

2002

Groping Towards Utopia (II): Speculations on Law, Policy, and Human Life

James Ottavio Castagnera

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the [Comparative and Foreign Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Castagnera, James Ottavio (2002) "Groping Towards Utopia (II): Speculations on Law, Policy, and Human Life," *Florida State University Journal of Transnational Law & Policy*. Vol. 12: Iss. 1, Article 1.
Available at: <https://ir.law.fsu.edu/jtlp/vol12/iss1/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

Groping Towards Utopia (II): Speculations on Law, Policy, and Human Life

Cover Page Footnote

James Ottavio Castagnera holds the J.D. and Ph.D. from Case Western Reserve University. A labor lawyer with a major Philadelphia law firm for nearly ten years, he has published a dozen law books, and some fifty articles and book chapters on law, labor, and higher education. Currently the associate provost at Rider University (Lawrenceville/Princeton, NJ), his professional and scholarly interests are focused on the role of higher education in creating a just society, and in bringing the American dream to the Global Village.

GROPING TOWARDS UTOPIA (II): SPECULATIONS ON LAW, POLICY, AND HUMAN LIFE

JAMES OTTAVIO CASTAGNERA*

Table of Contents

I.	INTRODUCTION	1
II.	WHAT DOES IT MEAN TO BE – AND NOT TO BE – HUMAN IN AMERICAN LAW?	4
	A. <i>The Race Question</i>	4
	B. <i>Legal Status of the Fetus</i>	6
	C. <i>Cloning and Stem Cells</i>	8
III.	WHAT IS A HUMAN’S VALUE IN AMERICAN LAW?	10
	A. <i>Wrongful Death</i>	10
	B. <i>Wrongful Birth</i>	12
IV.	ANOTHER MODEST PROPOSAL	13
V.	CONCLUSION	17

I. INTRODUCTION

This essay takes as its starting point the proposition that we are too many.¹

How many are too many? Despite the Green Revolution, which began in the early 1970s, an estimated 786 million people on this planet are still going hungry.² One might counter that the

* James Ottavio Castagnera holds the J.D. and Ph.D. from Case Western Reserve University. A labor lawyer with a major Philadelphia law firm for nearly ten years, he has published a dozen law books, and some fifty articles and book chapters on law, labor, and higher education. Currently the associate provost at Rider University (Lawrenceville/Princeton, NJ), his professional and scholarly interests are focused on the role of higher education in creating a just society, and in bringing the American dream to the Global Village.

1. See Joel L. Swerdlow, *Population*, NATIONAL GEOGRAPHIC, Oct. 1998, at 3 (“Of all the issues we face as the new millennium nears, none is more important than population growth. The numbers speak for themselves. The Earth’s population, which totaled 1.7 billion people in 1900, is now nearly 6 billion--and growing.”); PAUL R. EHRLICH & ANNE H. EHRLICH, *THE POPULATION EXPLOSION* (1990).

In 1968, *The Population Bomb* warned of impending disaster if the population explosion was not brought under control. Then the fuse was burning; now the population bomb has detonated. Since 1968, at least 200 million people--mostly children--have perished needlessly of hunger and hunger-related diseases, despite “crash programs to “stretch” the carrying capacity of Earth by increasing food production.”

Id. at 9.

2. Peter Rosset et al., *Lessons from the Green Revolution*, TIKKUN MAGAZINE, Mar. 1, 2000, available at <http://www.foodfirst.org/media>.

problem is not insufficient productivity but, rather, poor distribution. But,

[t]here is also growing evidence that Green Revolution-style farming is not ecologically sustainable, even for large farmers. In the 1990s, Green Revolution researchers themselves sounded the alarm about a disturbing trend that had only just come to light. After achieving dramatic increases in the early stages of the technological transformation, yields began falling in a number of Green Revolution areas. . . . The causes of this phenomenon have to do with forms of long-term soil degradation that are still poorly understood by scientists. . . . Where yields are not actually declining, the rate of growth is slowing . . . or leveling off, as has now been documented in China, North Korea, Indonesia, Myanmar, the Philippines, Thailand, Pakistan, and Sri Lanka.³

If the race between population growth and food supply cannot be won by the farmers and the chemical companies that supply their fertilizers, then we must either control, and presumably reverse, population growth of our species or leave it to the Four Horsemen of the Apocalypse — war, pestilence, famine and disease — to perform their age-old roles.

