Eugenic Recognition in Canadian Law

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1. Introduction

The discipline of eugenic science is easily discredited by association with offensive programs of breeding for human superiority, and preventing breeding by those whose children a society pre-determines would be unacceptable on racial or class grounds. In the United States, "eugenics" has a status close to that of a vogue dirty word, like "racism" and "fascism", with which it is sometimes confused. In 1972, when the American Eugenics Society found that almost eighty percent of its members wanted the word removed from its name, the Society voted to call itself the Society for the Study of Social Biology.1 Whoever can establish a new name for the authentic concern of eugenics, a science dealing with the improvement of genetic qualities, may secure for the discipline a new respectability, and for himself a place in posterity. In Canada in particular, no service was done to the science by the use of the name “Eugenics Boards” to describe the statutory boards in Alberta and British Columbia dealing with mental patients feared likely to transmit to their progeny characteristics harmful to society; the recent demise of these boards leaves behind a disquieting record of compulsory sterilization upon highly suspect scientific grounds.

The word “eugenics” (from the classical Greek eugenes, meaning hereditarily endowed with noble qualities) was introduced into the English language by Sir Francis Galton (1822-1911), an anthropologist and cousin of Charles Darwin, when he published his book Inquiries into Human Faculty and its Development in 1883. Accepting empirical evidence of selective organic breeding compelled by survival of only the fittest, he observed:

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 cognisance 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.2

This definition clearly goes beyond issues of individual genetic transmission, and includes, for instance, economic and environmental factors which together may be called social as opposed to biological or personal eugenics. It is usual, however, to regard eugenics as centered upon genetic knowledge.

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* Visiting Research Professor, Faculty of Law, University of Toronto.
2 (2d ed. London: Dent, reprinted 1951) at 17, note 1. He had earlier failed to successfully launch the word “viriculture”.
Galton's purpose of propelling evolution by speeding up the inevitable prevalence of the "more suitable" presumes that they can be identified in advance of their more successful survival, but, despite the controversy Galton's proposals have generated since the opening decades of this century, they can be seen as ethically neutral in themselves. His definition of "eugenics" now appears unfortunately phrased, however, and at best naive, in the light of our knowledge of how the evolutionary principle that the fittest do survive was perverted by Nazi philosophy into the fierce imperative that the fittest (by Nazi definition) must survive. Modern writers, with curious insensitivity almost confirm the apprehensions of critics of eugenics doctrine — they have been no more aware than was Galton of their liability to offend against racial or class susceptibilities. For instance, a former General Secretary of the British Eugenics Society, C. O. Carter, advocating eugenically desirable policies, has written that "special efforts are needed to offer the opportunity of family planning to the most ignorant and least gifted groups." The hidden cultural components of ignorance and giftedness have now been identified in traditional tests of these qualities, to the effect that such tests measure nurture rather than nature, and reward cultural sharing and assimilation with the testers, penalizing test subjects of different culture. Carter's "offer of opportunity" may thus appear an invitation to voluntary genocide. The purpose of eugenics may be worthy of more thoughtful presentation as offering relief from the procreation of seriously impaired or disadvantaged children to parents and families, rather than to persons as members of racial or social groups.

It would be useful if a clear distinction could be drawn between positive and negative eugenics, because negative eugenics is more immediately acceptable as a preventive and curative discipline. It is possibly even attractive in focusing on the elimination of disease and especially bio-chemical defects which future individuals would be likely to inherit genetically. In promoting their well-being, negative eugenics appears to advance the interests of humane society. Haemophilia and diabetes, for example, are genetically transmitted defects, found in some children, which may become preventable by the results of research in genetic engineering. This research may establish a treatment of potential parents before conception, or of a fetus before birth. At the moment, such conditions may be treatable by, for instance, placing affected children upon a special diet devoid of harmful materials such as phenylalanine or certain natural sugars, but several genetically transmitted diseases not responsive to antibiotics are eugenically only self-regulating in the sense that the children they attack are unlikely to survive to the age or condition of reproduction. Nevertheless, it is a current social dilemma that medical science and technology increasingly subvert the principle of survival of the fittest, and frustrate that of natural selection, by prolonging to the point of reproduction the lives of many who carry deleterious genes. They transmit their genetic defects to future generations, weakening the genetic capacity of the human race by increasing its accumulated inheritance of potentially harmful genes. A

4 For an interesting commentary on the cultural component of the Law School Admission Test, see Douglas, J. in De Funis v. Odegaard (1974), 94 S. Ct. 1704 at 1708 et seq.
time may come when individual genetic screening and counselling are con-
sidered essential services to each community, with the policy to be applied
upon identification of potential harm hopefully being based upon consent of
the individuals concerned.

Positive eugenics, named “euphenics” by Joshua Lederberg in an uncon-
scious bid for some traction on posterity\(^6\), contains the essence of Galton’s
purpose, and faces the awesome task of improving humankind to make its
members more intelligent, talented and physically fit to survive in a changing
atmosphere and material environment. By synthesizing new genes to be intro-
duced into human chromosomes, we may face not only the remote spectre
of breeding a sublime master race served by a parahuman, almost anence-
phalous worker race applying its durable human physique in robot tasks,
but also the prospect of human salvation on this world and beyond. Altera-
tion of body temperature could aid survival in a renewed ice-age, a capacity
to derive nourishment from artificial foodstuffs could ease food shortage,
adaptation to life under water, which covers four-fifths of the world’s surface,
might afford respite from population pressure on living space, and retardation
or suspension of ageing would assist journeys of curiosity or necessity to other
planets.

Deciphering the genetic code, and so gaining the ability through the
biological sciences to change the genetic message relayed to future generations,
will be comparable to the breakthrough achieved in the physical sciences in
harnessing nuclear energy; the new knowledge in itself will indeed be just as
neutral, but at the disposal of human beings with a potential to use it wisely
or unwisely. These dimensions of positive eugenics are little related to the
present condition of Canadian law. There is, however, such a close interaction
between normally legal negative eugenics and more formidable positive
eugenics, that an alleged distinction must be treated with care. A simple mani-
pulation of semantics will convert negative eugenics into positive eugenics.
By offering the opportunity to eliminate by genetic dexterity individual charac-
teristics of which we disapprove, we are in fact determining the characteristics
to be passed on to generations to come, projecting into the future the light
of current evaluations. Breeding out low intelligence in individuals by tech-
niques of negative eugenics is really the same as propagating high intelligence
in the community, and is consistent with the aims of positive eugenics.

The difficulty with pursuing — consciously or unconsciously — a blue-
print for humankind’s genetic destiny is that the implicit evaluations are not
biologically impelled, but stem from social convenience and cultural aesthetics.
Thus, for example, we react with some repugnance to dwarfism (achondro-
plasia) when not paraded for our diversion in the circus, and feel discomfort
in the presence of Marfan’s Syndrome\(^6\), so that parents would want to spare
their children these conditions, even though a child so affected might achieve
the distinction of Toulouse Lautrec or Abraham Lincoln respectively. To limit

\(^5\) As a Nobel Laureate, his claim upon posterity may be stronger than most.

\(^6\) A congenital ailment characterised by abnormally elongated fingers and possibly
toes, unusually flexible joints, dislocation of the eyes’ crystalline lenses, and perhaps less
obvious cardiac and spinal defects.
human development to our present conceptions of the ideal, however, may prove harmful. Our coming capacity to counteract mutations\(^7\) by the practice of negative eugenics may in the long run actually threaten the purpose of positive eugenics by obstructing progress along the evolutionary path. An inadequate understanding of human ecology may prevent recognition of those mutations that indicate a spontaneous biological adaptation to a new environment, and, far from overcoming what we perceive to be nature's occasional deviant tricks, we may in ignorance deny ourselves evolution's promise of survival by change.

This issue is too vast to be considered within the compass of this and perhaps any article on law. The long term prospects of increasingly pyrotechnic medicobiology, such as entirely ectogenetic fertilization and the asexual production of new humans identical to the donor of the single cell from which each develops by the process of cloning, undoubtedly warrant legal attention,\(^8\) but we cannot understand the direction of legal progress in the field of eugenic recognition without knowing where we are now, and something of where we have been. There are features of the present legal order which particularly lend themselves to analysis in eugenic terms, and certain areas of law and the policies underlying them may be considered as they affect individual and collective procreation and the quality of its product. Control of the birth-rate pertains more to social than personal eugenics, but the social environmental inheritance of a child cannot be separated from his genetic inheritance in estimating his prospects of a happy life, and society's prospects of advancement towards its goals by the addition of his presence.

2. Contraception

Galton and his followers were considerably influenced by the alarming population predictions of Thomas Malthus. Their great fear was not simply that the quality of human stock might degenerate, but that humanity itself might come to exhaust its vital materials and perish by the bulk of its own numbers: a fear more real in parts of the world today than it appeared in nineteenth century under-populated fertile North America. Opposition to

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\(^7\) A striking instance of the spread of a mutation exists in the estimated 8,000 white and coloured South Africans affected by porphyria variegata due to a dominant gene derived from a single mutation, all 8,000 having been reliably traced back to a couple who married in 1688. Porphyria variegata is the failure to metabolize porphyrin, a derivative of a respiratory pigment connected with haemoglobin. This defect causes formation of brown skin patches and sensitivity to barbituates, produces abdominal pains, neurotic symptoms and can lead to paralysis and death. Porphyria is not always caused by a defective gene. An outbreak among Turkish children, who suffered resulting liver damage, came from their eating seeds treated with a fungicide. See G. Dean, *The Porphyrias* (1963), cited by J. A. Fraser Roberts in J. E. Meade and A. S. Parkes, eds., *Biological Aspects of Social Problems*.

eugenic advocacy of birth control methods\(^9\) was not wanting, however, since those outraged when Charles Darwin contended that men had sprung from apes were not mollified when Galton proposed that thenceforward they should breed like race-horses. The doctrinaire religious convictions of birth-control opponents were reinforced by the social belief that contraception would lead directly to free love and moral irresponsibility, endangering the foundations of stable society built on fidelity to conjugal ties.

