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Social Factoring the Numbers with Assisted Reproduction

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Social Factoring the Numbers With Assisted Reproduction

Bridget J. Crawford and Lolita Buckner Inniss*

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ABSTRACT

In late winter 2009 the airwaves came alive with stories about Nadya Suleman, the California mother who gave birth to octuplets conceived via assisted reproductive technology. Nadya Suleman and her octuplets are the vehicles through which Americans express their anxiety about race, class and gender. Expressions of concern for the health of children, the mother's well-being, the future of reproductive medicine or the financial drain on taxpayers barely conceal deep impulses towards racism, sexism and classism. It is true that the public has had a longstanding fascination with multiple births and with large families. This is evidenced by a long history of media attention and film depictions of such families, both fictitious and real. However, there is a point at which fascination turns to disdain, and that occurs all too often when the time that parents of the children are revealed to be Other—outside of racial and class norms. This essay describes eight socio-legal anxieties that coalesce in response to Suleman's story: (1) race and racial hierarchies; (2) the contingency of white privilege; (3) the nature of white motherhood; (4) the role of doctors as agents of the state; (5) reproductive technology and class; (6) bodily perfection and class markers; (7) the bounds of the traditional family; and (8) geographical differences.

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The bounds of tolerance strain and break when individual autonomy collides with majoritarian notions of civic and moral virtue. Derision of Suleman reveals the limitations of tolerance for women who deviate from prescribed norms, including norms of "choice." Suleman's story is not just about multiple births, then, but about society's multiple anxieties when a woman breaches the bounds of racial, class and gender expectations.

INTRODUCTION

In late winter 2009 the airwaves came alive with stories about Nadya Suleman, the California woman who gave birth to octuplets conceived via assisted reproductive technology. In doing so, Suleman breached numerous mainstream social norms of motherhood. Perhaps first and foremost, she went well beyond the two-child home that has become the standard for middle class-dom. It is as if there were a Familial Least Common Denominator rule applicable to middle class parenting. You take the mother, put her in the numerator and put the number of kids in the denominator and you win points based on how close the resulting fraction is to one. For the wealthy and socially well-placed, extra children may be subtracted out in direct proportion to the parents' wealth. This is fuzzy math for sure, but in any case, Nadya Suleman got the math wrong. Her eight babies were, moreover, in addition to six that she already had at home.

It is true that the public has had a longstanding fascination with multiple births and with large families. This is evidenced by a long history of media attention and film depictions of such families, both fictitious and real. However, there is a point at which fascination turns to disdain, and that occurs all too often when the time that parents of the children are revealed to be Other—outside of racial and class norms. Nadya Suleman and her octuplets[1] are the vehicles through which Americans express their anxiety about

[1] For one of the earliest news stories reporting the octuplets' births, *see* Jeff Gottleib & Sam Quinones, *It's Sibling Revelry as Bonus Baby Makes Eight*, L.A. TIMES (Jan. 27, 2009); *On the Record With Greta Van Susteren* (Fox Television broadcast Jan. 26, 2009) ("It looks like it's going to be a full house for one family

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race, class and gender. The nation's id[2] may be sublimated by an ego[3] of "concern" – for the health of eight helpless children, for the children's rights to live productive, healthy lives,[4] for the taxpayer-funded programs that may be "burdened" with expenses for the children with special needs,[5] for the safety of reproductive medicine[6] or for the mental and physical health of the children's mother.[7] But these expressions of concern barely conceal the collective id's worst impulses towards racism, sexism and classism. Nadya Suleman's treatment by the press and public reminds us that, despite proliferating notions

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in California. An unidentified mother has given birth to octuplets. Yes, that is eight babies--six boys, two girls. All of the babies are in stable condition. This is only the second time in recorded history a women has delivered octuplets.").

[2] *See* SIGMUND FREUD, THE EGO AND THE ID (1923) *reprinted in* COMPLETE PSYCHOANALYTIC WORKS (James Strachey ed., W. W. Norton, 1974). For the application of Freudian concepts to law generally and to the explanation of racial discrimination in law, *see e.g.,* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[3] Shari Roan & Jeff Gottlieb, *Octuplet Births Raise Questions*, L.A. TIMES (Jan. 28, 2009).

[4] *See, e.g., Hospital Says Octuplets Are Off Ventilators*, ASSOCIATED PRESS (Jan. 29, 2009). Some public discussion has centered on whether children born in situations of grave physical or mental illness have a right not to come into existence at all, or, having been born, whether they have a cause of action against doctors or even their parents. *See e.g.* Maxwell S. Kennerly, posting of "Can the Octuplets Sue for Medical Malpractice?" Posting to Litigation and Trial: The Tales and Tribulations of a Philadelphia Lawyer blog (February 4, 2009), http://www.litigationandtrial.com/2009/02/articles/litigation/ideas/can-the-octuplets-sue-for-medical-malpractice-part-1-of-2/. Such claims, termed "wrongful life", typically occur in cases of physician negligence which causes birth defects, though it is perhaps noteworthy that the first such cases to use the term referred to claims made by healthy children born under the stigma of illegitimacy. *See, e.g.,* Zepeda v. Zepeda, 40 Ill. App. 2d 240 (1963). Few jurisdictions recognize wrongful life claims. *See* Jose Gabilindo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 19 n.69 (2008), citing Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 329 (2004). Nonetheless, the potential of such claims by the Suleman octuplets raises a host of moral and legal issues including the specter of eugenics (see infra notes_ and accompanying text) and varying and rapidly changing standards of "normality." *See e.g.,* Lori B. Andrews and Michelle Hibbert, *Can Disability Itself Be Viewed as a Legal Wrong*? 318, 318-323 *in* AMERICANS WITH DISABILITIES (Anita Silver ed., 2000)