Even if sufficient food can somehow be produced to feed the ever-increasing numbers of human mouths, a second question immediately forces itself upon our attention: what prices in environmental degradation and loss of other species are we prepared to pay for the ability to feed today's six billion and the billions more our population projections anticipate for this new century? Put another way,

[h]ow many cell phones is a gorilla worth? In the Democratic Republic of the Congo, eastern lowland gorillas are being killed for food by miners searching

3. *Id.* See also T.R. Reid, *Feeding the Planet*, NATIONAL GEOGRAPHIC, Oct. 1998, at 65. Just three crops — wheat, rice, and corn — dominate grain production. This specialization has helped drive the agricultural boom of the past 30 years. . . . Relying so heavily on such a narrow genetic base is risky, however. One virulent disease could cause crop failure and famine. Even if crops stay healthy and cereal grain production continues to climb as projected . . . the global food supply may ultimately fall short.

for coltan, a mineral in demand for making capacitors used in high-tech electronics. . . .

The gorillas' forest habitat is not the only ecosystem taking a beating. With globalization, humans are increasingly mismanaging such ecosystems, from prairies to forests to oceans. This abuse harms not only wildlife but also our own economic interests.⁴

Some intellectuals have had the temerity to question the assumption that a just and "humane" society must value human life, without qualification, above all else on the planet. Most notable in this camp is Princeton philosopher Peter Singer. Singer stirs controversy wherever he speaks because he does not shrink from the tough questions, such as: "The rights we endow humans with, moral rights if you will, would not justify treating them as we do animals. . . . Why is it that all humans have this moral standing that protects them from being treated cruelly, but animals don't? Why are other species outside this sphere of equality?"⁵

The way Singer answers his own questions is what gets folks riled up.

According to Singer, there are some humans, those with severe disabilities for example, who cannot really be called rational beings, and who are in fact less rational than non-human animals.

Inferiority of animals can be taken for granted by philosophers because they are humans writing for other humans. . . . The fact that they are not the same species is no more reason to keep them from equality than is race or sex. . . .

'I couldn't say that the lives of humans who do not have self-awareness are more precious than a thinking, conscious animal,' said Singer.⁶

4. *Valuing the Invaluable*, NATIONAL GEOGRAPHIC, Nov. 2001, at 10.

5. Laura Sass, *Peter Singer Imparts Philosophy at Rider*, THE RIDER NEWS, Apr. 12, 2002, at 1.

6. *Id.* See also Animal Freedom, *Factory farm animals and people from the third world are modern slaves*, at <http://www.animalfreedom.org/english/opinion/slavery.html> (last visited Sept. 9, 2002) ("In countries with factory farms animals are exploited as modern slaves, just as inhuman as the 'old' human slaves were treated and just as invisible.")

The fact is that at the dawn of this new century, we are confronted with two related, compelling questions which may be more fundamental than any others currently facing us:

- What does it mean to be “human”; and
- What is the value of a human life?

These questions are begged by the new technologies which will soon enable human cloning. They are begged by the bitter struggle between the right-to-life and the right-to-choose camps in the abortion debate. They are begged by the pharmaceutical industry and the medical profession, which together can cure many forms of cancer, eradicate small pox, and control HIV . . . but which cannot adequately serve the millions of Americans who have no health insurance, and which cannot help the tens of millions of HIV-positive Africans who cannot afford the expensive chemical cocktails.⁷ And they are begged by the challenge posed to our carbon-based intelligent species by the silicon-based artificial intelligence of computing machines.⁸

Of course, while these questions may be far more compelling now, as we approach the shore of a Brave New World, they are questions with which the American law has always had to grapple. And so this discussion will commence with a look backward, before attempting to look ahead.