Birth-control, reflecting the sexual appetite it was believed to liberate and corrupt, was not respectable, and not a topic to be discussed in polite society; as a cause of the publicly-professed godless, indeed, it was to be opposed by god-fearing folk on account of its patent and latent immorality, if not its actual obscenity. Like the prostitution to which contraception was held akin, however, it was not made illegal \textit{per se}, but attacked through its procurement and advertised availability. Charles Knowlton, a Massachusetts physician, took up the public cause of contraception, and his book \textit{The Fruits of Philosophy} sold over 40,000 copies in England, where public attitudes were not especially liberal. At home, however, Massachusetts authorities in 1833 suppressed the book, and Knowlton was fined and sentenced to a jail term of hard labour.\(^{10}\) Organised opposition to the distribution of birth-control information achieved a breakthrough in 1869 with passage of a New York obscenity act forbidding dissemination of such information and materials. Building on this precedent, Anthony Comstock persuaded Congress to enact section 211 of the 1873 Penal Code prohibiting the transmission of pornographic literature through the mail, and the posting of any device, drug or printed matter designed to prevent conception among human beings.

So-called "Comstock Laws", modelled on the federal initiative, were soon enacted in many American state legislatures,\(^{11}\) and the official approach to the spread of contraceptive information hardened in Britain at the same time, perhaps to control the emboldened spirits of such as George Drysdale, who instigated the Malthusian League, and Annie Besant, who became active in the League's activities. In 1876 the publisher Henry Cook was imprisoned for selling pornographic books, including \textit{The Fruits of Philosophy}, to which he had undertaken to add illustrations, and another publisher of advanced works, Charles Watts, withdrew the book when pleading guilty to a charge under the Obscene Publications Act of 1857. The official attitudes prevailing in the twin cultures of Britain and the United States, expressed respectively in the Indecent Advertisements Act 1889 and the Comstock Laws, made it natural that the new Canadian \textit{Criminal Code} of 1892\(^{12}\) would pro-


\(^{11}\) Only in recent years has the United States' Supreme Court declared the remnants of these laws unconstitutional; see \textit{Griswold v. Connecticut} (1965), 381 U.S. 479, and \textit{Eisenstadt v. Baird} (1972), 405 U.S. 438.

\(^{12}\) 55-56 Vict. c. 29.
scribe contraceptive advertising. This was achieved in Part XIII, entitled Offences Against Morality, where section 179 dealt with offences of publishing obscene matter.

Section 179 appeared as section 150(2)(c) of the 1953-54 presentation of the Code, which provided that "every one commits an offence who knowingly, without lawful justification or excuse . . . offers to sell, advertises, publishes, an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage". The words "without lawful justification or excuse" related to section 150(3), which allowed a defence of acting within the limits of the public interest. This might have protected instruction in contraception given to specific persons whose children would be likely to suffer from genetically transmitted disease or defect, and so accommodate personal eugenics, but accommodation of social eugenics was most probably excluded. In R. v. Palmer in 1937, the Ontario Court of Appeal upheld an acquittal of an employee of the Parents' Information Bureau prosecuted under an earlier version of section 150 holding that her offer of contraceptives and explanation of their use to poor married couples with large families served the public good. Whether the same result would have followed had the offer and explanation been made to an unmarried woman is, however, open to doubt. Aiding a couple with more children than they could support to avoid having another was considered of public advantage, but aiding an unmarried woman to avoid having any may have appeared as complicity in immorality. The contention of social eugenics that the child born outside a stable family represents a greater social danger and occasions a higher level of social expenditure may have been discounted. In R. v. Keystone Enterprises Ltd. in 1961, a company was convicted under section 150(2)(c) for mailing circulars advertising contraceptive products indiscriminately to householders, soliciting orders from those describing themselves simply as adults.

The critical words "preventing conception or" were removed from section 150(2)(c) on January 1, 1970, so that advertising contraceptive methods ceased to be an offence against morality. Beyond that, however, the change was more nominal than substantial, since legal control was withdrawn from the Criminal Code in order to be reposed in the federal Food and Drugs Act, complete with criminal sanctions for breach. The Act, administered by the Department of National Health and Welfare, provides in section 3(3) of its current form that "Except as authorized by regulation, no person shall advert-

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14 2-3 Eliz. II 1953-54, c. 51.
15 Now section 159(3).
16 (1937), 68 C.C.C. 20.
17 S. 207 of the then Criminal Code following amendments of the 1892 Code in 1906 and 1909.
18 (1961), 133 C.C.C. 338 (Winnipeg Mag. Ct.).
tise to the general public any contraceptive device or any drug manufactured, sold or represented for use in the prevention of conception”. Advertisements in the nature of information may be sent to physicians, of course, and Post Office regulations, as an exception to their general prohibition, permit the mailing of drug samples to physicians and those in analogous positions. The Governor in Council, giving effect to the exception at the opening of section 3(3), has acted under section 25(1) of the Act to authorize numerous regulations, and today the system of control of contraception advertisements to the public appears considerably eased, although it cannot be said that means and devices are marketable in the same way as are general products, services or patent medicines.

At the governmental level, the historical Canadian public policy on contraception, derived from earlier British and United States’ approaches, has been reversed in the present climate of national and international opinion. The 1968 United Nations’ Teheran Conference on Human Rights unanimously approved the basic right of couples to decide the number and spacing of their children, and the following year the General Assembly similarly passed the resolution that this includes the right of access to the knowledge and means necessary for exercise of the basic right, which the Economic and Social Council urged should be put into effect by 1980. Both the Canadian federal and provincial governments provide grants for Family Planning Association services, and since 1970 the former has maintained a training, research and information program. Consistent with principles of social eugenics and economic foresight, provincial agencies may meet the cost of certain supplies to welfare recipients and the federal government shares the costs of contraceptives supplied through provincial and local governments.

The special legal regime that still applies to the supply of contraceptives and contraception information goes beyond the now expected marketing requirement that advertised performance and efficiency of a product must be based on adequate testing. Provincial laws regulate who may insert intrauterine devices, but unfortunately are not always clear as to whether insertion is “the practice of medicine”; under the law of Ontario, for instance, such services cannot be performed by paramedicals. Food and Drug Regulations

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21 P.O. Regulations 1970, 1102.3.
23 Resolution XVII on Human Rights Aspects of Family Planning, adopted May 12, 1968 by vote of 56 to none, 7 abstaining.
24 Resolution 2542 (XXIV), December 11, 1969 by vote of 119 to none, 2 abstaining.
26 See, for instance, Quebec Social Aid Reg. No. 2, sect. 2.01 para. a.
27 See generally, infra, Part 6.
28 The Criminal Code, supra, note 13 covers this in ss. 319 and 366 (b) (iii), although recourse to other consumer protection laws may be more apposite.
29 See The Health Disciplines Act, S.O. 1974, c. 47, s. 52 (and s. 67 for penalties).
govern notification of manufacture and importation of drugs (notably pills) and certain devices, which must be properly labelled and be available only on prescription, to protect potential users against taking medically unsuitable means, drugs or dosages. The risk of untoward side-effects of pills taken even on prescription is acknowledged, but the 1970 Report of the Special Committee appointed by the Minister of National Health and Welfare observed that “it would be irrational to emphasize rare, serious complications and possible, but largely unproven, dangers to which only a few might be exposed, and to neglect the enormous and socio-economic benefit which oral contraceptives have conferred upon millions of people”.

Commercial advertising remains controlled under the Food and Drugs Act, but its Regulations are not all-embracing; contraceptive drugs not listed in Schedule F may be advertised to the general public without infringing the Act, as may certain devices such as sheaths. The general law on obscenity applies to such advertisement, of course, and radio and television advertisement is subject to official approval; actual feature programs on birth-control may be broadcast when appropriate to the medium. Beyond the law, self-imposed media codes of decency apply, such as the Canadian Code of Advertising Standards. Most codes do not refer to advertising of contraceptive methods as such, but regulate matters of taste and decency, usually creating a discretion exercised upon the nature of the proposed advertisement and the nature of the potential medium. The CBC declines certain categories of advertising not only on grounds of taste but also of controversy, and will not accept birth-control commercials, nor those for personal hygiene products, but the CTV claims to be less averse to controversy, and simply applies taste criteria. Outdoor advertising, particularly on billboards, of family planning products and comparable items will be controlled not only by content but also by design of the board and its location. Such advertisements, like cigarette advertisements, will be unlikely to be allowed near a school. Transport authorities, such as the Toronto Transit Commission, having a relatively captive audience, many of whom are taxpayers subsidizing the service, will be particularly sensitive not to cause them offence, and will not permit too heavy a message in such advertising. They may, for instance, bar such words as “contraception” and “birth-control”, and rely on the life-affirming domesticity of “family planning”.

