

# The New Genetics in the Post-Keynesian State

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## **About the Author**

Roxanne Mykitiuk is an Assistant Professor of Law at Osgoode Hall Law School, York University, where she teaches in the areas of Bioethics, Health Law and Family Law. She is also the mother of a two and a half year old son, Misha and has learned through experience about gender and genetic medicine. She is the author or co-author of a number of articles and book chapters investigating various legal and social implications of new reproductive technologies and the new genetics. She is also the co-editor with Martha Fineman of *The Public Nature of Private Violence* (Routledge, 1994). From 1990-92 she was Senior Legal Researcher for the Royal Commission on New Reproductive Technologies. She is one of the founding members of the Working Group on Women and the New Genetics. Her current research projects investigate the legal construction and regulation of gender and disability in health law and policy; and the construction of normalcy in the context of genetic counselling.

## **About the Article**

Roxanne Mykitiuk understands the Canadian Biotechnology Strategy, and the genetic technologies which it promotes, to be both a contributor to, and signifier of, the changing nature of the state. The state is currently undergoing restructuring, Mykitiuk argues. These changes are commonly attributed to the forces of 'globalization'; they are effected by state-sponsored 'de-regulation,' and result in widespread 'privatization' of formerly *social* responsibilities. Mykitiuk's argument is that the new genetics plays a key role in these processes. On the one hand, the new genetics contribute to a re-defined 'neo-liberal' self, which is responsible for the private management of real and potential risks to health. On the other hand, the new genetics appeal to the state as a means to develop the industrial potential of the knowledge-based economy, particularly in the health care market. It is these latter developments which Mykitiuk focuses on in this paper. The Canadian Biotechnology Strategy and the reorganization of the federal Health Protection Branch, together with legislative foot-dragging on the new reproductive and genetic technologies, point to what Mykitiuk characterizes as, "a shift in state policy from social protection to the encouragement of capital accumulation. This form of privatization is paralleled by a move to the individual as the site of governance through the self regulation of genetic risk."

## Introduction

The link between genetics and privatization is not intuitively obvious. Genetics is a branch of biology that deals with the heredity and variation of organisms, and understands such variation to be located in one's genes.<sup>1</sup> Privatization refers to the process of state restructuring attendant on the economic and political forces set off by globalization.<sup>2</sup> Contrasted in this way, genetics is aligned with the realm of the natural, the empirically verifiable and the material essence of the individual organism. Privatization stands on the opposite side of the nature/culture divide. It is a politically inspired project; the creation of human design. However, as I suggest in this paper, there is a significant affinity between the new genetics and the recent projects of privatization and neo-liberalism.

Privatization is largely a political and economic phenomenon – entailing a shift in state form from Keynesianism to neo-liberalism, as well as a shift in governing

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<sup>1</sup>Victor McKusick (1993:2351), whose catalogue of human genetic conditions is a classic in the field, defines "genetics" in the following way:

[T]he science of biological variation; *human genetics*: the science of biological variation in humans; *medical genetics*: the science of biological variation as it relates to health and disease; and *clinical genetics*: the part of medical genetics concerned with health and disease in individuals and their families or the science and practice (art) of diagnosis, prevention, and management of genetic disorders.

<sup>2</sup> For the past three years I have been part of a SSHRC funded collaborative research project – based at Osgoode Hall Law School – on Women, Law and the Challenge of Privatization. This paper emanates from my part in that project – a study of genetics in a post-Keynesian era – and is adapted from a presentation made before the Feminist Legal Analysis Section of the Canadian Bar Association, March 25, 2000.

practices. It derives its economic momentum from the notion that the Canadian state must reduce the fiscal burden of social welfare programmes which have become too costly in the globalized market economy, while simultaneously creating the conditions for capital accumulation. In one sense, privatization refers to the effort to reduce public debt and alleviate the pressures on public finance by eliminating, scaling back or transferring to the private realm of the market or the family, services that were formerly provided by the welfare state. Privatization also refers to a more far-reaching restructuring of social and economic institutions, and aims at the actual promotion of private sector interests in the economy as a means of meeting global competition. In this sense, privatization refers to an active and conscious restructuring of state institutions to favour the market and private investment. Increasingly, the public sphere embraces as its governing logic market rationales and practices. As Janine Brodie (1995:6) suggests: "governments are effectively acting as the midwives of globalization, transforming the state apparatus, development strategies and regulations to respond to the 'perceived exigencies' of a global economy."

