The In/Fertile, the Too Fertile, and the Dysfertile

Lisa C. Ikemoto
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by

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Introduction

I began by thinking about procreative technology.¹ But you cannot think about procreative technology as such. The technology is nearly indistinguishable from the stories about its uses.² The stories

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1. I use the term "procreative technology" to refer to interventions such as artificial insemination, in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, etc., that are typically explained as means to enhance human fertility. I use the terms "reproduce," "reproductive," and "reproduction," to signal the construction and perpetuation of the socio-political meanings attached to procreation. Later, in the text of this article, I examine the significance and effect of "technology." See infra notes 19-24 and accompanying text.

2. Susan M. Squier, Reproducing the Posthuman Body: Ectogenetic Fetus, Surrogate Mother, Pregnant Man, in POSTHUMAN BODIES 113, 114-15 (Judith Halberstam & Ira Livingston eds., 1995). Squier notes that "[a] gap exists between the range of medical practices (actual and hypothetical) known as reproductive technology, such as AID, IVF, Gamete Intrafallopian Transfer, Zygote Intrafallopian Transfer, Zona drilling, abdominal pregnancy, cloning, and so on, and their representations." Id. These gaps have been well-documented by those who have revealed the medicalization of pregnancy, the health risks to women, the low success rates of reproductive technology, the use of women as experimental subjects, the economic and physical exploitation of women, and the role of the representations in the subordination of women. Id. at 115. For an early feminist critique of the medicalization of pregnancy, see BARBARA EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD: 150 YEAR OF THE EXPERTS' ADVICE TO WOMEN (1978). For good examples of anthologies presenting a feminist critique of procreative technologies as reproductive control, see THE FUTURE OF HUMAN REPRODUCTION (Christine Overall ed., 1989); REPRODUCTIVE LAWS FOR THE 1990s (Sherrill Cohen & Nadine Taub eds., 1989); TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? (Rita Arditti, Renate Duelli Klein, & Shelley Minden eds., 1989). For good examples (in anthology or monograph form) of recent developments in feminist critique of procreative technology use, see CONCEIVING THE
and the images embedded in the stories shift according to the context. And, as philosopher Helen Longino has noted, "[e]ach contextual setting would yield a different pattern of connections." Since procreative technology is often characterized as infertility treatment, I am interested in questioning the stories of in/fertility. It seems to me that these stories are shaping public policy and law in direct and indirect ways. So, in questioning the stories of in/fertility, I am trying to raise questions about the public policy and law addressing in/fertility.

I use the slash (/) between "in" and "fertility" to signal that the dominant understandings of infertility and the infertile are shaped with respect to our understanding of fertility and the fertile. My inquiry takes for granted that human procreation, and in/fertility in particular, is a culturally significant site upon which political contests play out. So my inquiry, more accurately, is not about the way the technology should be used. It is, rather, an effort to trace the pattern of connections in the in/fertility discourses, formed largely by procreative technology use.

I follow three threads in the stories and images, or discourses, if you will, of in/fertility. The most obvious thread is that of the infertile, who are usually identified as women. Perhaps not surprisingly, given the binary, oppositional nature of master narratives, that thread leads to the thread of the "too fertile," those women whose sexuality and fertility are deemed deviant by dominant norms. The too fertile include unwed adult women, teens, welfare recipients, and/or women of color. In fact, within the in/fertility discourses, all of these women are too fertile. The third thread may be less apparent. While infertile women and too fertile women have been made visible and obvious in the in/fertility discourses, the fertility of those within the third


4. See Squier, supra note 2, at 118.

5. See infra notes 104-05 and accompanying text.
thread—lesbians and gay men—has been made invisible or irrelevant. I use the term “dysfertile” to suggest the dysfunction attributed to lesbians and gay men by the in/fertility discourses.

In the inquiry that follows, I first look to moments in the public discourse that reflect great unease with particular procreative technology uses. I explore the shape of these debates to question why and how some issues have been asked and answered, but not others. These moments represent outside points in the boundaries of use. I then examine the express and implicit content of the medical and legal rules that currently comprise the official boundaries of use. I trace the pattern of connections drawn by these rules to points squarely within the boundaries—use by married couples to overcome infertility, and then back to the edges—use by lesbians. The boundaries of use are formed largely from identity constructs. It is through an exploration of these identity constructs that I see the particularities of the boundary maintenance mechanisms and how they operate on the interlocking identifiers we know as race, gender, class, and sexual orientation.

At several points, certain identity patterns prove more liminal than others. These liminalities offer two possibilities, one negative, one positive. First, the constructs of womanhood that meld certain acts and traits as appropriately feminine with whiteness form a wedge that simultaneously maintains boundaries between white and non-white and heterosexual and non-heterosexual. Very often, this wedge also cuts on class lines in a way that melds whiteness with middle class privilege and non-whiteness with poverty. Second, the splintering of procreation that technology exacerbates, combined with the splintering of identity that technology enables, may effect the de-essentialization of women within the discourses of in/fertility.

I. Moments of Unease

There have been relatively few moments in which the public discourse has reflected widespread unease with developments in procreative technology use. Two of those moments occurred upon the birth

6. There have been moments in which medical professionals have expressed such unease. For example, the facts of Del Zio v. The Presbyterian Hospital reveal that a department chair, medical school dean, and hospital president, agreed to and did destroy in vitro fertilized ova before they could be transferred to plaintiff, Mrs. Del Zio, in what might have been the first in vitro fertilization procedure performed in the United States. The defendants cited the danger to the potential human life, the experimental nature of the procedure, violation of department rules, and the physicians' lack of competence to perform the procedure as reasons for their actions. Del Zio v. The Presbyterian Hospital, 74 Civ. 3588 (memorandum decision) (S.D.N.Y. 1978).
of Louise Brown, the world’s first “test-tube baby,” in 1978, and when the Baby M surrogacy case came to public light in 1987. The birth of Louise Brown provoked concerns about the use of technology to intervene in human procreation, risks to the woman, risks to the child, the use of selective abortion, the status and treatment of cryopreserved embryos, and the status and treatment of third party participants in procreative technology use. But the birth of Elizabeth Carr, the first child born after conception by in vitro fertilization and embryo transfer in the United States, resulted in an immediate call for federal support of test-tube conceptions. The moment of unease was over. Overall, these births generated more positive excitement about the possibilities for overcoming infertility than concern about the risks of in vitro fertilization.

The controversy surrounding the Baby M case was framed in terms of two issues: who should be the parents of Baby M, and should surrogacy be regulated at law. At the time, state legislatures and legal scholars busily debated and proposed a variety of regulatory approaches to surrogacy and procreative technology use. Since the New Jersey Supreme Court issued its decision condemning the commercial and contractual aspects of surrogacy, few states have actually enacted these proposals into law.

7. For many legal scholars, the key moment in this case was the New Jersey Supreme Court’s decision. In re Baby M, 537 A.2d 1227 (N.J. 1988). For the media and public, however, the 1987 trial supplied the key moments. The trial court held that the surrogacy contract was valid and issued orders to carry out the contractual terms. Id. at 1237-38. The court also ordered that the parental rights of Mary Beth Whitehead, the surrogate mother, be terminated, granted sole custody to William Stern, the sperm donor and intended father, and entered an order allowing Elizabeth Stern, the intended mother, to adopt the child. Id.


9. Elizabeth Carr was born in December 1981, in Norfolk, Virginia. Robert Blank & Janna C. Merrick, Human Reproduction, Emerging Technologies, and Conflicting Rights 89 (1995). The physicians who performed the procedure resulting in her conception were Howard and Georgeana Jones. For other references to Dr. Howard Jones, see infra notes 73-78 and accompanying text.


11. For additional discussion of how procreative technology came to be seen as an infertility treatment rather than as a potential health or moral threat, or as a possibility of reformulating family, see infra part III.

12. In re Baby M, 537 A.2d at 1234 (holding the surrogacy contract unenforceable and in violation of adoption law bans on child selling and as against public policy concerns regarding welfare of children and the degradation of women).

13. See infra notes 90-94 and accompanying text.
technology should be used ended quickly, just as it did after the birth of Louise Brown. Instead, much of the discourse about procreative technology use has focused on the former issue: who should be the legal parents. This clearly assumes that procreative technology will be used.

The tendency to assume that procreative technology use only raises the question of parental identity may stem from the fact that the public debates have largely developed around highly publicized lawsuits. In these lawsuits, the issue has not been whether a particular technology should be used, but how we should deal with the results of its use—the child. It is also true that many participants in the public debate have been lawyers and legal scholars who tend, by training, toward problem-solving with rule and outcome-oriented analysis. In addition to the possibility that the legal mindset might be determining the focal point of public discourse, there may be an assumption about the inevitability of technological development at work. That is, the public discourse-focus on the question of who should be the parent may be premised on a general attitude that if technology is developed, it will be used. This assumption may or may not contain a judgment about the desirability of new technology use. In other words, the assumption that the technology will be used may generate the need for it, and not the reverse. If there is a technological imperative, the answer to the question—whether procreative technologies should be used—is a foregone conclusion.

There may be something even more deeply embedded in the question of who should be the parents. The question seems less inevitable when one considers the phrasing—who should be, rather than who are the parents. The phrasing admits that there is no one clear answer. Many, in fact, have supported procreative technology use as a means of reformulating family structures and rethinking family roles. That this discussion could take place among so many different

14. Many agree that the convergence of public attitude and scientific desire to support technology development is not a coincidence. See Raymond, supra note 2, at 108-37 (describing the marketing of new reproductive technologies).

15. This partially explains why feminist critiques that question the desirability of procreative technology use have not resonated in public discourse. Of course, the fact that the public discourse has marginalized the feminist critiques indicates that patriarchy shapes the debate and is the core of the resulting default to science. For further discussion of the default to science, see Lisa C. Ikemoto, The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law, 53 Ohio St. L.J. 1205, 1286-93 (1992).

proponents may not seem surprising. After all, many of the proponents have been scholars deeply interested in family relations. Times have changed, and attitudes toward marriage, homosexuality, and gender roles have changed, so that many may be prepared to reject traditional family structures as heteropatriarchal. The technology, especially surrogacy, has scrambled the types of biological links that can be formed, raising questions about the means by which we have been identifying family relations. On the other hand, adoption also offers the opportunity to raise issues about reformulating the family. Why has this question been raised and discussed so easily in the context of procreative technology use and not in the context of adoption?

Until very recently, it has been widely assumed that adoption would be used to create a family as much as possible like that of the traditionally recognized family—marriage-based, with biological parent-child relations. And yet, in adoption, the “normal” means of identifying family relations—biology—is absent or scrambled. It may be that the “should be” question raised by procreative technology use has fueled the push to allow adoption by single persons and unmarried couples, including lesbians and gay men. But, adoption is older. It precedes the social changes that make the “should be” question possible. And it is already regulated at law, making change harder to imagine.

I still think that there is an additional reason. It goes to the effect of “technology” on our assumptions. Somehow, “technology” intervenes, at least temporarily, in our patterned ways of thinking about boundaries of use. Adoption simply seems like an extension of existing social and legal practices. So we assume that the usual boundaries—norms about appropriate family structure—apply. But we think


17. This has begun to change. See, e.g., In re Petition of K.M. and D.M. to Adopt Olivia M., 653 N.E.2d 888 (Ill. 1995) (permitting adoption by a lesbian couple); In re Jacob, 660 N.E.2d 397 (N.Y. 1995) (permitting biological mother’s partner to adopt as a stepparent adoption); In re M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995) (allowing second parent adoption by adoptive father’s partner).

18. For analysis and argument supporting formation of parent-child relationships by gay men and lesbians, see Lydia A. Nayo, In Nobody’s Best Interests: A Consideration of Absolute Bans on Sexual Minority Adoption From the Perspective of the Unadopted Child (forthcoming 1996); Nancy D. Pollikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459 (1990).

19. Professor Reva Siegel provided this insight during a “workshop” on this paper in her critical race theory course at Yale Law School.
of technology as both constitutive of boundaries and as a means of exploring beyond existing boundaries. So the introduction of new technology may signal the opportunity to see life beyond existing boundaries. In this respect, the microscope, space exploration, and procreative technology may be alike.\textsuperscript{20}

Even while technology represents the opportunity to explore the unknown, we also take it as evidence of mastery—over nature, over human weakness.\textsuperscript{21} Most of the procreative technologies at issue were first developed for use in animal husbandry. The early work on animals enabled fairly quick successes when the technologies were first applied to humans. So, in appearance, advances in procreative technology use on humans have come very quickly.\textsuperscript{22} The use of these technologies has also occurred during a period in which scientists have made very rapid progress in sequencing the genome and developing applications for the knowledge. There is a resulting sense that scientists are achieving mastery over the formulation of human life.\textsuperscript{23} So the implication may be, if we can invent humans, we can certainly invent family.

We understand technology to be something that humans invent. Procreative technology use blurs the line implicit in that understanding of technology—the line between human and technology.\textsuperscript{24} We also, as suggested above, take for granted that we have technology to

\textsuperscript{20} A comparison to science fiction may also be useful. Like science fiction, our "real world" understanding of technology "rests upon a scientific epistemology, one which assumes, first and foremost, that the external world is both real and phenomenal. That is, it consists in discrete, physical events that are available to us through our senses and that can be recorded as facts." CARL D. MALMGREN, WORLDS APART: NARRATOLOGY OF SCIENCE FICTION 4-5 (1991). Within a typology of science fiction, the narrative about procreative technology use fits into the category of "gadget science fiction." \textit{Id.} at 101-19. Writers of gadget science fiction "did not question the basic value of technology. They saw that technology would bring big troubles... but they were secure in the belief that more massive, more organised, doses of technology would take care of the problem." \textit{Id.} at 104 (quoting BRIAN ALDISS, BILLION YEAR SPREE: THE TRUE HISTORY OF SCIENCE FICTION 182 (1973)).

\textsuperscript{21} For a proposal of an alternative mode of knowledge-seeking not structured by dualisms—culture vs. nature, rational mind vs. prerational body, objectivity vs. subjectivity, etc.—that underlie the claim of mastery, see SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 136-62 (1986) (suggesting a move from empiricism to feminist standpoint epistemologies).

\textsuperscript{22} \textit{But see infra} notes 107-11 and accompanying text.

\textsuperscript{23} Longino, supra note 3, at 196.

