, JJC and Williams, B (1975) *Utilitarianism: For and Against* Oxford University Press.

too is famous for his 'Eugenics and Other Evils: An Argument against the Scientifically Organized State' (1922) a rejection of the principle of eugenics. Social Darwinists like H G Wells prophesied the emergence of a progressive eugenics in 1904. In Wells' world view, there should be little concern about using unjust means to achieve better or best ends. Intentional killing and compulsory sterilization were, in his opinion, a sound way to eliminate what he regarded as inferior peoples. Seeing no inconsistency in holding to both the determinism implied by natural selection and the free will associated with artificial selection, he believed that evolution, operating on its own, was not sufficiently effective. In his *Anticipations of the Reactions of Mechanical and Scientific Progress Upon Human Life and Thought*⁵⁶ he dreamt of a New Republic freed of the weak, unfit and unproductive and as well as a great number of 'blacks, browns, dirty whites and yellow people.' Society needed to be controlled and manipulated by a progressivist elite. For this reason, he sought to establish eugenic programs. The goal was the elimination of the unfit to be achieved by opiate-induced mercy killings (what I have called necro eugenics), and it was expected that the men of the New Republic would have 'no pity and less benevolence' about inflicting death on the unfit, because those who kill the weak would have a 'fuller sense of the possibilities of life than we possess.' Thus, his list of those who would not be fit to propagate (repro-eugenics), as well as those to be euthanized like willing lambs to the slaughter (necro-eugenics), included those with transmissible diseases, mental disorders and alcoholism:

[T]he men of the New Republic will hold that the procreation of children who, by the circumstances of their parentage, must be diseased bodily or mentally [...] that a certain portion of the population [...] afflicted with indisputably transmissible diseases, with transmissible mental disorders, with such hideous incurable habits of mind as the craving for intoxication exists only on sufferance, out of pity and patience, and on the understanding that they do not propagate; and I do not foresee any reason to suppose that they will hesitate to *kill* when that sufferance is abused. And I imagine also the plea and proof that a grave criminal is also insane will be regarded by them not as a reason for mercy, but as an added reason for death. I do not see how they can think otherwise on the principles they will profess.⁵⁷

The necro-eugenicists would not hesitate to kill these unfit:

The men of the New Republic will not be squeamish, either, in facing or inflicting death, because they will have a fuller sense of the possibilities of life than we possess. They will have an ideal that will make killing worth the while [...] They will naturally regard the modest suicide of incurably melancholy, or diseased or helpless persons as a high and courageous act of duty rather than a crime.⁵⁸

The necro-eugenicists were clinical, hygienic and detached. Their homicides were humane:

⁵⁶ Wells, HG (1904) *Anticipations Of the Reactions of Mechanical and Scientific Progress Upon Human Life and Thought* – available at: <<http://www.archive.org/details/anticipationsofr00welluoft>>.

⁵⁷ Wells *Anticipations Of the Reactions* supra note 56 at 299-300.

⁵⁸ Wells *Anticipations Of the Reactions* supra note 56 at 200.

All such killing will be done with an opiate, for death is too grave a thing to be made painful or dreadful, and used as a deterrent from crime. If deterrent punishments are used at all in the code of the future the deterrent will neither be death, nor mutilation of the body, nor mutilation of the life by imprisonment, nor any horrible things like that, but good scientifically caused pain, that will leave nothing but a memory.⁵⁹

As with most attempts to give a definition of what sort of person is to be regarded as 'fit' for the purposes of eugenics, Wells' version simply degenerated into a perverse form of discrimination. After an offensive account of the Jews,⁶⁰ he concluded that 'those swarms of blacks, and brown, and dirty-white, and yellow people will have to go':

And for the rest, those swarms of black, and brown, and dirty-white, and yellow people, who do not come into the new needs of efficiency? Well, the world is a world, not a charitable institution, and I take it they will have to go. The whole tenor and meaning of the world, as I see it, is that they have to go. So far as they fail to develop sane, vigorous, and distinctive personalities for the great world of the future, it is their portion to die out and disappear.⁶¹

