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Biology, Justice, and Women's Fate

Dorothy E. Roberts
University of Pennsylvania Carey Law School

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Mary Mahowald's paper, *Genetic Technologies and Their Implications for Women*, insightfully considers the way genetic technologies affect women differently than men, the reasons for these differences, and whether these differences can or should matter. By facing women's unique biology directly, Professor Mahowald avoids the limits of a gender neutral approach that pretends there are no differences between men and women. Working towards gender equality in the use of genetic technologies and elsewhere requires attending to the biological and power differences between the sexes.

**The Distinction Between Fairness and Fate**

What intrigued me most about Professor Mahowald's paper is its theme of fate and fairness. Mahowald notes that “[i]n very fundamental ways, as Simone de Beauvoir observed decades ago, biology informs destiny for women.”

But understanding how biology becomes women’s destiny and whether this result is just, depends on a distinction between fate and fairness. According to Mahowald, certain implications of genetic technologies for women depend entirely on biology, while others depend on socially-determined factors as well. Those that stem solely from biology are pretty much inevitable—they are women’s fate. However, those that stem from a combination of biology and social causes should be subject to scrutiny to determine whether they are fair.

Mahowald cites H. Tristram Englehardt’s suggestion that the unequal distribution of physical traits among individuals is due to “failures of fortune rather than failures of fairness” and occurs “naturally, and apparently, inevitably.” Although inequality that results from women’s biological fate may be *unfortunate*, it is not necessarily *unjust.*

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1. Dorothy E. Roberts is a Professor of Law at Rutgers, The State University of New Jersey, School of Law-Newark, S.I. Newhouse Center for Law and Justice.
3. Id at 445 (citing Simone de Beauvoir, *The Second Sex* 33 (Knopf 1953)).
4. Id at 454 (citing H. Tristram Englehardt, Jr., *The Foundations of Bioethics* 340-41 (Oxford 1986)).
Moreover, Mahowald points out that this distinction between what is unfortunate and what is unfair, between immutable fate and changeable injustice, is not the whole story. Biology cannot be unjust; but society’s response to biological difference may be. Mahowald explains several different philosophical approaches to such “naturally occurring inequality”5 and adds her belief that our concern for gender justice requires that we should at least seek to minimize gender inequality in the use of genetic technologies. “If gender justice is desirable,” she concludes, “then efforts should be made to reduce inequalities occasioned by differences between the sexes. Where inequitable differences are not changeable, as in the different reproductive roles of men and women, measures can still be introduced to reduce the gap.”6

I agree with Mahowald. Even if we accept the distinction between what is unfortunate and what is unfair, we can work to achieve gender justice. In addition, however, I believe that the basic distinction between fate and fairness needs to be complicated by a recognition that the very notion of “naturally occurring inequality” is already influenced by gender and other inequalities of power. Race, in particular, shapes the way our society determines which inequalities are “natural.” Women’s so-called biologically inevitable fate appears more changeable on closer inspection. As a result, it is more difficult to separate fate from fairness than Mahowald’s article suggests.

**Questioning Natural Inequality**

Many social values and practices are so ingrained in our culture that they appear to be natural. For example, Englehardt distinguished between fate and fairness by pointing to unfortunate physical traits. According to Mahowald, the fact that “some people are more talented, more intelligent, more attractive, or more athletically gifted than others” did not strike Englehardt as unjust because such differences occur naturally.7 But none of these terms describes a purely natural trait; they all incorporate a social norm of beauty, intelligence, or talent. To say it is unfortunate that a particular woman is unattractive, for example, leaves unchallenged the standard that deems her particular physical traits to be undesirable in the first place. We could minimize the impact of the inequality Englehardt observed by limiting the ways social actors like employers or schools treat “naturally” unattractive people. However, we will never really eradicate such inequalities until we question the underlying norms that are themselves based on profound racial and gender inequality.

Thus, Pecola Breedlove, the character in Toni Morrison’s *The Bluest Eye* who spends her childhood praying for blue eyes,8 was not just the victim of natural misfortune. She was the victim of a racist standard of beauty. As a little Black girl, she could never meet this standard even if by some miracle of

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5. Id.
6. Id at 453.
7. Id at 454.
genetic technology her eyes did turn blue. Therefore, Englehardt is clearly wrong that beauty and talent are solely matters of fortune and not fairness. Like all of us, Englehardt was so accustomed to the underlying norms used for judging what is natural that they became transparent.