At a discursive level, privatization is also about privacy, individual choice and self-reliance. One of its core ideas is that the preferred mode of social arrangement is one that allows individuals to control their lives as they see fit, without interference by others and government. It is a view about economic arrangements and normative social relations that distrusts collective solutions to problems, indeed imagines problems as individualized and, therefore, outside the purview of collective response. Thus, within neo-liberalism, the best form of regulation is one which is self-governing, where the governance of individual subjects promotes processes of self-regulation and provides the

circumstances under which people may effectively govern themselves.

My original entry into thinking about privatization and state re-structuring in the context of globalization was through the doorway of genetic and reproductive technologies – but, primarily genetic technologies. When I first began thinking about this issue, I was principally interested in examining how genetic technologies and therapies – the anticipated fruits of the much celebrated and publicly-funded international effort to map and sequence the human genome – were going to be configured in the post-Keynesian, restructured, neo-liberal state. If genetic services were truly the public goods they were promised to be, how would they be allocated/ accessible in a health care context where evidence-based medicine, cost containment, individual/consumer choice and restructuring were the mantras of the day? At the same time, I was also concerned about, and interested in, how the information that is the product of genetic testing and screening was going to be used in the context of the leaner, meaner state. If genetic diagnostics are capable of producing information about the health risks and genetic characteristics or capacities of the individual tested – or their biological family members, fetus or possible progeny – will this information be used in invidious ways to mark certain citizens or prospective citizens, or their characteristics, as deviant, abnormal, socially undesirable or risky? Is there a sense in which the new genetic technologies are being used, or are capable of being used, as a means of literally *creating* the responsible, autonomous, citizen of neo-liberalism – that citizen who makes no legitimate claims on the state but rather, who freely exercises their capacity for choice and manages their own self care?

The ways in which specific genetic technologies serve to restructure, and

privatize the relationship between the citizen and her/his health have been the subject of considerable feminist scholarship in recent years. These are certainly areas of concern. Yet, more is at work at the level of state practices and legislation in relation to the new genetics. In Canada, genetic technology as a whole is being actively promoted by some branches of the state, in particular, Industry Canada. At the same time, Health Canada, the branch of government which indeed has the mandate to regulate the social, legal and health consequences of the new genetic technologies, lags further and further behind. The Canadian Biotechnology Strategy and the reorganization of the federal Health Protection Branch point to a shift in state policy from social protection to the encouragement of capital accumulation. This form of privatization is paralleled by a move to the individual as the site of governance through the self regulation of genetic risk.

The advent of the new genetic technologies and the policies of privatization corresponding to globalization are not independent of one another. The pattern emerges of an interdependent process whereby biotechnology is at once promoted by the state as the high technology answer to the hollowing-out effects of globalization, and justified on the basis of its contribution to health. The changing understanding of health and health care brought about by genetic technologies in the post-Keynesian state connects the fostering of biotechnology as a form of industrial production, and the privileging of individual responsibility and risk management in the realm of health. In this sense, the role of biological technologies may be seen as both symptomatic and as an important constitutive factor in the transformation of the state in the post-Keynesian era.

### **The Canadian Biotechnology Strategy**

The development of the Canadian Biotechnology Strategy (CBS) is a key component of an industrial strategy aimed at reaping the benefits of a “knowledge based economy” to meet the challenges of globalization. It is a way of capitalizing on genetic information. It is worth noting that the Organization of Economic Cooperation and Development (OECD) defines “knowledge” in the “knowledge based economy” as, “the acquisition of intellectual property through learning or research” (OECD 1989). It is important to recognize that the appropriation of genetic information as intellectual property is an integral aspect of the knowledge based economy in general and the Canadian Biotechnology Strategy in particular.

The “vision statement” of the CBS was formulated as,

To enhance the quality of life of Canadians in terms of health, safety, the environment, and social and economic development by positioning Canada as a responsible world leader in biotechnology (CBS 1998a:8).