The new eugenicist supplies no clear reason why we should not kill the innocent, whether by euthanasia, abortion after screening or PGD, and indeed this is one central strategy of the new eugenics, in the name of bringing about better or best immediate and presumably too long-term consequences. In truth, the maximific imperative knows no bounds. Promoting the creation of a superhuman species and planning for the elimination of sub-men, costly men, old men, weak men, etc. they rarely calculate the implications of using such oppressive and perfectionist methods to achieve their optimized ends. The one argument canvassed to oppose the onwards-and-upwards trend toward supermen, is the thought that the poor creatures might eat their creators. The needs of the people created or the people eliminated figure nowhere in the analysis.

Maximising and Intergenerational Injustice

If the murder of the homeless man is a fundamental problem for the utilitarian so too are the implications of the demand to maximize by way of repro-eugenics. The maximizing imperative suppresses from its calculations the interests of future generations. Research demonstrating the intergenerational need of the love and support of their blood kin, all things being equal, is systematically ignored in the interests of the industry offering fertility services.⁶² The confusion that a person might feel as the result of being one of a thousand siblings, a human clone or a child of a man long dead or fetal mother is a matter that does not and indeed logically cannot figure in the maximiser's calculus.⁶³ Conceptually excluded

⁵⁹ Wells *Anticipations Of the Reactions* supra note 56 at 300.

⁶⁰ Wells *Anticipations Of the Reactions* supra note 56 at 315-7.

⁶¹ Wells *Anticipations Of the Reactions* supra note 56 at 317.

⁶² Laing, J and Oderberg, DS (2005) 'Artificial Reproduction, the 'Welfare Principle', and the Common Good' (13) *Medical Law Review* 328. Laing, J (2006) 'The Prohibition on Eugenics and Reproductive Liberty' (29) *University of New South Wales Law Journal* 261. Laing, J (2006) 'Artificial Reproduction, Blood Relatedness and Human Identity' (89) *Monist: International Journal of General Philosophical Enquiry* 548.

⁶³ This is not a mere fiction but a modern reality. Donor conception conceals the biological realities. Many

from his analysis, the maximizer proceeds to the enhanced world with little concern for the people created happily ceding to consumer demand for better, stronger, taller, fitter children. Julian Savulescu, who proposes an obligation to enhance, has recently limited the maximizer's obligation to the production of the best children we can have who would be our genetic offspring. Perhaps sensing the sorrow of the vast number of donor offspring lied to and deceived the world over, the Uehiro funded professor has had something of a change of heart. But his own ad hoc limitation emerging out of the conceptual blue, undermines the very foundation of the maximizing imperative and highlights the problem at the heart of the debate. The analysis, in part, ignores the needs of the person created, the illicit dominion exercised over the origins of the child, the commodification implicit in the third party control over the child, the lies and deception practiced routinely, the separation from blood kin often implicit in the practice, the fragmentation of a person's identity and much more. The illicit dominion and control over their lives and futures by men and women who regard the people created as a mere social experiment, invariably designed to be deprived of the love and support of those that created them and their blood kin, is set aside. These future generations in their role as products artificially conceived to satisfy consumer demands are designed to be denied fundamental information about their origins. A person's need for the truth about their origins and the love and support of their own blood kin is not something that even enters these depraved computations. I have argued elsewhere it is grossly irresponsible and inter-generationally unjust to bring into existence children who will be human clones, or people deliberately and avoidably alienated from their blood kin, the result of mass parenting or posthumous conception for example.⁶⁴

Calculating eugenics: arbitrariness and incommensurability

Part of the trouble with the utilitarian vision, is that it takes us down the path of maximisation with little idea how these calculations are to be performed. We are assured by animated, well-heeled bioethicists funded by those likely to cash in, that some procedure will inevitably reveal how we are to achieve the best results. Upon analysis the promise turns out to be a mirage. We are left in doubt about what the best result would be in any case, since the computation of the best overall consequences was impossible to begin with. Over what temporal time-slice would such a computation be undertaken? The next ten minutes would produce one answer while the next ten years would produce another answer. Over what spatial area would the sum be calculated? To calculate the happiness of ten people would produce one answer while the same calculation performed on 100,000 would produce another result. Much also depends on whom one performs the test. Performing a survey on a group of medical researchers and their followers would yield one result,

people conceived in this way are now finding thanks to DNA testing that they have hundreds of siblings and a hidden biological identity that has enormous implications for them. Logically implied by the maximisers imperative, the repro-eugenicist can give us no way of understanding the needs of future generations.

