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## NOTE

### GENETIC PLASTIC SURGERY: HOW NEOEUGENICS CREATES A CULTURE OF STAGE MOMS

JAMES A. LONG\*

#### INTRODUCTION

The developments being made in the area of genetic engineering foster as many promises as they do cautions. If these developments continue, bioengineers will have the ability, like never before, to completely alter entire gene pools.<sup>1</sup> Given this awesome, and somewhat frightening potential, the law must be ready to address these neoeugenic procedures such as genetic engineering and their proper limits within society. Neoeugenics, when used for cosmetic purposes and even for certain non-cosmetic purposes, can and should be regulated by states because it directly violates the personal autonomy of the unborn child, indirectly violates the personal autonomy of mothers, and it satisfies the Supreme Court's compelling state interest test.

Legislators are faced with a number of considerations when deciding if and to what extent neoeugenic procedures should be regulated or even required. Among these are the woman's autonomy in making reproductive decisions, the subjectivity of the unborn child, the degree to which the police powers would allow the state to require neoeugenic procedures, and whether there is a compelling state interest that would justify a regulation of neoeugenics. One immediate example is evidence that a directive approach (meaning gene therapy is expressly recommended) compromises a woman's autonomy;<sup>2</sup> therefore, a legislator can support a regulation of

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1. See, e.g., Susannah Baruch et al., Genetics and Public Policy Center, *Human Germline Genetic Modification: Issues and Options for Policymakers* 14 (2005), available at <http://www.dnapolicy.org/images/reportpdfs/HumanGermlineGeneticMod.pdf>.

2. See Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J.

neoeugenics requiring doctors to take a non-directive approach (meaning the doctor merely informs the patient of her options) in order to respect the woman's autonomy. This paper attempts to provide a framework for dealing with these types of considerations. Given this country's colorful history in the eugenics era, building a solid legal framework will help ensure that the mistakes of the past are not revisited.

Through an analysis of the history of eugenics and its modern counterparts, Section I of this paper will illustrate that neoeugenics is not insulated from the mistakes of the past, as its proponents claim. Rather, modern programs such as genetic engineering, contraception, and prenatal testing are haunted by the same racist and elitist overtones as compulsory sterilization and marriage-prohibition laws.<sup>3</sup> Section II will analyze the principle of autonomy and demonstrate how the Supreme Court's conception of autonomy is premised upon a false anthropology. Section III will examine the extent to which the state can regulate neoeugenics consistent with a compelling state interest.

A parent's decision to choose genetic engineering for their child is likely to be considered a fundamental reproductive right, and any regulation of neoeugenics will, therefore, be subject to strict scrutiny. Although I propose several compelling interests, two stand paramount: preserving patient autonomy and preserving the unborn child's autonomy. First, the autonomy of the patient requires that doctors adopt a non-directive approach to genetic counseling. Second, to the extent that neoeugenic procedures assume the life or birth of an unborn child, the child's autonomy interests become increasingly relevant.

## I. HISTORY OF EUGENICS

Despite its "good" etymology,<sup>4</sup> fewer words are charged with more negative history than the word "eugenics." It has traveled along the road of good intentions since the late nineteenth century, leaving in its wake oppression, racism, coercion, and genocide. Championed by the United States as a means to ensure ethnic purity, eugenics inspired the Asian Exclusion Act,<sup>5</sup> the forced sterilization of more than 60,000 people, and

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897, 919–20, 924–28 (2007) [hereinafter Suter, *Designer Babies*] (commenting on the effects of a directive approach).

3. This analysis is not intended to support a theory that marriage prohibition laws and compulsory sterilization are morally equivalent to genetic engineering, prenatal testing, and contraception. I simply wish to underscore the fact that neoeugenics is, sadly, motivated by the same stereotypes and elitism which inspired the universally decried eugenics of the 1920's—albeit at an individual rather than state level. The cause for such persistent motivations is the policy of "crypto-eugenics" which replaced eugenics in aftermath of World War II.

4. The word eugenics literally means "good birth."

5. Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153.

restricted marriages for the “feeble-minded.”<sup>6</sup> Adolph Hitler was inspired by U.S. policies and sterilized 3.5 million “undesireables” before he implemented the “final solution.”<sup>7</sup> In the aftermath of World War II and the horrors of the Holocaust, the United States began to abandon its official eugenics program—or so it seemed.<sup>8</sup> While many of the official eugenic programs were dissolved, some remained under the guise of “reproductive rights.”<sup>9</sup>

Now, at the dawn of the twenty-first century, eugenics is more alive than ever. Many scholars attempt to distinguish the eugenics of old versus the “neoeugenics” of the modern era, with some making a distinction between positive versus negative eugenics and others defending neoeugenics as a fundamental reproductive right.<sup>10</sup> Proponents of neoeugenics believe that, by correcting the false science of the early twentieth century and removing the instruments of eugenics from the state, neoeugenics can offer many of the promising benefits of eugenics without the collateral violations of human rights.<sup>11</sup>

#### A. *Classic Eugenics*

The word eugenics was first used by Francis Galton, a cousin of Charles Darwin, who defined eugenics as:

[T]he 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.<sup>12</sup>

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6. PHILIP REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* 2, 26–27 (1991).

7. Phillip R. Reilly, *Eugenics, Ethics, Sterilization Laws*, in *ENCYCLOPEDIA OF ETHICAL, LEGAL AND POLICY ISSUES IN BIOTECHNOLOGY* 204, 210 (2000); *see also* Suter, *Designer Babies*, *supra* note 2, at 901–02.

8. *Cf.* MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* 112 (2008) [hereinafter CONNELLY, *FATAL MISCONCEPTION*] (noting that in the aftermath of World War II eugenics as a way to shape populations was not discredited but found solid ground in the birth control movement).

9. *See* Note, *Regulating Eugenics*, 121 *HARV. L. REV.* 1578, 1586–92 (2008) [hereinafter *Regulating*]; *see generally* CONNELLY, *FATAL MISCONCEPTION*, *supra* note 8, at 104–09; MARGARET SANGER, *AN AUTOBIOGRAPHY* 106–08 (Dover Publications, Inc. 1971) (1938) [hereinafter SANGER, *AN AUTOBIOGRAPHY*]; MARGARET SANGER, *MY FIGHT FOR BIRTH CONTROL* 83–84 (Maxwell Reprint Company 1969) (1931) [hereinafter SANGER, *BIRTH CONTROL*].

10. *See, e.g.*, Suter, *Designer Babies*, *supra* note 2, at 917; *Regulating*, *supra* note 9; ANDREA TONE, *DEVICES & DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* 141 (2001).

11. *See generally*, *Regulating*, *supra* note 9, at 1582.

12. FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 17 n.1 (2d. ed. 1911), *reprinted in* *EVERYMAN’S LIBRARY: SCIENCE* (Ernest Rhys ed. 1943).

Inspired by Galton's eugenics, Annie Besant and Charles Bradlaugh sold 133,000 copies of Charles Knowlton's *Fruits of Philosophy*—a pamphlet that addressed the need to help people have sex without having children.<sup>13</sup> Besant argued in favor of contraception as a way to stop the proliferation of the weakest members of society.<sup>14</sup> Her notoriety, coupled with powerful international advocates,<sup>15</sup> helped motivate the developments in contraceptive techniques that resulted in the decline of Europe's population.<sup>16</sup>

When most countries in Europe adopted military conscription, the decline of population became a matter of national security.<sup>17</sup> France, for example, gave mothers free medical care for childbirth.<sup>18</sup> Likewise, Germany mandated maternity leave with pay.<sup>19</sup> In addition to low birth rates between 1870 and 1914, Europe experienced the greatest mass emigration of Europeans in history—thirty-two million people.<sup>20</sup>

While the European continent suffered dramatic declines in population, the United States was experiencing a boom. Receiving immigrants from Europe on the east coast and immigrants from Asia on the west, America's population began to increase rapidly.<sup>21</sup> Concerned not with the rate of growth but with the composition and quality of growth, American eugenic activists took aim at the Chinese,<sup>22</sup> depicting them as “disease-carrying cosmopolitans who excelled in economic competition and conspired to rule the world.”<sup>23</sup> The Workingman's Party in California began to campaign for immigration reform under the slogan “the Chinese must go!”<sup>24</sup> Massachusetts Institute of Technology president Francis Walker infamously

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13. ROGER MANVELL, THE TRIAL OF ANNIE BESANT AND CHARLES BRADLAUGH 44–47 (1976); CONNELLY, FATAL MISCONCEPTION, *supra* note 8, at 18–19.

14. See MANVELL, *supra* note 13, at 86–92 (Besant drew international attention when she and Bradlaugh were convicted of publishing an obscene pamphlet); see also *High Court of Justice*, THE TIMES OF LONDON, June 20, 1877.

15. Annie Besant was joined by Margaret Sanger, Elise Ottesen-Jensen, Marie Stopes, Baroness Shidzué Ishimoto, and Lady Rama Rau. CONNELLY, FATAL MISCONCEPTION, *supra* note 8, at 24.