### **The CBS and Health**

According to the federal government, “[B]iotechnology’s greatest impact both in Canada and world wide has been in the health field. More than 90 percent of the advanced biotechnology products on the world market are related to health” (CBS 1998b:1) Projections are that health products will continue to dominate the biotechnology arena. It is significant that the lead Department for the co-ordination and development of the Canadian Biotechnology Strategy is Industry Canada with the involvement of six other departments, including Health. Moreover, the strategy seems to be one designed to accommodate the ethos of the marketplace and not that of the health care system. While the CBS is promoted as a

strategy to develop the tools to improve the health and well being of Canadians through “more reliable health surveillance, disease diagnoses and therapies,”(CBS 1998b:3) its principal goal is to promote industrial activity and economic returns “to position Canada as a responsible world leader in the development and sale of biotechnology products and services” (CBS 1998c:2).

### **Genetics and Changing Definitions of Health**

There cannot be an industrial strategy without a market. In the new biotech age, that market is intended to be primarily in health products and processes. However, in the creation of that market, our very definition and understanding of health is transformed. In adopting a new genetic understanding of health, we are changing our definitions of health and disease and creating entirely new categories of embodied individual health risk. Genetic technologies constitute a significant departure from conventional medical technologies in that these new technologies do not, for the most part, treat an existing condition or diagnose a disease in progress. Genetic testing often has the effect of identifying individuals with genetic susceptibilities to particular diseases, but who are otherwise well, as unhealthy, or at least, to mark their health as suspect. Thus, the alleged predictive ability of genetic testing is problematic as it takes for granted that awareness of one’s personal risk status, as defined by genetic testing, is important to the individual, and that awareness will encourage behavioural changes such as to prevent the future development of the predicted condition. By creating the category and increasing awareness of genetic risk, the biotechnology industry creates a market for its products – genetic tests – which the responsible health care consumer feels compelled to use in order to determine their own risk status or that of their future

offspring. A prime example of this dynamic was at work in the case of BRCA1&2 testing with the attendant controversy and litigation about public funding for private testing in Ontario.

### **The Health Protection Branch of Health Canada and its “Transition” Program**

Nowhere has the shift in governmental roles been so apparent as in the recently proposed transformations of the Health Protection Branch within Health Canada. It is this branch which is responsible for, among other things, regulating the safety of drugs and devices including those related to the new genetic technologies. Arguing that the new reproductive, and especially the new genetic, technologies do not correspond physically or conceptually to the medical devices and pharmaceuticals traditionally licensed and regulated by the Health Protection Branch, Health Canada has suggested that its regulatory and legislative framework is inadequate, and launched a so-called “transition” program. This initiative to renew Health Canada’s mandate of health protection corresponds to the restructuring of the Canadian state in a climate of privatization. Not surprisingly, the transition program includes strategies to externalize the costs of regulation by enhancing cost-recovery and the development of stronger relations with industry. The effort to externalize the costs of regulation corresponds with a reduction of in-house research and scientific activity. One of the central safeguards proposed under the HPB Transition Program is to pass legislation making it illegal for a manufacturer to place a dangerous product on the marketplace. Such legislation is expected to force *manufacturers* to be more explicitly responsible for ensuring product safety due to enhanced and more rigorous liability. As the law now stands however, it is the Federal government, and ultimately the Minister of Health, who is responsible

for ensuring product safety before approving a product for release onto the market. Currently, the government is primarily accountable to the public for safety and the protection of public health. The proposed legislation alters this situation by shifting responsibility from the government to private industry. Moreover, it creates a situation where instead of Health Canada being primarily responsible for ensuring product safety *prior* to public exposure, industry carries this responsibility. Health Canada’s interventions are activated *after* a danger has been detected through market use (i.e. protection through the threat of a harsh punishment, instead of protection by preventing product entry onto the market in the first place).

Health Canada acknowledges that its regulatory system is shifting away from a model where assessments are made in-house towards one, which it calls a “networked” model, including universities and industry. This new model is defended as more consistent with access to the best scientific knowledge and expertise, although the Health Protection Branch transition team is apparently still grappling with the problems of accountability raised by this model. I suggest that this new model is consistent with the relativized position of the post-Keynesian state, testifying to the contradictions of the state’s role in health protection versus industrial promotion. To illustrate, one of the goals of the transition process is to promote “efficiency” in speeding up regulatory approvals. Speedier introduction of new pharmaceuticals is obviously in the interests of industry, but glosses over the potential tradeoffs between accelerated introduction of new products and the assessment of possible risks. The changing emphasis in health protection is consistent with the goals articulated in the Canadian Biotechnology Strategy. Increasingly, the Health Protection branch will depend on its clients to achieve the regulatory purpose of its mandate.