⁶⁴ In particular in Laing, J (2006) 'Artificial Reproduction, Blood Relatedness and Human Identity' (89) *Monist: International Journal of General Philosophical Enquiry* 548, but see also articles mentioned above. On the subject of posthumous conception, loss of one's parents after natural birth is itself a loss and sorrow to a child. To bring about this loss intentionally and deliberately involves new injustice by virtue of the intentional nature of the act. See also Laing, J and Oderberg, DS (2005) 'Artificial Reproduction, the "Welfare Principle", and the Common Good' (13) *Medical Law Review* 328.

while the same test on the same number of victims of the industry would produce quite another set. In debates about the legitimacy of slavery, the feelings of beneficiaries of the slave trade might well generate a diverse outcome to those attending to the feelings of its victims.

The answers to these diverse questions affect the outcome radically and demonstrate the arbitrariness of the calculation. Is felicity calculated by reference to the feelings of the family, the classroom, the boardroom, the racial group, a religious group or the nation? Each set of parameters achieves different results. Not only is the spatial standard used problematic, so too is the temporal standard. The truth is that utilitarian calculations falter with the simplest of evils. They cannot even produce a satisfactory moral computation with something as pernicious as chattel slavery. We arrive at a fluctuating account of the wrongness of slavery depending on whether we test for feelings about the practice in the slaving era and those in the 20th century. Arbitrariness besets the agenda most clearly when societies are in the process of change. If 51% of the wider community feel slavery to be acceptable, while certain groups are unhappy with it, which group is to be the arbiter of the standard? The incoherence and arbitrariness of the pleasure/pain calculation is familiar. The most important feature about attempts to gather information about how people feel about genocide, however, is that discovering what people feel about genocide reveals only that: people's feelings about genocide. In the same way calculating happiness, pleasure or utility is dependent upon the time slice applied.⁶⁵

Not only are there problems of arbitrariness surrounding the calculus, there are problems of incommensurability. The requirement that we undertake the business of maximisation is not merely impracticable but is actually senseless. How are we to add up completely diverse categories of good thing and arrive at any certain answer? The very question is like being asked to add up the good of four panes of glass with the good of courage, two particularly beautiful spires, one exceptionally soft cat, and six minutes of uproarious laughter. What would be the meaning behind such a calculus? How would I compare these diverse realities and come up with any significant answer? If some answer did present itself, what would the question have signified in the first place? Why not throw in the good of global warming for mosquito life in the UK, the disgust associated with a putrid stench and the intensity of a blue sky? How are these to be commensurated one against the other, not merely in the case of one person but in the case of the many? The thought that we can calculate goods and evils is predicated on the idea that there is some sensible way of commensurating goods and evils one against another. But the demand that we perform this act is actually senseless. There need to be stipulations and parameters against which we begin to commensurate and calculate outcomes. Utilitarianism assumes commensurability. Likewise, Harris, Savulescu and others presuppose as much when they make conjectures about the best outcome for groups of genetically enhanced, cloned, maximised and optimised personalities and the ideal numbers of such characters. Further they deliberately *select out* of their computations the wealth of dishonesty and deception that attends artificial reproduction and the very real confusion and loss that attends these activities. It is for this reason that there is still little transparency surrounding the relatively old-fashioned activity of donor conception, never mind human cloning, animal-human

⁶⁵ Finnis, J (1983) *Fundamentals of Ethics* Oxford University Press; MacIntyre, A (1981) *After Virtue* Duckworth; Oderberg, DS (2000) *Moral Theory* Oxford, Blackwell; Teichman, J (2000) *Social Ethics* Blackwell.