\textsuperscript{24} Alexandra Chasin, \textit{Class and Its Close Relations: Identities Among Women, Servants, and Machines}, in POSTHUMAN BODIES, supra note 2, at 73 (analyzing the persistent assumption that there is a clear and stable ontological difference between humans and technology).
better the world and to improve nature, whether nature be human, environmental, or other. At the same time, we use the concept of “unnatural” to signal when technology has gone too far. The question of who should be the parents has tripped that signal.

There was a moment of great unease in December 1993 and January 1994, when three particular procreative technology uses triggered widespread public debate and public appeals for legal regulation. Italian doctors used egg donation and in vitro fertilization to enable a 59-year-old British woman to have twins; British and Italian doctors implanted the ova of white women into black women; and British researchers developed a technique to retrieve eggs from aborted mouse fetuses to achieve fertility in other mice. The media reports often combined the three events together to raise the issue of legal regulation. The claim was that technology had gone too far. However, it is not sufficient to say that these uses were controversial because they push the boundaries of use. The issue is what boundaries do these uses push.

The way these stories were combined with each other may be telling. Most of the news media stories that did not address all three uses paired the post-menopausal woman having children with the black women using white eggs. A few paired the post-menopausal women having children with the possibility of retrieving fetal ova. Most of the stories that focused only on one practice discussed post-menopausal women having children. The obvious attention given to post-menopausal pregnancy largely occurred because bans in England, France and Italy were proposed when Italian doctors announced that a 59-year-old British woman had given birth to twins. In addition, prominent officials in England strongly condemned the practice, as did the

25. See, e.g., CNN News International: Reproductive Technologies Raise Tough Ethical Questions (CNN television broadcast, Jan. 4, 1994) (transcript available in LEXIS, News Library, CNN File). “These newest revelations [the possibility of using eggs from aborted fetuses] come one week after fertility technology allowed a 59-year-old woman to give birth to twins, and after Italian experts revealed they had implanted the egg of a white woman into the womb of a black African who said a white child would have a ‘better chance’ in life. Suddenly, science is moving faster than ethics can keep up.” Id. (statement by Vicki Barker, CNN Correspondent).


27. Dr. John Marks, former chair of the British Medical Association, said that the development “bordered on the Frankenstein syndrome.” Simon Jenkins, Simon Jenkins of The Times gives his view, SOUTH CHINA MORNING POST, Jan. 2, 1994, at 8. Dr. Stuart Homer of the British Medical Association’s ethics committee condemned the practice on the basis that the children will have parents of a “wholly foreign generation.” Id.
Vatican. The other rule being considered was a British ban on human research that would follow up on the retrieval of fetal ova in mice. So what purposes did the black woman, white egg story serve?

The media reports of post-menopausal pregnancy included the terms "granny moms" and "retirement pregnancies" in their accounts of public debate. A few of the reports that paired "granny moms" with black women using ova retrieved from white women linked the two practices and raised a concern about "designer babies." For example, a Los Angeles Times article reported, "French officials said the government was particularly alarmed by advances in medical technology that now make it feasible for women to choose the ethnic identity, physical size or other characteristics of their baby through embryo implants." Post menopausal pregnancy requires ova donation, so the opportunity for selection of race and other characteristics is created by the process. But artificial insemination by donor creates the same opportunity, and none of the stories mentioned artificial insemination by donor. In fact, there has been little public or media attention to trait selection in artificial insemination. So the concern seems to come from the particular practices at issue in the media accounts and, more specifically, the racial selection made visible in these stories.

The story of black women choosing white ova presents proof that racial selection occurs. In truth, the other types of selection provoke minimal unease. Many people probably assume that those using artificial insemination have chosen donors for intellectual qualities, medical history, and physical qualities such as height, eye color, and hair color that differ from their own. Those choices seem reasonable or at least uncontroversial. It may also be that, given common knowledge of basic genetics as well as the availability of tinted contact lenses, hair coloring, and varying heel heights, we perceive these traits as mutable.

31. A 1995 story attracted a great deal of attention because the couple using in vitro fertilization had twins, one white and one black. Here, the couple had chosen to use the woman's ova and her spouse's sperm. The conception of a biracial child resulted not from choice, but from a mistake made at the laboratory. See, Marlise Simons, Twins Touch Off In-Vitro Debate; Clinic Admits Error After Mother Delivers Sons of Different Races, DALLAS MORNING NEWS, June 28, 1995, at 1A. The similarity between this story and the black woman, white egg story, is that the unease arises from the transgression of the racial boundary.
It is race that presents the problem. In fact, what is interesting is that to the extent we assume that those using artificial insemination choose donors of the same race as themselves, we do not think of racial selection. It is only when the choice crosses the color line that we call it a choice, and identify that choice as troubling. Despite common knowledge of basic genetics and despite our apparent embrace of color-blindness as a legal standard and social norm, we still see race as immutable. So it is not only the fact that a selection has been made, but also that the selection signifies the mutability of race that provokes the unease.

Most of the media reports that paired granny moms with black women using white ova did explain the issues raised by postmenopausal pregnancy and motherhood, but did not explain the issues raised by transracial ova donation. Critics worried that older women would not live long enough, have enough energy, or be motherly (as opposed to grandmotherly) enough. A few worried about the health effects of pregnancy and childbirth on women past their naturally occurring childbearing years. On the other hand, the problems raised by the paired story were not made explicit; they were presumably self-evident. Most of these stories provided only the race of the women, and no other information. A few of the stories explained that few black women donate ova. Fewer indicated that the British woman’s spouse was biracial, and that his sperm was used to fertilize the egg. In absence of this information, however, the stories focused solely on the woman’s racial identity.

As mentioned, the legal rules at issue in these stories were proposals to ban fertility treatment for postmenopausal women. The inclusion of the black woman, white egg story served to demonstrate the urgency of the need to regulate procreative technology use. The following two excerpts from newspaper articles illustrate this point. “The debate over engineering births expanded Friday with reports out of Italy that a black mother gave birth after being impregnated with an egg from a white woman.”

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32. See, e.g., William E. Schmidt, Birth to 59-Yr-Old Briton Raises Ethical Storm, N.Y. TIMES, Dec. 29, 1993, at A1 (“Most of the objections are ethical ones, based on the strong belief that it is best for a child to have active, able parents.”); Bonnie Miller Rubin, New Moms in 40s and 50s Give Birth to Questions Too, Chi. TRIB., Jan. 3, 1994, at N1 (“One Chicago attorney, whose father was 60 when he was born, agreed [with Margie Rosenbaum, 45, mother of 3, who said, [t]here is a point when it becomes unfair]. ‘There were times when it was painful,’ he said. ‘People always asked me if he was my grandfather.’”).

33. Post-Menopausal Pregnancies Called Basic Right of Women, St. LOUIS POST-DISPATCH, Jan. 1, 1994, at 5B.
implanting of white woman's egg into a black woman."34 In these stories, race, or more specifically, some sort of racial transgression, is the thing that proves that science has gone too far. Once again, the immutability of race marks the desirable line between the natural and unnatural. In plain terms, the outrage expressed at the black woman, white egg story indicates that assumptions about the desirability of racial purity underlay procreative technology use.

The idea of a black woman having a white child oversteps lines originally maintained by two mechanisms of racial subordination. Both of these mechanisms were aimed directly at black women. During and after slavery, black women have cared for white children. But they have done so as slaves or hired caretakers.35 Parenthood connotes legal control, authority, even ownership. The image of a black woman claiming authority over a white child inverts racially-based rules of status and ownership. Second, the historical rule of race is that any child born of a black woman is also black.36 The use of transracial egg donation to change the conclusion that blackness begets blackness challenges the assumption that black mothers create the traits deemed inferior by white supremacy.

What may be most disturbing about this procreative technology use is the imagined moment of a black woman giving birth to a white infant, or a white woman giving birth to a black infant. Blackness has been so othered that the intimacy, the ultimate intimacy, of the moment seems impossible and strange and perhaps even alien. The strangeness and seeming impossibility of the image only shows the extent to which motherhood has been used to maintain the color line. The level of unease generated by interracial birth may also indicate that the notion of race that assumes biologically-inherent difference is still deeply embedded in the more recent notion that racial difference is culturally constructed.37


35. See Evelyn Nakano Glenn, Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in "Women's Work", 43 STAN. L. REV. 1333, 1339-42 (1991); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 70-78 (1990) (critiquing maternal and sexualized images used to define black women as the other).

36. In part, this resulted from anti-miscegenation laws, so that black women who gave birth to children fathered by white men were unmarried and the only parent (and hence, the only race) associated with the child. This rule of race is also known as that of "hypodescent," under which "the offspring of a Black and a white is Black." See Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 STAN. L. REV. 1, 24 (1991).

37. Id. at 3.
The media accounts of unease that paired the granny moms with fetal oval retrieval were linked by the fact that fertility treatment of women whose ova have deteriorated from age generates the need for ova from other women. The media frequently reported use of the term, "womb-robbing," for fetal ova retrieval.\(^3\) So, the pairing of these two stories may have implied an association between the granny moms and the womb robbers that echoes Little Red Riding Hood. The troubling choice in the "womb robbing" stories was that of abortion. Since the ova would be retrieved from aborted fetuses, the concern was that the practice would encourage some women to choose abortion. It is interesting that at some point, the public expression of unease was framed as a problem of choice—whether postmenopausal women should be able to choose to become pregnant; whether a black woman should be able to choose to become pregnant using a white egg; and whether women should be able to choose abortion.

It seems to me that each of these stories were linked by a practice that public discourse barely mentioned—egg donation. Curiously, stories expressing doubts about the practice of "egg donation" did not emerge until late 1995 and early 1996.\(^3\) During the past year, media stories and public attention have tended to focus on egg donation or retrieval of eggs from young women for use by older women to achieve pregnancy, and two other stories—the June 1995 scandal created by allegations that physicians at the prestigious University of California, Irvine fertility clinic, had transferred ova and embryos without the consent of the patients, and the story of the low success rates and high costs of procreative technology use as infertility treatment. It may be too soon to tell whether the concerns raised by these practices will endure.

Of the three issues, only the U.C. Irvine scandal seems to have generated a great deal of attention. The resulting calls for legal action mostly have been expressed as the goal of finding out what went wrong at this particular clinic and with these particular doctors. The other two stories are more like those that have generated moments of unease. They suggest that technology may have exceeded some appropriate boundary. Typically, both the egg donation and low success-

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\(^3\) Other terms included "fetus farming" and "grave-robbing." See, e.g., William Tuohy, Using Aborted Fetuses' Eggs Spurs Controversy in Britain, HOUSTON CHRON., Jan. 3, 1994, at A7.

\(^3\) See, e.g., Jan Hoffman, Egg Donations Meet a Need and Raise Ethical Questions, N.Y. TIMES, Jan. 8, 1996, at A1. Some of these stories followed the allegations that doctors at the University of California fertility clinic had given away eggs and embryos without the patients' permission, while others preceded the publicity attending the investigation.
high cost stories have asked whether the participants in procreative technology are being exploited. For example, news articles about egg donation have asked, "whether donors are victimized, whether clinics give recipients truthful information about the donors, whether the whole process has become too commercial." Articles about the costs, risks, and success rates ask whether regulation is needed:

The scientific basis of high-tech treatments remains weak, and clinical evidence that new techniques are significantly better than old ones is scarce. But the strongest impetus for the reassessment has been one little number. In 1993, the 267 clinics reporting to the American Society for Reproductive Medicine started 41,209 assisted-reproduction procedures. Of these, 8,741 resulted in live births. That's a success rate of 21.2 percent.

So the risk of exploitation is not sufficient to generate a moment of unease. Supporters of the industry have an easy answer to these concerns that bounces back at us, once again, from the abortion debate—it's their choice.

To me, the practice of "egg donation" is cause for great unease. Egg donation and fetal ova retrieval seem paired to me. They both seem premised on an image of woman as disembodied, futureless, and without agency. I am not speaking of the women who actually donate eggs, but the image of woman that I think must animate these practices. In this image, the woman as a person has largely been erased. This type of erasure has a long history, and I fear, a substantial future. Yet this practice seems to have generated the lowest level of unease. The primacy of fear about commercial exploitation over fear about the erasure of the moral identity of woman reveals how dominant standards for concreteness and tangibility operate on lines of gender, race and other forms of marginalization. The concreteness and reality we accord to cost and data but not to identity parallels the effects of using the public/private distinction to regulate harms. To the extent that harms cannot be measured in terms of cost and data, those harms will go unacknowledged and unaddressed.

The moments of unease reveal at least two tensions. One is between what we understand as the human and, in contrast, the human

40. Id.
42. For analysis and debate about how the public/private distinction is used to preserve some aspects of family life, and thus the harms occurring there, as private and not subject to intervention, see MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 177-98 (1995); Frances Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 CONST. COMMENTARY 319 (1993).
invention or technology. As suggested, procreative technology use challenges the distinction implicit in the definition of technology. The second is the tension between the natural and the unnatural. While the promise of technology suggests that we can reinvent ourselves, much of the unease arising from procreative technology use seems to arise from the way the uses push boundaries we call natural. These two pairs of tension are not mutually exclusive. Accordingly, I focus on tensions as well as dichotomies in mapping the webbed, nonlinear discourses of in/fertility. I use these points of tension to investigate the boundaries of procreative technology use and the identity boundaries drawn in the in/fertility discourses.

The contradictions within the in/fertility discourses reveal that our understanding of the natural within these discourses is contingent, and that the contingencies have to do with race and gender, at least. The permeability of the human/technology distinction suggests not simply that our understanding of what it means to be human is constructed or invented, but that some human identities are purposefully more invention than others. More specifically, the stories and images of the infertile within these discourses make the embodiment of infertile woman an inbetween, a wedge that operates to maintain race, class and sexual orientation boundaries. The embodiment of infertile woman is not a reified body. The embodiment is fluid and interactive with those on the fringe or far side of the boundaries. The core of this wedge is gender. The non-moments of unease, like that of egg donation, indicate that much of what we make of women in these discourses consists of erasure.

II. Boundaries of Use

As I said in the opening paragraph, procreative technology is nearly indistinguishable from the stories about its uses. In medical, informational media, and popular entertainment accounts, procreative technology is usually applied because of infertility. Stories about infertility have become part and parcel of most discussions about procreative technology, and vice versa. What I want to explore here is the contradictory power of procreative technology as infertility treatment.