Diffusion of accountability and responsibility forms its own kind of “privatization”.

There is no evidence that Health Canada or the federal government seeks to abandon its mandate in health protection, or that it is blind to the ethical concerns which have been raised. Instead, the renewal of the mandate for health protection occurs in a context where the role and meaning of the state is shifting, and where the autonomy of the Canadian state in relation to international trade agreements, and the demands of multinational corporations, is shrinking. The implementation of the privatization agenda is not therefore bringing about the deregulation of health, rather the manner in which health is being regulated is changing. Health is increasingly being regulated as a commodity rather than as a public good, and health care as a business rather than as a public service. In this context, it is interesting to note that one of the proposed name changes of the Health Protection Branch was to call it the “Management of Risks to Health” branch. No longer is the federal government to be involved in protecting the health of society from unsafe pharmaceuticals and medical devices, but it is positioning itself to manage the risk inherent in such commodities and mediate between the interests of industry and the citizen public. From a central concern with health care provision and public safety, the state has now shifted to a principle concern with the requirements of production and capital accumulation.

### **The Regulation of Genetic and Reproductive Technologies**

Despite the fact that the Royal Commission on New Reproductive Technologies reported more than seven years ago (1993), no new legislation has been passed regulating the health and social implications of these technologies

despite a significant amount of public support for such regulation. The federal government did introduce one piece of legislation, Bill C47, which died on the order paper of the last Parliament, and one discussion paper with legislation promised before the Fall of 2000. The important fact, for my purposes here, is not what is *in* the proposed legislation but the discrepancy between the urgency with which the Canadian Biotechnology Strategy and the restructuring of the Health Protection Branch have been pursued, and the hesitancy and caution with respect to the introduction of legislation to regulate the health effects of the new reproductive and genetic technologies. In the climate of state restructuring and privatization, study of the new genetics reveals how the priorities of the state in relation to health have shifted from protecting the public good to promoting the interests of industry, and creating the conditions for health to be a site of corporate profit making and capital accumulation.

### **Conclusion: About New Biotechnology, Accumulation, The Discursive Shift around Health, The Role of the State and Law.**

I have arrived at two major conclusions with respect to the introduction of genetic technologies and the ways in which these are regulated in Canada. The first conclusion – little discussed in this paper, but discussed more widely in feminist monographs<sup>3</sup> – concerns the ways in which the market for genetic technology shapes our understanding of health and risks to health. With genetic tests marketed as a kind of health-risk kit, individuals are being called upon to undertake self-surveillance in the name of

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<sup>3</sup> Both areas of privatization are discussed and analysed, in depth, within my book chapter, “Private Bodies, Public Parts: Genetics in a Post-Keynesian Era,” in the forthcoming book edited by Brenda Cossman and Judy Fudge. (Toronto: University of Toronto Press, 2001).

reducing the burden of disease on themselves and on society as a whole. Thus, genetic testing and genetic understandings of health, are seen as a means to create the ideal citizen of the post-Keynesian order – one vigilant about her/his economic burden or contribution to society and willing to discipline themselves or their procreative activity in the name of maintaining healthy and productive citizens. It is particularly through the genetic surveillance of potential offspring that women become the gatekeepers of the new social order, with genetic technology introducing a new gendered division of labour with respect to maintaining a disciplined order of productive citizens.

The second conclusion has to do with the nature of regulation and law in the post-Keynesian era of the new genetics. Here, the problem or phenomenon we witness is not simply “deregulation” in the service of the market, but rather a different kind of regulation and a shift in the legal paradigm of regulation. Instead of deregulation, we find a re-regulation intended to make

possible the greater appropriation of intellectual property and its capitalization. What the Canadian Biotechnology Strategy, the restructuring of the Health Protection Branch and the paralysis with respect to legislation on reproductive and genetic technologies illustrate is not just the promotion of the biotechnology industry, but a redefinition of the public interest. The state no longer sees itself as defending the public interest against the private interest of private actors, but sees itself as promoting the interests of private actors as the potential benefactors of the public through the production of health commodities. In so doing, however, the state is also changing the nature of regulation. In moving away from defining and representing the public interest, and towards a model of product liability and intellectual property, the state is shifting the arena of adjudication into the area of commercial law and away from public and constitutional law. This entails not only a different set of concerns, expertise and evidentiary rules but also a shift into a social arena with its own gendered hierarchy.

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