Newspapers will accept advertising of means of contraception, but carefully vet and sometimes edit the copy both to eliminate a tasteless presentation and to cater the message to their general readership group. For instance, the Toronto *Globe and Mail*, aiming at the better-educated and higher-income groups, prefers copy to be informative, with more science than sales-pitch,
while the Toronto Star, having a more general readership, will permit restrained advertising of prophylactics such as sheaths, but draws the line at those coming into the "thrill" category and will not sell space to "love boutiques". The more populist Toronto tabloid, the Sun, however, is more accommodating, and advertises boutique items from birth-control means to revealing nightgowns without pondering any contradiction in population policy.

While the legal position on birth-control has changed since the nineteenth century, and public policy has changed perceptibly in recent decades, the paradox remains that contraceptive protection is least available to those who in their own and society's interests most require it, notably the poor and the young. The supply or fitting of contraceptive means to girls aged under sixteen years poses special legal problems, aggravated by judicial withholding of normative rulings in deference to ad hoc ethical determinations arising within the medical profession. In Re "D" and the Council of the College of Physicians and Surgeons of British Columbia MacFarlane, J. held that "Whether there is impropriety in any particular case is a matter which doctors are better equipped to adjudicate upon than the Court, and particularly . . . where the evidence has medical overtones which the medical inquiry committee is more capable of appreciating than is a Judge". He declined to disturb the Council's findings of infamous or unprofessional conduct when a doctor fitted a fifteen year-old patient with a birth-control device without consent of her parents. The judge would presumably have been equally content had the doctor been held not liable. Such a verdict would have been compatible with an English incident where a practitioner who informed a parent of the prescription of an oral contraceptive to his fifteen year-old daughter was charged with professional misconduct in violating the girl's right to privacy in medical treatment. The doctor was narrowly discharged on the special facts of the case, but it was made clear by the Disciplinary Committee of the General Medical Council that future physicians acting in breach of such a patient's confidence would be liable to face an adverse ruling and its severe consequences. A more pragmatic reason was advanced by the Committee on the Working of the Abortion Act in Britain, which reported that "A majority of members believe that in exceptional cases doctors should make contraception available without the knowledge or consent of the parents where the girl has refused to consent to their being told, on the ground that in such cases this may be a lesser evil than allowing the girl to run the risk of pregnancy".

Judicial respect for extra-legal rulings of medical governing bodies gives significance to statements such as that appearing in January 1971 in the Report of the Council of the College of Physicians and Surgeons of Ontario, that "A physician may treat a person sixteen years of age and over for any medical condition without the necessity of informing the parents". This con-

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34 Id. at 578.
forms to the position enacted into law in, for instance, England,\textsuperscript{37} and to a more limited extent in British Columbia,\textsuperscript{38} but leaves open the position in principle of a girl aged under sixteen. Regulations for Ontario public hospitals now require parental consent for non-emergency surgery, diagnostic testing or medical treatment performed on an under sixteen year old,\textsuperscript{39} but consideration of contraceptive treatment would usually arise outside the hospital context. In Johnston v. Wellesley Hospital\textsuperscript{40} it was held by the Ontario High Court that a mature minor could give a legally effective consent to medical treatment,\textsuperscript{41} this suggesting that a girl of sufficient maturity could validly approve her contraceptive protection without parental consent. To test whether her parents could legally resist this, and make their will prevail over their mature daughter's, one may invert the position to enquire whether they could insist upon her being fitted with a device despite her resistance. It was doubted in B. (B.R.) v. B. (J.)\textsuperscript{42} that a parent could ignore the views of a child of fourteen or fifteen to compel submission to a blood test, and this may support the opinion that a girl, who can marry at sixteen and who may well be capable of maintaining a responsible sexual relationship at fifteen, can legally decide to undertake, or not to undertake, contraceptive protection. The matter cannot be pursued beyond such general principles, however, since any litigation would be determined by its particular facts, especially the relationship between parents and daughter.

3. Sterilization

Voluntary sterilization is commonly divided into therapeutic, contraceptive and eugenic sterilization,\textsuperscript{43} although any particular operation may be considered in the light of more than one division.\textsuperscript{44} Therapeutic sterilization of husband or wife may arise when conception would endanger the life of the wife. On analogy with the concept of life in abortion law (see 4 below),

\textsuperscript{37} Family Law Reform Act 1969, c. 46, s. 8.
\textsuperscript{38} Infants Act, R.S.B.C. 1960, c. 193, s. 23 (introduced by an Act to Amend the Infants Act, S.B.C. 1973, c. 43, s. 1).
\textsuperscript{39} R.R.O. 1970, as amended by O. Reg. 100/74, s. 11, under The Public Hospitals Act, R.S.O. 1970, c. 378.
\textsuperscript{40} (1971), 17 D.L.R. (3d) 139.
\textsuperscript{41} At common law, an infant's agreement regarding "necessary physicke" was a necessary, for which he could lawfully contract; see Lord Coke, Co. Litt. 172 a. See also, P. D. G. Skegg, Consent to Medical Procedures on Minors (1973), 36 M.L.R. 370.
\textsuperscript{42} [1968] 466 (C.A.), per Lord Denning M.R. at 473.
\textsuperscript{43} See B. Starkman, The Control of Life: Unexamined Law and the Life Worth Living (1973), 11 O.H.L.J. 175. This recent article outlines the path of sterilization movements in Canada and the United States, and the ground will not be retraced here.
\textsuperscript{44} A category of involuntary sterilization is that imposed as a penalty. In Skinner v. Oklahoma (1942), 315 U.S. 789, the U.S. Supreme Court reversed the Oklahoma Supreme Court, which declined to hold unconstitutional as too arbitrary and a violation of constitutional equal protection provisions a state law prescribing sterilization for anyone twice convicted of felony. The Oklahoma Court similarly declined to condemn the law as providing cruel and unusual punishment. See also J. Paul, The Return of Punitive Sterilization Proposals (1968), 3 Law and Society Review 77 regarding ten of the United States’ considering imposing the acceptance of sterilization as a condition of eligibility for support under the Aid to Families with Dependent Children (A.F.D.C.) program.
this may include not simply the fact of life but also its quality, so that the risk of serious danger to physical or mental health may also be an indication for therapeutic sterilization. The legal relationship of contraceptive and eugenic sterilization was discussed in the English case of Bravery v. Bravery, in which Denning, L. J. (as Lord Denning then was) cast his often-quoted and disproportionately influential doubts upon the legality of sterilization on contraceptive grounds. A majority of the Court of Appeal rejected his conclusion on this matter. On the legality of eugenic sterilization, however, he had no doubts, declaring that "When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease." The case involved male sterilization, but the principle applies equally to female sterilization, although some may distinguish the two in principle upon grounds of reversibility, depending upon the technique applied.

The Canadian Medical Protective Association's formerly restrictive view, that sterilization should be performed only to preserve life or health, has been superseded by its recognition of the uniform legality of voluntary sterilization. The Association "feels the problems should be left for decision by the individual doctor faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment." In contributing to a patient's feelings of well-being and confidence in interpersonal relationships, the operation may be comparable in law to cosmetic surgery. The only legal ground upon which to resist the legality of contraceptive sterilization is obscurantist and scarcely worthy of serious regard. Section 228 of the Criminal Code provides that "Every one who, with intent (a) to wound, maim or disfigure any person . . . causes bodily harm in any way to any person . . . is guilty of an indictable offence". A maim historically was an injury to a person rendering him less able to fight in discharge of his feudal obligations or in his own defence, and was a crime more grave than other assaults in that it was not excused nor mitigated by the victim's consent. Castration was a maim because it was observed to operate psychologically to impair martial confidence and aggression in defence of self or others.

There may be a procreational sense in which voluntary vasectomy is comparable to emasculation, but the psychological effect and social symbolism of the two are quite different, and use of the analogy to show steriliza-

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49 Id. at 67.
50 Sexual Sterilization for Non-Medical Reasons (1970), 102 C.M.A. Journal at 211.
48 Unless, of course, statute prohibits contraceptive sterilization, as it did in the laws of Connecticut, Kansas and Utah; see J. B. O'Hara and T. H. Sanks, Eugenic Sterilization (1956-7), 45 Georgetown L. J. 20 at 21, note 13.
tion illegal may be rejected without recourse to the further illogicality that maim did not apply in this feudal sense to females. Easy dismissal of the argument, however, is not to minimise the struggle of reformers to have the right to voluntary sterilization legally recognized, but rather is a token of their success.