[5] *See, e.g.,* Kimi Yoshino & Jessica Garrison, *Octuplets Care Could End Up Costing Taxpayers Millions*, L.A. TIMES (Feb. 11, 2009) at 1; NPR *Day to Day: Doctors Should Do More to Avoid Octuplets* (Nat'l Pub. Radio broadcast, Jan. 29, 2009) ("You're going to have millions of dollars spent keeping these babies in the neonatal ICU. It's either going to show up in your insurance premium, or it's going to show up in the Medicaid budget of the state. I don't know too many families who can afford this.") (statement of Arthur Caplan, Director of the Center for Bioethics at the University of Pennsylvania).

[6] *See, e.g., NPR Day to Day: Doctors Should Do More to Avoid Octuplets* (Nat'l Pub. Radio broadcast, Jan. 29, 2009).

[7] *Good Morning America* (ABC television broadcast, Jan. 28 (2009) ("How many babies could one woman's body hold"?).

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of shared social and ethical values in the Obama era,[8] the bounds of tolerance strain and break when individual autonomy collides with majoritarian notions of civic and moral virtue.[9] In an ostensibly equality-oriented society, Nadya Suleman embodies the Other and serves as a focal point for multiple cultural anxieties about several social factors: (1) race and racial hierarchies; (2) the contingency of white privilege; (3) the nature of white motherhood; (4) the role of doctors as agents of the state; (5) reproductive technology and class; (6) bodily perfection and class markers; (7) the bounds of the traditional family; and (8) geographical differences.

I. RACE-ING NADYA SULEMAN: BLACK, WHITE, AND/OR OTHER

As commentators and internet denizens reacted to the octuplets' births ("How could this happen?"),[10] the world imbued Nadya Suleman with racial characteristics.[11]

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[8] Barack H. Obama, Inaugural Address (Jan. 20, 2009), available at 2009 WL 135031 *1 (White House) ("On this day, we gather because we have chosen hope over fear, unity of purpose over conflict and discord. On this day, we come to proclaim an end to the petty grievances and false promises, the recriminations and worn-out dogmas that for far too long have strangled our politics . . . . The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness.").

[9] For a discussion of women's roles in inculcating children as future citizens, see LINDA K. KERBER, *The Republican Mother: Women and the Enlightenment - An American Perspective*, *in* TOWARD AN INTELLECTUAL HISTORY OF WOMEN: ESSAYS BY LINDA K. KERBER 41 (1987).

[10] *See, e.g.*, posting of "Resident from MA" to The Dish Rag (L.A. Times) blog, http://latimesblogs.latimes.com/thedishrag/2009/02/octo-mom-nadya.html (Feb. 10, 2009, 16:29 PST) ("How could this happen? How did she slip under the wire, avoid the money issues, use this money for implanting embryos when CA will have pay for years. Were there no social workers or investigations done? She has used state money for lip enhancement, etc."); posting of sonja leppert to Lipstick Politix by PollyPartisan blog, http://pollypartisan.wordpress.com/2009/02/06/octuplets-mom-wanted-millions-of-babies-to-compensate-for-growing-up-an-only-child/#comment-61 (Mar. 9, 2009 at 22:59 EST ("I do not know how it can be done but i think these kids the 8 should never go into her home they should be passed out to 4 families that can take care of them but to be fair how could this happen? They do not need to be put on display but how will this ever happen they are an oddity and will be all their lives. this Mom is nuts I heard her when the older one walked away the 911 call. I can not imagine 8 all beginniing to walk at once I praY to God for their saftey and the saftey of the sibs.")

[11] *Octuplets' Mum Has Already Got 6 Kids*, SUN (U.K), Jan. 29, 2009 ("The mum who gave birth to octuplets already has six kids, including twins…The identity of the mum, believed to be Hispanic, is being kept secret."); *Today Show* (NBC television broadcast Jan. 30, 2009) ("NBC News has confirmed that she

Reporters searched public records, claiming to uncover important information. Years prior, Suleman had petitioned a court for a name change;[12] she had divorced a man named Gutierrez[13] (as if these combined facts -- a name change plus a prior marriage to a man with a Latino-sounding surname[14] -- might explain why a woman who already had six children could want or love eight more).[15] Latinas have large families, right? She *must be Latina*. When Gutierrez distanced himself from his former wife,[16] then *she must be black*, according to the internet whispers,[17] as if *blackness* could explain how or why anyone would have fourteen children. As if to confirm her blackness, we then learned that even before the birth of the octuplets on January 26, 2009, Suleman had been receiving food stamps for three of her existing six children who suffer from developmental disorders or disabilities.[18] Food stamps are *proof*, to some, of blackness.[19]

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already has six other children living at home with her and her parents. That revelation is making some fertility experts question the mother's choice to carry a multiple pregnancy.")