16. By 1880, the population of Europe reached its peak and began to decline. See DEBORAH DWORK, WAR IS GOOD FOR BABIES AND OTHER YOUNG CHILDREN: A HISTORY OF THE CHILD WELFARE MOVEMENT IN ENGLAND 1898–1918 3–7 (1987); see also CONNELLY, *supra* note 8, at 20.

17. CONNELLY, *supra* note 8, at 24; DWORK, *supra* note 16, at 3.

18. CONNELLY, *supra* note 8, at 25.

19. *Id.*

20. WALTER NUGENT, CROSSINGS: THE GREAT TRANSATLANTIC MIGRATIONS, 1870–1914 41–43 (1992); DAVID HELD ET. AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 291–92 (1999).

21. CONNELLY, *supra* note 8, at 32–34.

22. *Id.* at 32–38.

23. *Id.* at 36.

24. ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 104–06, 122 (1971).

noted that immigrants were “beaten men from beaten races; representing the worst failures in the struggle for existence.”<sup>25</sup> In his view the “‘vast hordes of ignorant and brutalized peasantry’ would depress wages and discourage native stocks from forming new families.”<sup>26</sup> “Yellow peril” spread to Europe as Asian immigrants filled the void of Europe’s declining population.

The population struggles of the western world fueled the science of eugenics as eugenicists began to discuss ways of increasing desirable populations and decreasing the undesirable.<sup>27</sup> Beginning with Germany’s Society for Race Hygiene, national organizations emerged to unite eugenicists.<sup>28</sup> In 1912, London hosted the first international meeting of eugenicists.<sup>29</sup> Biologist Raymond Pearl<sup>30</sup> told the Eugenics Congress that politicians and the public should give scientists “a chance at directing the course of human evolution.”<sup>31</sup>

As the promises of eugenics became apparent its popularity grew. By 1910, the Index for Periodical Literature placed eugenics as the second most popular topic in print media.<sup>32</sup> Eugenics’ popularity provided a favorable political climate for passing eugenic laws, and the United States became the first country to pass laws aimed at reducing the fertility of “ethnic minorities, the poor, [and the] otherwise ‘unfit.’”<sup>33</sup> Connecticut spearheaded the eugenic laws movement by passing the first marriage prohibition law in 1896.<sup>34</sup> In 1907, Indiana became the first state to pass a sterilization law, and, by 1917, fifteen more states followed suit.<sup>35</sup> Altogether, more than

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25. Francis A. Walker, *Restriction of Immigration*, THE ATLANTIC MONTHLY, June 1896, at 822–29; CONNELLY, *supra* note 8, at 37–38.

26. Walker, *supra* note 25, at 822–29; CONNELLY, *supra* note 8, at 38.

27. Cf. CONNELLY, *supra* note 8, at 50.

28. *Id.* at 43.

29. *Id.*; see also, *First Eugenics Congress: Four Hundred Delegates In London—Americans to Read Papers*, N.Y. TIMES, July 25, 1912, at 5.

30. Pearl was one of the highest paid professors at Johns Hopkins and a member of the governing councils of the National Academy of Sciences and the National Research Council.

31. Raymond Pearl, *The First International Eugenics Congress*, 36 SCIENCE 395 (1912).

32. Phillip R. Reilly, *Eugenics, Ethics, Sterilization Laws*, in ENCYCLOPEDIA OF ETHICAL, LEGAL AND POLICY ISSUES IN BIOTECHNOLOGY 205 (Thomas H. Murray & Maxwell J. Mehlman eds. 2000). Not only was eugenics represented in popular literature but it also was represented in popular culture. For example, the American Eugenics Society began hosting “fitter family” competitions in the “human stock” sections at state fairs. See DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 61–62 (1985).

33. CONNELLY, *supra* note 8, at 49.

34. KEVLES, *supra* note 32, at 99. By 1914, thirty states passed marriage prohibition laws for “idiots,” the insane, “feebleminded,” “unfit,” and those afflicted with venereal disease. Indiana’s law passed in 1905 forbade the marriages of mentally deficient and drunkards because it was thought that they carried a “transmittable disease.” *Id.*

35. KEVLES, *supra* note 32, at 100. Iowa passed the broadest sterilization law which “compelled the sterilization of twice-convicted sexual offenders, of thrice-convicted other felons, and of anyone convicted just once of involvement in white slavery.” Madison Grant—a New York lawyer and treasurer for the second and third international eugenics conferences—argued that

60,000 people fell victim to compulsory sterilization laws—7,500 in California alone.<sup>36</sup> Congress passed the Immigration Act of 1924,<sup>37</sup> which resulted in “not just a drastic reduction in immigration from southern and eastern Europe, but the expulsion of immigrants [who] the courts did not consider to be white and the forced sale or seizure of their property.”<sup>38</sup> The United States’ aggressive eugenic legislation did not go unnoticed by European countries—especially Nazi Germany.

American eugenic laws encouraged Nazi Germany to implement increasingly radical measures.<sup>39</sup> Adolph Hitler praised American immigration restrictions in *Mein Kampf* and Nazi sterilization laws gave public praise to American eugenic pioneers.<sup>40</sup> Hitler explained that the “planned control of population movements” was necessary to preserve the quality and quantity of the Aryan race.<sup>41</sup> American eugenicists voiced their support for Hitler’s race policy.<sup>42</sup> Senior representative of the American eugenics movement in Berlin, Clarence Campbell, for example, stated that Hitler’s eugenic programs “[set] the pattern which other nations and other racial groups must follow.”<sup>43</sup> In the aftermath of World War II and its atrocities, American eugenicists began to distance themselves from the classic eugenic policies that inspired Nazi Germany.<sup>44</sup>

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sterilization offered “a practical, merciful and inevitable solution” to the problem of a wide circle of “social discards” including “the criminal, the diseased and the insane [as well as] . . . weaklings . . . [and] worthless race types.” MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR, THE RACIAL BASIS OF EUROPEAN HISTORY* 51 (2d ed. 1918).

36. Reilly, *supra* note 32. For California, see CONNELLY, *supra* note 8, at 48. The most infamous compulsory sterilization was Carrie Buck who was sterilized in 1927 after the United States Supreme Court validated Virginia’s compulsory sterilization statute. See *Buck v. Bell*, 247 U.S. 200 (1927). Carrie Buck died in 1983. On May 2, 2002 the State of Virginia erected a historical marker at Carrie Buck’s birthplace. At the dedication, Virginia Governor Mark R. Warner offered the “Commonwealth’s sincere apology for Virginia’s participation in eugenics.” Dave Reynolds, *The Eugenics Apologies: How a Pair of Disability Rights Advocates Scored the First State Apology for Eugenics, and What They Have Planned Next*, RAGGED EDGE ONLINE, Nov.–Dec. 2003, <http://www.ragged-edge-mag.com/1103/1103ft1.html>.

37. It is also known as the “National Origins Act of 1924” and the “Asian Exclusion Act of 1924.” See note 5.

38. CONNELLY, *supra* note 8, at 48. Before the Immigration Act of 1924, immigrants from eastern European countries (Romania, Bulgaria, Turkey) were emigrating to the U.S. at a rate of 15,000 people per year. After the Act, their immigration was limited to 1,500 per year. Likewise, Italian immigrants averaged 92,000 per year before the Act and 7,000 after. U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957* 56 (1960).

39. Cf. STEFAN KÜHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* 23–26 (1994); CONNELLY, *FATAL MISCONCEPTION*, *supra* note 8, at 105. The Nazi sterilization law enacted in 1933 resulted in the forced sterilization of 3.5 million people and led to the secret euthanistic killing of the disabled. See Reilly, *supra* note 32.

40. ADOLPH HITLER, *MEIN KAMPF* 439–40 (Ralph Manheim trans., Houghton Mifflin 1971) (1925). On sterilization see KÜHL, *supra* note 39, at 37–39.

41. HERMANN RAUSCHNING, *THE VOICE OF DESTRUCTION* 136–38 (1940).

42. See generally KÜHL, *supra* note 39, at 27–37.

43. *Id.* at 34.

44. *Id.* at 100; see also TONE, *supra* note 10, at 144.

### B. *Classic Eugenics to Crypto-eugenics*

Despite outward signs that eugenic programs were closing, many of the policies still remained operative. For example, the Immigration Act of 1924 was not repealed until 1965,<sup>45</sup> and, while the Eugenics Record Office was officially closed in 1939 and people no longer received “feebleminded” diagnoses, mandatory eugenic sterilizations continued until 1983.<sup>46</sup> Many eugenicists sought legitimacy by forging alliances with birth controllers and pronatalists<sup>47</sup> to regain popular support—a move Margaret Sanger, the founder of Planned Parenthood, had desired since she coined the term “birth control” in 1914.<sup>48</sup>

Sanger desperately sought recognition and support from eugenic scientists.<sup>49</sup> She believed that the growth of her birth control movement depended on “promoting birth control not merely as a personal choice, but as a public good.”<sup>50</sup> Insisting “there has never been any birth control movement that did not lay stress on the eugenic side of it,”<sup>51</sup> Sanger was successful in convincing eugenicists Edward East and Raymond Pearl that “providing the poor and ethnic minorities with birth control would reduce differential fertility.”<sup>52</sup> Agreeing with Sanger’s analysis, Pearl said

It is not only desirable in the eugenic interest of the race to cut down, indeed completely extinguish, the high birth rate of the unfit and defective portions of mankind, but it is also desirable . . . to reduce the birth rate of the poor, even though that unfortunate moiety of humanity be in every way biologically sound and fit.<sup>53</sup>

With the help of Pearl and East,<sup>54</sup> Sanger was able to network with medical

45. The Immigration Act of 1924 was repealed by the Immigration and Nationality Act of 1965, Pub. L. No. 89–236, 79 Stat. 911 (1965).