Recognition of the legality of voluntary sterilization procedures, whether performed on therapeutic or eugenic grounds, and later on contraceptive grounds, has brought its own problems. It is an obvious proposition that forced consent to the operation is no consent at all, but it has been recorded that therapeutic abortion committees, and individual physicians in jurisdictions allowing them lawfully to decide upon termination of pregnancy, have on occasion made it a pre-condition of approving abortion that the woman consent to sterilization as part of the same procedure. There may, of course, be strong medical grounds for advising that a woman should not risk a further conception, because of the harm likely to result to her not simply from advanced pregnancy or child-birth, but from experiencing spontaneous abortion or a late induced therapeutic abortion. Even when there are no specific medical indications for the operation, however, some United States doctors apply "the increasingly popular device of penalizing the mother scheduled for a therapeutic abortion by packaging it as a unit with a procedure for sterilization". An economic justification for this device, that may motivate the physicians concerned, is that after abortion without sterilization the woman is likely to become pregnant again, because of her ignorance of or refusal to employ effective contraceptive means. No more wanting the later pregnancy than the earlier, she will make a further demand upon the scarce resources of the local health delivery services: a demand the more burdensome when the woman's own financial means are unable to meet the cost she causes. Nevertheless, an applicant for abortion usually feels in a situation of crisis, and in any event is in no position to bargain. When presented with the offer of a package deal, she may therefore be compelled to give a form of consent to a sterilization procedure of no legal substance. She may find that a subsequent award of damages against or judicial penalization of the surgeon or institution concerned is no compensation, however, for the child she can no longer have.

It is not necessarily illegal for a therapeutic abortion committee to decide that a given pregnancy should be terminated only on condition that the woman agrees to be sterilized at the same time. If the medical indications are that a woman will be able to have only one more child, and if it will be considerably more hazardous for her to have it later, an abortion committee may in these special circumstances inform her of her option to have another child "now, or never". If she wants another child, it had better be the one of which she is currently pregnant, and abortion will be denied; that

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53 See Starkman, supra, note 43 at 177.
is, the abortion request will be withdrawn. Any later pregnancy would, of course, be terminable on normal health indications, and necessary sterilization would be done at that time; or, perhaps preferably, such sterilization would occur after the birth of the fetus she now bears, to obviate any later dangerous pregnancy. These are considerations of a purely medical character. The legal issue is simply that whatever the circumstances, the woman should know precisely to what she is being asked to consent, and should be able to reach her decision on sterilization free from an undue sense of pressure and outside of any appearance of unfair bargaining. In particular, she should not be offered an abortion-plus-sterilization package unless the sterilization is indicated upon independent therapeutic or eugenic grounds; the therapeutic abortion committee's conviction that a woman has enough children, or that any later pregnancy would be most likely to be terminated upon the woman's request, may not be sufficient justification for linking the procedures together, since the woman may not in fact feel able to decline the abortion.

The Lane Committee reporting in 1974 on the working of the Abortion Act 1967 in Britain put the point with force and clarity. It declared

we consider it wrong for a woman to be offered an abortion only on condition that she consents to be sterilized at the same time. We deplore those cases where we know that this has happened, even though, from the medical or social point of view, it may be desirable that she should not become pregnant again. We do not seek to discourage advice that sterilization is indicated; it is the element of compulsion which we consider should be eliminated.

Accordingly, when a therapeutic abortion committee considers abortion plus sterilization justified, it should simply approve the abortion after ensuring that the woman has made any "now, or never" decision she had to reach. The woman may then be approached independently on the advisability of therapeutic, eugenic or contraceptive sterilization, to be undertaken after the abortion procedure or during it, but not as a pre-condition to its performance.

The issue of directed sterilization of the allegedly unfit upon eugenic grounds opens up the experience and the whole agony flowing from the 1928 Sexual Sterilization Act of Alberta and the 1933 British Columbia Act of the same name. The enactment of these laws may be understood in the climate of their time. In Ontario, for instance, the 1930 Report of the Royal Commission on Public Welfare recommended sterilization laws regarding immoral defectives and criminals, and in Manitoba a provision in a 1933

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56 Although a later therapeutic abortion committee, reading the medical indications differently, or even responding to a different climate in the society to which it was sensitive, might consider termination not justified. A particular committee cannot guarantee the decision any later committee will reach.

57 Supra, note 36 at para. 299.

58 S.A. 1928, c. 37.

59 S.B.C. 1933, c. 59.

60 See Starkman, supra, note 43 at 181, note 32: this article deals with the origin of these laws in Canada and the United States in useful detail.
bill regarding defectives was deleted only after considerable controversy.\textsuperscript{60} Such laws, both enacted and proposed, drew notable support from the practice in the United States, where within the last decade twenty-three states still had compulsory sterilization laws.\textsuperscript{61} The constitutionality of asexualization statutes was upheld by the United States' Supreme Court in the celebrated 1926 case from Virginia of \textit{Buck v. Bell}.\textsuperscript{62} This concerned a seventeen-year-old girl with a mental age of nine who had an illegitimate mentally defective child and whose mother was feeble-minded and institutionalized: Holmes, J. favoured the sterilization law, observing that "Three generations of imbeciles are enough".\textsuperscript{63}

Eugenic science dates back to the work of Sir Francis Galton, but the concept of inherited criminality was initiated in the earlier writing of the Italian psychiatrist, Cesare Lombroso, whose book \textit{L'Uomo Delinquente}, published in 1876, founded the anthropological school in criminology. In refuting Lombroso's methodology, the English prison doctor Charles Goring nevertheless advanced the thesis that deviant tendencies are hereditary, and in particular assumed in his 1913 publication \textit{The English Convict} that mental deficiency was inherited. In this, he paid insufficient attention not only to the incidence of mental deficiency caused by birth injury and uninherited disease, but also to that of environmental origin.\textsuperscript{64} Goring's conclusions on hereditary deviance received speedy reinforcement, however, from claims to knowledge arising from measuring skills based on the newly developed instrument, the Intelligence Quotient, beginning with the appearance in 1914 of the book by K. Pearson and G. A. Jaederholm, \textit{On the Continuity of Mental Defect}. The delay before such ideas found legal expression in the United States and Canada may reflect not so much scientific caution in acceptance of the bulk of developing doctrine as the time-lag in law-reform, associated with the political dynamics of legislative innovation.

The British Columbia \textit{Sexual Sterilization Act} of 1933 remained unchanged until its repeal on 18 April 1973,\textsuperscript{65} and applied to any inmate of an institution who, "if discharged therefrom without being subjected to an operation for sexual sterilization, would be likely to beget or bear children who by reason of inheritance would have a tendency to serious mental disease or mental deficiency".\textsuperscript{66} The 1928 Act of Alberta was successively amended in the legislature's attempt to keep pace with evolving knowledge of psychiatry.

\begin{itemize}
\item \textsuperscript{60} \textit{Id.} at 183, note 42.
\item \textsuperscript{61} See E. Z. Ferster, \textit{Eliminating the Unfit — Is Sterilization the Answer?} (Symposium on Population Control) (1966), 27 Ohio State L. J. 591 at 596; and Fong and Johnson, \textit{supra}, note 1.
\item \textsuperscript{62} (1926), 274 U.S. 200.
\item \textsuperscript{63} \textit{Id.} at 207. To implement the reasoning of Holmes, J. it might also have been necessary, of course, to sterilize the child.
\item \textsuperscript{64} For instance, L. S. Penrose studied 1,000 mentally deficient patients and found 29 percent affected entirely by hereditary influences, 9 percent affected entirely by environmental factors, and the remainder by a combination of both factors: \textit{The Biology of Mental Defect} (New York: Trunn & Stratton, 1949).
\item \textsuperscript{65} S.B.C. 1973, c. 79.
\item \textsuperscript{66} \textit{Supra}, note 58, s. 4(1).
\end{itemize}
The initial Act governed "any inmate of a mental hospital", who was to be examined under the auspices of a Board of Examiners. Then, "If upon such examination, the board is unanimously of opinion that the patient might safely be discharged if the danger of procreation with its attendant risk of multiplication of the evil by transmission of the disability to progeny were eliminated . . . " the board might direct sterilization. The direction was not compulsory, but required consent of the patient if the Board considered him fit to give it, or, if not, of his spouse, parent or guardian, and if none of these existed, of an appointed provincial Minister. A 1937 Amendment Act distinguished a psychotic person from a mentally defective person, the latter defined as one suffering from a condition of "arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury". A psychotic person's consent was required as under the 1928 Act, but sterilization of a mentally defective person became possible without consent. A 1942 Amendment Act extended the Board's powers over those affected by neurosyphilis, epilepsy with psychosis or mental deterioration and Huntington's Chorea.

Although about one hundred persons annually were being sterilized under this Act in the mid-1960s, it was permeated with biological and social fallacies, and was more a product of anti-science than of science. Its application to those whose mental defect arose from injury was clearly not eugenic, and its application to victims of Huntington's Chorea was almost invariably futile, since this condition usually occurs late in life when the victim's children have passed their own reproductive period. Reliance upon I.Q. tests became very doubtful as these tests were shown to have a strong cultural component, and increasingly reports were publicized such as that in 1969 when a mentally defective teenage girl, sterilized under the Act with parental consent, passed her grade 12 examinations. In addition, surgery upon mongoloid children was shown of little purpose, since with their high mortality rate only about 40 percent reach reproductive age and, without considering their social opportunities for reproduction, they are in any event usually sterile. A further fallacy in the legislation existed where it provided for surgery only with consent, since this cannot be considered to have been freely given when its refusal would obviously have resulted in the patient being kept in custody; a custody based, moreover, not upon the patient's

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67 Supra, note 57, s. 4.
68 Id. s. 5.
69 Id. s. 6.
70 S.A. 1937, c. 47, s. 2.
71 Id. s. 5.
72 S.A. 1942, c. 48, s. 3.
74 Supra, note 70.
75 McWhirter and Weijer, supra, note 73 at 424.
76 Many mentally incapacitated persons have a low sex drive; see McWhirter and Weijer, supra, note 73 at 427.
need of mental treatment nor his personal danger to the community, but upon his supposed genetic danger.

