INTRODUCTION

Much of the literature on eugenics and the law deals with legislation in the first half of the twentieth century permitting eugenic sterilisation, particularly in the US and Nazi Germany. Fortunately, England did not enact such legislation.

Unfortunately, English law has not escaped eugenic influence. This paper considers the influence of eugenics in the second half of the twentieth century on the law in England relating to abortion, in vitro fertilisation and the non-treatment of disabled newborns. It concludes that in these areas English law, which has exercised a major influence on laws around the world, betrays a profound eugenic influence. The paper comprises two parts. Part I, the main part of the paper, concerns eugenics and the unborn. It notes substantial eugenic influence on the law of abortion, and also touches on eugenic influences on the law regulating in vitro fertilisation. Part II concerns eugenics and children after birth and notes the disturbing extent to which the law allows eugenic considerations to compromise their right to life, their right not to be intentionally killed, or to be denied treatment and sustenance, on the ground that they lack a 'worthwhile' life.

I. EUGENICS AND THE UNBORN

1. Abortion

(i) The law against abortion: historical background [3]
For centuries English law protected the unborn child and did so without regard to any abnormality of the child or its parents. The protection of the common law applied (at the latest) from the time of 'quickening', when the mother first felt her unborn child move. In 1803 Parliament, reflecting improving medical knowledge about the origins of human life, tightened the law to protect the unborn child from fertilisation. The prohibition was updated in 1861, partly to make it clear that the crime extended to the pregnant woman who tried to abort herself.

In 1929, because of doubts about whether the law protected the child during birth, Parliament enacted the Infant Life (Preservation) Act which created the offence of 'child destruction'. This Act prohibited the destruction of any child 'capable of being born alive', which it presumed children to be after 28 weeks. It thereby ensured the protection of unborn children who were viable, and did so whether the child was in the process of delivery or not. To summarise: the unborn child was historically protected by the English law against abortion. The viable unborn child was protected both by the law against abortion and by the law against child destruction. The viable child during delivery was protected by the law against child destruction.

English law did, however, allow some room for therapeutic abortion. The Infant Life (Preservation) Act explicitly allowed the destruction of the viable child ‘for the purpose only of preserving the life of the mother’. In relation to non-viable children, a judge ruled in a famous trial in 1938 - which involved the prosecution of a Dr. Aleck Bourne for aborting a young victim of rape - that anti-abortion Act of 1861 implicitly contained a similar exception permitting abortion to save the woman’s ‘life’, an exception which the judge interpreted broadly to mean not only saving her from death but also preventing her from becoming ‘a physical or mental wreck’. Despite these explicit and implicit exceptions for therapeutic abortion, however, the law did not permit the destruction of the unborn child for eugenic reasons.

The 1930s witnessed not only the significant ruling in the Bourne case but also the initiation, with the founding of the Abortion Law Reform Association (ALRA), of a campaign to permit abortion on much wider, including eugenic, grounds. In the 1960s ALRA’s campaign was given a eugenic boost by the thalidomide tragedy

[4]
and, in 1967, resulted in the Abortion Act. When the conditions laid down by this Act are satisfied, no offence is committed against the Act of 1861. Although the Abortion Act 1967 gutted the anti-abortion legislation of 1861, it did not affect the protection of viable children afforded by the Act of 1929.
(ii) The Abortion Act 1967

The Act provides that a person shall not be guilty of an offence against the Act of 1861 when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed ‘in good faith’, that one of the specified grounds is satisfied. The most important ground is laid out in section 1(1)(a):

that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.

It is this ‘health’ ground which has in practice allowed ‘abortion on request’. The vast majority of the 200,000 abortions performed annually in Britain are carried out on the stated ground of (alleged) risk to mental health.

There is good evidence that the Abortion Act’s sweeping ‘health’ ground was intended to include eugenic cases where abortion was thought desirable either to prevent poor women from having ‘too many’ babies or where the pregnant woman was mentally ‘defective’. First, the legislative proposals advanced by abortion campaigners’ had consistently contained clauses targeting the ‘unfit’ or ‘defective’ woman. [5] The ‘unfit’ mother clause was intended to cover what one abortion campaigner described as ‘the working-class mother over forty who was already the mother of several children and sometimes a grandmother as well’; and the woman who was ‘desperately poor’ or married to a ‘lifelong criminal, drug addict or alcoholic’. [6]

Secondly, the member of Parliament who piloted the legislation (David Steel) acknowledged the influence of a leading doctor (Dugald Baird) who had persuaded him of the need to provide abortion for poor women with large families. [7]