46. See Suter, *Designer Babies*, *supra* note 2, at 917. On eugenic sterilizations see Reilly, *supra* note 32, at 211 (“Although one cannot point to a moment in which state-sanctioned eugenical sterilization in the United States ended, a satisfactory date is 1983 when a class-action lawsuit brought by women in Virginia who had been sterilized without their consent while in state facilities was settled.”); See *Poe v. Lynchburg*, 518 F.Supp. 789 (1978).

47. The SHORTER OXFORD ENGLISH DICTIONARY defines “pronatalist” as “[o]f or pertaining to the encouragement of the practice of having a large family, esp. by the State; advocating large families.” SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2366 (5th ed. 2002).

48. See CONNELLY, *supra* note 8, at 51, 53–54, 105–06; SANGER, AN AUTOBIOGRAPHY, *supra* note 9, at 107–09; (Sanger tried several names before deciding on “birth control” such as “race control” and “family control”); see also Sanger, BIRTH CONTROL, *supra* note 9, at 83.

49. CONNELLY, *supra* note 8, at 51–54.

50. *Id.* at 43.

51. *Id.* at 53; see generally TONE, *supra* note 10, at 145.

52. CONNELLY, *supra* note 8, at 63 (noting that Sanger also suggested parents should be required to apply for babies as immigrants applied for visas).

53. RAYMOND PEARL, THE BIOLOGY OF POPULATION GROWTH 171 (1925).

54. East claimed that birth control is essential to a successful eugenic program and advocated “promot[ing] birth control at the lower end of the social scale.” See EDWARD M. EAST, MANKIND AT THE CROSSROADS 299, 303 (1923).



doctors, including the leaders of the Committee on Maternal Health and the American Medical Association.<sup>55</sup>

Aiding the birth control movement was the economic crisis of the Great Depression.<sup>56</sup> With millions unemployed and parents struggling to provide for their families, “it began to appear ludicrous to deny them the means to prevent unwanted births. . . . [T]here was increasingly an *expectation* that parents should have no more children than they could manage.”<sup>57</sup> With popular support, and medical and scientific backing, Sanger’s birth control movement was able to solidify support and legitimacy among population activists such as Gunnar and Alva Myrdal and Sir William Beveridge. Together, they created the “family planning” movement.<sup>58</sup>

According to the Myrdals “[t]he genius of family planning was to imply that parents would do the planning” while in reality “social engineers” would “create the conditions that would shape parents’ preferences (and in some cases compel more rational choices).”<sup>59</sup> For many eugenicists, the “future of family planning depended on their ability to manipulate a large segment of society they considered to be unfit for parenthood.”<sup>60</sup> As C. P. Blacker<sup>61</sup> wrote, “defectives being, for the most part, readily suggestible and open to the influence of the people around them, should in most cases be easily persuaded.”<sup>62</sup>

Under the leadership of C.P. Blacker, the International Planned Parenthood Federation<sup>63</sup> began a policy of “crypto-eugenics” in which

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55. CONNELLY, *supra* note 8, at 63. In 1937, family planning under a doctor’s supervision received the seal of approval of the American Medical Association. *See id.* at 109.

56. CONNELLY, *supra* note 8, at 107. *See also* TONE, *supra* note 10, at 151.

57. CONNELLY, *supra* note 8, at 83 (emphasis added).

58. *Id.* at 82; *see also* LINDA GORDON, *WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 344–48 (1977).

59. CONNELLY, *supra* note 8, at 104. This approach is similar to the “fitter family” competitions during the late 1920’s.

60. *Id.* at 107 (citing Alva Myrdal, *The Swedish Approach to Population Policies*, 30 *J. HEREDITY* 113 (1939)).

61. C.P. Blacker was chosen by Margaret Sanger as the first director of the International Planned Parenthood Federation (IPPF).

62. CONNELLY, *supra* note 8, at 107. The family planning movement acted as a catalyst to blunt the negative effects the Holocaust should have had on eugenics. In fact, Margaret Sanger used the Holocaust to justify eugenics in a speech delivered to the Planned Parenthood Federation of America, pointing to “the death camps as conclusive proof of the ‘widespread devaluation of human lives’ and the urgent need for policies to improve them, beginning with the sterilization of those with ‘dysgenic qualities of body and mind.’” *See id.* at 167–68.

63. The Planned Parenthood Federation of America (PPFA) was founded by Margaret Sanger in 1923 under the incorporated name of the “American Birth Control League” (ABCL) when Sanger opened her first birth control clinic in Brooklyn, New York. The ABCL changed its name to PPFA in 1942. *See* CONNELLY, *supra* note 8, at 109. The International Planned Parenthood Federation (IPPF) was founded by Margaret Sanger in 1952 just two years after her speech to the thirteenth annual Planned Parenthood Federation of America (PPFA). Together, the IPPF and PPFA form the entity formally known as “Planned Parenthood.” *See* CONNELLY, *supra* note 8, at 167–68.

“[y]ou seek to fulfill the aims of eugenics without disclosing what you are really aiming at and without mentioning the word.”<sup>64</sup> The Planned Parenthood Federation of America used a similar strategy—its director, William Vogt, for instance, carefully disguised an anti-Asian policy as a maternal health policy.<sup>65</sup>

The family planning movement gave eugenicists the mantel of personal autonomy to disguise their racist and elitist agendas. This was particularly true in the United States where Dutch “sex reformers” considered “Americans to be ‘obsessed’ . . . with ‘attacking population problems, and especially those of coloured people.’”<sup>66</sup> What differentiated eugenics from family planning was not its objectives, but rather the means which it employed to achieve its objectives.<sup>67</sup> By taking the eugenic instruments out of the hands of the state and giving them to private institutions, eugenicists now had the basis for claiming eugenics as a reproductive right.<sup>68</sup> This difference caused some scholars to refer to this new movement as neo-eugenics.<sup>69</sup>

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64. CONNELLY, *supra* note 8, at 163.

65. *Id.* at 165–66 (“It is commonly said in the Orient that we want to cut their population because we are afraid of them . . . but the program can be sold on the basis of the mother’s health and the health of the other children.”).

66. *Id.* Margaret Sanger openly targeted the poor while maintaining “life is so easy and charming and warm and bright for those who have money.” See CONNELLY, *supra* note 8, at 99. See also Brief Impressions of Japan (Apr. 10, 1922), in THE MARGARET SANGER PAPERS (Esther Katz et al. eds.), *microfilmed on* THE MARGARET SANGER PAPERS, Reel 70, Fiche 110–20 (1996); *cf.* TONE, *supra* note 10, at 145–46.

67. Both the family planning movement and eugenics sought to reduce the fertility rates of minorities and otherwise unfit, the difference being family planning sought to convince individuals to sterilize themselves (*i.e.*, choose birth control) and eugenicists sought state-mandated sterilizations. See, *e.g.*, CONNELLY, FATAL MISCONCEPTION, *supra* note 8, at 107 (discussing the need for the family planning movement to manipulate large populations of the “unfit”); *cf.* TONE, *supra* note 10, at 144–46 (discussing birth control as a way to racial improvement).

68. The history of reproductive rights in America centers on the ideals of personal autonomy and individual freedom. See, *e.g.*, Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992). When the eugenic movement began to shy away from state-mandated eugenics and focus on private institutions like Planned Parenthood, eugenicists could then articulate why their methods should be seen as consistent with personal autonomy and individual freedom, thus paving the way for eugenic programs like abortion, contraception, and prenatal testing to be considered fundamental reproductive rights. See the discussion *infra* p ### on crypto-eugenics for a fuller discussion.