43. Donna Harraway, Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective, in TECHNOLOGY AND THE POLITICS OF KNOWLEDGE, supra note 3, at 185 ("Feminist embodiment, then, is not about fixed location in a reified body, female or otherwise, but about nodes in fields, inflections in orientations, and responsibility for difference in material-semiotic fields of meaning.").
A. The Possibilities of Procreative Technology

If Louise Brown's birth was a critical moment, it is largely because we read three sets of significant possibilities into that moment. One set of possibilities was expressed in the question of who should be the parents—the possibility of reformulating family. The second set of possibilities were voiced softly, but negatively. These were the questions about the moral significance of separating conception from pregnancy and the dehumanization suggested by the image of "test-tube babies." The third set arises from the characterization of procreative technology as infertility treatment. In fact, Naomi Pfeffer marks 1978 as the year "[i]nvoluntary infertility resurfaced as a live issue."

It is not that procreative technology created these possibilities, but that these possibilities suddenly seemed feasible, serious, and real. Nor is the point that these three sets of possibilities were necessarily mutually exclusive. But in the moments to follow, procreative technology was characterized first and foremost as infertility treatment. That characterization contains a contradiction of the possibility of using the technology to reformulate family. The use of procreative technology to reinscribe a particular model of family has swept aside the second set of possibilities—the questions about whether the technology use changes what it means to be human—by placing the use in a traditional setting, and thus "naturalizing" it.

We cannot take the fact that infertility treatment has ascended as the primary explanation for procreative technology as the result of either chance or simple utility. That fact signals something about the other possibilities we read into Louise Brown's birth. Perhaps this is stating the obvious, but the possibility of reformulating the family has created moral uncertainty and anxiety. The very possibility challenges

44. Sarah Franklin, Postmodern Procreation: A Cultural Account of Assisted Reproduction, in CONCEIVING THE NEW WORLD ORDER, supra note 2, at 323 (writing that, "[f]rom an anthropological perspective, this conception story is an overdetermined one. With the birth of Louise Brown also came into being a new kind of public debate about conception, in which unprecedented procreative possibilities raised moral uncertainty and political controversy."). Compare a recent overview article published in a medical journal, which opens by noting the birth of Louise Brown in 1978, and concludes by paying tribute to the "improved chances of success to achieve parenthood for couples seeking infertility treatment." Kamran S. Moghissi & Richard Leach, Future Directions in Reproductive Medicine, 116 ARCHIVES OF PATHOLOGY & LABORATORY MEDICINE 436, 441 (1992).

45. PFEFFER, supra note 10, at 27.

46. Another consequence of sweeping aside the questions about the effect of this technology use on our understanding of what is human is to further marginalize the question of whether we should use the technology.
something that seemed fundamental. What is that fundamental something threatened by the possibility of reformulating family?

Thoughtful commentators have leaned toward two particular concerns about the possibilities of reformulating family. One is the intellectual and moral confusion that might result from separating different aspects of the biological relationship between parent and child. More specifically, the concern has been that the separation of coital conception, genetic ties, gestation, and child rearing means that we have to articulate why these connections are significant and we have to weight these connections. There is the chance that in the process we will have to admit that some or all of these connections are not significant. That admission would undermine our existing justifications for protecting the relationships we have been calling “family.” It might threaten or at least devalue the psychic significance we attribute to these connections. Or, there is the chance that we will lose something simply by exposing the connections to questioning. The second concern raised about the possibility of reformulating family is for the welfare of children born as a result of procreative technology use. This concern has focused on the psychological risk that might come to a child from learning the means of birth, and from physical defects that may be caused by the intervention of technology.47

Consider how these concerns have been discussed in the context of two surrogacy cases, In re Baby M48 and Johnson v. Calvert.49 Both cases were highly publicized. Anthropologist Helena Ragone concluded in her ethnography of surrogacy that the judicial decisions in the Baby M case reflected public opinion.50 I would extend that observation to the Johnson case as well. The outcomes in both cases have been explained as similar resolutions of the concerns about identifying the significant biological connections and the welfare of the child. For these reasons, these cases can serve as an introductory text for exploring the nature of the fundamental something at issue in the possibility of reformulating family.51

49. 851 P.2d 776 (Cal. 1993).
51. See also Adria Schwartz, Taking the Nature Out of Mother, in REPRESENTATIONS OF MOTHERHOOD 240 (Donna Bassin et al. eds., 1994). Ms. Schwartz, a psychoanalyst,
In the *Baby M* case, Marybeth Whitehead entered into an agreement with Elizabeth and William Stem. Ms. Whitehead was artificially inseminated with Mr. Stern's semen, became pregnant, and gave birth to a child. She then refused to relinquish her parental rights so that Ms. Stern could adopt the child. The New Jersey Supreme Court refused to recognize the surrogacy contract and sever the legal relationship between Ms. Whitehead and the child. Using the best interests of the child standard, the court awarded custody to Mr. Stern, and then remanded the issue of Mrs. Whitehead's visitation rights to the trial court. Ms. Stern was not allowed to adopt the child. The Court thus affirmed the biological connections present in this case as the basis for the parent-child relationship. In addition, the opinion accords the welfare of the child as primary among the policy concerns. Among its concerns, the court mentioned the harm that might occur when a child learned that the parties to the contract had bought and sold the parental rights.

In *Johnson v. Calvert*, Anna Johnson entered a surrogacy agreement with Crispina and Mark Calvert. In vitro fertilization using Crispina Calvert's ova and Mark Calvert's sperm was performed. A physician placed a pre-embryo in Ms. Johnson, who became pregnant and gave birth to the child. She then refused to relinquish her claim to parental rights. Two differences between this case and *Baby M* proved to be key. In *Baby M*, all the parties were white. In *Johnson v. Calvert*, the three adults were all of different races. Anna Johnson is African American. Crispina Calvert is Filipina. And Mark Calvert is white. The media stories focused on Anna Johnson's blackness and Mark Calvert's whiteness. In these stories, the baby was not de-

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53. *Id.* at 1240 (contract), 1258 (custody), 1261 (visitation).
54. *Id.* at 1250 ("The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money.").
56. See photographs in Lori B. Andrews, 'Baby M'—Part 2, 73 A.B.A. J. 30 (Dec. 1987). While the photographs do not prove the parties to the surrogacy contract in *Baby M* are white, the lack of media commentary about race compared to the consistent commentary about the race of the parties to the contract in issue in *Johnson v. Calvert* strongly suggests that William Stern, Elizabeth Stern, and Marybeth Whitehead are all white.
scribed as biracial or Filipino, but was implicitly made white. Like the 1994 stories reporting that a black woman had used a white woman's ova, the stories about Johnson v. Calvert did not explain the difference race might make. It was apparently self-explanatory. And as in 1994, race did make a difference; there was unease over the idea of a black woman claiming a "white" child. The California Supreme Court did not mention race in its opinion. The Court recognized the Calverts as the legal parents, thus denying Anna Johnson any legal basis for custody or visitation. The Court's analysis rested on the genetic connection between the Calverts and the child. The message that follows from this holding is that the genetic link is superior to the biological connection formed by pregnancy and childbirth. In the public discussion about the case, the racial identities of the parties made the logic of the preference for genetic link obvious.

In both of these cases, there was never any question that William Stern and Mark Calvert would be recognized as the legal fathers. Nor was their desire for a genetically-related child questioned. The parent question at issue in both cases was, who should be the mother and whose motivation was most appropriate. The fact is that the law in most states protects the parental status of the genetic father except where artificial insemination by anonymous donor has been used.58 There is also well-established law that presumes that a woman who gives birth to a child is that child's legal mother.59 The California Supreme Court's decision indicates that the legal status of women as mothers is less well-established and more contingent than that of men as fathers.

A reading of the surrogacy cases, Johnson v. Calvert in particular, in light of the history behind the Uniform Parentage Act (UPA) reveals the role of race in the contingent nature of motherhood. We rarely think about the legal basis for motherhood. The fact that a woman gives birth to a child makes the woman's status as mother seem obvious. Yet, the rule that the woman who gives birth to a child is the legal mother has long depended on the woman's race.60 For example, the maternal presumption was simply not applied to women who were slaves.61 These black women had no legal claim to their children. Professor Mary Louise Fellows has shown how the maternal presump-

58. See, e.g., CAL. FAMILY CODE § 7611, § 7613 (West 1996).
59. See, e.g., CAL. FAMILY CODE § 7610 (West 1996).
61. Id. at 504.
tion and its exceptions result from patriarchal concerns about sexual control of women and racial purity. The holding of Johnson v. Calvert has created another exception to the maternal presumption. The Court's preference for the genetic, rather than the experiential basis for parenthood is historically located in the twin goals of racial purity and the sexual control of women. The fact that Anna Johnson is black makes that history visible. The fact that so many find logic in the holding suggests that the goals are not mere relics.

Professor Fellows has also illustrated how the marital presumption—an evidentiary presumption that a child born to a married woman is the child of the husband—operates to "transfer procreative power to white men while simultaneously minimizing and denying the procreative power of African-American women and, in different ways, of white women." In part, the presumption was created on the premise that interracial marriage was forbidden. So, the rule was never applied to white men in relationships with black women. Further, the rule was not applied to married white women who gave birth to children that appeared to be of mixed race. In other words, the law was intended to secure paternity rights to white children. When the presumption was used in an interracial marriage context, the courts often refused to apply the pre-UPA marital presumption, especially if the result would be to recognize an African American child as heir of a white father. One can read the Johnson case as continuing the judicial practice of selectively applying the parental status laws to maintain white fatherhood. In other words, the court's holding was not inevitable. Our preference for genetic links has political as well as sociobiological reasons. Here, a decision to recognize Ms. Johnson as the child's legal mother would have given a black woman claim to a white child, made the child nominally black, and would have established a white man's paternity to that child.

Stating the last point in normative terms, motherhood is contingent on white fatherhood in this line of paternity cases. Ms. Johnson's

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62. Id. at 495.
63. Id. at 496. See also Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 211 (1995) (revealing that the "genetic tie's precise social import depends on the type of relationship to which it becomes relevant and the prevalent social conditions that influence that relationship"). Professor Roberts further demonstrates that race is significant in determining the import of the genetic tie. Id.
64. Fellows, supra note 60, at 504.
65. Id. at 501-02.
66. Professor Fellows shows that what emerges from the UPA as most protected is the relationship between the white husband and the white child. Id. at 532.
67. Id. at 503.
role was reduced to that of biological function. From a feminist standpoint, the preference for the genetic link, rather than that formed by pregnancy and childbirth, is perfectly consistent with a male-centered perspective. In simplistic terms, recognizing or even preferring pregnancy and childbirth as a legally significant basis for establishing parenthood would diminish the power of men as fathers; but preferring the genetic link while devaluing pregnancy and childbirth subordinates women as mothers. The marital presumption cases did not directly devalue pregnancy and childbirth. But they did reduce black women to biological functionaries. These cases erased black woman's status as wife and mother. Motherhood assumes fatherhood. But in these cases, black women merely produced black, not white, children, who could not lay claim to their white fathers.

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The concerns about the welfare of the child and biological indeterminacy have been addressed within the public discourses, at least with respect to surrogacy. First, the UPA, in contradiction to its effect, has the avowed purpose of protecting the welfare of the child. Neither the judicial nor public opinions suggested that the outcomes of the surrogacy cases undermined this purpose. Second, procreative technology use has extended the primacy of genetics as the basis for parenthood, and fatherhood in particular. The match between the legal outcome and public opinion in these cases may reflect the social significance attributed to the genetic connection. The significance of that connection seems "natural." But history shows that the significance attributed to genetic links comes from patriarchy and white supremacy. The naturalness of the relationship at issue depends on the race of the parents, and in particular on the race of the mother. In the marital presumption cases, the father-child relationship seemed unnatural because the marital relationship seemed unnatural; the marital relationship seemed unnatural because the woman married to the white man was African American. In Johnson v. Calvert, the parent (Anna Johnson)-child relationship seemed unnatural—unnatural because the woman who gave birth to the white child was black. One could state the explanations in reverse racial order. That is, one could say that the father-child relationship in the marital presumption cases seemed unnatural because the father was white, or that the parent-child relationship in Johnson v. Calvert seemed unnatural because the

68. See also Rothman, supra note 2, at 40-47 (offering a critique of the law's emphasis on the genetic tie over the experience of nurturing, and the effect of that emphasis in Baby M).
69. Fellows, supra note 60, at 522.
child was white. But the fact that the law secured the status of the fathers so that neither William Stern nor Mark Calvert had to defend their paternity shifted the focus to the identity of the mothers.

The uncertainty raised by the possibilities of reformulating family now may be read more accurately as concern about maintaining the security of paternity, particularly for white fathers. The anxiety about using procreative technology to produce new family structures also may have been a more general concern about maintaining the primacy of the "nuclear" or marriage-based family as the most privileged family structure. That concern also explains why procreative technology as infertility treatment emerged as the primary explanation for its use. As infertility treatment, procreative technology use has become a way of reinscribing the marriage-based family on the middle class.

B. The Technological Reinscription of the Marriage-based Family on the Middle Class

The institutional authority of both medicine and law have been brought to bear on the technological reinscription of the marriage-based family. Within the in/fertility discourses, the normative power of "family" naturalizes the technology, while the excluding power of "family" marks non-marriage-based parent-child relationships as unnatural.

Consider the formal definition of "infertility." It usually states that a couple is infertile if conception has not occurred after one year of unprotected intercourse. The meaning of these words is clear if you read into them dominant assumptions about who should have children. In other words, the definition assumes that the couple is heterosexual. It assumes that they have failed to conceive after a particular type of intercourse—vaginal penetration by the penis, followed by ejaculation. My point about the patriarchal and heterosexist assumptions built into the definition of infertility may seem overwrought. But the effects of the assumptions are real. When we read heterosexuality into the definition of infertility, it becomes impossible for a non-partnered person or lesbian couple to be included among the infertile. Since procreative technology use is primarily understood as infertility treatment, access to the technology usually hinges on the diagnostic power of the definition.

The process of choosing criteria for diagnosis requires designating some experience as more significant than others. That ability to define standards then becomes the power to test. Foucault described the power to test as "normalizing," as that which "introduces the con-
straints of conformity . . . [that] compares, differentiates, hierarchizes, homogenizes, excludes." 70 Here, testing is a means of reinforcing the norms expressed in the test itself. Medicine has used its power to test in ways that reinforce traditional, excluding norms that privilege heterosexual marriage as the basis for family formation. Testing, in this context, is a sign of fitness for parenthood. The contents of the definition deem some not fit for testing nor, by implication, for parenthood.