That doctor was, not surprisingly, a member of the Eugenics Society. Thirdly, not only is the ‘health’ ground expressed in language sufficiently vague to accommodate such eugenic cases, but the Act explicitly provides that in determining whether there is a risk to the pregnant woman’s ‘health’, account may be taken of her ‘actual or reasonably foreseeable environment’ (s1(1)(2). [8]
Further, not only does the Act implicitly accommodate eugenic abortion for ‘unfit’ mothers: it contains an explicit provision for the abortion of babies with disabilities. Section 1(1)(d) of the Act permits abortion if two doctors believe ‘in good faith’ that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Act defines neither ‘substantial risk’ nor ‘seriously handicapped’.

(iii) Human Fertilisation and Embryology Act 1990

The continuing influence of eugenic thinking on the abortion law was again evident in 1990 when the Human Fertilisation and Embryology Act stripped away the law’s protection of viable unborn children with disabilities. It will be recalled that the Infant Life (Preservation) Act 1929 prohibited the destruction of the unborn child who was viable, except to save the life of the mother. This prohibition was not affected by the Abortion Act 1967. However, in 1990 the Human Fertilisation and Embryology Act amended the law to allow eugenic abortion until birth if two doctors believe there is a ‘substantial risk’ of ‘serious handicap’. The fact that the disabled unborn child may be destroyed even if it can be safely delivered and survive, even indeed if it is in the process of delivery, illustrates the profound influence of eugenics on English abortion law. Moreover, because of the way the 1990 Act is phrased it even permits the destruction during birth of babies who are being aborted for a non-eugenic reason, who are viable and normal and who, for whatever reason, even something as trivial as hair colour, are unwanted by the mother.

During the passage of the Act, its permissive scope was pointed out to Parliament in a memorandum by Professor John Finnis (who is, of course, a highly distinguished member of the Pontifical Academy for Life) and myself. We observed that its loose drafting would allow abortion even for minor abnormalities like cleft lip and palate. We were accused in Parliament of ‘pure scaremongering’. One senior member of the Labour Party (who is now Leader of the House of Commons) even called for us to be reported to the Bar Council. But not only was our legal analysis of the Act accurate; it has since emerged that doctors have in fact been
performing late abortions cleft lip and palate [9] and that the authorities have declined to prosecute.

To summarise: the law relating to eugenic abortion in England is permissive; medical practice even more so. The eugenic philosophy informing the English law of abortion is evident from its provisions which explicitly (risk of fetal handicap) and implicitly ('unfit' mother) permit abortion for eugenic reasons. As we shall now see, the law’s eugenic nature reflects its eugenic roots, roots which have been valuably unearthed in a recent book by Ann Farmer. Farmer has trawled the archives of the Abortion Law Reform Association (ALRA) and has exposed as never before the driving eugenic motivations of those whose campaign produced the Abortion Act.

(iv) eugenic motivations of the abortion campaigners

Many people today regard the passage of the Abortion Act 1967 as a victory for individual choice, won by the feminist movement. As Ann Farmer persuasively demonstrates, however, this is to project present pro-choice feminist perspectives onto the past, and to overlook the eugenic motivations of those in ALRA. In his foreword to Farmer’s book, Lord Alton writes:

Contrary to popular belief, the Abortion Act ‘gave birth’ to the feminism rather than the other way round. In fact, libertarian and eugenicist men steered the campaign, and although campaigners claimed that poor women habitually sought illegal abortion, privately they admitted that legalization was needed in order to encourage them to seek it. [10]

Farmer, having noted that the early feminists were opposed to abortion, writes:

the English abortion campaign actually originated in movements opposed to feminism, namely, eugenics and population control; funded with American money, this campaign created a domino effect on abortion legislation that spread across virtually every Western nation, including the United States. [11]
She points out that the campaign for the decriminalisation of abortion in 1967, and the ensuing campaign to make it ever more freely available, were ‘the fruit of movements dedicated to the eradication of the disabled and the control of the poor and nonwhite’. ALRA, she writes, wanted abortion decriminalised not only for women with serious health problems, but for those who were poor or disabled, those with unemployed husbands and women ‘unable to cope’ with birth control. ALRA’s goal was, revealingly, not to help improve the financial position of poor women but solely to ensure that they had access to abortion.

Farmer also observes that many of the leading figures in the campaign for abortion law reform were members of the Eugenics Society, an organisation which campaigned for eugenic sterilisation and abortion in order to eradicate not poverty, but the poor.