69. See, *e.g.*, Suter, *Designer Babies*, *supra* note 2, at 922.

*C. Crypto-eugenics to Neoeugenics*<sup>70</sup>

The founder of eugenics, Francis Galton, never supported compulsory eugenic programs. Rather, he believed that if the public was properly educated, they could be trusted to make the right eugenic reproductive decisions.<sup>71</sup> Galton's optimism is reflected in the neoeugenics movement. Neoeugenics is best described as a "voluntary improvement of the human species at the individual level."<sup>72</sup> Although many agree that there are similarities between neoeugenics and classic eugenics, they argue that neoeugenics (unlike classic eugenics) is morally justifiable because its focus is on autonomy and individual freedom rather than state-compelled sterilization.<sup>73</sup> Yet some scholars believe that crypto-eugenic policies still influence neoeugenics. Professor Suter of George Washington University Law School writes:

[A]lthough the choice is always the individual's, pressures from providers and society may have coercive effects. In the era of compulsory sterilizations, efforts were made to persuade individuals to make particular reproductive choices. Likewise, in the midst of the voluntarism of neoeugenics, efforts are made to persuade individuals to make particular reproductive choices. Thus, although the landscapes of eugenics and neoeugenics are clearly different, the distinctions are not as extreme as commentators often suggest.<sup>74</sup>

The problem with neoeugenics is not that it attempts to achieve some of the same ends as classic eugenics. After all, the classic eugenics movement did actually seek some valid ends, such as the eradication of diseases. The problem with neoeugenics is that, since its implementation in the 1930's, crypto-eugenics has created the social pressures that shape our reproductive choices.<sup>75</sup> For example, one scholar recognized that when "choices" become available, they all too rapidly become compulsions to 'choose' the socially endorsed alternative."<sup>76</sup> This compulsion to choose the socially

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70. The term neoeugenics will be defined as found in Suter, *Designer Babies*, *supra* note 2. While many scholars use different terms, I believe they all describe the same thing. Some use positive versus negative eugenics; some call the new eugenics movement "liberal eugenics" because it "advocates genetic modification of humans on liberal political grounds." *Regulating*, *supra* note 9, at 1582. I have chosen to use the term neoeugenics because I believe that it accurately describes the movement.

71. Suter, *Designer Babies*, *supra* note 2, at 922.

72. *Id.*

73. See, e.g., *Regulating*, *supra* note 9, at 1582; cf. Lene Koch, *The Meaning of Eugenics: Reflections on the Government of Genetic Knowledge in the Past and the Present*, 17 *SCI. IN CONTEXT* 315, 317 (2004).

74. Suter, *Designer Babies*, *supra* note 2, at 938.

75. Cf. Ruth Hubbard, *Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy*, 7 *WOMEN'S RTS. L. REP.* 201, 210 (1982).

76. *Id.*

endorsed alternative is most profoundly demonstrated in the area of prenatal testing (discussed *infra* in Section II).<sup>77</sup>

Before a legal framework can be laid to deal with neoeugenics, an outline of the kinds of neoeugenic procedures currently or potentially available should be discussed. Below is a discussion of five neoeugenic procedures.

### 1. *Amniocentesis and Chorionic Villus Sampling*

Some of the most common procedures of the neoeugenic era are diagnostic tests such as amniocentesis and chorionic villus sampling,<sup>78</sup> which, due to numerous social pressures, have become a routine part of pregnancy.<sup>79</sup>

### 2. *Preimplantation Genetic Diagnosis*

One option gaining momentum is preimplantation genetic diagnosis of embryos created through in vitro fertilization. Once an embryo is tested and found to be free of “genetic abnormalities,” it can be “transferred to the woman’s uterus for gestation.”<sup>80</sup> But, like prenatal testing, preimplantation genetic diagnosis is not a treatment for disease; rather, preimplantation genetic diagnosis merely “overcomes some of the emotional complications associated with prenatal testing and termination. . . . [T]hose who believe that life begins at conception may still be troubled by the prospect of embryo destruction if the embryo is found to carry disease genes.”<sup>81</sup> Another developing area of neoeugenics will reduce the cost of testing and make “prenatal diagnosis even more desirable and broader in its scope.”<sup>82</sup>

### 3. *DNA Chips*

In less than a decade, “next-generation technologies that make reading DNA fast, cheap and widely accessible” will become available.<sup>83</sup> Michael J.

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77. See, e.g., *id.* at 210; see generally Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 255–57 (2002) [hereinafter Suter, *Routinization*].

78. Amniocentesis is a “procedure in which a small sample of amniotic fluid is drawn out of the uterus through a needle inserted in the abdomen and is then analyzed to detect genetic abnormalities in the fetus or to determine the sex of the fetus.” THE AMERICAN HERITAGE STEDMAN’S MEDICAL DICTIONARY 36 (2d ed. 2004). Chorionic villus sampling is a “prenatal test to detect birth defects that is performed at an early stage of pregnancy and involves retrieval and examination of tissue from the chorionic villi.” *Id.* at 153. Chorionic villi are any of the “fingerlike projections of the chorion of the embryo.” *Id.*

79. Suter, *Designer Babies*, *supra* note 2, at 923; see also Suter, *Routinization*, *supra*, note 77, at 255–56.

80. Jeffrey R. Botkin, *Ethical Issues and Practical Problems in Preimplantation Genetic Diagnosis*, 26 J.L. MED. & ETHICS 17 (1998).

81. Suter, *Designer Babies*, *supra* note 2, at 930–31.

82. *Id.* at 931.

83. George M. Church, *Genomes for All*, SCI. AM., Jan. 2006, at 47.

Malinowski describes “DNA chips” that “can be used to test the samples of individuals for the presence of thousands of identified genetic variations.”<sup>84</sup> In essence, scientists will know the type of child two people will have before an embryo is even created. But these procedures do nothing to treat genetic diseases; they only provide evidence of genetic abnormalities. Gene therapy and gene transfer, on the other hand, have the potential to treat some genetic diseases.<sup>85</sup>

#### 4. *Gene Therapy and Transfer*

Despite neoeugenicists’ optimism, the science of gene therapy has progressed very little since the 1990’s.<sup>86</sup> This may be due, at least partially, to the debate among neoeugenicists over its potential uses. Apart from merely treating diseases, gene therapy could be used to enhance healthy genes by altering them to improve height and athleticism, or even cosmetic enhancements like facial structure and eye color.<sup>87</sup> These enhancements are advocated by scholars such as Professor Ronald Dworkin,<sup>88</sup> who justifies genetic enhancements on philosophical grounds: he argues that society is morally obligated to provide genetic enhancements so that children can choose broader life plans and have a greater chance of success.<sup>89</sup>

The technology may become so advanced that gene therapists could choose to manipulate genes at the somatic cell level (making the enhancements uninheritable) or at the germline level (making the genetic alterations inheritable).<sup>90</sup> With this technology, neoeugenicists could actually achieve what they set out to do in the 20s and 30s—eradicate unwanted gene sequences (albeit at the individual, rather than the state, level).<sup>91</sup>

#### 5. *Human Genome Project*

Complimenting gene therapy are developments in the Human Genome

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84. Michael J. Malinowski, *Law, Policy, and Market Implications of Genetic Profiling in Drug Development*, 2 HOUS. J. HEALTH L. & POL’Y 31, 40–41 (2002).

85. Suter, *Designer Babies*, *supra* note 2, at 933.

86. *Id.* at 932.

87. *Id.* at 933–34, n.195.

88. Ronald Dworkin is a Professor of Jurisprudence at University College London and New York University School of Law. UCL Faculty of Laws, Ronald Dworkin, <http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?dworkin> (last visited Mar. 4, 2010).

89. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 448–52 (2000).

90. Susannah Baruch et al., Genetics and Public Policy Center, *Human Germline Genetic Modification: Issues and Options for Policymakers* 14 (2005), <http://www.dnapolicy.org/images/reportpdfs/HumanGermlineGeneticMod.pdf> (“If and when it occurs, germline genetic modification would involve introducing a new genetic sequence into a person’s germline cells that could be passed to future generations.”). *See generally id.* at 13–24.

91. *Cf.* Suter, *Designer Babies*, *supra* note 2, at 937–38.

Project. The late Daniel E. Koshland, former Editor-in-Chief of *Science*, hypothesized that the Human Genome Project had the potential to provide solutions to many of today's social problems, such as homelessness and crime, by eliminating the illnesses which in large part lead to them.<sup>92</sup> This medicalization of social problems—casting them as primarily genetic—is strikingly similar to the position espoused by classic eugenicists.<sup>93</sup>

As these new age technologies become mainstream, the social pressures to use them will increase.<sup>94</sup> These social pressures affect neoeugenics to the extent that they impair the autonomous choices of people who use neoeugenic procedures.<sup>95</sup> Therefore, while neoeugenics is rooted in the ideals of personal autonomy and informed consent, the choices that motivate neoeugenic treatments are the aggregate result of what social engineers have predetermined constitutes the good.<sup>96</sup>

## II. THE HUMAN PERSON AND AUTONOMY

Personal autonomy plays a central role in due process jurisprudence. It is difficult to assess however, the importance personal autonomy plays in rendering a decision. For example, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* implied that everything under the sun is encompassed by the due process clause because “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>97</sup> But, in *Washington v. Glucksberg*, the Court adamantly downplayed the role of autonomy in due process jurisprudence opining: “That many of the rights and liberties protected by the due process clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”<sup>98</sup> However, in *Lawrence v. Texas* the Court again reiterated the sweet mystery of life and held that personal autonomy is a core liberty interest at the heart of the due process clause.<sup>99</sup> One thing is certain: courts will always struggle with balancing personal autonomy on one hand with the state’s interests on the

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92. Koshland hypothesized that psychological disorders such as schizophrenia and the like are responsible for many social problems including homelessness. The Human Genome Project may rid society of social problems to the extent that it can ameliorate or obliterate the psychological disorders that cause such social problems. Daniel E. Koshland, *Sequences and Consequences of the Human Genome*, 246 *SCIENCE* 189 (1989).