At fertility clinics, physicians often screen by using fixed social criteria. Marital status, age, and sexual orientation are commonly used to exclude unmarried persons, especially lesbians and gay men, from procreative technology use. 71 Professor Helena Ragone lists these criteria as "extra-program guidelines" for surrogacy programs: "(1) Couples should be asked to provide medical proof of their infertility; (2) Only heterosexual, married couples should be permitted the option of participating in the surrogate mother program; (3) Unmarried heterosexual women or men should not be permitted to engage the services of a surrogate; (4) Lesbians, lesbian couples, gay men, or gay male couples should not be permitted to engage the services of a surrogate." 72 She defines extra-program guidelines as those "primarily designed as a public relations strategy, to protect the industry from potential negative publicity by averting situations that might be perceived as immoral, exploitative, or transgressive." 73 Two obvious points follow from this. First, medicine and the fertility industry is consciously accepting dominant norms about preferred family structures, or at least medicine is consciously reconstructing what it perceives to be acceptable. Second, the guidelines make clear that non-marriage based family formation is understood to be transgressive.

So "infertile" married couples are safely within the boundaries of use. Medical literature, popular culture accounts, and legal scholarship tend to affirm the need to provide such treatment to married couples. 74 In fact, most of the accounts that characterize procreative technology as infertility treatment simply assume that married couples

70. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 183-84 (1979).
71. See Sarah Franklin, Essentialism, Which Essentialism? Some Implications of Reproductive and Genetic Techno-Science, 24 J. HOMOSEXUALITY 27, 31-33 (1993) (illustrating that in England, heterosexual essentialism is preserved by government restricting the use of new technologies to two-parent families consisting of both mother and father, so that which should have resulted in the erosion of heterosexual privilege has, instead, led to its reinforcement).
72. RAGONE, supra note 50, at 16.
73. Id. at 15.
are the patients. In commenting on law professor John Robertson's book, *Children of Choice*, Dr. Howard Jones, a renowned expert on procreative technology, expressly limits his discussion to "those patients who suffer from infertility." In the discussion that follows, it becomes clear that those patients are married women. He recommends that doctors ask, "Why do you want a baby?" He also evaluates the answers he has heard. If the woman does not refer to her spouse, the doctor's comments do. In other words, he supplies the woman's marital status for the reader. He identifies one answer as problematic because the woman spoke as "I." He notes, "[t]he infertility specialist likes to hear 'WE.'" Dr. Jones also chooses one answer as the best one. The woman said, "My husband and I have a very happy marriage, but have been distressed that we have not had a child. I think we will make ideal parents. We hope the problem can be solved." Dr. Jones added, "[n]otice that it is expressed in terms of "we" rather than "I." Dr. Jones' preference for "we" does not express concern about the doctor-patient relationship, but about the marital relationship.

Clinic rules that screen patients based on these social criteria reinforce the conflation of marriage, heterosexuality, and procreation. This, in turn, makes each social category seem like an inherent element of the others—marriage as heterosexual, heterosexuality as procreative, and procreation as marital. The apparent inseparability of these concepts makes the definition of infertility and the procreative technology use as infertility treatment less penetrable to questioning. The reservation of procreative technology for use by heterosexual, married couples to achieve parenthood seems unquestionable and therefore, natural.


76. "Shortly after the birth of the world's first child conceived by IVF, Drs. Howard and Georgeanna Jones of Norfolk, VA, initiated trials of IVF at Eastern Virginia Medical School. . . . After several months of effort, Jones and colleagues were able to announce the birth of the first IVF child in the United States. The Norfolk program continues to provide invaluable leadership in the field, not only in the technical aspects of Assisted Reproductive Technologies, but also in the complicated ethical and social issues. The program established by the Doctors Jones remains one of the largest and most successful in the United States." Luther M. Talbert, *The Assisted Reproductive Technologies: An Historical Overview*, 116 ARCHIVES OF PATHOLOGY & LABORATORY MEDICINE 320, 320 (1992).


78. *Id.* at 226-28.

79. *Id.* at 228.

80. *Id.*
The class and race dimensions of the boundaries of use emerge in the effects of the clinic rules. Current estimates of the mean charges for in vitro fertilization range from $6,233 to $8,000, although one study showed that, in 1992, charges at six centers ranged from $7,000 to $11,000. The cost per delivery may be $44,000 to $211,940. Anyone who uses in vitro fertilization or a comparable method must have substantial credit or lots of cash. For many, the lack of financial means bars access to procreative technology use. In effect, the high cost screens out low income users. Surrogacy users "as a group are upper-middle-income, educated professionals, in their late thirties and early forties. . . . The average combined family income is in excess of $100,000." In addition, the majority of couples who use surrogacy, in vitro fertilization, and other technologies to achieve fertility are white. Procreative technology use has become a racially-specific, class-based method of family formation.

Procreative technology use is little regulated at law. In other words, the law enables physicians and clinic rules to operate freely. So while there has been much public and scholarly discussion about

82. Neumann, supra note 81, at 239-40.
83. Id. at 239; see also John A. Collins et al., An Estimate of the Cost of In Vitro Fertilization Services in the United States in 1995, 64 Fertility & Sterility 538 (1995). A significant amount of the cost accrues because multiple births are more common among procreative technology users. Assisted-reproductive techniques were used in 2 percent of singleton, 35 percent of twin, and 77 percent of higher-order multiple gestation pregnancies. Tamara L. Callahan et al., The Economic Impact of Multiple-Gestation Pregnanacies and the Contribution of Assisted-Reproduction Techniques to Their Incidence, 331 New Eng. J. Med. 244, 247 (1994). Multiple births increase the costs of maternal care and neonatal care. "[T]he total charge per family in 1991 was $9,845 for a 29-year old white mother of a single neonate and her child, as compared with $37,947 for a mother of twins and her two children and $109,765 for a mother of triplets and her three children." Id.
84. RAGONE, supra note 50, at 89-91.
85. Id. at 91.
87. A study of the costs of multiple-gestation pregnancies found that 35 percent of twin and 77 percent of higher-order multiple-gestation pregnancies occurred after procreative technology use, and that "[w]omen with twin and higher-order multiple gestation pregnancies were . . . more likely to be white." Callahan, supra note 83, at 245. See Dorothy E. Roberts, Race and the New Reproduction, 47 Hastings L.J. 935, 937 (1996) (discussing the reasons for the racial disparity between African Americans and white Americans in procreative technology use).
using law to regulate procreative technology use, the standard approach has been to refrain from legal intervention, and in effect, to delegate the regulatory function to medicine. To the extent that legal rules do govern procreative technology use, most rules affirm current medical industry practices.

Most of the existing legal rules govern use through the potential parents, rather than through the medical professional. And the most common types of legal rules provide legal certainty for married couples who use procreative technology. More specifically, the most common types of legal rules provide married couples with certainty about their status as the legal parents and the status of the child as theirs. In addition, the legal rules, like the clinic rules assume that the potential parents are married couples. For example, approximately one-third of the states have adopted the Uniform Parentage Act provisions to determine the status of a child conceived by artificial insemination. The UPA provides that a child born to a married woman by heterologous artificial insemination is the husband's child, if he consented in writing, and if a physician performed the insemination. It further states that the donor in this situation is not the father.

Few states provide rules that create legal certainty for unmarried persons who use artificial insemination. In some states, a sperm donor may establish paternity after the child’s birth by having his name placed on the birth certificate, by declaring paternity, and/or by proving genetic paternity. Only Arkansas, New Hampshire, and Washington allow a sperm donor to declare intent before a child’s birth.

88. Uniform Parentage Act §§ 5(a) & (b), 9B U.L.A. 287, 301-01 (1987). Approximately one quarter of the states have identical language. A few states have substantially similar statutes that use language focusing on the child’s legitimacy, or that declare the child to be the "same as the naturally conceived child of the husband and wife." See, e.g., ALASKA STAT. § 25.20.045 (1994); CONN. GEN. STAT. § 45a-771 (1994); IDAHO CODE § 39-5405 (1995).

89. If a physician does not perform the insemination, the donor may or may not be able to establish paternity. See In re Thomas S. v. Robin Y, 599 N.Y.S.2d 377, 382 (Fam. Ct. 1993), rev’d on appeal, 618 N.Y.S.2d 356 (1994) (denying paternity of sperm donor based on evidence that he lacked intent to claim paternity); C.M. v. C.C., 377 A.2d 821, 824-25 (N.J. Juv. & Dom. Rel. Ct. 1977) (recognizing C.M. as the legal father based on the parties expectations at the time of insemination); Jhordan C. v. Mary K, 244 Cal. Rptr. 530, 533-36 (Ct. App. 1986) (recognizing the sperm donor as the legal father because a physician had not performed the insemination).

only three states clearly enable unmarried couples or nonpartnered men to plan parenthood through insemination without legal risk.

While nearly every state has a statute addressing some aspect of artificial insemination use, fewer states govern at law the less accessible (due to cost and/or the need for medical expertise) types of procreative technology. Only fourteen states and the District of Columbia have enacted statutes addressing surrogacy. Of these jurisdictions, four have enabling legislation. Florida expressly permits gestational surrogacy agreements. The Nevada, New Hampshire, and Virginia statutes permit surrogacy contracts in which the intended parents are married and money is paid to the surrogate only for medical and necessary living expenses for the birth of the child. Only one state, Washington, does not require that the intended parents be married. Arkansas is the one state that expressly provides for the possibility of unmarried men (but not women) using surrogacy to become a parent. The other eight states and the District of Columbia have statutes that prohibit surrogate parenting contracts, declare them unenforceable, or criminalize participation in commercial surrogacy. Only three states have enacted statutes that address the status or use of cryopreserved pre-embryos. The most recent form of law addressing procreative technology use requires insurance companies to cover use of in vitro fertilization, embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, or other technologies as infertility treatment.

91. Fla. Stat. Ann. § 742.15-742.16 (West 1995) ("gestational surrogacy" is defined as "a commissioning couple's eggs or sperm, or both, are mixed in vitro and the resulting preembryo is implanted within another woman's body").
(a) No group policy of accident and health insurance providing coverage for more than 25 employees that provides pregnancy related benefits may be issued, amended, delivered, or renewed in this State . . . unless the policy contains coverage for the diagnosis and treatment of infertility including, but not limited to in vitro fertilization, uterine embryo lavage, embryo transfer, artificial insemination,
of requirement limit coverage to married couples.\textsuperscript{98} Again, the existing legal rules tend to echo existing medical practices, which in turn, operate on assumptions about "transgressive" family formation. The fact that most states do not have legal rules addressing surrogacy leaves doctors and clinics free to exercise the "power to test."

The success of characterizing procreative technology as infertility treatment has marked the discourses of in/fertility in at least two ways. First, the technological imperative has become a family formation imperative—at least for married couples, and perhaps also for single persons who "should be" married (i.e. those presumed to be heterosexual). The focus has shifted from the "unnatural" method of family formation that procreative technology might represent to the unnaturalness of childlessness. Second, because "infertility" has come to mean a treatable, and therefore temporary condition, it stands in opposition to "sterility." Sterility signals permanent inability to have a child. Before the advent of infertility as a treatable condition, sterility referred to physical flaws causing childlessness. Now sterility may have a physical or social source. That is, sterility now includes those whom I call the "dysfertile," those rendered childless by their failure to fit the definition of infertile, because they are unmarried and/or lesbian or gay. Within the discourse, sterility is an abnormal state. Because having children is the natural state, and because the assumption that childlessness is temporary has grown stronger, those who are unmarried or married without children are seen as waiting to have children, even expected to use the technology to achieve parenthood.\textsuperscript{99} Thus the technology imperative has been transformed from a need to see scientific progress into a social imperative for which it is natural to use technology to achieve.

C. High Tech—Low Tech Procreation

Consider the distinction the legal rules make between artificial insemination on the one hand, and on the other, the methods of assisted conception that require more expertise and more money. The different legal treatment correlates with the designation of these technologies as low tech and high tech, respectively. Perhaps the first


\textsuperscript{99} The recent spate of self-help books for those who have decided to not have children evidences the pressure brought to bear on women and opposite-sex couples to become parents.
thing to note is that in other contexts, the low-tech designation has acquired a slightly negative connotation, whereas high-tech is presumptively both more sophisticated and more effective. The distinction may arise from that part of the technology imperative that equates new technology with progress. It also serves the purpose of marking the development of new technology. This works, of course, because we also assume that new tech should be high tech. But what particular significance does the high tech/low tech distinction acquire in the in/fertility discourses?

I start from the pattern drawn by the legal rules. The fact that many more states have regulated artificial insemination probably results, in part, from the fact that it was the method first used on humans, it is the most commonly used method, and it is one of the least controversial methods. So there has been more time and more consensus to enact rules. In addition, artificial insemination by donor sperm creates a paternity question. And, as mentioned, most of the existing statutes address this very concern. Yet, the legal rules addressing artificial insemination express other concerns, as well. As discussed, a majority of the statutes limit the goal of providing certainty regarding the status of the child and paternity to the context of marriage. In addition, most of the statutes require that a physician perform the insemination, despite the fact that insemination is a do-it-yourself technology, either to trigger the status presumptions or to use artificial insemination at all. The physician requirement may increase medical safety. But it also identifies physicians as the official gatekeepers of fertility.  

Maintaining the authority of physicians reinforces the characterization of artificial insemination as medical treatment, and vice versa. Finally, think about how the natural and the technological change shape here. The imperative of family formation abetted by procreative technology as infertility treatment naturalizes the technology use. But the requirement that physicians perform even this simple procedure keeps the technology from becoming too natural. Semen becomes a controlled substance, and hence something artificial and manufactured.

The high tech/low tech distinction may not only arise from the technology imperative, but may also shape it. Some have reported that the publicity given to in vitro fertilization and other high tech

100. Since in vitro fertilization and the other high tech methods of achieving conception and pregnancy require expertise, a legal rule requiring physician participation is unnecessary.
methods have created a demand for those particular methods. The reported successes achieved from the high tech methods may cause some infertile couples to discount the efficacy of the low tech methods. The high tech methods have acquired a life of their own. Of course, that last point contains an internal contradiction. The fact that the high-demand methods are high tech insures that they do not have a life of their own, but that they stay within the control of medicine.