Increasingly, the view was accepted that, "Socially, the compulsory aspects of the act bear against persons and families who are likely to be young, poor, uninfluential, and certainly unlikely to resist personally the infliction of purportedly legalized mayhem." From its legal, social, and scientific standpoints the act is a disgrace to the whole of Canada ... this ignorant and perverted legislation poisons the atmosphere and holds up advances in modern preventive eugenics, which must be based on consent." Despite such vigorous and uncompromising condemnation from experts, however, the repeal of the Acts in British Columbia and Alberta had to await the removal of political administrations rather than their enlightenment.

4. Abortion

Canadian abortion law, expressed in section 251 of the Criminal Code, makes no express accommodation for termination of pregnancy upon a eugenic indication. Such an indication may arise from parental genetic predisposition to breed a defective child, or from disease or injury during pregnancy affecting the child. The former may be illustrated by Down’s Syndrome (mongolism) and Tay-Sachs disease, the latter by irradiation and rubella (German measles, this last condition is especially harmful to a fetus if contracted by the mother during the first trimester of pregnancy, and when in 1964 rubella reached epidemic proportions in the United States an estimated 30,000 children were born suffering defects from this cause. In contrast to Canadian legislation, the British Abortion Act 1967 provides for termination of pregnancy if “there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped”. The British Act also recognises social factors, permitting abortion if “the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were

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77 The anachronism of describing voluntary sterilization as a mayhem (maim) is not necessarily so in describing an involuntary operation.
78 McWhirter and Weijer, supra, note 73 at 430.
79 Supra, note 65.
80 See S.A. 1972, c. 87.
81 Indeed, an amendment to this effect proposed at the time of legislation of therapeutic abortion was not accepted: see Krever, supra, note 8.
82 See text, infra, Part 7.
83 See C. Tietze, Therapeutic Abortions in the United States (1968), 101 Am. J. Obst. and Gynec. 784.
84 K. B. Niswander, Medical Abortion Practices in the United States (1965), 17 Western Res. L. Rev. 403 at 412.
85 Id. n. 1(1)(b). The Lane Committee recorded that in 1971 of 123,084 notified abortions, 1,277 were on the purely eugenic indication, although such an indication could have been partly responsible for a further 21,282 operations performed on mixed indications: supra, note 36 at Table C3.
terminated", allowing that in determining whether such risk exists, "... account may be taken of the pregnant woman's actual or reasonably foreseeable environment". These words are obviously more immediately accommodating than section 251 of the Criminal Code, which permits due certification of an abortion only if "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health".

It follows that if factors of personal eugenics regarding the likely physical or mental condition of the prospective child, or of social eugenics regarding the material and emotional environment into which it is likely to be born, are to be influential, they must operate in law as considerations pertinent to the pregnant woman's health. A threat to physical health is liable in a serious case to be a threat to life, but beyond this consideration it is accepted that the reference to health in section 251 includes mental health. If innumerable abortions performed under the aegis of section 251 are to be judged neither illegal nor unethical, it is necessary to identify in health indications for abortion a modern legal fiction, namely that the components of a physical or psychiatric indication affect the pregnant woman in ways from which the law allows her to be protected. This fiction does not imply impropriety in physicians or psychiatrists who, for example, anticipate harm to a woman from bearing a child in poor socio-economic conditions; a single or deserted mother of two young children living on an inadequate diet in a badly heated upper storey of a building with no elevator, lacking suitable winter clothing, can properly be described as at risk of ill-health if she has to bear a further pregnancy to full term. Similarly, the young daughter of a comfortable family, brought up in a strict and sheltered atmosphere, who will apparently be thrown out of her home and rejected by her parents upon their learning of her pregnancy may be considered at risk to her mental health if not her physical health by its continuation. The element of legal fiction consists in the acceptance that the circumstances moving committees conscientiously to certify operations are those the legislature gave section 251 its present form in order to meet.

Regarding the child's likely inheritance of physical or mental abnormality, therefore, the key to legal termination of pregnancy will be the fear of those attending the mother that her awareness of this likelihood would or would be likely to cause her distress endangering health. Since the law focuses on the condition of the mother and not that of the prospective child, there need not be "substantial risk" of the prospective child being "seriously handi-
capped", as required by the eugenic indication of British law; section 251 is satisfied provided that the mother's knowledge of any risk of imperfection "would or would be likely to endanger her ... (mental) health". The technique of amniocentesis, the surgical extraction and the analysis of the amniotic fluid surrounding the fetus, is able to detect genetically transmitted defects which, if not treatable by fetal surgery or otherwise, may become relevant to the question of abortion, although use of the technique is by no means widespread at present.\(^9\) Since it may be harmful for a doctor to give a patient information of his treatment or prognosis that will cause her distress,\(^9\) there is no need to go through the cruelty of supplying the woman with such an amount of morbid information as will make her sufficiently anxious to justify abortion upon grounds of existing mental illness. Section 251 does not require this, and provided the woman gives normally informed consent to the operation, it will be lawful if certified to protect the woman against prospective mental harm.\(^9\)

A comparable indication of a threat to mental health may arise when the child's anticipated social and emotional environment would be inimical to its well-being, or the pregnancy is for some reason deeply repugnant to the woman. If this reasoning appears to run close to the argument that a woman's request for abortion can itself play a large part in a psychiatric indication that she requires one, subject to medical contra-indications, it may be no more than a rationalization of existing power among those who have the authority to operate the law; an "opinion" under section 251(4)(c) is no less genuine because others do not share it, nor even because they would interpret the purpose of section 251 more restrictively.

The heritage of a child conceived in the rape of its mother, for instance, may arouse the greatest foreboding, and make it socially preferable that the pregnancy be terminated. The mother herself may regard nine months of increasingly enervating pregnancy as a continuing offence against her body and autonomy, and see in the child a living symbol of his father's felony. While rape is not a ground for abortion under section 251, it may be hard to believe the legislature of a society concerned to relieve innocent suffering intended to exclude the bearer of such a pregnancy from lawful termination, even though the pregnancy might be routine in representing no special health danger, and the woman's sense of outrage might not threaten her mental balance. The difficulty with the rape indication for abortion, making legislatures reluctant to deal with it, is that it treats medical procedures upon an apparently legal indication. Termination of pregnancy cannot await corroboration of the crime, such as the offender's conviction or reliable identification, however, nor even legally probative evidence. In common with abortion upon a eugenic indica-

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\(^9\) See further text, infra, Part 7.

\(^9\) Providing harmful information may even constitute malpractice: see Male v. Hopmans, [1967] 2 O.R. 457 at 465 (Ont. C.A.), and Natanson v. Kline (1960), 350 P. 2d 1093 at 1103 (Kan.).

\(^9\) Smith and Wineberg noted in their survey that "All the doctors admitted that even if the mother were utterly oblivious of the dangers of German measles they would abort", supra, note 90 at 298, note 12.
tion, a psychiatrist’s genuine conviction that a woman faces impending mental danger because of her belief as to the circumstances of her pregnancy must suffice; it may be contended that authority to certify termination of pregnancy on the ground of rape is equally subsumed by the psychiatric indication. If the woman wilfully deceives the psychiatrist, of course, the abortion will have an ambivalent legal character, being lawful *vis-a-vis* those medically and psychiatrically involved, but illegal concerning the woman who successfully feigns the conviction dangerous to her mental health that she has been raped, thereby using the therapeutic abortion committee as a means to procure her own miscarriage, contrary to section 251(2) of the *Criminal Code*.

The contention that a pregnancy arising criminally can *ipso facto* justify termination is clearly not made out. A girl aged under sixteen years, with whom sexual intercourse is an offence against section 146, may have the physical and mental resilience to bear a child, and many do; the younger the girl, the easier certification of abortion becomes, however, and a refusal to abort may be because “… these girls are so scared they hide the pregnancy until it becomes apparent, at which time it’s medically unsafe to abort”.

A cruel irony is that, while intercourse with a known mental defective is an offence against section 148, and her child may be a threat to eugenic principles, her mental health may not be endangered “by continuation of the pregnancy” since she may not suffer any accelerated deterioration by this experience. An additional offence that does not seem in itself to justify abortion is incest, and this so obviously has eugenic aspects that the general position merits separate consideration (below). It may be added in conclusion, however, that incest highlights a frequent objection to abortion for willing participants in the behaviour resulting in pregnancy, namely that the female should not be allowed to “profit from her own wrong”. Apart from misrepresenting abortion as a right of the worthy rather than the needy, this is objectionable as introducing the unsavoury concept of punishment by childbirth, and a pitiful social inheritance of safeguards to the child born of its mother’s “wrong”.

5. *Incest and Prohibited Degrees*

Abhorrence of incest runs deep in our conventional culture and sense of natural order, and may have been at the origin of regulated society itself; in his widely ranging survey of the organisation and laws of peoples in an early condition of society, A. S. Diamond observed that “… in the rules of marriage, or at least the rules prescribing with whom it may or may not take place, we have reached a vague beginning of law”. Evidence of the degenerative effects of inbreeding exists in biblical rules and narratives, and in

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86 Intercourse with a girl aged sixteen but under eighteen may be an offence under the conditions specified in s. 151, as may seduction of a female aged under twenty-one years under ss. 152 and 153(1)(b), or indeed of any age under ss. 153(1) and 154.