The claim that natural inequality can be demonstrated empirically does not resolve the issue. Tests of biological difference that now seem absurd were once accepted by the scientific community. In 1872, for example, one Justice of the United States Supreme Court relied on “[t]he natural and proper timidity and delicacy” of the female sex as scientific fact to justify upholding women’s exclusion from the legal profession.10

Perhaps the most influential evidence of the “natural” hierarchy of the races was the cranial measurements collected by the Philadelphia physician, Dr. Samuel George Morton.11 Morton attempted to calculate the cranial capacities of five major races (Caucasian, Mongoloid, Malay, American Indian, and Ethiopian) by measuring over eight hundred skulls from throughout the world. In Crania Americana, published in 1839, Morton reported that the Caucasian skull measured the largest; American Indians were much smaller; and Negroes measured at the bottom.12 Assuming that skull size reflected intelligence, Morton’s data purported to substantiate the intellectual inferiority of Blacks.13

Nature and Genetics

This confusion between what is natural and what is social is particularly rampant in matters involving genetics. The desire to have genetically-related children, for example, is commonly attributed to nature. In his recent book, Children of Choice, John Robertson asserts, “at the most basic level transmission of one’s genes through reproduction is an animal or species urge closely linked to the sex drive.”14 Robertson posits the frustration of “their normal species urge to procreate”15 as the motivation for couples’ use of reproduction-assisting technologies and he praises these technologies for freeing us from the “luck of the natural lottery.”16 His words are reminiscent of the opening paragraph of a popular guide to infertility treatment which declared:

13. Stephen Jay Gould has demonstrated that Morton’s conclusions suffered from numerous methodological errors and miscalculations, as well as its erroneous premise linking skull size to intellectual ability. Gould, Mismeasure of Man at 54-69 (cited in note 11).
15. Id at 98.
16. Id at 3.
“Call it a cosmic spark or spiritual fulfillment, biological need or human destiny—the desire for a family rises unbidden from our genetic souls.”¹⁷

Yet, the desire to have genetically-related children is at least influenced, if not created, by our culture. Our preoccupation with defining people according to their genetic background, which tends to reinforce existing social hierarchies and create new ones, may reflect the social dominance of patriarchy. As a result, a number of feminists have advocated abandoning the genetic model of parenthood, its “preoccupation with male seed,”¹⁸ and the male standpoint it reflects. Instead, feminists advocate a feminist standpoint that is not based on notions of superiority and dominance. For example, Mahowald quotes Sara Ruddick’s advocacy of “‘an engaged vision of the world opposed and superior to dominant ways of thinking.’”¹⁹ Others define the feminist standpoint as one that is anti-hierarchical.²⁰ Overall, feminists resist the trend in science, law, and popular culture toward “genetic essentialism,”²¹ “geneticization,”²² or “geneticism.”²³ They question the view that “personal traits are predictable and permanent, determined at conception, ‘hardwired’ into the human constitution.”²⁴

The way Americans think about genetics was also shaped by the idea of racial purity that was supported by law, violence, and social convention for over three centuries.²⁵ The fact that race is inherited influences the meaning of the genetic tie in American culture.²⁶ For example, the institution of slavery made the genetic tie to a slave mother critical to determining a child’s social status, yet legally insignificant to the relationship between male slaveowners and their mulatto children.²⁷ Today we generally assume that the

¹⁹. Mahowald, 3 U Chi L Sch Roundtable at 461 (cited in note 1) (quoting Sara Ruddick, Maternal Thinking: Toward a Politics of Peace 129 (Beacon 1989)).
²⁰. See, for example, Catharine A. MacKinnon, Crimes of War, Crimes of Peace, 4 UCLA Women’s L J 39, 80 (1993).
²⁷. Id at 225-28.
genetic tie creates an enduring bond between parents and their children. However, the law sometimes disregards this genetic bond and is especially likely to do so if the bond is between poor Black mothers and their children.