[12] Dan Childs et al., *Octuplets Mom: Can She Afford to Raise 14 Kids?*, ABC News (Feb. 2, 2009) (reporting Suleman's 2001 name change request from "Nadya Doud" (her father's surname) to "Nadya Suleman" (her mother's surname) and her 2008 divorce from Marcos Gutierrez), http://abcnews.go.com/Health/WomensHealth/story?id=6774471&page=1.

[13] *Id.*

[14] *See, e.g.*, Kenny Darter, *Unmarried nonwhite woman's crapload of babies not considered "little gifts from God,"* posting at Hate On Me blog, http://hateonme.com/2009/02/07/unmarried-nonwhite-womans-crapload-of-babies-not-considered-little-gifts-from-god/ ("Suleman, whose mother is Hispanic and whose father is Arab, goes and has eight kids all at once. People freak. Someone asks me, "What color is she?" Unsure how to respond, I tell him she's Hispanic. He nods his head in disapproval and makes a tisk, tisk sound"). *See also* posting of KeKe to *Is Nadya Suleman Racially Confused?* Yahoo! Answers, http://answers.yahoo.com/question/index?qid=20090224224004AA0wrXG ("she looks ALOT like Angelina.. regardless she is very attractive.. i find arabs could never look as attractive as her unless they have black in them.. i think she definitly [sic] has black in her or latino/hispanic blood").

[15] Thomas Watkins, *Octuplets' Mom Has 6 Other Children*, ASSOCIATED PRESS (Jan. 30, 2009).

[16] *Octuplets Mom: Can She Afford to Raise 14 Kids? supra* note 12.

[17] See, e.g., posting of "oh no you didn't," *Is Nadya Suleman black because if she is she is making all black people look bad?* Yahoo! Answers discussion forum.

[18] Suleman's publicist told the press that Suleman receives $490 each month in food stamps; three of her six older children also receive supplemental disability payments, msnbc.com, Feb. 10, 2009 20:59 a.m. EST, http://www.msnbc.msn.com/id/29110391/Octuplet's Mom on Food Stamps, Publicist Says. Interviewed for that television broadcast, Dr. Arthur Caplan, Director of the Center for Bioethics at the University of Pennsylvania said:

A. Anxiety #1: The Specter of Blackness

Both popular and purportedly scholarly accounts vilify black people, and especially black women, for poor parenting.[20] Indeed, ineffective motherhood is often portrayed as the principal province of black women,[21] the source of myriad social ills,[22] and a contagion that moves from black women to larger society as more women of other

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> If this woman has six kids at home, she's go three disabled kids, which we now know she does. She's on food stamps, doesn't have any help, doesn't even own her own home, it's absolutely appropriate both to ask about social circumstances and the psychological circumstances.
>
> When I look at her, I wind up thinking to myself, this woman has a lot of psychological problems. I can't believe that she would make it in as a patient to get one more baby, much less take the risk and wind up having eight more babies.

Id.

[19] Then there was the unusualness of the children's names: Maliyah, Noah, Jonah, Isaiah, Nariyah, Jeremiah, Makai, and Josiah. Jill Smolowe, *The Challenge of Her Life*, PEOPLE MAGAZINE at 70 (Feb. 23, 2009). Because of their "unique names" the children were marked as racially ambiguous. Unique names are those which are not commonly used in European or any other regional or national tradition of naming, or names which have no clear or direct etymological link to any known word in any language (invented names), or highly unusual variations in spelling of common names. MICHAEL ERIC DYSON, IS BILL COSBY RIGHT? OR HAS THE BLACK MIDDLE CLASS LOST IT'S MIND? 129-130 (2006). There is a high correlation between unique first names and African ancestry in the United States. This is seen in a study of children's names registered in Illinois in 1989. T wenty-eight percent of black girls and 16 percent of black boys were given unique names. By contrast, 5 percent of white girls and 3 percent of white boys were given unique names. Stanley Lieberson & Kelly Mikelson, *Distinctive African American Names: An Experimental, Historical, and Linguistic Analysis of Innovation*, 60 AM. SOCIOL. REV. 928, 930 (1995). The incidence of unique naming among African Americans is even higher in recent years. *See also* Roland G. Fryer, Jr., Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767 (2004).

[20] For a discussion of this vilification, *see*, e.g., PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF ENGAGEMENT (1991); DOROTHY A. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

[21] Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994) (discussing historic devalution and disregard for black mothering).

[22] Senator Daniel Patrick Moynihan infamously said, "[T]he Negro community has been forced into a matriarchal structure which, because it is to [sic] out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women as well." Daniel Patrick Moynihan, The Negro Family: The Case for National Action, U.S. Dep't of Labor (Mar. 1965), available at http:// www.dol.gov/asp/programs/history/webid-meynihan.htm, *in* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 128 (1994). *See also* Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 75 (reporting Supreme Court Justice Clarence Thomas's statement during his Senate confirmation hearing that his sister receives government assistance and "gets mad when the mailman is late with the welfare check. That's how dependent she is.").

races "fall prey" to the ills afflicting black mothers.[23] Nadya Suleman thus became the newest evidence to which conservatives could point: "See, here's another lazy (black) welfare queen having (too many) children."[24] The birth of the octuplets was not a media "miracle," or a cause for celebration (would the reaction have been awe instead of horror if Suleman been white?). Rather Suleman and her octuplets might strain the already-burdened (with too many of "those") public fisc.