88 *Leviticus*, xviii and xx.

89 See the Book of Enoch, recording Noah’s birth as an albino, and the Book of Jubilee recording that his parents were first cousins.
modern scientific texts explaining the coincidence of recessive genes. Advancing knowledge of hereditary transmission of physical and mental defects does much to explain pre-scientific societies' pragmatic hostility to incestuous union and belief in the peculiarly high incidence of deformity and disability among its progeny. Incest may occur, of course, in the institutionalized form of marriage, or in the episodic form of casual sexual relations; we acknowledge the distinction between the prospective social union of incestuous wedlock and the biological union of incestuous mating by treating the former in our marriage or family law and the later under the Criminal Code. The two sets of rules do not necessarily coincide, the Criminal Code understandably being more strict; accordingly, an uncle-niece and aunt-nephew relationship could not result in marriage, but equally would not result in prosecution.

It might be expected that if the historic understanding of the eugenic harm of inbreeding was decisive, there would be a common practice among different cultures, founded on a common biological experience. The variety of ways in which these laws have been drawn from time to time and place to place, however, confounds any pragmatic wisdom. The fact that the legal definition of prohibited degrees has varied between different cultures and classes suggests that the incest taboo is invoked to serve other than eugenic purposes; indeed, when other interests are paramount, the stigma of incest is disfunctional and may be removed in favour of the seal of social approval, or at least acceptance. Within historic regal and caste groups, for instance, endogamous marriage (that is, within close blood ties) was not only allowed but was mandatory, notwithstanding that the protection of such groups against degeneration might be supposed to have been a matter of priority. Kings could not marry commoners, nor could the priestly class marry beneath their holy status. Traditions disfavouring close marriages could be subjected to stronger compulsions of exclusiveness of ruling elites, perhaps associated with claims of divine right if not of divinity itself. Queen Cleopatra is reputed to have been the product of some twenty-six successive marriages between brothers and sisters.

An economic function of incestuous marriage within a propertied group or caste would be to ensure that wealth was not dissipated by succession upon death; marriage within a few families preserving tightly interwoven blood ties would both concentrate the accumulation of possessions and enhance dynastic ambitions. An alternative motivation for marriage within close degrees of

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101 For Ontario, for instance, see The Marriage Act, R.S.O. 1970, c. 261, Form 10, indicating the prohibited degrees of consanguinity. See also federal Bill C-1001, passed July 17, 1975: “An Act to provide an exception from the general law” permitting the marriage of a specifically named uncle and niece.
102 See the Criminal Code, supra, note 13, s. 150.
104 Susser and Watson, supra, note 100 at 196.
blood, however, might be the necessity created by the exclusiveness of rejection. A group of social pariahs would be denied the opportunity of exogamous marriage, and its members would have to find partners within the group contained inside the territorial or conceptual confines of the ghetto. In Jewish law, for instance, first cousins may marry as may uncle and niece. Such unions are often inconsistently recognized even in proximate legal systems, confirming the ambivalence in social policy directed to degrees of incest. The advent of efficient contraception, more easily available sterilization and more liberal abortion, greatly reducing the risk of genetically defective children resulting from incestuous unions, may add to their uncertain status in a society increasingly tolerant of formerly unacceptable sexual relations. If the incest prohibition protected purely eugenic interests, endogamous intercourse after, for instance, hysterectomy would not be illegal. Since it clearly is, the inference must be that the modern basis of this law is not eugenic, but social. Viewed in this light, however, the utility of and consistent purposes served by the Criminal Code relevant to this area must be open to criticism, both for failing adequately to cover what is harmful to individuals specially at risk of sexual exploitation, and for being severe regarding conduct deserving no punishment at all.

An apparent anomaly arises from the attempt to protect the female participant lacking autonomy when entering into an incestuous relationship. Rape is committed, by section 143 of the Code, when the male acts without the female’s consent or “with her consent if the consent . . . is extorted by threats or fear of bodily harm”. Section 150(1) enacts that “Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person”, but section 150(3) provides that a convicted female need not be punished when the court is satisfied that she committed the offence only because “she was under restraint, duress or fear of the person with whom she had the sexual intercourse”. Rape is punishable with life imprisonment, and requires the clearest proof of guilt; the “restraint” or “fear” under section 150(3) may be less than the “threats or fear of bodily harm” under section 143, facilitating a prosecution for incest where a rape charge might fail. Nevertheless, the female jointly prosecuted for incest may

105 The frequent reference to “blood” in this context reflects the primitive belief that the vehicle of biological transmission is blood.

106 Legal ambivalence to first cousin marriages was highlighted in Sottomayor v. De Barros (1877) L. R. 3 P. D. 1 (C.A.) where cousins married in England (where the marriage was lawful) when they were domiciled in Portugal (where it was unlawful unless they obtained a papal dispensation). The view that “It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous” (per Cotton, L. J. at 5-6), implied more “general consent” than existed.


108 See In re May’s Estate (1953), 305 N.Y. 486 (N.Y.C.A.) where a Jewish uncle-niece marriage was lawfully contracted in Rhode Island when it would have been void in New York where the parties were domiciled and returned to live; discussed in P. D. Maddaugh, Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position (1973), 23 University of Toronto L. J. 117 at 132-33.
undergo a trial experience that is humiliating and traumatic, which may subvert the leniency which section 150(3) intends when her conduct warrants no punishment. Prosecutors may feel unable to charge one participant in incest, however, calling the other simply as a witness, and similarly a jury satisfied that incest occurred may balk at convicting only one party.

By section 150(4), "brother" and "sister" includes half-brother and half-sister respectively, so that intercourse with them constitutes incest, punishable with up to fourteen years' imprisonment; adopted children, however, not being in a "blood relationship" under section 150(1), rank as strangers to the family. Section 153(1) provides that a male having illicit intercourse with his step-daughter, foster daughter or female ward is liable to imprisonment for two years, but she has no special protection against family members other than the father, notwithstanding the fact that the emotional and social damage she suffers from being manoeuvred into a sexual relationship may be as great as that suffered by a natural daughter, sister or grand-daughter. She may feel no less a member of the social family, yet be less entitled to protection against sexual abuse and exploitation. The same applies, of course, to an adopted child, and to permit socially harmful intercourse with such child by the new "parent" or any other member of the immediate family, when "she was under restraint, duress or fear" such as would exempt a female blood relative from punishment for incest under section 150(3), on the ground that it is genetically safe, is cynical and unconscionable.

Incest law may also deprive a male participant of the protection he enjoys under the general law. By section 146(2), his intercourse with a girl between 14 and 16 is an offence, but by section 146(3) he is entitled to acquittal if "the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person". The immature older brother, misled by his precocious sister, loses this defence, however, when charged with incest; he may try to mitigate sentence on this ground, at some risk to the remaining quality of family life, but cannot avoid the stigma of recorded conviction and its effect upon his subsequent life.

A further inadequacy of incest law reflects its early eugenic origins in that it focuses upon sexual intercourse. The Criminal Code provides no special offence or additional penalty when a girl is exploited by indecent assault where she might expect to be most protected, namely within her own family; moreover, her consent, however indicative this may be of seriously defective if not actually depraved upbringing, removes the conduct entirely from the Criminal Code. Equally, regarding both males and females, buggery

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100 Part VI of the Code, concerning offences against the person, provides in section 196 that "child" includes an adopted child, but Part IV on sexual offences and public morals has no such definition. Under most provincial laws, such as the Ontario Child Welfare Act (R.S.O. 1970, c. 64), although "For all purposes . . . the adopted child becomes the child of the adopting parent . . . as if the adopted child had been born in lawful wedlock to the adopting parent" (s. 83(1)(a)), this does "not apply for the purposes of the laws relating to incest and the prohibited degrees of marriage" (s. 83(4)). Whether provincial legislation can affect the capacity of the adopted child to marry any member of his new family whom he could have married had the adoption not occurred is arguable (see Re Murray Canal-Lawson v. Powers (1884), 6 O.R. 685 (Ch.)). Capacity to marry is a federal concern.
contrary to section 155 and gross indecency contrary to section 157 are excepted from liability as such if, under section 158, they are committed "in private between . . . any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act", notwithstanding that the two persons fall within the degrees specified in section 150 or are otherwise close blood relatives, including members of the same sex.

Considering what the Criminal Code allows, it appears hard to rationalize all of the special prohibitions of the incest law, and considering what these prohibitions attempt to prevent under sanction of heavy punishment, it appears no easier to justify all that the Criminal Code allows. The picture is incomplete, of course, without reference to provincial child welfare legislation, which might punish parental sexual conduct toward a child within the age of child welfare protection not punished by the Criminal Code, whether because of the child's consent or otherwise. The same legislation might also punish such parental neglect as allows comparable conduct by a sibling, grandparent, or indeed any other person placing the child in moral danger. Nevertheless, provincial child welfare laws would be subjected to a weight they were not designed to bear if used to extend the incest prohibition to analogous conduct not punishable under the Code, and while there is no evidence of an urgent need, there is a case for rationalizing the federal law. The range of permitted sexual relations of persons within the same family, defined by both blood and affinity, to include adopted, step and foster children, should conform to clear rules of social origin, designed to protect the emotional and social interests of those vulnerable to harm. The law should not distinguish sexual intercourse from other sexual conduct equally harmful to development, even of those who give a degree of consent that would decriminalize the conduct of a partner not expected to exercise the special restraints compatible with domestic discipline.