II. WHAT DOES IT MEAN TO BE--AND NOT TO BE--HUMAN IN AMERICAN LAW?

A. *The Race Question*

As Judge A. Leon Higginbotham has pointed out, the white American colonists did not immediately declare Africans to be sub-

7. See *Africa Today*, NATIONAL GEOGRAPHIC, Sept. 2001, Map Section.

As devastating as war, AIDS is tearing into the heart of African societies. It has killed more than 16 million people; 25 million more are infected with HIV. . . . Some 20 percent of adults are infected in South Africa, 36 percent in Botswana. The epidemic is fueled by taboos against discussing sex, lack of education about the transmission of HIV, women's second-class status, and the high cost of treatment.

Id.

8. See JIM JUBAK, IN THE IMAGE OF THE BRAIN: BREAKING THE BARRIER BETWEEN THE HUMAN MIND AND INTELLIGENT MACHINES ix (1992) (“Machines that incorporate some principles of the physical brain challenge our understanding of what a human being is all about.”); ROBERT L. NADEAU, MIND, MACHINES, AND HUMAN CONSCIOUSNESS 43 (1991) (“The fundamental breakthrough that now seems required in order to accomplish this technological feat is a theoretical model that describes the global aspects of brain function in mathematical, or full scientific, detail.”).

human. Taking the Commonwealth of Virginia as his case study, Judge Higginbotham discovered that “[w]hen the first Africans arrived at Virginia in August 1619, they were initially accorded an indentured servant status similar to that of most Virginia colonists.”⁹ But by 1669 Virginia common law and social attitudes had evolved to the point where the colony’s lawmakers enacted “the first legislative pronouncement in Virginia that blacks were not fully human.”¹⁰

Higginbotham continues, “[b]y 1705 the precept was even more deeply embedded in the minds and laws of white Virginians. The 1705 statute stated that if a master killed his slave, the law would treat the killing ‘as if such accident had never happened.’”¹¹

Once one has been educated about this early Virginian history, duplicated throughout the American south, the *Dred Scott* decision seems almost inevitable. In the key passage of the opinion Chief Justice Taney wrote of the Africans,

They had for more than a century before [the Declaration of Independence and the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.¹²

Much the same conclusions were drawn by the white colonizers with regard to the Native Americans. “The basic conquest myth postulates that America was virgin land, or wilderness, inhabited by nonpeople called savages; that these savages were creatures sometimes defined as demons, sometimes as beasts ‘in the shape of men.’”¹³

Following the Civil War and the passage of the Thirteenth Amendment, no one could deny the legal status of African-Americans as fellow human beings, however second-class might be

9. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 18 (1996).

10. *Id.* at 51.

11. *Id.*

12. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

13. FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 15 (1976).

the citizenship they were accorded. As for the Native Americans, prior to the Civil War, the largest enclave, known as the Five Tribes — Choctaws, Chickasaws, Cherokees, Creeks and Seminoles — which occupied most of modern Oklahoma, not only had their own governments, constitutions, court systems and schools; they even owned some 7,500 Black slaves.¹⁴ “After the Civil War came the era of Christian reformers in Indian Affairs,” and while surely viewed by whites as inferior humans — much like African-Americans — they were no longer considered to be “beasts in the shape of men.”¹⁵ In sum, while African Americans and Native Americans might remain second-class citizens and non-citizens, respectively, for many decades to come, their fundamental “humanness” was no longer denied by the American legal system.

Still, it is my argument that this nation’s history of mistreatment of people of color established a line of thought in American law to the effect that some among us are not merely less equal, but are actually less than truly human. This might at first blush appear to be the antithesis of liberalism. Ironically, the view reemerged in the late twentieth century as the most radical and inflammatory of liberal views.