For example, concerning the trial of Dr. Aleck Bourne, not only was Dr. Bourne a member of the Eugenics Society, but so too was the doctor who had referred the rape victim to him for abortion and the eminent lawyer who defended him. Prominent ALRA figure Dora Russell preferred abortion reform over welfare measures for the ‘proletarian mothers’ who bore ‘many children of a very poor quality’. Her philosopher husband, Bertrand Russell, was a leading advocate of sterilising the ‘unfit’. Janet Chance, who chaired ALRA, wrote in 1938:

In short, it is in the name of racial amelioration, and as one of the bases on which a eugenic and hygienic education of our race may be built that we ask a revision of the abortion laws.

Glanville Williams, an eminent jurist at the University of Cambridge, and President of ALRA, was yet another outspoken eugenicist. His book *The Sanctity of Life and the Criminal Law* (published in the US in 1957 and in England the following year) proved influential on both sides of the Atlantic. It was, for example, cited by Justice Blackmun in
\textit{Roe v Wade}, the case establishing a constitutional right to abortion in the United States, and it has been fairly described as the foundation stone of the discipline of medical law in England. Williams advocated sterilisation, abortion, infanticide and euthanasia, not least for eugenic reasons. He wrote of the obvious social importance of preventing the birth of children who are congenitally deaf, blind, paralysed, deformed, feeble minded, mentally diseased, or subject to other serious hereditary afflictions…; He commented that ‘keeping alive mentally and physically ill-equipped children…’ opposed natural selection; claimed that the community was ‘burdened with an enormous number of unfit members…’; approved the idea of a ‘human stud farm…’; and claimed that to allow ‘the breeding of defectives’ was ‘a horrible evil’ and an ‘offence to society’.

He rejected the idea that all life was inviolable ‘however disabled or worthless or even repellent the individual may be…’ and expressed sympathy with the killing of infants who were disabled or born into poverty. In relation to the former, he proclaimed that ‘an eugenic killing by a mother’ was ‘exactly paralleled by the bitch that kills her mis-shapen puppies,…’.

In relation to the latter he criticised the punishment of a mother of six children who had beaten her two year old child to death with the leg of a chair. Williams regarded as mitigation the fact that the boy was ‘delicate and sickly, often crying and moaning…’.

As Ann Farmer notes:

The [abortion] campaigners expressed concern about poor women, but only in the context of
the women being unwillingly pregnant, as part of their campaign for legalizing abortion. Most significantly, all were members of the Eugenics Society...before the campaign began. Thus the connections, inspirations, and views of campaigners indicate that the driving force behind the abortion campaign was a preoccupation with eugenics and population control. [31]

The eugenic motivation of the campaign which led to the Abortion Act 1967 helps to account for the Act's eugenic provisions. Later legislation - the Human Fertilisation and Embryology Act 1990 - would extend eugenic elimination from the womb to the laboratory.

2 In Vitro Fertilisation

The Human Fertilisation and Embryology Act 1990 created a comprehensive framework for the regulation of in vitro fertilisation (IVF). The legislation was a response to the emerging technology of IVF, pioneered by Professor Robert Edwards of Cambridge University (and member of the Eugenics Society). Its provisions were based to a significant extent on the recommendations of a committee, chaired by the influential utilitarian philosopher Mary Warnock (now Baroness Warnock), which reported in 1984. A central recommendation of the report she drafted was the establishment of a statutory body to regulate IVF. The Act therefore set up the Human Fertilisation and Embryology Authority (HFEA), which licenses clinics to produce embryos by IVF for the treatment of infertility and for experimentation. The HFEA permits 'quality control': preimplantation diagnosis to detect genetic abnormalities. [32] Abnormal embryos are, of course, typically discarded. It is reported that there are now some sixty genetic conditions for which clinics may test, such as cystic fibrosis. Since 2006 the HFEA has permitted testing for certain genes even if that gene may not result in a particular condition and even if that condition is curable. It was recently reported that a baby was born in Britain who had undergone preimplantation diagnosis for a gene linked to breast cancer. [33]

Another recent report reveals that a test for autism has moved closer as a result of the discovery by scientists at Cambridge University that high levels of testosterone in the amniotic fluid may signal the condition. [34]

As the number of diagnostic tests increases, in relation to both embryos in the womb and in the laboratory, so will the practice of eugenic discrimination. This practice will, moreover, not only be facilitated by scientific advance; it will also be encouraged by the civil law concerning professional negligence.
3 The Civil Law’s Encouragement of Eugenic Discrimination