When Suleman was revealed as *not* Latina and *not* African-American but "white" (read: *white* in America), the search was on to explain Suleman's appearance. "Octuplets Mother Nadya Suleman Angelina Jolie Look-Alike," bleated one entertainment website.[25] "The Octuplets' Mom Obsessed With Angelina," alleged *Life & Style Weekly*.[26] Suddenly Suleman was a stalker, a mentally unbalanced, star-struck, fan-mail-sending weirdo.[27] Her mental state, not her race, became an "explanation" for having

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[23] Black women are frequently portrayed as "bad mothers" all too often owing to their status as sole parents. *See e.g.* Laurel Parker West, *Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care,* Emory University MARIAL Center Working Paper 16, 2002, *available at* http://www.marial.emory.edu/pdfs/wp016_02.pdf.

[24] Scholars have discussed the way in which legislative and policy norms meant to control public spending have had as their stated and unstated objectives the reduction of family size among women of color. These objectives have been effectuated via various means, from forced sterilization and coerced birth control implants to "family caps" on welfare payments. *See* Melynda G. Broomfield, *Controlling the Reproductive Rights of Impoverished Women: Is This the Way to "Reform" Welfare?,* 16 B.C. THIRD WORLD L.J. 217, 227-235 (1996); Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & LAW 15, 21-24 (1994).

[25] *Octuplets [sic] Mother Nadya Suleman Angelina Jolie Look Alike*, posting by "Castina," popcrunch blog, Feb. 6, 2009, *available at* http://www.popcrunch.com/octuplets-mother-nadya-suleman-angelina-jolie-look-alike/.

[26] LIFE & STYLE WKLY, Feb. 11, 2009, at 1, *available at* http://www.lifeandstylemag.com/2009/02/large-908-cover.html.

[27] The tabloid National Enquirer claimed that Ms. Jolie was "'totally creeped out' by look-alike wanna-be Octo-Mom"! *Angie Octo-Mom War*, NAT'L ENQUIRIER, Feb. 12, 2009, *available at* http://www.nationalenquirer.com/angelina_jolie_octomom_nadya_suleman_creepy_stalker/celebrity/66201#. The Chicago Sun Times reported that a "source close to Jolie" said that Suleman had "made attempts has made attempts to reach out to the actress -- sending her admiring letters and extolling her talent and humanitarian efforts on behalf of children's issues around the world." Bill Zwecker, *Octuplets' Mom "Creepy," Woman Who Tries to Look Like Julie Said to Irritate Actress*, CHI. SUN-TIMES at 22 (Feb. 12,

fourteen children. Suleman (then read as *white*) was accused of having plastic surgeries to make herself resemble Jolie, a white celebrity known for full lips and dark hair, characteristics commonly associated with African-Americans. Suleman thus became the abnormal white woman (read as black) imitating a white woman famous for "black" aspects of her appearance. Suleman was engaged in a bizarre, reverse racial passing[28] in which an often-mocked black physical attribute - big lips - is re-appropriated (having been appropriated first by Jolie and other famous whites) to become a measure of white beauty.[29]

Dig further and we learned that Suleman's father is a Middle Eastern immigrant;[30] her mother is Western European.[31] Suleman may have read culturally as white, then, but she is not *all white*, or *not really white*, again as if her ethnic heritage could explain her

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2009). Suleman denied these allegations. *Octomom Denies Obsession With Jolie, Says It's 'All Lies,'* CHI. SUN-TIMES 19 (Feb. 18, 2009).

[28] *See, e.g.* JAMES WELDON JOHNSON, AUTOBIOGRAPHY OF AN EX-COLOURED MAN (1927). *See generally* Valerie Smith*, Reading the Intersection of Race and Gender Narratives of Passing*, DIACRITICS 24.2-3, Summer/Fall 1994, at 43 and KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); *See also* Lolita Buckner Inniss, *A 'Ho New World, Raced and Gendered Insult as Ersatz Carnival and the Corruption of Freedom of Expression Norms*, 32 NYU REV. OF L. & SOC. CHANGE ___(forthcoming 2009).

[29] YANICK ST. JEAN & JOE R. FEAGIN, DOUBLE BURDEN: BLACK WOMEN AND EVERYDAY RACISM 13 (1998). The authors write that the systematic devaluation of black female beauty is often done in the midst of behavioral and attitudinal inconsistencies on the part of whites, allowing white women to seek dark skin via tanning and full lips via chemical injections, physical attributes for which black women are devalued. *Id*.

[30] Suleman describes herself as "half Arabic, half Lithuanian." Kimi Yoshino et al., *Before the Octuplets*, L.A. TIMES at 1 (Feb. 6, 2009), reporting on Suleman interview with Ann Curry, Today Show, NBC broadcast, Feb. 6 2009. One news story claimed that Suleman's father, Ed Doud, is "a Palestinian immigrant to hails from Jerusalem." David Finnegan & Jeremy Olshan, *Whoa, Momma!!! Octuplets Lady Has 6 Other Kids & All Live with Grandfolks*, N.Y. POST at 5, Jan. 31, 2009. Another reported that Suleman was "the daughter of an Iraqi linguist and a mother from Lithuanian stock who worked as a teacher." Philip Sherwell & Caroline Hedley, *Nadya Suleman Faces a Backlash over her Increasingly Peculiar Approach to Motherhood*, SUNDAY TELEGRAPH (U.K.) at 17 (Feb. 8, 2009). Anonymous internet posters asserted a variety of other ethnic combinations. See Posting by "AnonymousJC," usmagazine.com, Feb. 18, 2009, 17:47 EST ("For the record, Nadya Suleman is ½ Urkranian and ½ Iraqi, making her ethnically 100% Caucasion [sic]").