hybrids, and genetic enhancement. In short, the New Eugenocrats, for that is what they are, assure us that there is some better or best state of affairs that they will reveal in due course. In fact, these insights are never forthcoming and cannot be because these better states of affairs are arbitrarily assessed often with a view to someone's fortunes and industry. Indeed, when asked for details deception and obscurantism prevails whether in the realm of repro-eugenics or necro-eugenics. With repro-eugenics, at least where children created artificially are concerned deception invariably prevails. Deception has been the experience of donor conceived adults and is likely to be the experience of human clones, animal human hybrids, the posthumously conceived and those who have been mass parented. To the extent that they are able to form a desire to know their own kin the genetically enhanced supermen of the future are likely to be suffering in entirely new ways. Their masters and creators by then, however, like the slavers of yesteryear, will have moved on. In the same way, where necro eugenics is concerned deception prevails. Euthanasiasts rarely inform victims and their families of the danger presented to them by passive and active euthanasia in hospitals. The political, financial, medical, research, body part and Malthusian interests in their deaths remain obscure and undefined.

If the New Eugenocrats cannot tell us what it is they want to maximise, for how long, for how many and for what kinds of creatures, if dishonesty and deception surrounds their every endeavour, we may be sure their genetic utopian dreams will spell grief, confusion, loss and avoidable sorrow for future generations. The promise of an easy death (a necessary means to eliminating the unfit) will bring an industry in compelled death, organ and tissue removal from the non-consenting and homicide for uninformed and unwilling victims. The eugenicist's promise of a better populace will merely bring distress to those over whom they claim dominion.⁶⁶

Eugenics, Markets, Financial and Political Interests and Maximisation

We assume that those charged with the business of caring for the vulnerable will not knowingly or unwittingly injure or kill people. But human experience demonstrates otherwise. We take for granted that doctors and others charged with the care of patients will not assault, mutilate or kill in order to further their research, achieve bureaucratically set standards, eliminate the unfit, save time and trouble, and so on. Historical evidence shows otherwise. We regard administrators, managers, team-leaders, and other professionals as existing in a morally hazard-free zone particularly when operating freely but a brief look at history shows that they can and often will cooperate in atrocities. The human spirit, however full of philanthropic and scientific zeal, has within it also the capacity to achieve its ends with little interest in the means employed. Assurances of safeguards by those who seek to open up a conceptual space for the new eugenics are proffered often in wilful ignorance of the power of institutions and markets to incentivize cruel injustice, whether immediate or intergenerational.

⁶⁶ On the subject of genetic enhancement by gene manipulation, Robert Sparrow plausibly argues in 'A Not-So-New Eugenics: Harris and Savulescu on Human Enhancement,' that Harris and Savulescu's ethics collapses into the eugenics of old. Sparrow, R (2011) 'A Not-So-New Eugenics: Harris and Savulescu on Human Enhancement' (41) *Hastings Center Report* 32.

Above all, the new eugenics appears destined recklessly to disregard the power of the market to motivate and incentivise torture and destruction of the vulnerable with little concern for the victims, their families, the long-term consequences and the kinds of societies created thereby. It is precisely because of this maximising and optimising imperative that there is a preparedness systematically to justify repro and necro-eugenics. These self-same theorists reject the natural law while relying on it to distinguish themselves from the bad, old eugenicists of times past. They then apply the very same assurances to propound a view that is destined to be taken up by industries and businesses that undermine the interests of the vulnerable creating avoidable loss for future generations.

The experience of the twentieth century and the power of financial, political and medical interests suggest that the new eugenics, without access to fundamental natural law precepts, conceptually collapses into its older unacceptable version. Further, the institutionalised deception that attends much of what is now promoted as progressivist and maximific merely highlights the unacknowledged cost to innocents both now and intergenerationally. The natural law tradition permits the conceptual apparatus that allows a critique of the oppressive direction of modern markets.