If, however, no question of exploitation arises, and a mature brother and sister of the half-blood or the full-blood wish to live together in simulation of man and wife, it is unnecessarily oppressive of their freedom, and in service to no social interest, to leave them liable to imprisonment for up to fourteen years. Those couples whose liability to produce genetically defective offspring is as strongly prognosticated as that of siblings are free to reject genetic counselling and procreate, in or out of marriage, and a brother and sister wishing to find happiness in a stable union should be afforded the legal right to try; to express the issue in its most distasteful way, if they may live together in lawful buggery, they should be free to live together in a more generally orthodox sexual relationship. Incest law regarding non-exploitive casual sexual relations between siblings could similarly be discarded with little social risk, since such incidents are rarely prosecuted now, and their identification among those aged under the limits of provincial child welfare laws are treated in the context of the social disorder and need for care such conduct may betoken. Punishments of the criminal law have little to offer in this context; there is a strong sense in which both volunteers in such relations are victims.

110 The Ontario Child Welfare Act, id., for instance, is administered by the provincial Ministry of Community and Social Services.
6. **Public and Welfare Law**

Public law, for instance that concerning social welfare,\(^{111}\) is in principle eugenically neutral, but it has features bearing upon considerations of social eugenics. The federal *Family Allowance Act of 1944*,\(^{112}\) for instance, provides non-means-tested allowances, paid monthly to their mothers, for all Canadian children, to supplement the income of families with dependent children aged under eighteen. These allowances rank as income of the person claiming exemption for the child for income tax purposes or otherwise of the person receiving them, the amount determined by arrangements between the federal and relevant provincial governments. Application forms for allowances are available at any post office but also at maternity hospitals, confirming that from birth an eligible child will be a source of income to the maintaining parents. Beyond federal allowances lie provincial means-based payments, such as under *The Ontario Family Benefits Act*,\(^{113}\) providing for a person unable for various reasons financially to support him or herself and a dependent family. Geared to estimated domestic budgetary needs, the allowance is paid to a mother raising a dependent child or children alone, a disabled parent and, for instance, one permanently unemployed. In addition, free health benefits may be provided through the Ontario Health Insurance Plan, and dental care is available to benefit a recipient with a dependent child, the cost of drugs prescribed by doctor or dentist also being covered. Alternatively, municipal governments may absorb these costs under *The General Welfare Assistance Act*,\(^{114}\) which may include financial allowances to heads of families in need.

These allowances in themselves are not so lavish as to constitute an inducement to breed children, but they symbolise a public attitude of tolerance to family size unrelated to individual family means. For the sake of children of poor families, it should not be otherwise. Nevertheless, under this system those with least to offer children, in material terms and very often in educational, cultural and environmental terms, are given greatest support to redress their deprivation, and little disincentive to family expansion; the position may indeed be self-perpetuating, since their children may well fail to escape the poverty trap and, being educationally disadvantaged and so low earners when employed, they are liable themselves to procreate children equally dependent upon public support. Recommendations such as have appeared in the United States that those dependent upon public financial relief limit their family size,\(^{115}\) however, smack of class discrimination, and worse when the dependent class is of specific ethnic identity. Paradoxically, among some Canadian ethnic immigrant groups, a stronger propellant to family limitation may exist in provisions for the elderly.

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\(^{112}\) See now, R. S. C. 1970, c. F-1.


\(^{114}\) R.S.O. 1970, c. 192.

\(^{115}\) For federal and Ontario provisions in outline, see Paul, *supra*, note 44.
In many cultures the tradition of having large families has been not so much an indulgence or vaunting of virility as a prudent means of ensuring economic security. In both agricultural and industrial societies with no governmental provision for old age, the elderly depend for sustenance directly upon the products of their children's labour. The necessity of having sufficient children to provide for one's aged incapacity is reinforced by high rates of infant mortality; in male-dominated cultures, furthermore, where daughters are economically less productive and in any event leave home upon marriage, the birth of a son, and his survival, are essential insurance of continuing food and shelter. The first son used to take priority over older daughters, and in many legal systems was compensated for the imposed burden of family leadership, and at the same time tied to the family settlement, by the rule of primogeniture. This pragmatic accommodation to the necessity of family reliance, which in devout communities may have found expression not only in rejoicing at the birth of a son as a special blessing but also in religious doctrines hostile to deliberate birth limitation, serves no material need in modern Canada.

Here, the socialised welfare system applies, principally based on the federal collection of taxes from income-earners and disbursement among the elderly, with needs-based increments in money, goods and services from provincial and municipal governments. The federal *Old Age Security Act*\(^{116}\) pays monthly sums to qualified residents sixty-five years of age, without the recipient necessarily having previously paid taxes, and whether or not the recipient is drawing a salary or other income; those dependent solely on the Old Age Security pension may also be eligible to receive a Guaranteed Income Supplement.\(^{117}\) Through the Canada Assistance Plan, the federal government shares costs incurred by provincial and municipal governments in anticipating and meeting the needs of all persons, irrespective of age, covering the whole spectrum of welfare assistance and including training in self-reliance. In Ontario, the Senior Citizens' Bureau of the Ministry of Community and Social Services administers legislation pertaining to various programs for the elderly, including running homes for those over sixty years of age needing supportive services, and contributing to costs of maintaining residents in municipal institutions.

The theme of institutional treatment and hospitalization raises two further aspects of eugenics in public and welfare law. The first has already been noted (see Introduction), namely that improved standards of medical care allow the genetically less fit to survive and to procreate children whose own genetic endowment and potential are socially disfunctional. The social cost of seeking and of achieving the propagation of the unfit will become an increasingly sizable component of the terrible calculus of economic health care and effort to preserve individual life. The second concerns more personal aspects of eugenics, since the hospitalized physically and mentally afflicted are frustrated in such sexual urges as they may experience by the administra-

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\(^{116}\) *R.S.C. 1970, c. 0-6.\(^{117}\) Citizens qualifying to participate gain additional protection from the Canada Pension Plan, except that those in Quebec participate in its own comparable plan.
tive obstacles to conjugal visiting; the contribution their lack of opportunity to conceive children makes to negative eugenics depends, of course, upon the genetic transmissibility of their disorder. Without regard to the possibility of a patient's physical or psychological condition being improved by such visits, the public hospital system secures this eugenic result as an unintended by-product of its pursuit of administrative convenience. The developing patients' rights movement, currently gaining momentum in the United States, may in time make itself felt in Canada in this area. In the absence of such recognized rights, the entitlements of both patient and spouse depend less upon provisions of the law than upon the ability to purchase private medical treatment in suitable accommodation.

With the discrediting of theories of inherited criminality there can be less cause on eugenic grounds for prohibiting conjugal visits to the penally incarcerated. Reasons of convenience, accommodation and delicacy are officially advanced to resist this proposal, as well as the difficulty in principle and administration of, for instance, distinguishing between the visiting rights of lawful wives, common law wives, cohabiting women, irregular but frequent sexual partners, casual friends and those paid or provided by outside associates upon an ad hoc basis. It may be considered, however, that at least a lawful wife's claim to bear her husband's child is worthy of recognition, perhaps as much as the convenience of prison administrators, especially with the growing recognition that nothing should be done to or withheld from a prisoner not strictly required in the interests of his rehabilitation or detention for the public protection. This is not the place to consider the positive impact the prospect of returning to a family life may have upon the prisoner's discipline and rehabilitation, nor the negative point that prison life today is forced administratively to accommodate several forms of sexual activity, to the exclusion of that socially deemed normal. It may be observed, however, that when a wife cannot visit a prison for conjugal purposes, and her husband cannot be temporarily released, techniques of artificial insemination are available to facilitate conception without sexual relations or close personal

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120 At present, public hospitals allow overnight visiting only for children's parents.


122 In State ex rel. Thomas v. State of Wisconsin (1972), 198 N.W. 2d 675, the Wisconsin Supreme Court proposed that a prisoner retains constitutional right "... unless the government can show the restrictions are related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment, such as rehabilitation or the security of the prisoner and prison. Mere convenience of the prison administration is not sufficient" (per Hallows, C. J. at 682). This principle was applied to writing letters, but it seems capable of extension.

123 Frequently in processes to screen homosexuals and keep them apart from those they may infect.
proximity. The technique has been used officially in the United States armed forces of sending back from Viet Nam the frozen sperm of soldiers to impregnate their wives at home. This facet of the New Biology has a considerable potential in society, and in conclusion, eugenic aspects of such developments may be considered in outline.

7. The New Biology

It cannot be pretended that Canadian law has made more progress than any other contemporary legal system in facing, to say nothing of actually accommodating, eugenic and other implications of evolving biological skills. Artificial insemination by a husband is among the less controversial of these, however, and probably the most easily accommodated under the present law. The eugenic problem the practice raises centres on the cause of the husband's inability himself to inseminate his wife. If he is impotent, for organic or psychogenic reasons, or sub-fertile, the condition of body or mind may be capable of hereditary transmission, to the prejudice of his male child, grand-child, or other successor under the laws of genetic inheritance. Artificially aided genetic survival through their offspring of those who objectively are not the fittest so to survive raises the constantly recurring question of the disfunctional eugenic effects of modern and prospective biology.