93. Suter, *Designer Babies*, *supra* note 2, at 940.

94. See Suter, *Routinization*, *supra* note 77, at 255–57.

95. *E.g.*, *id.* at 255 (“ . . . [e]ven when women understand conceptually that they have a choice, social norms and beliefs about what is best for their child may make choice illusive”).

96. See, *e.g.*, *id.* (discussing how the “routinization” of prenatal testing creates a situation where “true choice often gives way to the *illusion* of choice”).

97. *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

98. 521 U.S. 702, 727 (1997).

99. 539 U.S. 558, 574 (2003).

other. If neoegenic procedures qualify as a fundamental right protected by the due process clause, then overcoming a state regulation of neoegenics requires walking that delicate balance.

This section demonstrates how our conception of autonomy is false and, therefore, to the extent that the Court would rely on this false conception, it is wrong. This section implores the Court to move from an “atomistic” conception of autonomy and move towards a “relational” autonomy. It also argues that, as a matter of public policy, doctors should refrain from taking a directive approach when proscribing neoegenic procedures, and legislators should prohibit cosmetic genetic enhancements.

Professor Suter points out that “[o]ur culture seems to have adopted an ‘atomistic conception of self-definition, in which the individual shapes herself without reference to others.’”<sup>100</sup> The Supreme Court has adopted this atomistic view in *Casey* and *Lawrence*.<sup>101</sup> But the atomistic conception of autonomy is flawed to the extent it assumes that human persons act in isolation from each other.

Analyzing this atomistic conception of autonomy requires evaluating what it means to be a person.<sup>102</sup> Once one understands the nature of the human person, a truer conception of autonomy emerges. Only with this fuller understanding can the implications of genetic engineering be clearly seen.

#### A. *The Subjectivity of the Human Person*

Karol Wojtyła<sup>103</sup> begins his analysis of the human person with the observation that the person is both a subject and an object of action.<sup>104</sup> As a subject, the person is “an entity which exists and acts in a certain way.”<sup>105</sup> As an object, the person exists within a world of objects and is an objective particular person.<sup>106</sup> But the person is not simply a subject; he is a human subject with the ability to reason, distinguished from “even the most advanced animals by a specific inner self.”<sup>107</sup> Unlike animals, a person

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100. Suter, *Designer Babies*, *supra* note 2, at 951 (quoting Sonia M. Suter, *Disentangling Privacy from Property*, 72 GEO. WASH. L. REV. 737, 772 (2004) [hereinafter Suter, *Disentangling*]).

101. *Casey*, 505 U.S. 851; *Lawrence*, 539 U.S. 574.

102. See Suter, *Designer Babies*, *supra* note 2, at 951.

103. Karol Wojtyła was ordained a priest in 1946 and ordained a Bishop in 1958. Elevated to Cardinal in 1967, he was later elected 264th Pope of the Catholic Church under the name John Paul II. Holy See Press Office, His Holiness John Paul II Short Biography, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/biography/index.htm](http://www.vatican.va/holy_father/john_paul_ii/biography/index.htm) (last visited Mar. 4, 2010).

104. KAROL WOJTYŁA, LOVE AND RESPONSIBILITY 21–23 (H. T. Willetts trans., rev. ed. 1981) (1960).

105. *Id.* at 21.

106. *Id.*

107. *Id.* at 22. Human persons do not only act and react in a passive sense; human persons are as Boethius described them—individual beings of a rational nature (*individua substantia*

“does not only intercept messages which reach him from the outside world and react to them,” rather, the human subject perceives an object and because of his inner life, is aware that he perceives an object.<sup>108</sup> Thus, he is capable of making value judgments about the objects he perceives, or, as Wojtyła would say, “he strives to assert himself, his ‘I’ [into the world].”<sup>109</sup> Man is a person precisely because of his interior life.<sup>110</sup>

By virtue of the specific interior life, the human person has the power of self-determination and exercises his subjectivity by free will. The collateral effect of the human person’s power of self-determination is this: “No one can substitute his act of [free] will for mine.”<sup>111</sup> All human relationships are predicated upon the principle that each person remains independent in his actions.<sup>112</sup> Because the human person is not merely the subject of action but can at the same time be the object of action, there are many ways in which the human person can be “used.”

To “use” something means to employ some object as a means to an end.<sup>113</sup> In this sense, the number of objects that a person uses in his daily life as a means to an end is potentially limitless. But when he uses other persons as a mere means to an end—when he objectifies them—he denies them their subjectivity and does violence to their very nature as human persons.<sup>114</sup> In other words, he denies them their power of self-determination and substitutes his will for theirs. Therefore, when the object of a person’s action is another human person, he must never use that other person as a mere means to his own ends; rather, he must respect that person’s own subjectivity—he must treat that person as an end.

Immanuel Kant came to the same conclusion when he discussed his categorical imperative.<sup>115</sup> Kant proposes that one must “act in such a way that you always treat humanity, whether in your own persons or in the person of any other, never simply as a means, but always at the same time

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*rationalis naturae*). The human person’s rational nature fosters an interior life or an inner self that distinguishes him from even the most advanced animals. *Id.*

108. *Id.* at 23

109. *Id.*

110. WOJTYŁA, *supra* note 104, at 23.

111. *Id.* at 24.

112. *Id.*

113. *Id.* at 25.

114. *Id.* at 27. Not every instance of using another human person does violence to their dignity. For example, the employer uses the employee and vice versa. In this type of relationship, the employer could easily use the employee as a mere means to an end; but, if they arrange their association such that both are ordered to the other’s good, then, even though they may be “using” one another as a means to an end, their act of use is actually an act of love. The employee works diligently for the good of the employer, and the employer pays a just wage for the good of the employee. It is only when people are used as a mere means to an end that an act of usury does violence to the dignity of the human person. *See id.* at 29.

115. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 77 (H. J. Paton trans., Harper and Rowe, 1964) (1948).



as an end.”<sup>116</sup> In this way, Kant not only affirms the autonomy of the human person, but also implicitly rejects atomistic autonomy. If atomistic autonomy were true, then man would only relate to other people as a subject of action and not at the same time as an object of action. Since the human person is both a subject and object of action, atomistic autonomy is necessarily false.

Personhood is “bound up and expressed in relation to others’ and does not focus on individual goals that are disaggregated from community and personal history.”<sup>117</sup> Analysis of neoegenics through the lens of “relational autonomy” focuses on the “development and expression of the relational self,” whereas an “atomistic autonomy” analysis focuses on self-definition to the exclusion of any relational considerations.<sup>118</sup>

### B. Relational Autonomy

Relational autonomy reveals “subtle and contextual” problems with neoegenics apart from its effects on the atomistic self.<sup>119</sup> This is important particularly in the realm of reproductive decisions that affect not only the subject making the decision, but also the object of the decision. In some cases, the way in which we exercise our autonomy has profound effects on other people. While this is particularly true of the disabled community,<sup>120</sup> it also affects parents and the types of decisions they make for their children.<sup>121</sup> If genetic engineering becomes possible, social pressures may encourage parents to cosmetically engineer their children, much like social pressures encourage parent to undergo prenatal testing.<sup>122</sup> Thus, as a matter of public policy, doctors and medical boards should refrain from taking a directive approach in prescribing neoegenic procedures and should restrict neoegenic procedures like genetic engineering when used for cosmetic purposes.

#### 1. The Disability Rights Approach

Like eugenics of old mentioned at the beginning of this paper, Professor

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116. *Id.* at 96.

117. Suter, *Designer Babies*, *supra* note 2, at 953 (quoting Suter, *Disentangling*, *supra* note 100, at 763).

118. *See* Suter, *Designer Babies*, *supra* note 2, at 954.

119. *Id.*

120. *See, e.g.*, Darrin P. Dixon, *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3, 3–4 (2008) [hereinafter Dixon, *Informed Consent*] (discussing the effect direct and indirect influences of medical professionals have on the termination of fetuses with Down syndrome).

121. *See, e.g.*, Suter, *Designer Babies*, *supra* note 2, at 963–64 (discussing the effects parents’ overbearing expectations have on their children).

122. *Id.* at 935–37 (arguing that “advancing technologies and cultural norms may exert a coercive effect on individuals’ reproductive choices”).

Suter underscores one of the “key criticisms” of neoeugenics under a relational autonomy analysis—many reproductive decisions are motivated by “prejudice and stereotypes of different groups.”<sup>123</sup> “Majority views regarding disabilities often reflect the able-bodied’s misperceptions and stereotypes about the experiences of the disabled, in large part because of lack of experience with the disabled community.”<sup>124</sup> For example, despite the reality that “many individuals with Down [s]yndrome can become semi-independent and with good medical care, can live into adulthood,” 90 percent of all babies diagnosed with Down syndrome are aborted<sup>125</sup> due primarily to the “direct and indirect influences of medical professionals.”<sup>126</sup> Thus, rather than being motivated by accurate information, many mothers choose to terminate their pregnancies due to a doctor’s own stereotype and lack of experience treating children with Down Syndrome.<sup>127</sup> Unlike the atomistic conception of autonomy, analysis under a relational autonomy approach must not only consider whether or not the woman has accurate information, but also the effect of the woman’s action in relationship to her community.<sup>128</sup>

By choosing to terminate a fetus with an unwanted genetic condition or trait, the woman “defines the ‘unfit’ in terms of that [condition] or trait,” which “may devalue the lives of those with the trait.”<sup>129</sup> Those in the disability movement have long recognized that social barriers create disability and “that the difficulties of living as a disabled person are due to discrimination and prejudice, rather than impairment.”<sup>130</sup> Exemplifying this

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123. *Id.* at 955.