B. *Legal Status of the Fetus*

The legal category which I will label “non-human” did not disappear with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the enactment of enabling legislation. The category remained in American law, as it does today. One notable occupant of this category is the human fetus. The non-human status of the fetus under Texas law comprised a significant part of the plaintiff’s argument in *Roe v. Wade*.¹⁶ This argument included the following legal propositions:¹⁷

- The killing of a fetus was not considered in Texas to be murder or any other form of homicide;

14. TED MORGAN, *A SHOVEL OF STARS: THE MAKING OF THE AMERICAN WEST 1800 TO THE PRESENT* 404 (1995).

15. *Id.* at 369. (“The reformers assumed that progress depended on turning the Indians into farmers. Education and religion, they believed, would facilitate the transition. . . . Essentially, the peace policy—known at the time as ‘piety or bullets’—aimed to move the Indians onto reservations under religious supervision. Congress wanted them to be self-sufficient. . . .”); JENNINGS, *supra* note 13, at 15.

16. 410 U.S. 113 (1973). See also SARAH WEDDINGTON, *A QUESTION OF CHOICE* 97-98 (1992).

17. WEDDINGTON, *supra* note 16.

- A pregnant woman engaging in conduct which was inadvertently fatal to the fetus was not guilty of negligent homicide;
- “No legal formalities [regarding] death were observed with respect to a fetus;”¹⁸
- Most property rights were contingent upon the fetus being born alive;
- Tort recovery was confined to babies who were born alive;
- No benefits, such as under workers’ compensation statutes, were awarded to children unless they had been born.

This theme was pressed by plaintiff’s counsel both in their initial briefs and in their supplemental briefs after the Court ordered re-argument of the case.¹⁹ Furthermore, the plaintiffs contended that Texas law was typical of American law in the aggregate.

[A] section of the brief stressed, yet again, the fact that Texas had never treated the fetus as having the rights and dignity of a person. We cited an 1889 decision which held that in order to obtain a murder conviction, the State must prove “that the child was born alive.” We mentioned that under the rules of the Texas Welfare Department, a needy pregnant woman could not get welfare payments for her unborn child; that a federal court in Pennsylvania had held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act; and that a New York state court had concluded that the Constitution does not confer or require legal personality for the unborn.²⁰

The second oral argument reflected the concern of at least some members of the Court about this issue of a fetus’s humanness, or lack thereof.

Justice Stewart asked, ‘If it were established that the fetus were a life, you would have a difficult case, wouldn’t you?’

18. *Id.* at 97.

19. *Roe*, 410 U.S. at 113. Interestingly, in light of the topic of this essay, it has been said that no case “except the *Dred Scott* case has aroused as intense popular emotion.” ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 322 (1987).

20. WEDDINGTON, *supra* note 16, at 135.

Stewart then asked, 'Do you know of any case anywhere that [has] held that an unborn fetus is a person within the meaning of the Fourteenth Amendment?'

'No,' [counsel for the State of Texas] responded, 'we can only go back to what the framers of our Constitution had in mind.'²¹

Ultimately, the majority opinion embraced the principle that a fetus is a not a person for purposes of the Fourteenth Amendment.²² As noted above, I see some irony here: while, no doubt, all my readers abhor slavery, it seems equally certain that many support a woman's right to an abortion; both *Dred Scott* and *Roe* arguably spring from a fundamental cultural or legal tradition that accepts the proposition that not all who share the genetic make-up of *homo sapiens* are truly "human."²³

C. Cloning and Stem Cells

The debate, which has swirled around *Roe v. Wade* for some three decades, has spilled over into the bio-tech laboratories where stem cell research and cloning are science's concerns. President George W. Bush's bioethics panel recently favored a four-year moratorium on stem cell research, reasoning that

[a] moratorium . . . would allow for a broader public debate about [stem cells'] moral status. Like human embryos, cloned cells have the potential to become a normal human baby. Scientists propose to destroy cloned cells to yield undifferentiated stem cells, which they hope to grow into replacement tissue for a variety of diseased and damaged organs.

The report questions the ethics of creating cloned cells solely for medical experiments and therapies. "There's an important moral boundary here, and we

21. *Id.* at 139.

22. *Roe*, 410 U.S. at 158-59.