[31] Kimi Yoshino et al., *supra* note 30.

decision to have fourteen children. Suleman suddenly is rendered brown again, a backwards "Other" who should go back to "her" country[32] where (veiled) women are not "liberated" enough to have control over their own bodies and (terrorist) men are the national enemies of any red-blooded American. Finally, we have an explanation that sticks: she's really one of *them,* or at least, *she's not one of us*. Suleman is only *contingently white*.[33]

B. Anxiety #2: Of "Chicken Doo-Doo" Whites: Contingent Whiteness and Racial Hierarchy

In the film *Paper Moon*,[34] the character Imogene (played by actress P.J. Johnson) is the fourteen-year old black maid of the sexually promiscuous exotic dancer Miss Trixie Delight (played by actress Madeline Kahn). Addie (played by actress Tatum O'Neal) is the nine-year old white daughter of a white man who is the object of Miss Trixie's affections. Imogene explains to Addie that Miss Trixie, who appears Caucasian in all respects, is really not white – or at least not "white" beyond her appearance. "You know that little white speck on top chicken doo-doo?" Imogene ask Addie, "Well, that's the kind of white I think Miss Trixie is. She's just like that little white speck on top of old

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[32] *See, e.g.*, Post of Bad Bill Bo Baggins, tmz.com, 14:19, Feb. 18, 2009, *available at* http://www.tmz.com/2009/02/18/octomom-nadya-suleman-foreclosure/ (With all the cash from her interviews, I'm sure the mortgage will be paid real soon...There's even talk of a reality show in the pipeline to boot....OctoMom will be doing great thanks to her adoring public wanting to know more about her Skank-azz...."I say...ignore the b-otch.....maybe she'll take her litter and go back to IRAN!!!!!!!!). *See also* Anonymous, post at *Octomom Asks for Donations Via Web*, starmagazine.com, Feb. 12, 2009, *available at* http://www.starmagazine.com/news/15223?comment_page=20#comments ("She's a dumb ass and need to go back to Iran and raise those bastards. The government has no money to pay for folks working hard and this one sucks the system dry with her trash. Tell her to go to hell! All of this for publicity and stupid folks to donate. Go back to your country. Your high school pictures show a different look from now with all of her plastic surgergies and fake nails!!! But no food for the children. ").

[33] On contingent whiteness, *see generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xxi (10th anniv. ed. 2006).

[34] PAPER MOON (The Directors Company 1973).

chicken shit."[35] Miss Trixie's low morals and social transgressions make her whiteness, in Imogene's cosmology, a preliminary stem of unsoiled whiteness leading to a dark and filthy (black) base.[36] Public reaction to Nadya Suleman suggests that Suleman, like Miss Trixie, is being read as a "chicken doo-doo" white, a contingently white woman. Like Miss Trixie, Suleman becomes contingently white because her choices transgress the "rules" of whiteness. And in final confirmation that Suleman is just another "chicken doo-doo" white, an internet video went viral.[37]

In a widely distributed video, Suleman and her mother argued on camera for the world to see. Suleman agrily pleads with her mother, "You need to learn to understand . . . [and] learn to let go of what I chose to do. You didn't accept it and move forward."[38] The octuplets' grandmother counters, "I will never understand" her daughter's choice to carry eight fetuses.[39] Angela Suleman suggests her daughter should have given the embryos up for adoption. "How are you going to be able to provide for them?" the grandmother accusingly asks.[40] In making the mother-daughter disagreement public, both Suleman and her mother transgress the bounds of white motherhood. They become the supposedly "low class" whites who air their family secrets on daytime talk-shows.[41]

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[35] *Id.*

[36] *Id. See* Alvin Sargent, Script of PAPER MOON; (1973) *available at* <http://www.script-o-rama.com/movie_scripts/p/papermoonscripttranscripttatum.html> .

[37] Octo-Mom Erupts! Video Showdown With Her Mom Over Babies, Randaronline.com, 14:06 Feb. 24, 2009, available at http://www.radaronline.com/exclusives/2009/02/octomom_erupts_video_showdown_with_her_mom_over_babies.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See* Helene Shugart, *Ruling Class: Disciplining Class, Race, and Ethnicity in Television Reality Court Shows*, 17 HOWARD J. OF COMM. 79 (2006); Bev Skeggs, *The Making of Class and Gender Through Visualzing Moral Subject Formation*, 39 SOC. 965 (2005); Peter Lunt & Paul Stenner, *The Jerry Springer as an Emotional Public Sphere*, 27 MEDIA, CULT. & SOC'Y 59 (2005).