Artificial insemination by donor, claimed already to have accounted for the births of up to a million children in the United States, raises an array of legal questions, including control of the genetic calibre of the donor. Modern law fails to deal with this, outside of inadequate provisions on negligence, contract and consumer protection. Obstetricians and family physicians operating in this field now undertake to obtain semen from healthy donors they attempt to match to the husband in appearance and blood group, and frequently dedicate the potential mother to the cause of positive eugenics by selecting a donor more intelligent than her husband, but in time, as resort to A.I.D. grows, they may turn to commercial suppliers. The few commercial sperm banks today are based primarily on vasectomy and infertility insurance and safeguarding family rights of men in occupations with high risk of sterility or mutation, but they might in the future purchase reserves of variously characterised sperm, for sale to physicians or indeed members of the public such as nurses, unqualified fringe practitioners and women seeking a do-it-yourself facility. The proven risk of hepatitis infection through inadequate screening of blood donors adumbrates the consequences of inadequate genetic testing on semen donors, whether by individual practitioners or commercial suppliers. The female equivalents of semen donation,
namely ovum donation and embryo transfer, raise the same issues *mutatis mutandis*, and they attach in conjunction to fertilization of an ovum *in vitro*.

The confidentiality protecting the identity of the semen, embryo and ovum donor may itself pose a eugenic threat. A donor may be used for many separate fertilizations, and so long as artificial insemination remains unregulated by a central notification requirement and operates as part of the free enterprise system, there are few means of limiting the possibility of a male and female offspring of the same donor later meeting and marrying, in a manner biologically though not legally incestuous. The prospect is very real, since A.I.D. practitioners operate within a particular neighbourhood, district or region and, as they offer luxury medicine, within a particular socio-economic class. There is therefore a higher than average prospect of children of the same donor meeting in circumstances conditioned to their marriage, they being not only socially compatible but also compatible in personality, finding (though not to the full extent) that they have things in common.

The risks this prospect raises may be socially acceptable, especially since donors are screened on health grounds to eliminate those with transferable genetic defects, but in any event they could be reduced, while preserving the privacy of the circumstances of individual conception, by a system of genetic screening at birth, or later as part of counselling before marriage.

At present, the prospect of introducing compulsory screening, and prohibition of marriage without sterilization where significant risk exists of producing defective offspring, seems altogether too draconian to contemplate, not least since such measures could not prevent casual conceptions by the genetically incompatible. Genetic counselling could serve an advisory role, however, especially for individuals or groups particularly at risk, permitting them to reconsider a decision to marry or to have children, or perhaps to take steps to protect a future child by therapy for the genetic disorder. A difficulty is, however, that those rushing precipitately into marriage, knowing relatively little about their partner, are least likely to seek or take such advice, even

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128 Because of lack of knowledge of the blood relationship required by s. 150 of the *Criminal Code, supra*, note 13.

129 Commercial suppliers might be able to provide a better geographical spread for donors, reducing this risk.

130 Though less, the risks of their having a child outside marriage, perhaps following a casual encounter, should also be considered.

131 With the prospect of detecting such genetic disorders as phenylketonuria at a treatable stage, but with all of the implications of detecting a baby boy with the XYY chromosome configuration: see P. N. Brown, *Guilt by Physiology: The Constitutionality of Tests to Determine Predispositions to Violent Behaviour* (1974), 48 Southern Calif. L. Rev. 489.

132 It has been observed that, for all the novelty of the discipline, “Genetic counselling . . . is simply medical advice on a rather new, rapidly developing, and highly specialized topic”: See Lord Kilbrandon, *The Comparative Law of Genetic Counselling* in B. Hilton et al., ed., *Ethical Issues in Human Genetics: Genetic Counselling and the Use of Genetic Knowledge* (New York: Plenum Press, 1973) at 247.
though simple tests could disclose transmissible venereal disease, epilepsy and drug addiction. Among responsible partners, moreover, the degree of risk they feel justified in taking would be agonizing to assess. If the mother contracted rubella early in pregnancy, the possibility of abortion followed by another hopefully uneventful pregnancy could be comfortably discussed, but more enduring parental disorders raise much greater problems. For instance, a relatively simple blood test would identify a prospective or married husband and wife who were sickle-cell heterozygotes. The probability of any child born to them being a sickle-cell-anemia homozygote, doomed to a life of suffering and an early death, stands at twenty-five percent. Rather easier may be the position of Ashkenazi Jews, among whom there is a 1 in 5,000 births risk of Tay-Sachs disease, a form of infantile amaurotic idiocy leading to death within the first two to four years of life; the frequency rate among non-Jewish Americans is 1 in 500,000 births. The condition is caused by an inherited biochemical abnormality which can be detected in the amniotic fluid of a pregnant woman, as can the symptoms of, for instance, Down's Syndrome (mongolism).

This fact may now offer a hopeful approach to many problems inadequately solvable, and to others not solvable at all, by premarital genetic screening. A wait-and-see policy may be adopted, relying upon the technique of amniocentesis, applied selectively at present due to cost but perhaps in time universally, to discover defects in the fetus once pregnancy occurs. Identification of defect in itself is not enough, of course, since the potential advantage of extracting a sample of amniotic fluid and analysing its fetal chromosomal and genetic content lies in the ability to act on the results. The clinical option of aborting the pregnancy depends upon bringing the circumstances within section 251 of the Criminal Code, but it has been seen above that this provision makes no concession towards a eugenic indication for abortion, the mother's physical or more probably mental health having to be invoked for this purpose, if possible. The alternative to abortion is to treat the fetus in utero, which expression may inconsistently include removing a fetus from the uterus by caesarian section, applying treatment, and restoring it inside the mother to develop to full term birth.

While treatment of this nature is currently going on in Canada, its basis depends upon knowledge derived from fetal research. A limited though important proportion of this research is undertaken on fetuses resulting from induced as opposed to spontaneous abortion, but the public movement hostile to induced abortion is applying pressure to restrict fetal research. It has made significant headway in the United States in fostering restrictive attitudes and in securing enactments of state legislatures, notably in Massachu-

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133 See Pauling, supra, note 124 at 268-69.
134 In recent origin Central and Western European Jews, as opposed to Sephardi Jews from Southern Europe, North Africa and Asia.
136 See Krever, supra, note 8.
and other New England states, and of federal bodies; this appears in the stringent regulations proposed by the Department of Health, Education and Welfare for supported fetal research and the National Research Act of 1974. This imposed a four-month moratorium on federal support for research involving fetuses with beating hearts, before or after an induced abortion, and constituted a National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, to report directly to Congress in 1976 with recommendations for control. How far Canadian practice will be insulated from and affected restrictively or expansively by these influences has still to be seen, as has the emergence of any derivative or original indigenous movement able to restrict fetal research. It is clear, however, that the social price to be paid for restricted research is the mere maintenance and possible deterioration of existing medical standards of both antenatal and post-natal care of mother and child, and of the ability to treat defective fetuses to offer them an improved prospect of living a human life worthwhile to themselves and others.

The problem of conducting eugenic and more important research on live fetuses intended to be legally aborted is inescapable, since not all research can be undertaken on animals and the products of spontaneous abortion. Testing the effect upon the fetus of a potentially beneficial drug or vaccine given to the mother, for instance, tracing passage of the drug or effects of the vaccine across the placenta and into the fetus, requires the clinical availability of affected fetuses of different gestational ages, which cannot be secured other than by use of live fetuses of determined age already scheduled for abortion. The costs of appropriate methods of doing this research, evaluated by reference to a variety of criteria, must be set against the costs of not doing it at all. In itself, non-research represents a certain though not easily quantifiable loss to individual and communal health in that it removes the hope of advancement, and there is the consideration that shutting off an area of research may open the door to new diseases of fetuses, children and adults.

The dark side of fetal research and the abuses that furnish substance to its critical reception become visible, but the cost of not engaging in research consists less visibly in the suffering of those living and to be born, and the denial of life to those not to be born, that only research may relieve. If the facilities and personnel to undertake this research are unavailable, society


Where many of the continent's leading medical research institutions are located.


Id. s. 213.

Id. s. 201.

Such as the rubella vaccine, recently claimed to have prevented an anticipated epidemic and up to 30,000 birth defects among children in the United States, with a saving of $2 billion in health care: "Rubella Vaccine Foiled Epidemic, U.S. Doctor Says", The Globe and Mail, March 15, 1975 at 35.
has no choice but to endure the *status quo* and regard it finite. Where such facilities exist, however, as they do in Canada,\textsuperscript{144} the refusal to use them can be socially justified only in terms of a clearer set of socially approved priorities than currently exists. Without reciting the dismal litany of presently untreated genetic and other conditions, it may be concluded that, despite the achievements of medicine and the New Biology, there is still too much we do not know.

\textsuperscript{144} Although the amount of funding the government provides always appears inadequate, making medical research seem a low priority and compelling agonizing choices in distribution of available resources; see Clive Coking, "Medical Research in Canada Suffering from a Dread Disease", *The Globe and Mail Weekend Magazine*, March 8, 1975 at 3.