We have noted the decriminalisation of abortion by the Abortion Act 1967 and the regulation of preimplantation diagnosis by the Human Fertilisation and Embryology Act 1990. The fact that the criminal law now permits eugenic discrimination against the unborn in the womb and in the laboratory has significant implications for doctors and scientists from the viewpoint of the civil law, particularly the law of professional negligence. While both pieces of legislation thankfully contain ‘conscience clauses’, allowing those with a conscientious objection to abortion or IVF from participating in either, those who have no conscientious objection to eugenic discrimination against the unborn will find themselves encouraged by the civil law to practise it. For example, a doctor who fails to detect an abnormality in an unborn child, in the womb or in the laboratory, risks liability in negligence for the child’s subsequent ‘wrongful birth’ and may be required to compensate the mother, at least for the extra costs associated with bringing up a disabled child. Further, in some jurisdictions, though not in England, courts have held that compensation may also be recovered by the disabled child, in an action for ‘wrongful life’, on the ground that the child is so disabled that they would have been better off dead and should therefore be compensated for being alive. In short, the civil law, and the so-called ‘compensation culture’ which now makes liberal use of it, will likely serve to increase eugenic testing and abortion.

II. EUGENICS AND THE BORN

The influence of eugenic thinking on English law extends beyond the womb and the laboratory and into the delivery room. In particular, eugenic judgments about the inferior worth of disabled babies have undermined the protection afforded to disabled infants by the law of homicide. We noted at the start of this paper that historically the English law against abortion did not allow eugenic considerations to compromise its protection of the unborn. This was also true of the English law of homicide which, recognising our equality-in-dignity, has historically protected all (innocent) human beings after they have been born alive. In recent years, however, this protection has been undermined by a number of court judgments which have held that life-saving medical treatments may be withheld on the basis of the doctor’s opinion that the life of a disabled infant is not worth living, and that it is in the child’s ‘best interests’ to die. In one dramatic case - the Arthur case in 1981 - a judge even went so far as to suggest that it is lawful for a doctor not merely to withhold a
medical treatment from a disabled infant but to withhold food, and perhaps even to take active steps, precisely with intent to kill.

Dr. Leonard Arthur was a senior paediatrician at Derby City Hospital who was charged with the murder of a newborn baby, John Pearson, who had Down’s syndrome. Dr. Arthur told the nurses that the parents had rejected the baby and did not wish him to survive. Dr. Arthur directed the nurses not to feed John and also prescribed large doses of an analgesic in order (as the doctor would later admit to the police) to stop the baby seeking food. John died a few days later. Dr. Arthur was charged with the John’s murder. Despite the clear evidence of Dr. Arthur’s intention to suppress John, and of the course of conduct he initiated to that end, the doctor was acquitted.

The jury could be forgiven for reaching this verdict - a surprising verdict in view of the law and the facts - in view of the direction they were given by the judge. The judge’s summation in the case was not only a miasma of confusion and contradiction about the law of homicide but was also laced with eugenic prejudice about people with Down’s syndrome. As Professor Finnis has pointed out in his withering analysis of the summation, the judge misled the jury by claiming that babies with Down’s syndrome who were rejected by their parents had little chance of adoption and were therefore condemned to life in an institution, and also engaged in prejudicial references to their ‘stigmata’, their ‘lolling tongues’, ‘oriental appearance’ and their ‘most appalling handicap’. [40] Despite the confused, contradictory and eugenic nature of the judge’s summing-up, it may represent the current state of English law. If it does, then the right of disabled infants not to be intentionally killed by starvation, and perhaps even by a positive act, has been seriously compromised. Not surprisingly, Dr. Arthur (who died shortly after his acquittal) had been a sometime member of the Eugenics Society. [41]

CONCLUSIONS

Eugenics has made considerable inroads into English law. The Abortion Act - reflecting the eugenic motivations of the pressure group which campaigned for it - permits eugenic abortion (implicitly) for ‘unfit’ mothers and (explicitly) of disabled babies, even perhaps those with minor and remediable disabilities such as cleft lip and palate. The Human Fertilisation and Embryology Act 1990 facilitates preimplantation diagnosis and permits an increasing range of eugenic tests. A number of court judgments have held that disabled babies may be denied life-saving treatments because their lives are thought to lack worth. If the judge’s direction in Art hur is good law, they may even be intentionally starved and perhaps even actively suppressed.
Many supporters of these legal developments would doubtless claim that they are not as sinister as the eugenic programmes of sterilisation, abortion and euthanasia in Nazi Germany because the Nazi programmes were enforced by the state whereas modern eugenic laws respect individual choice. The distinction is not, however, so clear cut. First, eugenic discrimination remains just that, whether it is carried out by the state or by a parent. Secondly, it is the state (whether through legislature or judiciary) which is promoting laws allowing eugenic discrimination. Thirdly, it is the state which, motivated no doubt by cost-benefit analyses, is encouraging eugenic choices by funding and publicising eugenic testing.