The attempts to race Nadya Suleman reveal long-standing "rules" of American whiteness: notions of racial hierarchy in which whites with Northern European, Christian Protestant[42] heritage are at the top[43] and all others are placed downward along a rapidly plummeting slope leading to the ultimate in Otherness, blackness. Superficially, we may be well past the era of efforts to expose and shame racial "passing," the assumption by mixed-race individuals of a white identity.[44] But social scorn still will be brought on whites who, while having no any black ancestry, fail to meet religious, familial, cultural or social norms for "counting" as white.[45] They, too, are Other, and perhaps in the worst sense. They are biologically white, but they, like Miss Trixie, actively choose a path of social non-whiteness, bringing racial and cultural ambiguity to what remains a stubbornly

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[42] The large-scale 19th and early 20th century immigration of whites who were Catholic or Jewish greatly altered the public understanding of race. NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1-5 (1995). One vivid illustration of this is the case of Leo Frank, the Jewish manager of a pencil factory in Atlanta, Georgia who was accused of raping and murdering an employee, thirteen year old Mary Phagan, the daughter of white tenant farmers. Frank v. Magnum, 27 U.S. 309 (1915). Initially, two black workers were arrested and interrogated about the crime, but according to prosecutors, all evidence pointed to Frank. Eric M. Freedman, *In Memoriam: Frank M. Johnson, Jr.: Milestones*, *in* Habeas Corpus Part II; *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1474-501 (2000). Frank was tried and convicted. *Id.* Although the governor of Georgia ultimately commuted Frank's death sentence to life imprisonment, Frank was taken from custody and lynched. *Id*. According to one scholar, the characterizations created in the *Frank* case, such as "perfectly innocent child" and "Northern [read foreign] Jew," required the reconstruction, in some cases radical, of certain widely held beliefs about gender and race. MAROUF ARIF HASIAN, LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE 131-141 (2000). The case of Leo Frank, moreover, brought a new and complex element to understandings of race. This was true for two reasons. First and perhaps foremost, two blacks had been passed over for prosecution. *Id*. at 142 This in and of itself was seminal—both during the Jim Crow period and in more contemporary times, blacks were often constructed as criminals and the notion of choosing a white man in their stead to stand accused was well outside legal and social the norms. Moreover, one of the principal witnesses in the case was a black man, and the *Frank* case is often cited as the first instance in which a black was allowed to testify in a Southern court against a white man. *Id.*

[43] *See, e.g.,* IGNATIEV; KAREN BRODKIN, HOW JEWS BECOME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1999); ARE ITALIANS WHITE? HOW RACE IS MADE IN AMERICA (Jennifer Guglielmo & Salvatore Salerno eds., 2003).

[44] ADAM MCKIBLE, THE SPACE AND PLACE OF MODERNISM: THE LITTLE MAGAZINE IN NEW YORK 136-37, 147 (2002); A.D. POWELL, PASSING FOR WHO YOU REALLY ARE 5, 134 (2005); PAMELA L. CAUGHIE, PASSING AND PEDAGOGY: THE DYNAMICS OF RESPONSIBILITY 187-88 (1999).

[45] MCKIBLE, *supra* note 44, at 136-37.

binary racial discourse in the United States.[46] These whites manqués also threaten to undermine long-established social and cultural understandings about race and gender. One site for this instability is the notion of white motherhood itself.

II. POLICING ROLES, POLICE ROLES

For much of American history, bad mothers frequently were seen as undermining ideals of American citizenship, while good mothers, responsible for raising physically and psychologically fit future citizens, were held up as the bedrocks for a strong, democratic future.[47] Indeed, liberal conceptions of citizenship were implicitly (and sometimes explicitly) based on normative ideas about gender from earliest times in the United States, perhaps beginning with notions of "Republican Motherhood."[48]

A. Anxiety #3: Policing White Motherhood

Republican Motherhood was the virtuous motherhood that afforded women political status (though not necessarily political rights) in the early days of the new American nation.[49] There were, however, distinct racial, class and even religious dimensions to the concept, as it encompassed only white, middle-class or wealthy Christian women.[50] Black mothers, characterized as desexualized breeders of slaves,

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[46] *See, e.g.,* Linda Martín Alcoff, *Latinos/as, Asian Americans, and the Black-White Binary*, 7 J. of Ethics 1572 Richard Delgado, *Derrick Bell's Toolkit – Fit to Dismantle that Famous House?* 75 N.Y.U. L. REV. 283 (2000); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997)

[47] RUTH FELDSTEIN, MOTHERHOOD IN BLACK AND WHITE: RACE AND SEX IN AMERICAN LIBERALISM 1930-1965 89 (2000).

[48] Kerber, *supra* note 9, at 43.

[49] *Id.*

[50] FELDSTEIN, *supra* note 47, at 5

caretakers of white children, or hyper-sexualized, promiscuous hussies,[51] remained outside the paradigm of virtue. In the post-slavery era, black women, Native American women, and poor, working-class white immigrants remained outside of the notions of Republican Motherhood, excluded by virtue of both their class and race.[52]

The racial and class dimensions of motherhood are, to a significant extent, still present in contemporary society. Feminists may resist rhetoric about "good mothers" as misogynistic efforts to regulate women,[53] but even feminist value judgments about motherhood persist. Less inflammatory language of "concern" conceals these judgments and tempers them with distinctions between the institution of motherhood and the praxis of motherhood.[54] But the public responses to Nadya Suleman remind us that the institution of motherhood still lies at the heart of entrenched racial and class hierarchies, all while we have come to recognize mothering to include a range of social, cultural and even political practices.[55] Even among social progressives, a hidden transcript plays. Women (if educated, financially comfortable and adhering to mainstream values) may choose or not choose motherhood, as long as that choice is not publicly funded,[56] doesn't

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[51] *Id.* For an analysis of how persistent stereotypes hamper female law faculty members of color, *see* Regina Austin, *Sapphire Bound!* 1989 WIS. L. REV. 539 ("Black bitch hunts are alive and well in the territory where minority female law faculty members labor. There are many things to get riled about that keeping quiet is impossible. We really cannot function effectively without coming to terms with Sapphire. Should we renounce her, rehabilitate her, or embrace her and proclaim her our own?").