124. *Id.*

125. Amy Harmon, *Prenatal Testing Puts Down Syndrome in Hard Focus*, N.Y. TIMES, May 9, 2007, available at <http://www.nytimes.com/2007/05/09/us/09down.html?ex=1336363200&en=ccf8eef18ff478e4&ei=5088>.

126. See Dixon, *Informed Consent*, *supra* note 120, at 3–4.

127. *Id.*

128. Cf. Suter, *Designer Babies*, *supra* note 2, at 955–57. Suter argues that those who we chose to terminate via abortion in some sense labels who society as a whole considers disabled or unwanted. In the case of genetic engineering, those traits we choose to enhance exclude certain traits and individuals, and may have a corrosive effect on how society views those persons with traits that are selected against. Thus, when making reproductive decisions women are not only affecting their own bodies and the life of their child, but they are also shaping their community.

129. See Suter, *Designer Babies*, *supra* note 2, at 955. See also Robert Wachbroit, *What is Wrong with Eugenics?*, in *ETHICAL ISSUES IN SCIENTIFIC RESEARCH: AN ANTHOLOGY* 334 (Edward Erwin et al. eds., 1994) (stating that what is “prima facie wrong” with using sex selection to select males “is that it insults the dignity of women; it demeans the value of being female”); Mary B. Mahowald, *Aren’t We All Eugenicists? Commentary on Paul Lombardo’s “Taking Eugenics Seriously”*, 30 FLA. ST. U. L. REV. 219, 230–34 (2003) (noting that expressivists argue that prenatal testing sends the message to people with disabilities that their lives are not worth living).

130. Tom Shakespeare, *Eugenics, Genetics and Disability Equality*, 13 *DISABILITY & SOC’Y* 665, 669 (1998). See also Adrienne Asch, *The Human Genome and Disability Rights*, *DISABILITY RAG AND RESOURCE*, Jan.–Feb. 1994, at 12 (arguing that the premise of the disability rights movement is that persons with disabilities are disadvantaged far more by negative social attitudes

principle is the fact that deafness is viewed as a minor problem rather than a major misfortune in communities where deafness is common.<sup>131</sup> The fact that those with disabilities are impaired much more by social prejudice and value judgments than by their actual disability highlights the role that individual value judgments play in shaping who and what we call “disabled.”<sup>132</sup> Hence, relational autonomists are right to be concerned about the effects genetic engineering and in vitro fertilization may have on those who have traits that are selected against.<sup>133</sup>

## 2. *Genetic Plastic Surgery*

Analysis of genetic engineering must hinge on the nature of the human embryo. If a human embryo is merely an object of action, then genetic enhancements of it are morally neutral.<sup>134</sup> But if the human embryo is both a subject and an object of action, then it is a human person and, whenever human persons are the object of our actions, we must never use them as a mere means to achieve our own ends.<sup>135</sup> If an embryo were simply an object, then it would make no sense to discuss how genetic enhancements might broaden its autonomous life choices—much like it makes no sense to discuss how reupholstering a chair would broaden its autonomous life choices. Since genetic engineering is aimed at providing the embryo with broader potentiality with regard to the types of choices it will eventually be able to make, those who advocate for genetic engineering must believe that the embryo is not merely an object, but in some sense, it must also be a subject—the kind of entity that is capable of making choices. Thus, genetic engineering must presuppose the existence of a human person and as a result the embryo cannot be used as a mere means to achieve an end.<sup>136</sup>

Those who support genetic engineering as a fundamental reproductive right argue that parents should have the right to equip their children with certain traits to enhance their potential for success and for making

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than by their disabilities). In a more recent case, Sarah Palin (the 2008 Republican U.S. Vice-Presidential nominee) knowingly had a Down syndrome baby: Trig. Citing the effect Plain’s decision would have on society’s conception of Down syndrome should she get elected, a doctor in Canada worried that fewer Downs babies would be aborted. See John Flynn, *Unlikely to Survive*, ZENIT, Sep. 21, 2008, <http://www.zenit.org/article-23672?l=english>.

131. See Bob Sapely, *From Stigma to the Social Exclusion of Disabled People*, in *STIGMA AND SOCIAL EXCLUSION IN HEALTHCARE* 270 (Tom Mason et al. eds., 2001) (noting that relatives and friends value individuals with disabilities for qualities other than their impairments; however, to outsiders, individuals with disabilities continue to illicit negative responses).

132. Cf. Suter, *Designer Babies*, *supra* note 2, at 956.

133. Cf. *id.*

134. Cf. WOJTYLA, *supra* note 104, at 25–27. Wojtyla argues that it is precisely because man is an object and a subject that we ought to not to use him as a means to our own ends. *Id.* Thus, the moral implications of how we use a fetus change depending on whether or not they are merely an object or if they are also a subject. *Id.*

135. *Id.*

136. *Id.*

autonomous life choices.<sup>137</sup> Some supporters, like Professor Dworkin, make moral claims for a right to genetic engineering.<sup>138</sup> Professor Dworkin bases his moral claim on two principles. First, that “it is objectively important that any human life, once begun, succeed rather than fail,” and second, every person has the right to “define, for him, what a successful life would be.”<sup>139</sup> I agree with both principles; however, since the goal of genetic engineering is to allow parents to choose cosmetic, intellectual, and physiological enhancements for their child before the child is even born, the only types of genetic engineering that fit into Dworkin’s analysis are preventative measures aimed at curing diseases.<sup>140</sup> Since each person should “define, for him, what a successful life would be,”<sup>141</sup> there is no moral argument for cosmetic enhancements because it is impossible to know what the autonomous life choices of an embryo would be before he or she is born.<sup>142</sup>

Decisions to provide cosmetic enhancements for a child, therefore, must only be motivated by life choices that the parents themselves would have chosen.<sup>143</sup> This phenomenon is already taking place in field of plastic surgery.<sup>144</sup> Motivated by their own conceptions of beauty and social

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137. See JOHN RAWLS, *A THEORY OF JUSTICE* 92 (rev. ed. 1999) (explaining that a rational actor wants to ensure that her descendants have the capabilities to pursue their preferred plans of life. Because enhancing a child’s natural talents neither infringes on others’ liberty nor makes anyone worse off, “society is to take steps at least to preserve the general level of natural abilities and to prevent the diffusion of serious defects.”).

138. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 449, 452 (2000).

139. *Id.* at 448–49. (Finding a moral obligation for genetic engineering from two principles: first, “it is objectively important that any human life, once begun, succeed rather than fail,” and second, every person has the right to “define, for him, what a successful life would be.” Given these two precepts, society should have no qualms about enhancing the capabilities of its children so that they may have a greater choice of life paths and better odds at succeeding at whatever they choose to do. Indeed, morality requires that society do so.”).

140. For example, parents who want their children to be athletic can equip the embryo with the genetic material that will make the child taller, faster, stronger, and essentially more athletic. Thus, the fetus is an objectively tall, fast, strong, and athletic human person.

141. DWORKIN, *supra*, note 138, at 449.

142. Except perhaps to the extent that G.K. Chesterton explored them in his poem *By the Babe Unborn*. See G.K. Chesterton, *By the Babe Unborn*, in *STORIES, ESSAYS, AND POEMS* 278 (2007).

143. See Suter, *Designer Babies*, *supra* note 2, at 963. Suter discusses a *Real Housewives of Orange County* episode in which a teenager whose father and grandfather were professional baseball players is raised with the constant message that he has the genes for baseball and an obligation to fulfill his family’s dreams of his becoming another professional player. Ironically, the pressure to focus solely on baseball results in the son’s poor academic performance and inability to play baseball on his high school team his senior year, which ultimately harmed his drafting potential. This part of Suter’s paper influenced the title of my paper. “Stage mom syndrome” is an idiom referring to a parent living out their own frustrated desires through their children. The idea is that when genetically engineering a child, parents will choose life choices for their children that resemble their own life choices and in the case of unattained goals parents can take steps to ensure their children succeed where they failed.