Fourthly, there are serious questions about the extent to which women’s choices to undergo eugenic tests are (as the general law on consent surely requires) free and informed. And, finally, as Ann Farmer has pointed out, some prominent eugenicists think that parents not only have a right but a duty to make eugenic choices. She quotes, for example, one popular British ‘agony aunt’ who has claimed that parents have a ‘duty to choose unselfishly’ and that they should ask themselves whether they have the right to inflict the cost of caring for a disabled child on others.

Farmer also quotes a leading figure in ALRA who has recommended infanticide of disabled newborns because they are a drain on health care resources.

Farmer also notes that philosopher Mary Warnock has commented ‘A friend of mine has an older Down’s Syndrome daughter and he says she’s a pig’.

More recently, Warnock has suggested that some elderly people have not only a right but also a duty to die.

As Farmer stresses, the ‘common thread’ running through advocacy of reproductive technology, abortion, and infanticide is eugenics and the history of eugenics has shown a ‘cavalier disregard for human autonomy....’ It would surely be naïve to assume that the future of eugenics will be very much different.


FARMER, p.169. See also ibid, p.171. She notes that ‘every abortion bill submitted to Parliament was infused with eugenics.’ ibid, p.177

FARMER, p.169.
FARMER, pp.165; 183 n.164; 185; 197-199.

And see FARMER, p.179. Although the Act allows the woman’s environment to be taken into account in determining risk to her health, it does not allow abortion for social reasons. However, there is good evidence that many abortions are performed for social reasons. See KEOWN I.J., op cit n.3, supra, chapter 5. Recall also that s1(1)(a) allows abortion if there is a risk to any ‘existing children’.

In the light of this evidence, the Member of Parliament who made the accusation of scaremongering admitted that the law needed to be re-examined. http://www.telegraph.co.uk/news/uknews/1448709/Abortion-campaigners-welcome-MP’s-change-of-heart.html (last accessed 18th February 2009). See also FINNIS J., ‘We warned them, they mocked us, now we’ve been proved right’ http://www.telegraph.co.uk/comment/personal-view/3599848/We.warned.them.they.mocked.us.now.weve.been.proved.right.html (last accessed 18th February 2009).

FARMER, p.viii (original emphasis).

FARMER, p.xii (footnote omitted).

FARMER, p.xiii.

FARMER, p.80.


[16] FARMER, p.70. See also ibid, pp.89-107.


[22] K&J, p.87

[23] WILLIAMS, p.82.

Farmer points out that in the 1930s American geneticist Herman Muller foresaw that producing embryos in vitro would prove a more efficient eugenic tool than sterilisation.

“Designer” fear after cancer-free baby is born’ The Scotsman, 10th January 2009.

“The Big Question: should mothers be offered screening for autism and what issues would it raise?” The Independent, 13th January 2009.

Abortion Act 1967 s.4; Human Fertilisation and Embryology Act 1990 s.38

[37] Ibid., pp.189-196.


[43] See e.g. LAWSON D., Your baby girl has Down’s syndrome, the doctor told me…., Daily Mail 22nd June 1995.
[44] See e.g. LAWSON D., We’re hiding from the truth: eugenics lives on, The Independent 27th May 2008.

[45] FARMER, pp.246-247. See also ibid., p.291.


[48] ‘If you’re demented, you’re wasting people’s lives – your family’s lives – and you’re wasting the resources of the National Health Service’. Baroness Warnock: Dementia sufferers may have a ‘duty to die’. http://www.telegraph.co.uk/uknews/2983652/Baroness-Warnock-Dementia-sufferers-may-have-a-duty-to-die.html (last accessed 18th February 2009); See also ‘euthanasia comment sparks anger’ http://news.bbc.co.uk/1/hi/uk/4090463.stm (last accessed 18th February 2009).


[50] ‘if negative attitudes to the poor and disabled do not change, and with reproductive technology much easier and cheaper, the future of medicine will be dominated not by the search for cures, or ways of making sufferers more comfortable, but by the hunt for and the elimination of the genetically defective. True to the history of eugenics, which has privileged the biological over the political, and has shown a cavalier disregard for human autonomy, men and women of the future will be selected and modified without their consent, and without reference to their authentic humanity…’ FARMER, p.363 (footnote omitted).