The low tech methods may suffer from being too easy and simple in comparison to the high tech methods. The high tech methods are for the serious problems. The high tech methods, therefore, result in miracles. But the differentiation between high tech and low tech procreation also speaks of who wields the technology, which also speaks of whether that use is socially sanctioned. Those who perform the high tech methods are special. "If you are the messiah for a kind of medical care, you'll have people beating your door down," Dr. Ledger said. Compare the implications of the label used for self-insemination: the turkey baster method. The label is humorous, but also denigrating. It captures the negativity of the low tech designation by implying crudeness. It subjects those who self-inseminate to ridicule.

101. See, e.g., Nancy Wartik, Making Babies: The Boom in the Infertility Business is Raising Hopes, and Increasing Criticism, L.A. TIMES MAG., Mar. 6, 1994, at 18, 43. ("Last fall, the procedure [intracytoplasmic sperm injection or ISCI, a technique to insert a single sperm into an ova's center] won its 15 minutes of fame here, touted in headlines and on 'Donahue' and 'Eye to Eye with Connie Chung,' as the panacea for male infertility. 'In big urban centers, people will call around to clinics asking, "Do you offer it?"' notes Barry Behr, director of the human embryology and andrology lab at Stanford University. 'If you say no, they'll call elsewhere. It's a rat race; you almost have to stay one-up on the program down the road to get business.'").

102. The control exercised by medicine may be over more than the norms of family formation. The recent stories about the low success rates and high costs of procreative technology use have also revealed that profit-motive may induce physicians to recommend high tech treatments when low tech treatments may be effective. "Doctors inside and outside the specialty said that to increase revenue, some unscrupulous clinics push patients toward costly high-tech solutions when they would be just as successful with simpler treatment."

103. Gabriel, supra note 102, at A1. The more serious question raised has been whether the high tech methods do anything at all. In 1989, the Canadian Government assembled a Royal Commission to come up with guidelines and funding recommendations. . . . The commissioners reviewed hundreds of studies from international research on the use of reproductive technologies for infertility problems. Last year, they concluded that only one procedure—standard IVF for treatment of blocked tubes—had been proven in studies to give women a better chance of birth—about 10% per attempt—than no treatment at all.

Wartik, supra note 101, at 21.

Dr. William Ledger is chair of obstetrics and gynecology at Cornell. He oversees Cornell's fertility clinic. Id.
The label reflects how the high tech/low tech distinction draws a line between two groups of procreative technology users. The high tech users are necessarily, by virtue of the clinic and legal rules, infertile married couples. Many of the low tech users do have physicians perform the insemination, are married, and/or are infertile. The prevailing understanding of self-insemination contains not only the knowledge that many who self-inseminate are single women and lesbian couples, but also the judgment that such technology use is outlaw. It is, with snide overtones, the backroom conception.

It is interesting that within the dominant parts of the in/fertility discourses, the term “artificial” insemination is well-accepted. But many marginalized within the discourses—particularly lesbians—object to “artificial” insemination, and prefer “insemination” or “self-insemination.” The objection is based on the point that the semen and the children born after conception by insemination are natural. This suggests that within the dominant discourses, “artificial” serves the purpose of making insemination a technology, a human invention to be controlled by man. The rejection of “artificial” shifts the meaning not only of the method of conception, but also of the place of procreation with respect to women’s lives. “Insemination,” and “self-insemination” in particular, claim the process of conception as well as the fact of conception and the resulting parenthood as natural. This redefinition speaks of self-definition, and conscious effort to create a space for these parent-child relationships as “family.” The discourses of in/fertility, then, are contested from within.

III. Identity Boundaries

Within the discourses of in/fertility, the meanings of human/invention and un/natural change. They do not by themselves determine the boundaries of procreative technology use. Indeed, they seem to have little substance. Instead, human/invention and un/natural are line drawing mechanisms, ways we have of saying that one side is privileged, normative, and central relative to the other. Exploring the moments of unease and the rules that set the boundaries of use tells us which social categories are at stake. More importantly, the moments

104. Ironically, the visibility of these married couples among high tech users and not among low tech users may be due to the success of the low tech methods for infertile couples. Since infertility carries a social stigma, many infertile couples do not reveal that they are being treated for infertility. But since the high tech methods have attracted public attention, so have those who use these methods. Those who use the low tech methods can escape publicity, unless their use steps over the boundaries.
of unease and the medical and legal rules tell us a bit about how and when race, class, sexual orientation, age, and gender may become a point on the line. Now I turn to the particular identities across which the lines are drawn to find out how the boundaries are maintained.

A. High Tech Women

So what really lies at the high tech, low tech point on the line? The identities inscribed with high tech use form the right side of the line. They are, of course, the in/fertile. And for the most part, they are women. As a matter of medical fact, men comprise half of those diagnosed as infertile. But whether it is a man or woman who is infertile, the technology is used on the woman. And it is the woman who is not pregnant. Therefore, as a normative matter, it is the woman who is in/fertile. On the other side of the line the identities inscribed with low tech use are forming. Most who use the low tech methods are infertile couples. But their use is irrelevant to the high tech, low tech distinction. That point of difference serves the purpose of designating some users as deserving of access, and designating some use as illicit. So the line is drawn on the bodies of high tech women and low tech lesbians.

Those on the high tech side have been deemed not only infertile, but also fit for use. They are women because they “should be” mothers. The answers to the questions, who should be the parents and which women should be mothers converge at this point where race (white) and economic privilege meet. On the low tech side of the line, race and class matter less. It is lesbianness that prevents these women from being infertile, and therefore not fit for use. Of course,

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105. For couples diagnosed as infertile, the woman has the physical defect causing infertility 40% of the time, the man is identified as the source of the problem 40% of the time, and no cause is found 20% of the time. JOHN YEH & MOLLY U. YEH, LEGAL ASPECTS OF INFERTILITY 6-7 (1991).

106. For example, intracytoplasmic sperm injection (ICSI) in which the doctor uses a tiny needle to manually insert a single sperm into an ova, is used when the man has a subnormal sperm count, but it is the woman who undergoes the most invasive procedures to achieve pregnancy.

107. See, e.g., Howard W. Jones, Jr. & James P. Toner, The Infertile Couple, 329 NEW ENG. J. MED. 1710 (1993). From the opening paragraph, the authors of The Infertile Couple link infertility with women and treatment with couples. “Since 1988, the problem of infertility has increased in several ways. First, there are more infertile women in the population. . . . Second, a larger proportion of infertile couples now seek treatment.” Id. at 1710. After interviewing couples experiencing infertility, Arthur Greil noted that “both husbands and wives seemed to identify infertility as mainly the wife’s problem.” ARTHUR L. GREIL, NOT YET PREGNANT: INFERTILE COUPLES IN CONTEMPORARY AMERICA 108 (1991).
within the dominant parts of the in/fertility discourses, these women are not quite women. This indicates that at the point of convergence, where "should be" lies, "woman" and "mother" conflate. That is, whiteness, middle class status, and a particular permutation of gendered woman form the right side of the line, while a raceless, classless, denatured woman forms on the other side of the line.

One irony that falls out of the high tech, low tech distinction is that one reading of the words makes the high tech woman more tech than woman, and the low tech lesbian more natural by comparison. Perhaps this reading is imaginable because high tech procreative methods seem to transform the users into both products and producers. These women, after all, are "fit for use," or warranted for motherhood. Or, consider the many accounts of women and men who have tried several cycles of in vitro fertilization or have tried several different technologies despite evidence that the chances of taking home a child decline from approximately 20% to less than 5% over four tries. It is not that those who make multiple attempts to have a child using procreative technology lack reason or agency. But within the in/fertility discourses, some high tech users become not sim-
ply consumers, but self-described gamblers, “addicted” to treatment,\textsuperscript{111} caught by the chance of that big win—a take home baby.\textsuperscript{112} Those for whom the high tech methods have failed are caught in a no-win situation. They are damned if they do try again—because of the expense, the low odds, the emotional and physical tolls. They are damned if they don’t—because they are then no longer infertile, but sterile.

I am intrigued by the gambling metaphor used by the infertile and their doctors not because I think infertile women are self-deluded addicts, nor because I think they should not use the technology. But the gambling metaphor seems to me to be an uncannily, and perhaps unconsciously, accurate description of the way procreative technology has been purveyed. Many fertility clinics post their odds or advertise their success rates,\textsuperscript{113} just as Las Vegas Casinos do. So while the gambling metaphors focus attention on the “gamblers,” the infertile women, they also reveal something about the character of the business side of procreative technology use. It is the character of the business that indicates that “infertility treatment” may offer a partial description at best, or a misnomer at worst, of procreative technology use by those deemed infertile.\textsuperscript{114} “In/fertility industry” captures those aspects of procreative technology use that reproduces in/fertility for profit and other gains.\textsuperscript{115}

\textsuperscript{111} “You almost feel like you’ve got a bug for gambling. You say, ‘What else is there to try, what else have you got?’” Begley, supra note 41, at 47 (quoting Valerie Hendy). “I won’t ask for more than two tries. But you go in every time thinking, this is the time it’s going to work.” Wartik, supra note 101, at 20 (quoting John Taylor). Both Taylor and his spouse, Leslie Taylor, have undergone corrective surgery and tried fertility drugs. In addition, Leslie Taylor has undergone intra-uterine insemination twice and in vitro fertilization twice. The method John Taylor referred to in his comment involves injecting sperm directly into an egg. The text of the article comments, “[t]his could be the Taylors’ winning ticket in the baby lottery.” Id.

\textsuperscript{112} Since the industry’s use of pregnancy rates has been criticized as misleading, because those rates do not take spontaneous abortions, ectopic pregnancies, and still-births into account, clinics have began advertising birth rates as “take home baby rates.” Wartik, supra note 101, at 21.

\textsuperscript{113} For a discussion of infertility clinics as an industry, and the industry’s use of advertising, see Gabriel, supra note 102, at A1.

\textsuperscript{114} Among the recent events indicating that profit sometimes supersedes treatment goals, consider the following. In 1995, a dozen scientists left the Cornell fertility clinic laboratory after complaining that the high volume of patients had resulted in an overcrowded lab and unsafe conditions for the in vitro embryos. Id. The Federal Trade Commission has obtained cease-and-desist orders against several clinics for advertising inflated success rates. Begley, supra note 41, at 40.

\textsuperscript{115} Patricia Spallone has argued that “reproductive researchers use women’s bodies as the ‘raw materials’ of scientific inquiry,” or as experimental subjects for the pursuit of scientific knowledge rather than treatment. Spallone, supra note 2, at 84.
There is another sense in which the technology inscribes itself on those deemed in/fertile in a way that speaks of production. In an essay that examines "the identity and difference between the work that people do and the work that machines do," Alexandra Chasin refers to the Marxist tradition of distinguishing between productive labor and reproductive labor:\(^{116}\)

Where the former is invested in commodities whose distribution and sales profit the owner of the means of production, the latter supports and maintains the activities of production. Reproductive labor conditions the support and maintenance of cultural and technical systems... as well as the uninterrupted control of production, whether by owner, state, or most likely, some combination of the two.\(^{117}\)

Within the in/fertility discourses, the work that infertile women perform to become procreative maintains the cultural significance of motherhood and its use as a means of social control.\(^{118}\) The sacrifices infertile women make to become mothers is taken as proof that they should be mothers and that motherhood is important. Comments made by women using procreative technology indicate that for them, motherhood has personal emotional and social significance. But the emotional and social consequences are read as evidence that maternity is inherent, natural, and desirable for women. That is, a woman's particular hopes and needs are translated into cultural artifact—motherhood—that has symbolic meaning and results in practices that support production.

Motherhood as a cultural system simultaneously reproduces an understanding of women as inherently and inevitably responsible for domestic labor, both physical and moral, and it preserves the assumption that reproductive labor is predominantly feminine while productive labor is predominantly masculine in nature. Motherhood describes women as mothers whether or not they have babies. The ultimate irony is that within the in/fertility discourses, it is women who give birth, but it is men who perform the productive labor. Procreative technology use has provided opportunity to extend largely patriarchal significations of pregnancy and birth. While many women choose procreative technology use over adoption so that they may experience pregnancy and childbirth, pregnancy is also read as evidence

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\(^{116}\) Chasin, Class and Its Close Relations, in POSTHUMAN BODIES, supra note 2, at 77.

\(^{117}\) Id. at 77-78.

\(^{118}\) See Carol Sanger, M is for the Many Things, 1 S. CAL. REV. OF L. & WOMEN'S STUDIES 15, 31-39, 51-55 (1992) (revealing "maternal essentialism," the belief that the true "whatness" of women is motherhood, and how maternal essentialism shapes our understanding of infertile women).
that “daddy planted a seed.” In addition, procreative technology use further segregates and devalues the significance of pregnancy and birth from the genetic link. So the desire of women who want to experience childbirth and pregnancy is trivialized compared to the goal of using the ova and sperm of the married couple.

If women as mothers perform reproductive labor, they are probably service workers. Service is “a kind of labor that is immediately consumed or exhausted. That is, it cannot be stored, accumulated, or saved. Service is exhausted in its performance.” On a simpler level of analysis, mothers serve, and they do it with pleasure. Certainly, this willingness is implied, if not expressed, in the stories and images of infertile women. This description of motherhood places infertile women in a lower class position than the economic status of the infertile would indicate. Middle class women as mothers are simultaneously servants and employers. It is the middle class woman who can and does hire other women to do household labor, thus delegating part of her role as woman and transferring her gender subordination by virtue of her race and class privilege. Yet it is the infertile middle class woman who uses procreative technology to affirm her place as a mother and service worker.

119. Rothman, supra note 2, at 40-47.

120. Roberts, supra note 87, at 937.

121. Part of the reason that egg donation may be causing less unease than I expected is that a formal notion of gender equality has been used to say that egg donation is like sperm donation. Yet the lack of unease about use of sperm donation has been premised, in part, on the acceptability of the image of sperm as seeds. This image, in turn, traces back to the use of stigmas on pregnancy as a means of sexual control over women. If an unwed woman became pregnant, the pregnancy is stigmatized as evidence that the woman had sex. The seed image operates here to minimize the significance of the man’s participation. At the same time, pregnancy is treated as evidence of male virility. So what stigmatizes the woman also valorizes the man. Again, the seed image operates here. It is natural, as is the uncontrollability of man’s (hetero)sexuality. The importance attributed to the genetic link follows from this history. What follows from the genetic link—the child’s resemblance to the father—evidences the man’s sexual strength and his sexual control over the woman. Infertility raises questions about the man’s virility. The response is to shift the emphasis from the means of conception to the components of conception—the genetic components. The primacy given to the genetic contribution allows men the continued right to hoist the flag over procreation.