23. Obviously, I understand that the law recognizes that business entities, notably corporations, are "persons" under the Fourteenth Amendment, but this point does not affect the fundamental thrust of my argument, since it is only as incorporations of people that corporations enjoy this status.⁵ See COX, *supra* note 19, at 121.

need time to discuss the costs of crossing it and not crossing it.²⁴

No less an academic light than Francis Fukuyama has weighed in, postulating a "Factor X."²⁵ According to Fukuyama, it is this human essence that, contrary to Peter Singer's view, accords us rights to which other species are not entitled. "You can cook, eat, torture, enslave, or render the carcass of any creature lacking Factor X, but if you do the same thing to a human being, you are guilty of a 'crime against humanity.'"²⁶ Fukuyama then acknowledges the point made above, namely that

[t]he circle of beings to whom we attribute Factor X has been one of the most contested issues throughout human history. For many societies, including most democratic societies in earlier periods of history, Factor X belonged to a significant subset of the human race, excluding people of certain sexes, economic classes, races, and tribes and people with low intelligence, disabilities, birth defects, and the like.²⁷

Arguing that Factor X is more than the sum of its parts--consciousness, intelligence, ability to make moral choices--Fukuyama concludes that

[a]n embryo may be lacking in some of the basic human characteristics possessed by an infant, but it is also not just another group of cells or tissue, because it has the *potential* to become a full human being. . . . It is therefore reasonable . . . to question whether researchers should be free to create, clone, and destroy human embryos at will.²⁸

24. Jeffrey Brainard, *Presidential Bioethics Panel Recommends Moratorium on Research Cloning*, THE CHRONICLE OF HIGHER EDUCATION, July 12, 2002, available at chronicle.com/daily/2002/07/2002071201n.htm.

25. FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 149 (2002) ("What the demand for equality of recognition implies is that when we strip all of a person's contingent and accidental characteristics away, there remains some essential human quality underneath that is worthy of a certain minimal level of respect -- call it Factor X.")

26. *Id.* at 150.

27. *Id.*

28. *Id.* at 176.

Fukuyama fully appreciates the irony that the stem cell debate holds the potential to rip apart traditional political coalitions. In the United States, for example, the Right includes economic libertarians who prize business entrepreneurship and social conservatives who abhor abortion. The former should favor stem cell research, which holds the promise of new bio-technology industries, while the latter should condemn it, if they are to be consistent.²⁹ As for the American law, *Roe v. Wade* would seem to compel the conclusion that embryos, destroyed to produce stem cells, are not "persons" under the Fourteenth Amendment . . . in other words, not "human" because they lack Factor X.

But what then of clones; should we actually create such creatures some day soon? Will my clone be accorded the same rights that I enjoy under the United States Constitution? Or will the clone be my property, its status as a person or non-person, human or non-human, dictated by legal principles drawn from the ancient American legal tradition which culminated in the *Dred Scott* decision?

III. WHAT IS A HUMAN'S VALUE IN AMERICAN LAW?

A. *Wrongful Death*

Certainly the most famous and influential consideration of the value of human life in American tort law was undertaken in the 1970s by Richard A. Posner, now chief judge for the United States Court of Appeals for the Seventh Circuit and an author of considerable renown. In his groundbreaking study,³⁰ Posner posited the following proposition concerning the valuation of a human life:

[s]ince the loss of vision or limbs reduces the amount of pleasure that can be purchased with a dollar, a very large amount of money will frequently be necessary to place the victim in the same position of relative satisfaction that he occupied before the accident. This factor is most pronounced in a death case. Most people would not exchange their life for anything less than an infinite sum of money, if the exchange were to take place immediately, since they would have so little time in which to enjoy the proceeds of the sale. Yet it cannot be correct that the proper award of damages in a death case is infinity.

29. *Id.* at 177.

30. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

This would imply that the optimum rate of fatal accidents was zero, or very close to it, and it is plain that people are unwilling individually or collectively to incur the costs necessary to reduce the rate of fatal accidents so drastically.³¹

The courts, Posner continues, solved this problem “by ignoring it.”³² In other words, the value of the life lost is equated to the pecuniary loss that will be endured by the survivors, plus pain and suffering endured by the decedent prior to death.³³ A particularly difficult problem is posed by the death of a child. The loss felt by the parents is incalculable. Yet from a purely pecuniary posture, the child’s future earning capacity cannot be calculated; therefore, the only reliable measure is the investment made in the child to the date of death by the parents.³⁴

These sorts of valuations might strike one as disturbingly similar to the values placed upon slaves in the antebellum American South.³⁵ The practice of slavery persists in parts of the world today, and where it is still practiced, continues to place a value on human — including children’s — lives.³⁶ What seems to be the most significant distinction between tort valuations determined by juries and the price of slaves — either in the antebellum American South or in twenty-first century Africa — is the ability of the former to include an award for pain and suffering, at least in cases where the plaintiffs can bear their burden of proving that the decedent survived long enough to sustain such injuries. Otherwise, the parallel between valuing a life in a wrongful death action and valuing a slave in the antebellum southern marketplace would be as disturbing as is that between the de-humanizing of a fetus and the de-humanizing of a person of color at separate times under American law.

31. *Id.* at 82-83.

32. *Id.* at 83.

33. *Id.*

34. *See id.* at 82-83.

35. The Constitution itself counted slaves as three-fifths of free citizens. Frederick Douglas is said to have purchased his freedom (his life, if you will) for \$600. GEOFFREY C. WARD, *THE CIVIL WAR* 8, 16 (1990).

36. *See, e.g.,* Ricco Villanueva Siasoco, *Modern Slavery: Human bondage in Africa, Asia, and the Dominican Republic*, at <http://www.infoplease.com/spot/slavery1.html> (Apr. 18, 2001) (“According to 1993 U.S. State Department estimates, up to 90,000 blacks are owned by North African Arabs, and often sold as property in a thriving slave trade for as little as \$15 per human being.”).

B. Wrongful Birth

An interesting twist on the law's approach to wrongful death is its treatment of wrongful birth. A seminal case is *Fassoulas v. Ramey*.³⁷ Plaintiffs were married with two children, "both of whom had been born with severe congenital abnormalities."³⁸ Plaintiff John Fassoulas engaged the defendant, Dr. Ramey, to give him a vasectomy.³⁹ Despite John's operation, Edith Fassoulas became pregnant twice thereafter.⁴⁰ The first post-vasectomy child was, like her older siblings, deformed.⁴¹ The second post-vasectomy child was only slightly deformed and the deformity was surgically corrected so that he grew to be a normal, healthy child.⁴²

The plaintiffs sued Dr. Ramey and his clinic, claiming "wrongful births."⁴³ They sought damages, *inter alia*, the cost of raising the two children to adulthood.⁴⁴ The case was allowed to go to trial and a jury awarded the plaintiffs some \$300,000, after making a deduction for the plaintiffs' comparative negligence in conceiving the second post-surgery child.⁴⁵

The Florida Supreme Court reversed in part, reasoning that

[t]he rule in Florida is that 'a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.' . . . '[I]t has been imbedded in our law for centuries that the father and now both parents or legal guardians of a child have the sole obligation of providing the necessaries in raising the child, whether the child be wanted or unwanted.' 'The child is still the child of the parents, not the physician, and it is the parents' legal obligation, not the physician's, to support the child.' . . . For public policy reasons, we decline to allow rearing damages for the birth of a healthy child. . . .

The same reasoning forcefully and correctly applies to the ordinary, everyday expenses associated with the care and upbringing of a physically or

37. 450 So.2d 822 (Fla. 1984).

38. *Id.* at 822.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 823.

43. *Id.*

44. *Id.*

45. *Id.*

mentally deformed child. We likewise hold as a matter of law that ordinary rearing expenses for a defective child are not recoverable as damages in Florida.⁴⁶

However, the court did allow the award of damages for "extraordinary" expenses associated with rearing the first post-vasectomy child, who was severely deformed.⁴⁷ It allowed no such damages for the second, healthy sibling.⁴⁸

Clearly, under the holdings of cases such as this, a healthy human life is valuable. The law will not hear from the parents of such a human life that they have suffered a loss because the child was unwanted and visited upon them due to a doctor's negligence. With regard to a severely handicapped human, the court set a lower value upon that human life, the difference in value between her and her healthy sibling being the cost to be incurred by the parents in rearing her, over and above the cost of rearing her healthy brother.