Although genetic technology deals with biological facts, genetic technologies that purport to rely solely on biologically-based factors to determine their use also rely on socially-determined factors. For example, we must question whether it is a natural and inevitable product of biological fact that “women rather than men undergo prenatal genetic tests and interventions undertaken in response to such tests, whether these be pregnancy terminations or fetal therapies.” Certain it is biologically determined that only women can become pregnant and gestate a fetus, but men are equally able to undergo testing for genetic anomalies. It is also not natural that courts, in some cases, invade women’s autonomy by requiring them to undergo medical interventions for the sake of the fetus. According to many feminists, these forced treatment decisions equate women with inert vessels or fetal containers, disregard their own reproductive decisions, and value them solely for their capacity to nurture a fetus. Moreover, these decisions are disproportionately imposed against women of color, reflecting the extra disregard for minorities’ reproductive decisions. Although some people find it natural that women should undergo these interventions, even against their will, because it is natural that they become pregnant, we do not require fathers to donate bone marrow for the sake of their children just because they are naturally fathers. In fact, the reason courts are more likely to impose requirements on pregnant women has to do with the social role of women, not biology.

Another example of social norms masquerading as biological fact can be seen by examining couples’ reasons for using in vitro fertilization (“IVF”). IVF offers couples who are naturally infertile a way to have a genetically-related child. Yet at least half of women who undergo IVF are themselves fertile and could conceive a child using artificial insemination. These women usually endure the greater risks and expense of IVF simply to enable their infertile husbands to have a genetic inheritance.

28. Id at 252-64. The law often disregards the genetic tie between parents and children in cases involving so-called surrogate mothers, sperm donors, and unwed fathers.
29. Id at 267-69.
30. Mahowald, 3 U Chi L Sch Roundtable at 442 (cited in note 1).
31. See, for example, Janet Gallagher, Prenatal Invasions and Interventions: What’s Wrong with Fetal Rights, 10 Harv Women’s L J 9, 57-58 (1987).
33. See Robertson, Children of Choice at 193 (cited in note 14).
34. See Judith Lorber, Choice, Gift, or Patriarchal Bargain? Women’s Consent to In Vitro Fertilization in Male Infertility, in Helen Bequaert Holmes and Laura M. Purdy, eds, Feminist Perspectives in Medical Ethics 169, 171 (Indiana 1992).
Nature as an Excuse for Social Inequality

Categorizing inequality as “natural” is a powerful tool of oppression. Perpetrators of the most horrible inhumanity have enlisted supposed biological facts as the supreme justification for their domination. Calling the fate of subordinated groups a natural misfortune assuages the guilt of those in power who thereby assume no responsibility for social inequality. Eugenic theory during the Progressive Era utilized this method to explain poverty and criminality as inherited traits in order to reinforce and justify the prevailing social order. Despite the biological “facts” advanced to support the government’s eugenic program, it actually punished those who deviated from social norms. Officials claimed that Carrie Buck, the plaintiff in Buck v Bell, for example, was sterilized due to an alleged mental disability. Historical research reveals, however, that she was sterilized because she was poor and had been pregnant out of wedlock. Eugenists pretended that the condition of the oppressed stemmed from their own incurable, inherited deficiencies rather than political, economic, or social realities. As Donald MacKenzie put it, eugenic theory was “a way of reading the structure of the social classes onto nature.”

In the recent best-seller, The Bell Curve, Richard Herrnstein and Charles Murray, like the early eugenicists, attempt to provide a biological explanation for America’s class structure. They claim that intelligence levels differ among ethnic groups because of biological fate and that this lower group intelligence accounts for social problems, such as poverty, unemployment, and welfare dependency. In other words, they argue that America’s social inequality results from the biological misfortune of the oppressed and not our failure to support egalitarian social programs.

Conclusion

There are undeniable biological differences between women and men and these differences may in fact be inevitable. Similarly, the color of one’s skin is a function of one’s genetics. However, “differences” between the sexes and the races, in many cases, matter solely because they have been “transformed into social and economic deprivation.” Therefore, people interested in social justice should always test claims of biological difference to see whether or not

they actually cloak a social norm that has become transparent because of socially imposed gender and racial inequalities.