122. Chasin, in POSTHUMAN BODIES, supra note 2, at 78.


B. The In/fertile

The last part of the discussion suggests that another point on the line is bounded by the identities of infertile women as white, middle class women and those who receive the transfer of subordination. I am not referring to women who are actually hired as domestic labor, but to women characterized as only fit for low status labor by virtue of their race and class. Just as class (middle), race (white), and marital status (married) qualify infertile women as those who should be mothers, class (low income), race (nonwhite), and marital status (single) mark the women on the other side of the line as not fit for motherhood. Their apparent fertility makes them “too fertile.” So infertile women can use procreative technology to fulfill their natural role as mothers, while avoiding the most stigmatized and oppressive work of women by hiring others. Poor women of color are deemed destined for low status labor, while their work as mothers is stigmatized.

I can identify infertile women and too fertile women as groups because there were already stories and images attached to these identities. The groups were pre-constructed. The stories and images seem to explain the predicament of women read through these identities. And the explanations implicitly ascribe causal power to race, gender, and class.

Upon reviewing the texts—medical, legal, and media news—that I have used to trace the in/fertility discourses, I find that there are two types of descriptors for in/fertile women. There are vital statistics indicating that in/fertile women who seek treatment are over thirty; as one result of the Industrial Revolution, “the home was no longer seen as the site of ‘work,’ and paid ‘housework’ was regarded by employers as low status, even stigmatized work, or not real work at all.” Historically and currently, women of color have actually performed domestic work and have been representative of domestic workers. During and after slavery, African American women formed a large part of the domestic labor force. In the latter part of the 20th century, Asian American women and Latinas, many of them immigrants, have become a disproportionate part of this sector. Chasin, in Posthuman Bodies, supra note 2, at 81.

125. As one result of the Industrial Revolution, “the home was no longer seen as the site of ‘work,’ and paid ‘housework’ was regarded by employers as low status, even stigmatized work, or not real work at all.” Sanjek & Colen, I: Orientations, in At Work in Homes, supra note 124, at 4. Historically and currently, women of color have actually performed domestic work and have been representative of domestic workers. During and after slavery, African American women formed a large part of the domestic labor force. In the latter part of the 20th century, Asian American women and Latinas, many of them immigrants, have become a disproportionate part of this sector. Chasin, in Posthuman Bodies, supra note 2, at 81.

126. For an analysis of how “the dominant family ecology entails an ideal-worker husband supported by a flow of domestic services from his wife,” which for high-status families means hiring other people to do other domestic work, see Joan Williams, Is Coverture Dead? Beyond a New Theory of Alimony, 82 Geo. L.J. 2227, 2236-42 (1994).

127. In the statutes, the only descriptors are gender and marital status. In the cases, a little about class status emerges as well. But race is not expressly mentioned, even in the surrogacy cases discussed.

128. The mean age for female patients at one center was 33.1 years and 31.8 years at the second center. The average male ages at the two centers were 35.7 and 34.5. Corson, supra note 109, at 645.
and as discussed, in/fertile women are typically white, middle class, and married. The other type of descriptor provides explanations, which then become inextricably linked with the vital statistics. Both the medical and media accounts of procreative technology use refer to the frustration, despair and hope that the infertile experience during the diagnosis and treatment process. These descriptions call for empathy with the infertile. The accounts also refer, usually subtly, to negative views of infertile women held by the public. More specifically, the negative views seem to say that because infertile women are economically privileged, they do not need support or sympathy. These views tend to be described as a response to the demand for legislation requiring insurance coverage of procreative technology use. So one explanatory story links infertile women with class. But what is the rest of the story?

A medical journal article stated, "[p]art of the resistance to paying for a lot of these treatments is the thought that all these women are just upper middle-class women who have a lot of money and they delay childbearing to have a career." A newspaper article quoted a psychotherapist who counsels infertile women: "Part of the myth that really gets me is this idea that women have just kind of postponed pregnancy because of their careers." In other words, the message in the story about infertile women is that they put career before marriage and motherhood. Social historian, Margarete Sandelowski, has traced the tendency within the in/fertility discourse, to conflate voluntary and involuntary infertility and "to suggest that infertile women who seek to achieve motherhood may not really want it." When you think about the opposition within the explanatory story for infertility, the attribution of volition becomes clear. The story sets up selfishness in opposition to motherhood. Motherhood is about

129. See, e.g., Jones & Toner, supra note 107, at 1710 ("When those who desire children find their efforts unsuccessful, frustration, despair, and helplessness are common and debilitating consequences."); Felicia R. Lee, Infertile Couples Forge Ties Within Society of Their Own, N.Y. Times, Jan. 9, 1996, at A1 (describing formation of support groups by and for infertile couples).

130. See, e.g., Rubin, supra note 32, at N1 ("[M]edical knowledge is offset by the more disturbing aspects of turning a baby into a commodity. 'To invest so much time, money, emotions into having a child is troubling behavior,' said Mahowald. 'It's saying, "This is something I want so much that I must have it at all costs."').

131. See, e.g., Collins, supra note 81, at 1163.


selflessness, not only on behalf of children, but also on behalf of society. The explanatory story privileges a particularly domestic, essentialized notion of selflessness and devalues achievements that threaten this image of social order. The story offers a moral about women who have too much control and operates as a response to the feminist call for women's liberation.

The same theme about the price of control runs through a slightly different explanatory story. This story is premised on one assumed and one accepted medical fact. The assumed fact is that contraceptive use by women can cause infertility. The accepted fact is that sexually transmitted disease may result in blocked fallopian tubes or other problems causing infertility. This story is about the liberated woman who sought not only sexual freedom but also freedom from the consequences of her deviant sexuality. The message here is that infertility is the price women must pay for sexual freedom and reproductive control. Remember that by virtue of their race and class, infertile women are the women who should be mothers. The fact that these women have tried to have children reinforces the assumption that the "should be" women are naturally mothers. The explanatory story, particularly when coupled with the prevalence of accounts about successful procreative technology use, becomes a vindication of motherhood as the primary role for women. In these stories, the infertile were always mothers; they were the only ones who did not realize that. It was their exercise of choice and control that denatured them. And it is the use of technology that can restore them to nature.

134. For a discussion tracing the selfless mother to the race and class-based ideology of the late-nineteenth/early twentieth century privileged, see Ikemoto, supra note 15, at 1210-19.

135. While a high percentage of those women who have sought treatment for infertility have used the pill or any contraceptive method, infertile women have been less likely to have used the pill, IUD, or other methods than fecund women. Marilyn B. Hirsch & William D. Mosher, Characteristics of Infertile Women in the United States and Their Use of Infertility Services, 47 FERTILITY & STERILITY 618, 621-22 (1987).

136. Women diagnosed as infertile were more likely than fecund women to have been treated for pelvic inflammatory disease which is typically attributable to sexually transmitted disease. Id. at 621. One study has shown that physicians are more likely to misdiagnose endometriosis as pelvic inflammatory disease in black women than in white women. Donald L. Chatman, Endometriosis in the Black Woman, 125 AMER. J. OBSTET. & GYNECOL. 987, 987-88 (1976). This suggests that physicians are imposing race-based assumptions about sexual activity and promiscuity in the diagnosis process.

137. Sandelowski, supra note 133, at 36. Following the in/fertility discourse back in time, Naomi Pfeffer locates this morality tale in the late-nineteenth century. "Sterility...denoted a barren mind and body." PFEFFER, supra note 10, at 34.
C. The Too Fertile

While the problem of infertility has been labelled a medical problem, and read as the result of a problematic social trend, the problem of the too fertile has been clearly labelled first and foremost as a social problem. So law and media texts, not medical texts provide the explanatory stories and images, even though, to some extent, the problem has been medicalized. Here, I rely on the records of recent senate and house debates about "welfare reform" and on news media accounts.

It is interesting that in the media coverage of those moments of conflict discussed above, several reports drew direct comparisons between the granny moms and the too fertile. Consider this comment:

What has the woman [the 59 year old British woman who had twins] done that merits such ethical concern and public criticism? She isn’t an unmarried, 15-year-old high school dropout whose unplanned baby will put her on welfare, perhaps for decades. She isn’t 21 and having her fourth baby by four men, none of whom will actively father their children.

She hasn’t been using crack or other illegal drugs during pregnancy, condemning her unborn infant to neurological problems of unpredictable severity. She’s not passing along the AIDS virus or forcing fetal alcohol syndrome on her child by her drinking. She’s not risking her baby’s health by skipping prenatal care. Her twins aren’t the unintended and unwanted consequences of careless sex.

The problems ascribed to the too fertile become the standard against which troubling technology use gets measured. In this comparison, the too fertile are simultaneously a problem of nature and of inappropriate intervention. When read within the broader discourse about deviantly fertile women, the too fertile woman’s race and class emerge as natural explanations for her hyper-sexuality and promiscuity. On the other hand, in the context of the debate about welfare


139. Joan Beck, There are Far Worse Things a Parent Can Be Than Old, CHI. TRIB., Jan. 2, 1994, at C3. See also Steve Sternberg, Twins’ Birth to Woman, 59, Raises Whole New Set of Difficult Questions, ATL. CONST., Dec. 30, 1993, at A4 ("'There's a lot of concern that a child born to a 59-year-old woman will face a set of problems that a child born to a woman of 25 wouldn't face, including the early loss of parents,' Nelson [medical ethicist at the Hastings Center] says. 'But you could tell a similar story about a child born in deprived circumstances, say a ghetto,' he says. 'The difference is that poor women don't have any problems getting pregnant, while a 59-year-old will only get pregnant if you use all sorts of high-tech bells and whistles.'").
reform, the woman's dependency and lack of education result from misguided government intervention.

This comment, like recent political debates, combines a series of stories about deviant fertility that have emerged over the years. The identity stories about unwed pregnancy and motherhood consistently have been framed as calls for social control over women. But the crux of the problem and the explanations have changed over time and varied according to race and class.

It is probably obvious that sexual activity and pregnancy among the never married are what make fertility in these stories deviant. But it is the details of how these stories were told, and the similarities and differences that emerge in the stories now being told that reveal shifts in societal stress points and how gender, race, and class have changed to accommodate these shifts. In addition, tracing the stories as they evolved over time shows that particular gender-race-class confluences appear continuously and in such a way that the identity strands of gender, race, and class have become melded and cannot be traced separately.

Both Regina Kunzel and Rickie Solinger have tracked the central importance of race in the constructs of unmarried mothers to the 1940s.140 Unwed motherhood has been recognized as a major social problem at least two times since then—the late 1970s, and now. During both times, race has continued to shape our understanding of the problem. What triggered public attention on unwed motherhood in each instance was the sudden realization that white middle class women constituted a significant group of unwed mothers. In other words, the assumption that unwed pregnancy and motherhood is a problem of black women and poor white women has been persistent. The fact that middle class white women become pregnant and bear children out of wedlock then comes as a surprise. That fact, in turn, seems to prove that the problem is out of control, that the race and class barriers have been breached.

During the World War II period, pregnancy by white middle class women came to light and challenged the prevailing assumption that unwed pregnancy was a problem of the lower classes that occurred

because of lower moral standards inherent in those classes. Those who managed unwed pregnancy, social workers, responded by providing a new explanation for pregnancy among white middle class women. "The increasing presence of middle-class girls and women in maternity homes and social agencies led social workers to reevaluate the causes behind out-of-wedlock childbearing in an attempt to remove them from the larger category of 'sex delinquency.'" From the World War II period, pregnancy among unmarried white women has been explained as individual pathology. At the same time, pregnancy among unmarried African American women has been attributed to sociological pathology. So, black women who bore children before marriage were in need of control and punishment. And white middle class pregnant women were in need of treatment. The parallels between these explanatory stories and those used now are telling. Then and now, the race of women of color is used to characterize out-of-wedlock childbearing as evidence of inherent character weaknesses. And then and now, deviance among white, middle class women is characterized as individual, medical, and treatable.

In the 1970s, the issue was framed as one of pregnancy, rather than childbearing. So, in the 1940s, much of the problem-solving focused on the use of adoption, whereas in the 1970s, the problem-solving focused on preventing pregnancy. Pregnancy may have been the issue because the group of white middle class women at issue were adolescents. In the 1970s, the problem was specifically identified as one of "teenage pregnancy." In other words, the youth of the women highlighted the inappropriateness of their sexual activity. In fact,

141. Kunzel, supra note 140, at 146.
142. Id. at 147.
143. Id. at 147-152 (describing how social workers adopted psychiatrists diagnoses of illegitimacy as a neurotic symptom, "a purposeful, albeit unconscious act").
144. Id. at 157-59. See also Solinger, supra note 140, at 26-27.
145. Solinger, supra note 140, at 24-25. One result of the race-based explanations for out-of-wedlock pregnancy is that white women were encouraged, and even coerced into giving their children up for adoption. The hope was that these women could then start over, get married, and have children within marriage. Black women were encouraged to keep their children. Ursula Gallagher of the United States Children's Bureau stated, "[i]n some courts it is almost impossible for a Negro unmarried mother to give up her baby for adoption. The general interpretation of this is that courts believe the girl should be made to support her children and should be punished by keeping them." Id. at 26-27.
146. Nathanson, supra note 138, at 56.
147. Id. at 4 ("Pregnancy makes sex visible; it converts private behavior into public behavior. Adolescent pregnancy is the curiously enigmatic label adopted by late twentieth-century Americans to signal and demand attention to a centuries-old problem: the departure of single young women from age- and gender-based norms of sexual propriety.").
the population report that triggered the public’s attention described two significant social changes—the rate of marriage among teenagers had decreased, and the percentage of sexually active teenagers had increased. But the public focused on the second change as the problematic one.