By requiring the negligent defendant to compensate the parents for the extraordinary costs of rearing the deformed child, the court has in essence equated the deformed daughter's value to the parents with the inherent value of the healthy child. This willingness of American law to equalize the value of a disabled human being with that of a normal, healthy human might be carried over into American society at large.

IV. ANOTHER MODEST PROPOSAL

In his 1959 science fiction novel, *The Sirens of Titan*, Kurt Vonnegut early on observed of a main character,

[b]ut, well-endowed as Mrs. Rumfoord was, she still did troubled things like chaining a dog's skeleton to the wall, like having the gates of the estate bricked up, like letting the famous formal gardens turn into New England jungle. The moral: Money, position, health, handsomeness, and talent aren't everything.⁴⁹

But, of course, in determining the relative positions of people on the socio-political ladder of life they can be worth a lot. In other words, those who possess one or more of these attributes enjoys a

46. *Id.* at 823-24 (citations omitted).

47. *Id.*

48. *Id.* at 824.

49. KURT VONNEGUT, *THE SIRENS OF TITAN* 12 (1959).

statistically-significant superior chance of success in our society over others who lack any or all of these advantages.

Later in the story, Vonnegut invents the Church of God the Utterly Indifferent.⁵⁰ Embraced by most of the human race, the new religion teaches that God is too great and too busy to worry about lowly *homo sapiens*, and therefore we must all learn to take care of ourselves. More to the point of this sequential essay⁵¹ is one of the church's central tenets, namely that members purposely handicap themselves for the sake of creating equality.

Everyone wore handicaps of some sort. Most handicaps were of an obvious sort — sashweights, bags of shot, old furnace grates — meant to hamper physical advantages. But there were . . . several true believers who had chosen handicaps of a subtler and more telling kind.

There were women who had received by dint of dumb luck the terrific advantage of beauty. They had annihilated that unfair advantage with frumpish clothes, bad posture, chewing gum, and ghoulish use of cosmetics.

One old man, whose only advantage was excellent eyesight, had spoiled that eyesight by wearing his wife's spectacles.

A dark young man, whose lithe, predaceous sex appeal could not be spoiled by bad clothes and bad manners, had handicapped himself with a wife who was nauseated by sex.

The dark young man's wife, who had reason to be vain about her Phi Beta Kappa key, had handicapped herself with a husband who read nothing but comic books.⁵²

This is good satire. And like all good satire, it hits its mark. A more serious proposal aimed at the same mark asserts:

50. *Id.* at 216.

51. See James Ottavio Castagnera, *Groping Toward Utopia: Capitalism, Public Policy, and Rawls' Theory of Justice*, 11 FLA. ST. J. TRANSNAT'L L. & POL'Y 297 (2002).

52. See VONNEGUT, *supra* note 49, at 224.

Equal opportunity requires not only the elimination of legal and informal barriers of discrimination, but also efforts to eliminate the effects of bad luck in the social lottery on the opportunities of those with similar talents and abilities. (The 'social lottery' here refers to the ways in which one's initial social starting place — family, social class, etc. — affect one's opportunities. . . .)⁵³

A question worth considering is whether John Rawls, whose theory of justice was a theme of the prequel to this article, would endorse this "bad luck" standard for measuring equal opportunity.

It is worth noting that there are passages in Rawls's much-cited discussion in his book *A Theory of Justice* of how his Principle of Fair Equality of Opportunity and his Difference Principle fit together that might be interpreted as endorsing the [bad] luck view. . . . [However] Rawls may be merely saying that it would be impermissible to base a person's entitlement to a share of social goods on the mere fact that he happens to have been more fortunate in the genetic lottery. That view does not commit him to the [bad] luck thesis that all natural inequalities require redress or compensation as a matter of justice.⁵⁴

If, indeed, Rawls is ambivalent about what I shall now call the "bad luck view" of justice, others of equal stature are up front in espousing the contrary opinion.