Comparative legal history demonstrates that at times practices that appear to be progressive turn out to be human rights abuse. A consideration of the comparative legal history of slavery and certain eugenics practices of the twentieth century is raised as a reminder of the limits of positive law's bindingness. Significant features of the natural law tradition are outlined. The new eugenics is predicated on an informal rejection of the idea that there are no timeless and universal moral laws. The very idea of a bad eugenics involves implicit recognition that consensus, legality and state sanction are no arbiter of justice. 'Bad eugenics' is rooted in an unstated admission that certain kinds of human laws are universally and timelessly unjust. To this extent efforts to propagate a plausible new eugenics are entrenched in certain significant aspects of the natural law tradition though proponents might reject any such link. The power of financial, political and medical interests suggest that the new eugenics, deprived of logical access to fundamental natural law precepts, conceptually collapses into its older unacceptable version. The institutionalised deception that attends much of what is now marketed as progressivist and maximific merely highlights the obvious though unacknowledged cost to innocents both now and intergenerationally.

The dignity of the human being and the universal and timeless nature of justice demand a critical approach to the new eugenics and a memory of laws and times that challenge their reality. The natural law tradition permits the conceptual apparatus that allow that critique.

CONCLUSION

Comparative law demonstrates that positive laws often enthusiastically championed as progressive, forward-thinking and socially useful turn out, upon analysis, to be no such thing. The twentieth century is nothing if not a reminder of man's capacity for vice and iniquity dressed up as evolution and progress. Among those groups targeted for oppression typically are the young, the poor, the dissident, alcoholics, addicts, the unemployed and the disabled. Millions have been slaughtered and oppressed for their ethnicity, creed, race, social grouping, medical inheritance, sexuality and political views. Comparative legal history highlights human capacity for vice particularly when laws, institutions and public

attitudes normalise injustice. The human propensity to rationalise our own enormities in the name of social utility, explains how it is that lies and deception can become institutionally endemic while injustice becomes invisible to its practitioners. I have suggested that the practice of eugenics deprived of precepts to be found in the natural law tradition raises the spectre of serious human rights abuse. Conceptually related to the utilitarian and social Darwinist worldview and historically evolving out of the practice of slavery, it has led to some of the most spectacular human rights abuses in history. The sterilization of and experimentation on those deemed disadvantageous in many technologically developed states like the US, Scandinavia, and Japan, led inexorably and most systematically to Nazi Germany with the systematised elimination of countless millions. What was aimed at here was only 'the better.' The new eugenics adopted by John Harris, Julian Savulescu and others, without access to precepts central to the natural law tradition, is bound to collapse into the old variety in part because of its fixation on producing the better. It was this very idea operating in conjunction with the idea that the end justifies the means that drove much of the injustice of the twentieth century. Ethically questionable strategies were at the time viewed as forward thinking and socially evolutionary. The new eugenics with its continuing commitment to what I have called repro-eugenics and necro-eugenics, I suggest, fares no better and spells loss for people regarded by the powerful as deficient in some way, whether, physically, socially or politically.

The idea that the better outcome could by virtue of being freely chosen avoid the charge of injustice is implausible. The fact that one freely chooses to give one's children away into slavery or medical experimentation or to clone oneself a hundred times, is no bar to the action's being at odds with human dignity and intergenerational justice. Schemes like genocide are perfectly realizable by willing participants using effective marketing techniques, law reform and altered mindsets. Importantly, misinformation, propaganda and behaviour modification techniques beloved of advertisers, entertainers and defence strategists, are well-known ways of getting people to do foolish, mistaken or vicious things. Eugenics remains a continuing threat both to the defenceless, in particular, and the categories of people deemed deficient, more generally. Biometric databases exposing one's medical data, DNA defects, IQ, political views, social networking inanities, while in some ways appearing promising, demonstrates how vulnerable humans are, not just in the hands of political misfeasors, fanatics and tyrants but insurance companies, government snoopers, false friends and, bluntly, credulous utilitarians. These latter suffer a dearth of capacity for self-reflection, a catastrophic inability to understand matters pertaining to human virtue and vice and, in view of their funding and influence, appear destined further to normalise irrationality with their ill-judged and over-reaching scientism.