The response to the problem of unwed motherhood was shaped by the pro-choice and liberal ideology. The goal was to educate teenagers about the consequences of sexual activity. The promotion of sex education was strongly linked to the way the problem had been framed—as one of white, middle class suburban kids. The identity of the audience made the education goal seem plausible. The solution assumed that the teenagers could be educated and could learn to use birth control under medical supervision. But during this same time period, the problem of unwed motherhood among African American women was tied to the cycle of dependency perpetuated by welfare. So in the 1970s, unwed pregnancy among whites was again characterized as treatable. Unwed pregnancy among African Americans was identified as social pathology. In addition, the welfare mother image emerged to embody the combination of dependency, over-fertility, and Blackness that caused the pathology.

The current debate about deviant fertility emerged in the late 1980s. But the key moments have occurred in the 1990s. Newspapers published articles about out-of-wedlock pregnancy and childbearing at a higher rate during three moments of this decade. First, then-Vice President Dan Quayle, in May 1992, made use of a story line in Murphy Brown, a popular television sitcom, to emphasize his conclusion that a “poverty of values” caused the mass street violence that took place in Los Angeles that year. In the story line, the main character, a single, white, professional woman, became pregnant and had a

148. The report appeared in an Alan Guttmacher Institute publication, Family Planning Perspectives. A 1976 special issue on “Teenagers USA” contained these facts. For a discussion of media and political attention given to these publications, see NATHANSON, supra note 138, at 46-50.

149. NATHANSON, supra note 138, at 186.

150. Quayle made this speech on May 19, 1992 to the Commonwealth Club in San Francisco, California. The unrest in Los Angeles occurred on April 29 through May 2, 1992. Quayle stated, “It doesn’t help matters when prime-time TV has Murphy Brown—a character who supposedly epitomizes today’s intelligent, highly paid professional woman mocking the importance of fathers by bearing a child alone and call it just another lifestyle choice.” Douglas Jehl, Quayle Links Riots to Family Breakdown, TV, SACRAMENTO BEE, May 20, 1992, at A1.
Second, a June 1994 Census Bureau report showed that the most significant rate of increase in out-of-wedlock pregnancy occurred among white, college-educated women over 20 years of age. In fact, the report proved that most unwed mothers are white.152 Third, President Clinton and house and senate republicans placed unwed motherhood centrally in their plans for social reform. The centrality of this issue emerged most clearly after the Fall 1994 elections resulted in Republican control of both the house and senate, and the resulting push for an agenda called the Contract with America.

The current debate combines elements of earlier stories, so that the comment made in support of granny moms is not atypical. In other words, one image operating in the in/fertility discourse is that of the teenaged, substance-abusing, welfare-dependent, pre-natal care shirking, disease-ridden woman who has several damaged and ill children each sired by a different man. However, the most visible and stigmatized identities in the discourse are those of women of color who live in poverty. The problem is so strongly linked with race and welfare that the traits of the all-in-one unwed mother are also strongly linked with race and welfare.153 This has two effects. It simplifies—it shifts attention away from substance-addiction, prenatal care, contraceptive distribution, and AIDS prevention to the women themselves. In addition, the conflation of unwed motherhood among poor women of color with every other visible social ill makes unwed motherhood among white women seem less problematic.

The stories about white, college educated women over twenty bearing children out of wedlock, like the granny mom stories, provide a point of comparison that proves welfare motherhood as the worst case scenario. For example, in an interview following the speech in which he referenced “Murphy Brown,” Quayle distinguished the Murphy Brown character as a non-typical unwed mother. “I think especially in her position, a highly successful professional woman, this

151. For a more extensive treatment of this moment, see Rebecca Walkowitz, Reproducing Reality: Murphy Brown and Illegitimate Politics, in MEDIA SPECTACLES 40 (Marjorie Garber et al. eds., 1993).
153. “By blaming these women for their own poverty and, indeed, for the economic ills of the entire nation, attention is diverted from the injustice of the racial and gendered labor market and from the ‘savage inequalities’ increasingly characterizing U.S. society.” Leith Mullings, Households Headed by Women: The Politics of Race, Class, and Gender, in CONCEIVING THE NEW WORLD ORDER, supra note 2, at 131.
would be a real exception to have an unwed child, a big exception."154 Whether or not Quayle used professional status as a proxy for race, others clearly identified the distinguishing factor as race. "But on a more fundamental level, the sophisticated professional woman played by Candice Bergen bears almost no resemblance to most real-life unmarried mothers... In real life, the highest percentages of unmarried mothers are found among African Americans and Hispanics."155 Within the in/fertility discourses, lack of economic privilege or professional status signals race.

Both the stories about unwed white mothers and about unwed mothers of color contain messages about selfishness. But the selfishness of unwed white women in these stories is more like that of infertile women than of unwed mothers of color. The statistics indicate that many of the unwed white women bearing children are teenagers. But within the in/fertility discourses, the white women made visible are the college-educated, over 20 years of age. And their fertility is understood in a way that conflates voluntary and involuntary fertility.156 In other words, these women, like infertile women, have too much will. In this case, women are exercising too much control by not waiting for marriage before having children, whereas infertile women waited too long for marriage and children. For the unwed white mother, society, rather than the woman, has to pay the price.157 The price it pays is moral decay. That's the result of her selfishness.

By comparison, women of color who bear children out of wedlock are selfish not from having too much will but from a failure of volition. The failure seems to be inherent in their lives. Welfare dependency of the 1990s parallels the social pathology explanation of the 1940s. Language and concepts from recent political debates over wel-


155. Barbara DaFoe Whitehead, Here She Is, America: Your New Ideal Mother, SEATTLE TIMES, May 22, 1992, at A11. After the Census Bureau report came out, the same writer acknowledged that "[t]he biggest rate of increase in unwed childbearing has come among women who probably have the greatest control over their fertility: college-educated women." Then she attributed the high rates of adolescent pregnancy to the behavior of older women. "One of the class responsibilities of adults is to set an example for children. An example has been set." Barbara DaFoe Whitehead, At Risk Teens Just Following Adult Example, HOUSTON CHRON., Sept. 5, 1995, at 33.

156. Whitehead, At Risk Teens Just Following Adult Example, Houston CHRON., supra note 155.

157. See Illegitimacy in Fashion, the Stigma of Unwed Motherhood Wanes, But the Costs to Mother, Child and Society Do Not, DAILY NEWS of L.A., July 15, 1993, at N18. Also note that the commentary refers to illegitimacy in terms reminiscent of the 1970s “epidemic.” Here, the phrase is “a plague was spreading.” Id.
fare and budget reform speak of how government has enabled personal failure. More specifically, the emphasis on "personal responsibility" and "self-sufficiency," and on the need to teach values and encourage independence with a tough-love approach expresses the assumption that AFDC recipients only lack the necessary will. This characterizes the fertility among women of color who live in poverty, as something like a disease, and in the process denies that any such woman has agency.

The volitional failure in this discourse is contradictory. Within this contradiction, women who need welfare cannot win. Public response to a 1995 event illustrates this point. A pregnant woman saved three of her children from their burning home. She gave birth by Cesarean section four days later, and then died from her injuries. The San Francisco newspapers that published accounts of her self-sacrifice "received a flood of letters and calls condemning her for having five children while on welfare." Within the discourse, an act that could be called the ultimate act of selfless motherhood is redescribed as one necessitated only by her own irresponsibility.

The debates also assume that unwed mothers can choose, but choose wrongly. Accounts of black grandmothers who self-sacrifice to care for the children of their drug-addicted daughters are used to illustrate this error. In these stories, the self-sacrifice of grandmothers necessitated by their daughters' failure is also the payment these grandmothers must make for having been poor, black and fertile themselves. The theme of punishment, articulated in the 1940s, reoccurs here.

158. See, e.g., 141 Cong. Rec. H3352 (daily ed. Mar. 21, 1995) (statement of Mr. Archer) ("The current welfare system destroys families and undermines the work ethic. It traps people in a hopeless cycle of dependency. . . . Virtually every section of the bill requires more personal responsibility. . . . This bill will reverse the decades-long Federal policy of rewarding unacceptable and self-destructive behavior."). See also Martha A. Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J. 274, 277-89 (exposing how poverty reform discourse links poverty with lack of a work ethic, and single motherhood with social pathology).


160. See, e.g., 141 Cong. Rec. S13562 (daily ed. Sept. 14, 1995) (statement of Mr. Faircloth) ("The young teenager giving birth out of wedlock is simply repeating the pattern and model which her mother laid down."). In this statement, the young teenager is not recognized as having a say-so. The failure or bad choice was made by her mother or grandmother.

161. See, e.g., Laurie Petrie, Grandmother's Hand Rocks the Cradle, Cincinnati Post, Nov. 15, 1993, at 5A.
The significance of marital status becomes apparent in the stories that first characterize the too fertile as the reproducers of social ills, and then identify the decline of marriage and/or fatherlessness as the cause of that phenomenon. The public debate has resurrected the term "illegitimacy." This shifts the focus from pregnancy back to childbearing. That shift then allows room to call for marriage and fatherhood as solutions to all that ails us. Often, the public debate uses fatherlessness interchangeably with unmarried status. One theme in the public debate seems new—that unwed childbearing and fatherlessness are now accepted as normal. Earlier debates may have expressed fear that the marriage and two-parent family norms were weakening. But the fear now is that those norms are gone.

The aspect of the story that shifts attention to marriage and fatherhood comments both on unwed mothers of color and on white unwed mothers. So one overarching theme has begun to emerge. And it is one that places the male presence in the family front and

162. For example, recent welfare proposals have contained requirements to have unwed mothers identify the father of their children before receiving benefits, or to get married. Newspaper editorials promoting marriage and the importance of fathers appeared frequently in 1995 and 1996. See, e.g., Andrea Neal, *Decline of Marriage in America*, INDIANAPOLIS STAR, May 18, 1995, at A10 ("society has passively accepted the decline of marriage and turned its attention to fixing the effects: teen-age pregnancies, absent fathers, neglected children, violent youths"); Lynn Smith, *How Do Fathers Nurture*, News & Observer (RALEIGH, N.C.), Mar. 21, 1995, at E1 ("Although many researchers think the influence of the father has been denigrated in the past, they criticize as too simple the recent claims of father advocates who have painted fathers as the saviors of a society riven by crime, poverty, unwed childbearing and violence.").

163. See, e.g., 141 CONG. REC. H3449 (daily ed. Mar. 22, 1995) (Speaker pro tempore Mr. Oxley, introducing the bill: "Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the further consideration of the bill (H.R. 4) to restore the American family, reduce illegitimacy, control welfare spending and reduce welfare dependence."). In the Senate, Mr. Faircloth was largely responsible for the emphasis on illegitimacy. For example, in supporting an amendment sponsored by Senator Dole to H.R. 4, Mr. Faircloth repeatedly used the term, "multigenerational illegitimacy." He stated, "If you vote against this amendment, you are voting to subsidize and promote multigenerational illegitimacy." 141 CONG. REC. S13562 (daily ed., Sept. 14, 1995).

164. See Ellen Willis, *Say It Loud: Out of Wedlock and Proud*, NEWSDAY, Feb. 11, 1994, at 70 ("To be sure, the image Bennett and Wehner mean to invoke when they call unwed childbearing the 'road to economic poverty and social decay' is not white, middle class or coupled.").

center. At this point, the medical and legal rules for procreative technology use, the identity stories of high tech women, the too fertile, and the infertile converge. They each contain a message about the primacy of institutions—marriage and fatherhood—that insist on a male presence. They each use race and class, in a variety of ways, to naturalize the male presence and denaturalize women in family structures not centered on the male. So within the in/fertility discourses, marriage and the presence of prospective fathers naturalize infertile women who use procreative technology. The absence of marriage and fathers denatures unwed motherhood. White unwed mothers—presumed to be over twenty, educated, and mothers by choice—evidence the extent of moral decay. But unwed mothers are perceived to be the cause of that decay. Unwed mothers of color are measured in terms of cost and data. This signifies that the harm they represent is concrete and significant.

D. The Dysfertile

Stories about procreative technology use by lesbians and gay men exists largely in the extreme margins of the in/fertility discourses.\textsuperscript{166} As discussed, procreative technology use is little regulated at law, and most of the legal rules reinforce marriage and opposite sex parenting. They barely suggest that others might use the technology, or that there might be other family structures. The medical rules also tend to premise technology use on marriage. While some clinic rules permit access to single women, the written medical texts simply do not address procreative technology use by lesbians and gay men. There are a few mainstream media news and popular culture accounts of gay and lesbian procreation. But only a few. So, within the dominant parts of the in/fertility discourses, lesbians and gay men are virtually invisible. One can infer their presence by reading the other parts of the in/fertility discourses through dominant gay and lesbian identity constructs.

Procreation and parenthood are so strongly associated with heterosexuality and marriage that procreation and lesbians and parenthood and gay men seem disassociated. I used the pairings, pro-

creation—lesbian and parenthood—gay men, intentionally. I believe that for women, procreation is mediated largely by the presence of the masculine, and that for men, parenthood is mediated largely by the feminine.

For infertile women, it is marriage and the presence of potential fathers, in part, that qualify them as women, and as women who should be mothers. For too fertile women, it is sexual activity while not married and mothering in the absence of fathers that stigmatize unwed motherhood. So heterosexuality, marital status and procreation are either positively or negatively, but apparently inherently, linked. The independence from men in lesbian sexuality and social intimacy de-links lesbian identity from procreation. Remember that within the in/fertility discourses, woman's work as mother is reproductive labor, and that man performs the productive work. In other words, pregnancy and childbearing have been segregated and trivialized compared to the power attributed to the male seed. So lesbian sexuality denies women access to the seed, and therefore denies them access to the power to procreate.