[52] Kerber, *supra* note 9, at 43.

[53] *Id.* (commenting upon the image of the "bad mother" in the 1940's and beyond and how certain texts of the period revealed overt misogyny and efforts to regulate women.)

[54] *See, e.g.,* ADRIENNE RICH: OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1995). Rich situates motherhood as an oppressive institution, created by men to foster women's dependence. At the same time, via her own anecdotal experiences of motherhood, she re-enshrines the notion of good mothering by arguing for an embrace of biological, woman-centered mothering that privileges the ideas and thoughts of women about parenting. *Id.* at __.

[55] *See, e.g.,* FEMINIST MOTHERING (Andrea O'Reilly ed., 2008).

[56] *See, e.g.,* PATRICIA J. WILLIAM, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 216-220 (1991).

result in "too many" children,[57] and doesn't radically challenge the notion of the nuclear family.[58] Middle-class white women most easily can follow this *sub rosa* transcript. Hence, critiques of Nadya Suleman operate to police and maintain the bounds of modern white, middle-class motherhood.

B. Anxiety #4: Doctors as Failed State Agents

One of the concerns frequently expressed in the media and on the internet was why any responsible physician would implant six or more embryos in a woman who already had multiple children.[59] Moreover, once the fetuses were viable, wouldn't a responsible doctor have coordinated some sort of social-services intervention?[60] This line of discussion highlights the ways in which pregnant women's doctors are frequently viewed as having responsibilities beyond the role of health care provider. Hence, when they fail to act, as in the case of Nadya Suleman, fail as representatives of the state.

Though not the case in the early history of medicine in the United States,[61] for much of the twentieth century, doctors have been expected to act not only as health care

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[57] *Id.*

[58] *Id. See also* Nancy D. Polikoff, *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); Laura T. Kessler, *The Politics of Care*, 23 WISC. J.L. GENDER & SOC'Y 169 (2008).

[59] *See e.g.* Adam Pertman & Naomi Cahn, *Limiting Reproduction*, BALT. SUN, Feb. 25, 2009 19A (discussing the case of Nadya Suleman and that of a 60 year old Canadian woman who gave birth to twins and arguing that federal and state governments should consider legal rules and boundaries for the fertility industry); Ashley Surdin, *Octuplet Mother Also Gives Birth to Ethical Debate,* WASH. POST, Feb. 4, 2009 (writing that guidelines call for in vitro fertilization of no more than two embryos and that the number implanted suggest a situation of law regulation.)

[60] *See infra* note ___ and accompanying text.

[61] One scholar, in writing about the role of physicians in the abortion debate in the late modern era in the United States notes that in the early years of American history, during the colonial period and for decades thereafter, medicine was not practiced as part of a well-defined, guild system that maintained standards over the membership in and conduct of the profession. KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 16 (1985) Rather, in much of the 19th century medicine was a domestic art, often relegated to women and slaves who practiced "healing arts" and folk medicine. Id. Even when medicine was practiced by medical school graduates, the quality of work of such persons was often widely variable, as many early schools were proprietary and were open to all who could pay their fees. *Id.* at 18

providers but also as teachers, counselors, or parents to their patients.[62] This is particularly true in the case of female patients, especially pregnant women.[63] Even in the era of childbearing choice made possible by popular availability of contraceptives and legal access to abortion, the discursive construction of a woman's decisions regarding childbirth is posited to be one wherein her doctor plays a significant if not a lead role.[64] Where once women's decisions to bear children were described as being between themselves and their God,[65] those choices are now determined by women, their God and their doctors, or, more typically, thanks to the secularization of society (or the deification of doctors)[66] women and their doctors.[67]

Doctors enforce established mainstream cultural, social and legal norms of mothering. There are, for instance, a number of statutes that permit (and in some cases, mandate) physicians and other health care professionals to violate their pregnant patients' confidentiality in order to report suspected drug or alcohol use to state authorities.[68] There are also a number of laws requiring health care workers to report suspected

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[62] LUCY M. CANDIB, MEDICINE AND THE FAMILY: A FEMINIST PERSPECTIVE 126-127 (1995) (discussing the paternalistic, authoritarian model of the doctor-patient relationship and the way that such relationships have disserved women.)

[63] *Id.*

[64] *Id.*

[65] *See e.g.* MYRA MARX FERREE ET AL. SHAPING ABORTION DISCOURSE 160 (2002) (Discussing how the choice of whether to terminate a pregnancy involves a woman's relationship with God.)