If I understand Dr. Singer's argument, then his thesis is the very opposite of the "bad luck view" of justice: he seems to say that those who have suffered bad luck may have forfeited their right to equal justice. The rights of a fully-conscious animal may trump those of a comatose human.⁵⁵

Closely allied to the "bad luck view" is the "rescue principle." Lawyer-philosopher Ronald Dworkin writes,

[f]or millennia doctors have paid lip service, at least, to an ideal of justice in medicine which I shall call the rescue principle. It has two connected parts. The first holds that life and health are, as Rene Descartes

53. ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 65 (2000).

54. *Id.* at 68.

55. See Sass, *supra* note 5 and accompanying text.

put it, chief among all goods: everything else is of lesser importance and must be sacrificed for them. The second insists that health care must be distributed on grounds of equality: that even in a society in which wealth is very unequal and equality is otherwise scorned, no one must be denied the medical care he needs just because he is too poor to afford it.⁵⁶

Thus is the issue joined. At one end of the spectrum of views are those, symbolized by the parishioners of Vonnegut's Church of God the Utterly Indifferent, who believe that even natural inequalities must be compensated, and at the other are those — e.g., most advantaged classes throughout all of human history — who accept, and perhaps even praise, political and economic inequalities as part of the natural order of things. Somewhere in the middle are those who would correct political and economic inequalities, by enacting anti-discrimination laws and affirmative action programs, but who are willing, like Plato, to accept natural inequalities as . . . well, natural, and therefore not offensive to our sense of justice.⁵⁷

Let me suggest that implicitly fundamental to these views of equality and justice are differing notions of the value of individual human beings. Those who believe that even natural inequalities must be corrected or compensated must necessarily value all human lives equally. Those who favor class distinctions believe — implicitly, if not expressly — that some human beings are more valuable than others.⁵⁸

The forces of history seem to favor this latter group. If the population pressures noted in Part I, above, increase, as I am predicting they will, the relative value of the *lumpen proletariat* will necessarily decline in the eyes of this group. Even those who favor affirmative action presumably will be content to provide those members of disadvantaged groups, who enjoy the requisite intelligence and talents, with a leg up over their majority-group competitors.⁵⁹

Only under the "bad luck view" of justice and equality would fundamental physical disadvantages have to be remedied in order for a truly just society — a Utopia — to be achieved. The

56. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 309 (2000).

57. BUCHANAN, *supra* note 53, at 63.

58. See, e.g., EDMUND MORRIS, *THEODORE REX* 450 (2001) (Concerning Theodore Roosevelt's wife, Edith, Morris observes, "Mediocrity bored her, as did class resentment. 'If they had our brains,' she was wont to say of servants, 'they'd have our place.'").

59. See COX, *supra* note 19, at 274-287.

impracticality of this approach is implicit in Vonnegut's satire: the bad luck of some in society is satirically overcome by the self-imposed, artificial disabilities of all the others. As Posner might be quick to point out, this is a highly inefficient way to achieve justice, albeit it could be accomplished tomorrow if suddenly somehow we all voluntarily embraced Vonnegut's concept.

V. CONCLUSION

What then might we do if we wish to grope toward this Utopia? In my prequel, I suggested that "improving the lot of the lowest common denominator of our sisters and brothers . . . will improve life for us all by replacing handouts with disposable income."⁶⁰

Extending this notion a single step farther, let me now suggest that as we strive to achieve this material goal we concurrently must come to a consensus on what it means to be human and what is the value of a human life--even a severely damaged life in being. For my part, I favor a consensus which embraces Fukuyama's Factor X as the baseline for being human. The right to continued existence and to the resources that make such survival possible seem to me to be the minimum entitlements of all such "Factor X" lives in being. These are, in my view, "bottom line" requirements, the floors or foundations of a just society . . . as we continue to grope toward Utopia.

60. See Castagnera, *supra* note 51, at 307.