144. Sandra Boodman, *For More Teenage Girls, Adult Surgery: Rise in Breast Implants, Other Procedures, Raises Doubts About Long Term Effects*, WASHINGTON POST, Oct. 26, 2004, at A1. Rhinoplasty remains the number one procedure for teenage girls. Boodman suggests that the

pressures, there are a disturbing number of parents electing plastic surgery for their teenage daughters—girls as young as fourteen are receiving breast augmentations, rhinoplasty, and liposuction.<sup>145</sup> Since genetic engineering would allow parents to equip their children with cosmetic enhancements, the demand for genetic plastic surgery is likely to be as high or even higher than the demand for plastic surgery. But unlike plastic surgery, genetic plastic surgery will hinge on only the parents' conception of the good. Therefore, to the extent that parents will use genetic engineering to manufacture children they conceive to be valuable, genetic engineering does violence to the autonomy of the child by treating the embryo as a mere means to achieve the parents' ends. In essence, the parents substitute their will for that of the child.<sup>146</sup>

Under an atomistic autonomy approach, genetic engineering may result in fostering prejudice and stereotypes.<sup>147</sup> Allowing parents to choose desirable genetic traits for their children may result in the devaluing of those persons without those traits. Much like plastic surgery, genetic engineering will result in homogeneous trait selections,<sup>148</sup> which could send a message to those who opt out of genetic engineering that they are abnormal.<sup>149</sup> Therefore, to the extent that genetic engineering will be used to cosmetically enhance a child's future, it should be regulated.

Regulation of genetic engineering and similar neoeugenic procedures turns on whether (1) such procedures are likely to be considered fundamental rights; and if they are, whether (2) there is a compelling state interest to defeat a due process challenge.

### III. THE CONSTITUTIONAL LANDSCAPE OF NEOEUGENICS

There is a constant tension between the extent to which the state can compel action against individual freedom and the extent to which the state can prevent action in accordance with individual freedom. This tension is usually solved using a "compelling state interest" test.<sup>150</sup> Should the

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increase in teenage plastic surgery is due to the popularity of reality shows such as "Extreme Makeover," "The Swan," and "I Want a Famous Face".

145. *Id.*

146. *Cf.* WOJTYLA, *supra* note 104, at 21.

147. *See* Suter, *Designer Babies*, *supra* note 2, at 956.

148. In plastic surgery, no one chooses to make themselves fatter, or their noses bigger, breasts smaller (the result of those persons who have breast reduction is not smaller breasts but more comfortable large breasts); the choices reflected in plastic surgery are for the most part homogeneous. *See also* Suter, *Designer Babies*, *supra* note 2, at 960; *cf.*, Dixon, *Informed Consent*, *supra* note 120, at 3–4 (discussing how those with Down syndrome are selected against, thus, limiting their communal population).

149. The pressure on young girls to have plastic surgery is only one example. An alarming number of teenagers opt to go under the knife because of the perception that they do not fit in. The same analogy is true of genetic engineering.

150. *See, e.g.*, *Regulating*, *supra* note 9, at 1589.

technology ever advance to the point where parents can, in fact, engineer their own children, there are two compelling interests which will justify the regulation of such technology: the autonomy of the patient and the autonomy of the child.

A. *Neoeugenics as a Fundamental Reproductive Right*

An unsigned Note in the Harvard Law Review argues that the Due Process Clause of the Fourteenth Amendment extends a person's liberty interest to include neoeugenic programs such as in vitro fertilization and genetic engineering.<sup>151</sup> The Supreme Court has already determined that a woman has a fundamental reproductive right to decide when to have a child. For example, a woman has a reproductive right of "procreation without state interference,"<sup>152</sup> the right to decide when to get pregnant,<sup>153</sup> and the right to terminate a pregnancy.<sup>154</sup> At least one district court determined that a woman has a right to prenatal testing.<sup>155</sup> The Supreme Court may soon have to determine whether women have a fundamental reproductive right to in vitro fertilization.<sup>156</sup>

John Robertson argues in favor of a fundamental right to in vitro fertilization, remarking that "if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally."<sup>157</sup> He therefore would extend those constitutionally-protected liberties to in vitro fertilization and other reproductive enhancing technologies.<sup>158</sup>

But abortion, contraception, prenatal testing, and in vitro fertilization focus on the extent to which the constitution protects a woman's right to decide when and if to have a child. The question of whether these protections extend to the *sort* of child she will have (e.g., preimplantation genetic diagnosis and genetic engineering) remains.

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151. *Id.* at 1578.

152. *See* Maher v. Roe, 432 U.S. 464, 472 n.7 (1977) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

153. Griswold v. Connecticut, 381 U.S. 479 (1965).

154. Roe v. Wade, 410 U.S. 113 (1973) (finding that the state cannot restrict 1st trimester abortions); Stenberg v. Carhart, 530 U.S. 914 (2000) (finding that the state cannot restrict abortions into the 2nd and 3rd trimesters). *But see* Gonzalez v Carhart, 550 U.S. 124 (2007) (limiting *Stenberg* in that a woman's reproductive right does not extend to dilation and extraction (intact dilation) procedures).

155. *See* *Regulating*, *supra* note 9, at 1587 (citing Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990) (holding that a woman's constitutional right to abort her fetus must also include a right to prenatal testing to give the woman information on which to make the decision to abort or not).

156. Suter, *Designer Babies*, *supra* note 2, at 950; *cf.* *Regulating*, *supra* note 9, at 1587.

157. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 39 (Princeton University Press 1994). *See also* Suter, *Designer Babies*, *supra* note 2, at 950.

158. *See* Suter, *Designer Babies*, *supra* note 2, at 950.

The Note argues that the constitution already protects a woman's right to determine the sort of child she will have.<sup>159</sup> For example, "it would almost certainly be unconstitutional for the state to prohibit citizens from dating eugenically."<sup>160</sup> In addition to eugenic dating, at least one federal district court has already determined that a woman has a substantive due process right to screen her fetus for genetic abnormalities.<sup>161</sup> And since *Roe*, "eugenic abortions" are also protected.<sup>162</sup> But these rights do not necessarily establish a constitutional right for a woman to decide what sort of child she will have; they only establish a woman's right to decide what sort of child she will *not* have.<sup>163</sup>

Advocates will nevertheless defend genetic engineering as a fundamental reproductive right by combining three separate rights already recognized by the Supreme Court.<sup>164</sup> The first is the right to procreation without state interference.<sup>165</sup> The second is the right "to direct the upbringing and education of one's children,"<sup>166</sup> including giving them advantages not available to all.<sup>167</sup> The third right is "the guarantee of marital privacy, which extends 'to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"<sup>168</sup>

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159. See *Regulating*, *supra* note 9, at 1588.

160. *Id.* at 1586. The Note describes eugenic dating as dating with the goal of finding a mate who will provide desirable genes for one's offspring, whether such genes are for hair color or for intelligence. I do not find this evidence compelling. While I agree that regulations on "eugenic dating" would be unconstitutional, they would be unconstitutional for many other reasons than the neoeugenic characteristics, such as individual liberty. The inference from eugenic dating is weakened by the fact that many states restrict who can legally marry. For example, siblings cannot marry, in large part, due to the genetic abnormalities that would result from such a union. In so far as eugenic dating is posited to prove that the state is constitutionally forbidden from regulating the types of couples who are having children, the fact that diseugenic unions (like that of brother to sister) are regulated reveals that the state cannot prevent people from dating but they can decide the types of relationships that will receive state benefits. This may be a type of indirect regulation.

161. See *Regulating*, *supra* note 9, at 1587 (citing *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376–77 (N.D. Ill. 1990) (holding that a woman's constitutional right to abort her fetus must also include a right to prenatal testing to give the woman information on which to make the decision to abort or not).

162. *Regulating*, *supra* note 9, at 1587 (describing instances where women chose to abort after finding out their fetus will be born with a serious genetic disease. These abortions are referred to as "eugenic abortions").

163. Even eugenic dating does not allow a person to determine what sort of child they will have because there are innumerable ways that genes may combine. Therefore, eugenic dating—at best—only gives a person better odds for the desired characteristics of the child.

164. See *Regulating*, *supra* note 9, at 1587–88.

165. *Regulating*, *supra* note 9, at 1587–88 (citing *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977)); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

166. *Regulating*, *supra* note 9, at 1587–88 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)); accord *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

167. *Regulating*, *supra* note 9, at 1587–88 (citing John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 424, n.12 (1996); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972)).

168. *Regulating*, *supra* note 9, at 1588 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720

This last right, when combined with the previous two rights, creates the constitutional foundation upon which a right to genetically engineer a child might be found to exist. All of these rights have their foundation on what the Supreme Court considers to be “central to personal dignity and autonomy.”<sup>169</sup>

The extent to which genetic engineering will be found to fall within the liberty interests of the due process clause remains to be seen. Perhaps the Court will agree with John Robertson that genetic engineering may “deviate [so much] from the core interests that make reproduction meaningful as to fall outside the protective canopy of protective liberty.”<sup>170</sup> Assuming *arguendo* that neoeugenic programs fall within the protective canopy of the due process clause, any attempt to regulate them will be subject to a “compelling state interest” test.<sup>171</sup>

### B. Two Compelling Interests

Finding a compelling state interest in regulating some types of neoeugenic procedures may be more difficult than it seems. In *Lawrence v. Texas*, the Supreme Court rejected morality and ethics as the only compelling state interests justifying the regulation of a liberty interest.<sup>172</sup> There, a compelling state interest must do something more than reflect mere moral disapproval.<sup>173</sup> Moral disapproval aside, one can imagine all sorts of interests a state may have in regulating neoeugenics. For example, the state may have a compelling interest in regulating the health of the embryos and their mothers.<sup>174</sup> The state could regulate neoeugenics using its police powers to the extent that neoeugenic procedures will be harmful to public welfare or health.<sup>175</sup>

The state also has an interest in regulating neoeugenic procedures to the extent that they are motivated by and promote discrimination.<sup>176</sup> Allowing a narrowly-tailored state affirmative action program, the Supreme Court has

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(1997); and *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)).

169. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

170. ROBERTSON, *supra* note 157, at 34; *cf.* Suter, *Designer Babies*, *supra* note 2, at 949–50 (“The Supreme Court has explicitly treated parenting decisions concerning education, religion, and procreation as constitutionally protected interests, describing them as “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . . Whether they include all manner of neoeugenic reproductive decisions remains to be seen.”).

171. *See Regulating*, *supra* note 9, at 1589.

172. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003)).

173. 539 U.S. at 585.

174. *Id.*

175. *See, e.g.*, David M. Nelson, *The Police Powers: A Pretext for Protectionism?*, 32 SYRACUSE J. INT’L L. & COM. 163, 164 (2004).

176. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 325, 343 (2003) (noting a compelling state interest in racial diversity).



found a compelling state interest in promoting a “cross-racial understanding.”<sup>177</sup> Similarly, in striking down a Seattle student allocation plan based on race, the Supreme Court has nevertheless affirmed the state’s compelling interest in avoiding racial isolation.<sup>178</sup> In the same vein, since genetic engineering fosters discrimination against less genetically perfect human beings, regulations of some neoeugenic programs—like genetic engineering—could survive a Fourteenth Amendment challenge if the Court finds a compelling interest in avoiding genetic isolation or discrimination.<sup>179</sup>

Given the Court’s emphasis on the liberty interests of the due process clause—namely personal autonomy<sup>180</sup>—two interests are particularly compelling.

### 1. Patient Autonomy

Patients undergoing procedures such as genetic engineering, gene therapy, and even amniocentesis are owed a degree of personal autonomy with regard to medical decisions—especially reproductive decisions.<sup>181</sup> Yet as discussed *supra*, there are numerous social pressures and remnants of crypto-eugenics which impair true patient autonomy. Professor Suter believes that “[perhaps] the greatest social pressure is the view that one should undergo prenatal testing and screening because it is in the best interests of one’s future child.”<sup>182</sup> “In some cases, patients actually believe they have no choice with regard to prenatal testing or screening.”<sup>183</sup> Yet prenatal testing is not without its limitations. Although doctors frequently refer to prenatal testing as a “treatment” or “doing what’s best,” prenatal testing often “merely ‘prevents disease’ by preventing the existence of someone with the disease.”<sup>184</sup>

A study in California (where doctors are *required* to offer prenatal testing) revealed that doctors are “more interested in persuading [patients to

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177. *Id.* at 330.

178. *Parents Involved in Community Schools. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783, 797–98 (2007). In his concurring opinion, Justice Kennedy affirmed the necessity of diverse public schools, however, such diversity should not be limited to race alone but also to cultural and economic diversity.

179. *See Regulating*, *supra* note 9, at 1590. The Note points out that “congress is probably within its power to ban the genetic modification of a child’s racial phenotype and might be within its power to outlaw sex selection.” *Id.* at 1590. The legitimate state interest is more convincing because race and sex are recognized constitutional classes. As genetic engineering becomes mainstream and less desirable genes are more frequently discriminated against, the compelling interest becomes more convincing for other classes of persons.

180. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

181. *See Regulating*, *supra* note 9, at 1586–89.

182. Suter, *Designer Babies*, *supra* note 2, at 924.

183. Suter, *Routinization*, *supra* note 77, at 255.

184. Suter, *Designer Babies*, *supra* note 2, at 924.

undergo prenatal testing] . . . than informing patients.”<sup>185</sup> The American Medical Association is well aware that in many cases, what seem to be autonomous choices are really influenced by crypto-eugenics.<sup>186</sup> For example, the Council on Ethical and Judicial Affairs’ report to the AMA revealed that, while “overt eugenics” is not a potential threat, “the aggregate result of individual choices creates societal and cultural norms which substantially influence or limit the scope of autonomous decision making in regard to the use of genetic technology.”<sup>187</sup> While state-mandated prenatal testing does not yet occur, the California study reveals that state-compelled offers of prenatal testing, when combined with a policy of crypto-eugenics, achieve substantially the same goals as a mandated testing program.<sup>188</sup>

Given this evidence, a regulation requiring doctors to adopt a non-directive approach to genetic counseling will succeed a due process challenge in order to preserve patient autonomy.

## 2. *Autonomy of the Fetus*

In a post-*Roe* era, discussing the autonomy of a fetus may seem odd. After all, the Court in *Roe v. Wade* refused to opine on whether the fetus was a human person, implying that the autonomy of the mother trumped that of the fetus.<sup>189</sup> As discussed *supra*, the right of a woman to decide what child she will *not* have and the right to decide the sort of child she *will* have are fundamentally different. A right to abortion concerns the former, while a right to genetically engineer a child concerns the later.

To the extent that a woman has decided to carry a child to term, the fetus’s autonomy becomes increasingly relevant. Since arguments for genetic engineering as a fundamental right assume that the fetus is alive, there is a compelling interest in protecting the fetus’ autonomy. Dworkin argues that, “it is objectively important that any human life, once begun, succeed rather than fail” and that every person has the right to “define, for him, what a successful life would be.”<sup>190</sup> The only way for a fetus to define for himself what a successful life would be, is to protect the fetus from cosmetic enhancements imposed on him by his parents. Allowing parents to

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185. Nancy Anne Press & Carole H. Browner, *Collective Silences, Collective Fictions: How Prenatal Diagnostic Testing Became Part of Routine Prenatal Care*, in *WOMEN AND PRENATAL TESTING: FACING THE CHALLENGES OF GENETIC TECHNOLOGY* 201, 216, 216 n.10 (Karen H. Rothenberg & Elizabeth J. Thomson eds., 1994).

186. AM. MED. ASS’N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CEJA REPORT A – A-91: ETHICAL ISSUES IN CARRIER SCREENING OF CYSTIC FIBROSIS AND OTHER GENETIC DISORDERS (1991) 10–11, available at [http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja\\_aa91.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_aa91.pdf).

187. *Id.* at 11.

188. Press & Browner, *supra* note 185, at 216 n.10. The study showed that 85% of women in California chose to have prenatal testing compared with the national average of 65%.

189. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

190. DWORKIN, *supra* note 89, at 448–49.

cosmetically enhance their children does violence to their autonomy because it substitutes the parent's will for the child's.<sup>191</sup> Thus, the state has a compelling interest in ensuring that a child can define, for itself, what a successful life would be," and can, therefore, prohibit cosmetic enhancements through neoeugenic procedures like genetic engineering.

#### IV. CONCLUSION

Neoeugenics is motivated by many of the same prejudices and value judgments that motivated the classic eugenics era. If Professor Suter is right, that reproductive decisions in the neoeugenic era are motivated by "prejudice and stereotypes of different groups,"<sup>192</sup> then there is no moral difference between a state's decision to eradicate genetic "defectives" and an individual's decision to eliminate an undesirable genetic trait based on the same stereotypes and biases. The coercive desire to eliminate genetically inferior life turned the classic eugenics movement into a monster that devoured ten million "undesirable" Jews. This same desire has led to a modern holocaust of genetic undesirables, especially in the case of Down syndrome. The neoeugenics movement must learn from its catastrophic forerunner. States should enact laws that require medical professionals and genetic counselors to take a nondirective approach when advising patients during prenatal testing, genetic engineering, and gene therapy in order to avoid value judgments about what constitutes a desirable life. States should also prohibit the cosmetic enhancement of fetuses.

Neoeugenics is not all bad. Due to advancements in science, it offers some very promising means of enhancing the quality of a person's life.<sup>193</sup> Researching genetic cures and treatments for disorders should be vigorously encouraged. But, because we make decisions in relationship to other people, we should be cautious about how our pursuit of neoeugenic procedures affects the personal autonomy of others. To the extent that the Supreme Court would rely on an argument in favor of neoeugenic programs, like genetic engineering, based on personal autonomy, the Court should not only weigh how a regulation affects the autonomy of the parents seeking a neoeugenic benefit, but also consider how the neoeugenic benefit would affect the fetus—namely, respect the fetus' own subjective ends.

Since we can never know what would have been better for a child, the Court should allow neoeugenic programs linked to an objective good to the fetus. Those goods which are unknown, or are reflections of the parent's own subjective desires, like cosmetic enhancements, should not be permitted because it does violence to the very nature of the fetus—it treats

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191. WOJTYLA, *supra* note 104, at 24.

192. Suter, *Designer Babies*, *supra* note 2, at 955.

193. *Id.* at 932–34 (discussing the potential of gene therapy and gene transfer).

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the fetus as a mere means to an end. Cosmetic or physiological enhancements are not permissible because the ends of the embryo are never known. However, since the most basic good of all creatures is existence, genetic engineering is permissible only to the extent that it is used to sustain a child's most basic good—life.