Anthropologist Ellen Lewin has observed, "[l]esbians, after all, were assumed to be creatures defined by their sexual appetites and thus were seen to be at odds with the kind of selfless devotion expected of mothers."167 Motherhood defines women who should be or are mothers as nonsexual. The fact that procreative technology use separates sexuality from procreation may have seemed not unnatural because white, middle class women—those who should be mothers—use the technology. They were already defined as nonsexual and simply reproductive. So even when lesbians identify themselves as mothers, they may remain invisible, simply because lesbian identity as reflected in the dominant parts of the discourse stands in opposition to, not within, motherhood.168

The invisibility of gay men in the in/fertility discourse may be more acute than that of lesbians. Even though the male seed is understood to be the source of procreative power, male procreation depends on the biological capacity of women to carry and give birth to the child. So it is at least possible to imagine a lesbian woman as pregnant, giving birth, and therefore becoming a mother. But it seems difficult, at best, to imagine how a gay man would have a child. His

168. Id.
sexual orientation simultaneously makes sexual intimacy with men and women seem unnatural.

Perhaps more important is that social fatherhood depends on motherhood. It may be that existing stories about unwed fathers disrupt our ability to perceive gay men as fathers. Unwed fathers to children of unwed mothers are marked by their absence from the family structure. Active parenthood outside of marriage, then, seems unlikely. In addition, the ability of men to achieve stability in intimate relationships is also understood to be contingent on the presence of women. Masculinity is partly about the uncontrolled sexual drive of men that inhibits their ability to form stable relationships until they choose or commit to do so. In marriage, men "settle down." Stories about gay men often emphasize their promiscuity. The implication is that two gay men in a relationship are potentially more unstable than men in heterosexual relationships. So the formation of a marriage-like relationship in which to raise a child appears inconsistent with gay male identity. Finally, motherhood attributes qualities we deem necessary to parenting to women. Fatherhood has largely been about balancing the emotional aspects of mothering with authority. But because gay male identity has been feminized, gay men are caught between the twin assumptions that they lack the stability and nurturing capacity to mother and the authority to father children.

Even while I write about the invisibility of lesbians and gay men in the in/fertility discourses, I am conscious of the fact that lesbians and gay men do use procreative technologies to become parents. Despite their extreme marginalization within the in/fertility discourses, both lesbians and gay men are procreative and forming parent-child relationships through technology use. In fact, one can find references to a "lesbian baby boom." So, perhaps it is more accurate to say that lesbians and gay men are becoming parents largely independent of the medical establishment. The question this raises

169. The parenting books, cited supra at note 166, typically discuss alternative insemination as the method available for women and surrogacy as the method available for men.

170. See, e.g., Marilyn Kalfus et al., High-Tech Fertility: Laws & Ethics Lag, ORANGE Cty. REGISTER, June 5, 1995, at A1 ("There is a lesbian-mother boom," said Barbara Raboy, director of the Sperm Bank of California in Berkeley, a nonprofit clinic that has seen at least 40 lesbian clients become pregnant in the past six months."); Janis Ian, Heather Has Two Mommies, THE ADVOCATE, May 14, 1996, at 63 ("I am drowning in the lesbian baby boom, everyone I know is having one, inundating me with diaper talk and deep decisions.").

171. This may go a long way in accounting for the lack of visibility. Medicine has had primary control over both procreative technology use and the discourse about its use. See RAYMOND, supra note 2, at 108-37 (discussing the collaboration of science and media in
is how do these technology uses and these relationships disrupt domi-
nant concepts used to define procreation and family, and what follows
from the disruption.

Consider lesbians who bear and raise children. The fact that wo-
men bear and raise children outside of marriage at least suggests that
marriage-based family is not the only model. The labels used for
these families send the message that the marriage-based family is nor-
mal, and other family structures are not. “Family” is used to refer to a
marriage-based family structure. “Single-parent household” is used to
distinguish the mother-child based family structure from “family.”
Similarly, “single mother” is distinguished from “mother.” The labels,
“single-parent household” and “single mother” contain assumptions
about how this family structure came to be—by divorce or unintended
unwed pregnancy. “Single-parent household” implies a broken fam-
ily, with the rupture occurring either before or after marriage, but al-
ways with reference to marriage. Intentional unwed pregnancy and
childrearing does not quite fit the assumptions behind “single-parent
household.” The family formation denies the implication of fracture.

Intentional pregnancy and childrearing by lesbians who use do-
nor, alternative, or self-insemination challenge the normative content
of “family” more directly. When a heterosexual woman, particu-
larly the college-educated white woman over twenty years old who
represents the recent increase in unwed mothers, chooses to become a
single mother, we can still read the possibility of marriage and “nor-
malcy” into her future. Or we can provide explanations for her devi-
ant fertility that refer to marriage—she just couldn’t find the right
man. In other words, this single mother’s identity is still made contin-
gent on a male presence. But we cannot read a male presence into the
lesbian woman who chooses to become a mother. With or without a
woman partner, this family structure asserts itself as intact and defies
the reference to marriage and the necessity of a male presence. Lesbi-
the marketing of new reproductive technologies); DOROTHY NELKIN, SELLING SCIENCE:
HOW THE PRESS COVERS SCIENCE AND TECHNOLOGY 173-74 (1987) (characterizing the
relationship between scientists and the media as a promotional model). Use occurring
independent of medicine is likely to go unnoticed.

172. Insemination appears to be the most commonly used technology. Some have
pointed out that other, high tech methods would enable a lesbian couple to share the bi-
ological connections of procreation. “[T]he technology of cross-uterine egg transplants,
although highly regulated economically, finally allows a lesbian to give birth to another
lesbian’s child, a fact that to date has gone entirely unmentioned by either the medical
community or the media.” Cathy Griggers, Lesbian Bodies in the Age of (Post)mechanical
Reproduction, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 178,
ans who decide to have children challenge the use of "motherhood" to maintain a particular set of gender relationships. The practice also claims entitlement to the credentials of womanhood that have been conflated with motherhood. So pushing the boundaries of motherhood may move it away from marriage. And it may naturalize lesbians as women.

Consider the links between women and procreative technology. Procreative technology use, within the dominant parts of the discourses, reproduces motherhood as a cultural system that maintains social control of women, essentializes woman with respect to her capacity to bear children, and devalues maternal labor. The technology is also used in ways that reinforces the inscription of gender roles on biological function, and further, to segment those parts and roles so that both body and identity become component parts. Lesbians who use the technologies lay claim to identity parts denied them in the dominant discourse—womanhood and motherhood—by manipulating the splintering effect of the technologies. The result, lesbian motherhood, may be both transgressive and assimilated. The transgressive use of technology, in turn, flips the human/invention distinction on its head. Lesbian use of the technology inscribes lesbian identity on the technology—hence, low tech lesbians who use insemination, not artificial insemination, to create family. What this suggests is that the liminal position within the discourses may be manipulated for self-definition.

173. Lewin, On the Outside Looking In, in CONCEIVING THE NEW WORLD ORDER, supra note 2, at 117.
174. Id. at 116.
175. Griggers, supra note 172, at 182.
176. There may be a risk that procreative technology use by lesbians may be read in ways that reinscribe existing boundaries. For example, lesbians who have children may be recognized as "women," but at the cost of holding the woman-line against lesbians who are not mothers. See Lewin, On the Outside Looking In, in CONCEIVING THE NEW WORLD ORDER, supra note 2, at 115. See also Shelley A.M. Gavigan, A Parent(ly) Knot: Can Heather Have Two Mommies?, in LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 102, 108 (Didi Herman & Carl Stychin eds., 1995) (arguing that in the context of custody cases between lesbians, the language of assimilation versus anti-assimilation proves inapt).
177. It also counters the usual practice of technology, which makes "deviant subjects" of lesbians, gay men, people of color, women, and poor people. For an analysis of how science makes deviant subjects of lesbians and gay men, see Jennifer Terry, The Seductive Power of Science in the Making of Deviant Subjectivity, in POSTHUMAN BODIES, supra note 2, at 135.
178. For a more extensive discussion of the multiplicity of lesbian identities and the de-essentializing effects of the multiplicity, see Griggers, supra note 172, at 183-84.
IV. Boundary Rules and Liminal Identities

Tracing the pattern of connections in the in/fertility discourses leads me to note that some identities and positions within the discourses are more contingent than others. They are more liminal, with fewer fixed points. They are able to shift more easily as a result. This liminality has at least two possible uses. The first is suggested by the multiple images attached to white, middle class women. These stories and images do two things. They merge the technological imperative, the default to science, with the ideology of family. And they act as wedges to maintain boundaries against women of color, particularly poor women, and lesbians. The second is suggested by the splintering of inscribed lesbian identity when lesbians become mothers through procreative technologies. The splintering indicates that the essentializing concepts within womanhood can be subverted. We can use liminality as a prism to break up and recompose our identities.

Think about the moments in which the positions of white, middle class women were saved from being too problematic by comparison to others. The unnaturalness of high tech women seems natural when contrasted with procreative technology use by lesbians. The age of postmenopausal women who seek to have children becomes a virtue relative to the harms unwed teenage mothers will wreak on their children. Also think about the situations in which white, middle class women become inbetweens. Infertile women as women who should be mothers are positioned as service workers relative to men, whose labor is productive given their power over procreation. On the other hand, infertile women have the ability to transfer the most oppressive labor by employing true service laborers—domestic workers. Or the college-educated, over-twenty unwed mothers—their sexual activity and fertility out of wedlock makes them deviant. But they are distinguishable from the real unwed mothers—poor, women of color. The natural-by-comparison and the inbetweenness of these identities makes them liminal or fluid and contingent, even while particular points—white, middle class, and woman—remain fixed.

A. Boundary Rules

The contingencies depend on the norms under question. In the natural-by-comparison examples, questions about whether the technology should be used are diverted to the conclusion that these women should be mothers, and the dominant norms are reinforced by pointing to their opposites. The high tech, low tech comparison, privileges the technology itself by strengthening the association between
the technology and the particular use of perpetuating marriage-based family. The granny mom, unwed teenage mother comparison makes the technologically-formed family more desirable than the sociologically-formed family because of the traits—money, marriage, and whiteness—that gave the 59 year old woman technology access in the first place. So, money and the ideology of marriage-based family become both the means and the justifications for the technology use.

I believe that we should be able to ask the question that keeps disappearing from the discourse—whether the technology should be used. To sustain a dialogue about that question, we need to unwrap the ideology of family from the technology. Exposing the pattern of connections is just one step. So I cannot, by myself, say what the boundaries of use should be. I doubt that we should or could ban all procreative technology use. The desire for children and family is real, as is the pain caused by inability to create those relationships. On the other hand, we can question the ideology of family. The family formation imperative aimed at the white middle class has the effect of perpetuating heteropatriarchy and race and class-based eugenic goals. And, as discussed, the privileging of marriage-based family over others contributes to the strategy of shifting attention away from the structural problems that cause poverty and corrode the significance of life and law, to the individual choices of those who live with these problems. In other words, the question we may need to ask is, how should the technology be used. This would change our understanding of who should have access.

As we address the question of whether and how technology should be used, we should take seriously the concerns pushed aside by the drives for money and family. There are health concerns that we might currently recognize as concrete and significant. But there are other concerns that we usually dismiss too easily as lacking in concreteness—the erasures of woman’s body, mind, and future that occurs in practices like egg donation and the testimony of those, like Anna Johnson, who have been harmed. I am, in short, pushing for an approach that will probably result in bans on some practices, and limitations placed on others. But I am pushing for an approach—addressing the question and doing so in a way that acknowledges the patterns of connections in the discourses—not particular end results.

179. See RAYMOND, supra note 2, at 114 (commenting on how the accounts of surrogacy omit the numbers and testimony of dissatisfied customers and unhappy surrogates, and observing how the impact of available testimony is minimized by characterizing the dissatisfied and unhappy as isolated cases).
B. Wedges and Prisms

When white, middle class women are described as inbetweens, the contradictions in their identities have the primary effect of perpetuating the unprivileged status of the other, rather than undermining their relative privilege. The Murphy Browns may feel the effects of social condemnation. But they are also used to locate the real harm behind the race and class lines. As wedges, the liminality of white middle class women uphold as well as hold down. Their whiteness and middle class status work to privilege these women. But their gender, and in particular, their position as women who should be mothers, has the effect of maintaining white male privilege. This happens largely by inscribing these women in marriage-based families, which require the presence and authority of white men.

Lesbian mothers, and probably gay fathers, also occupy contradictory and potentially manipulable positions in the discourses. Tracing the connections disrupted by lesbian procreative technology use indicates that women can reposition themselves in ways that undermine essentializing concepts in womanhood and motherhood. This seems to occur by using the contradictions to fracture rather than to compare identity constructs. "Lesbian mother" is a hybrid identity constructed from two categories "normally" understood as mutually exclusive. The fact that some lesbians may achieve recognition as mothers, and therefore as women, does not fix things. To some extent, it may harden other lines, such as the exclusion of lesbians without children from womanhood. But hopefully, the existence and recognition of lesbian mothers brings the essentializing aspects of woman and mother closer to the light, and implies that multiplicity is just as possible as exclusivity.

Alexander Doty has defined "queerness" as "a quality related to any expression that can be marked as contra-, non-, or anti-straight."\footnote{180. ALEXANDER DOTY, MAKING THINGS PERFECTLY QUEER: INTERPRETING MASS CULTURE xv (1993).} He is not advocating simply taking an oppositional standpoint—that would reinforce the existing boundaries. He suggests, instead, the potential of creating contradiction, of using liminality as a standpoint position\footnote{181. See also Lisa Lowe, Heterogeneity, Hybridity, Multiplicity: Harking Asian American Differences, 1 DIASPORA 24 (1991).} to enable self-definition. Technology use may enhance our opportunities for creating contradiction because it so easily shifts the line between human and invention. Procreative technology use has made the separation of biological from social function and
the rearrangement of the biological-social correlations seem more concrete. So lesbians and others may pick and choose the component parts in defining their lives.\textsuperscript{182}

The question then arises, how do we create liminality for those in positions apparently fixed by the fusion of race, gender, and class—the too fertile women of color. It may be that Doty's work on interpreting mass culture to undermine the apparent inevitability of straight or white or middle class or male content of culture offers one approach. There must certainly be other ways to subvert identities drawn on us. This type of work cannot depend entirely on those whose imposed identities fix them in the margins to first gain access or power. Those less marginalized can collaborate with those in the far margins to subvert the boundaries that hold them there. But that, in turn, will require those of us who can collaborate from a position of relative privilege to recognize and resist those moments when we might become wedges.

\textbf{Conclusion}

In tracing the pattern of connections that first emerge in these moments of unease, to the medical and legal rules that express the official boundaries of use, to the implicit boundaries formed by the identity constructs of the in/fertile, the too fertile, and the dysfertile, I have said much about procreative technology use. But while I began thinking about procreative technology use, that is not where I ended. The dynamics of discourse that I have observed are in some ways particular to in/fertility. But I believe the possibilities suggested by using liminality as a wedge or a prism exist beyond in/fertility.

\textsuperscript{182} I am not necessarily advocating more procreative technology use. Rather I use this example to illustrate the point about the positive potential of liminality.