[66] ROBYN ROWLAND, LIVING LABORATORIES: WOMEN AND REPRODUCTIVE TECHNOLOGIES 203-204 (1992) ("Leaders of research in the reproductive area are deified as if they are 'acting God'. The danger of this deification is that both the medical profession and the community may feel that medical teams are not accountable to the society in which they work.").

[67] *Id.*

[68] *See* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER AND L. 147, 169-170 (2007) *See also* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 619 (2002), (discussing physicians as state agents in the context of compelled medical treatment).

incidences of abuse or neglect of a child.[69] Although such rules ostensibly have the welfare of children in mind, they undermine parents' confidentiality and privacy in ways that are permitted in almost no other area of the law.[70] Reporting rules deputize healthcare providers to act as agents of the state in what appears almost to be a third party policing scheme.[71]

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[69] ALASKA STAT. §§ 47.17.020, -023, -068 (2009); ARIZ. REV. STAT. § 13-3620 (2009); ARK. CODE ANN. §§ 12-12-504, -507, -518(2009); CAL PEN CODE §§ 11166, 11165.7 (2009); COLO. REV. STAT. §§ 19-3-304, 18-1.3-501(2009); CONN. GEN. STAT. § 17a-101 (2009).

[70] *See* N. Renke, *The Mandatory Reporting of Child Abuse Under the Child Welfare Act*, 7 HEALTH L. JOURNAL 91, 92-94 (1999) (brief history of mandatory reporting laws in the United States and Canada).

[71] Lolita Buckner Inniss, BACK TO THE FUTURE: IS FORM-BASED CODE AN EFFICACIOUS TOOL FOR SHAPING MODERN CIVIC LIFE? *11 University of Pennsylvania Journal of Law and Social Change 75* (2007-2008), citing LORRAINE MASEROLLE & JANET RANSLEY, THIRD PARTY POLICING 52 (2006). Third party policing is a style of policing involving several entities, such as private individuals or community groups, who exercise regulatory control. *Id.* at 2. Those involved may be willing or unwilling partners. This is because included within the regulatory framework for such policing schemes are mechanisms for the police to coerce participation by the threat of civil or administrative sanctions for the failure to participate. *Id.* Harms occurring after the implementation of third party policing is often seen not only as a failure of governmental authorities but of the citizens who are made "partners" in third party policing. *Id.* Hence, when doctors act as Nadya Suleman's doctors did, allowing her to undertake such an aberrational pregnancy, they fail not only in their individual capacities but also as state agents.

Besides the dictates of formal laws compelling physicians to participate in the regulation of mothers, there are stringent social or cultural norms that guide the behavior of doctors via-à-vis their patients. Though doctor-patent relationships are posited as purely private, they may have substantial public elements, and be intensely political in nature. ROBERTS, *supra* note 20, at 134. While the conceptual model of the doctor-patient relationship is seen as contractual or benignly paternalistic, these models, rather than inuring to the benefit of women, frequently work to their detriment. *Id.* *See also* Mark A. Rodwin, *Patient Accountability and Quality of Care: Lessons From Medical Consumerism and the Patients' Rights, Women's Health and Disability Rights Movements*, 20 AM. J. L. & MED. 147, 150-151 (1994) ("Until very recently, medical professionals interpreted the ethical injunction to work in the interest of patients to mean that they should make decisions for patients. Physicians generally assumed that medicine was primarily a science, that doctors were experts who would know better than patients what was in their interest, and that patients had neither the interest in becoming involved in medical decision-making nor the ability to do so. Doctors promoted benign paternalism.")

The relationship between doctors and patients, especially their women patients, are embedded in hierarchies of power. Women, and especially outsider women, may be viewed in simplistic, stereotypical terms and as a result are often unable to exercise large degrees of self-determination in their medical care decisions. Those women who do succeed in exercising control over the nature of their care are therefore altering normative power arrangements. While there is a growing trend toward "patient-centered care" that accords patients recognition, respect and choice in medical matters, there is still a substantial adherence to the "medical model" which privileges the healthcare provider's knowledge and choice. Rebecca Dresser, *What Bioethics Can Learn from the Women's Health Movement*, *in* BEYOND REPRODUCTION 116, 138 (Susan M. Wolf ed., 1996) (patient-centered care promotes patient autonomy and greater access to health care). *See, e.g.,* Carole Warshaw, *Limitations of the Medical Model in the Care of Battered Women*, 3 GENDER & SOC'Y 506 (1989); J.D. Allan & B.A. Hall, *Challenging the Focus on Technology: A Critique of*

Discussion of doctors as failed state agents in its most basic sense refers to doctors' failure to carry our formal state norms or even informal societal norms that replicate state norms. In this reading, doctors are failed *state agents*. However, it is perhaps more intriguing to center on the first two words of the phrase, reading it *failed state* agent. A failed state is a nation wherein there has been a collapse of sovereign capacity. There are arguably a number of ways understand the notion of "failed state."[72] Much has been written on developing typologies of the forms of state failure, using either state strength or the degree of failure or its cause as a criterion. [73] Yet, while no one view of the failed state prevails, there is a central and immutable fact about the concept: "state failure'" is "an umbrella for various tendencies which are not always the same, but are united in demonstrating the inability to control."[74] When doctors act as Suleman's doctors did (or did not), they not only fail in carrying out ethical, legal or even social obligations. Their failure to rein in her behavior potentially speaks to broader, more systemic state demise: an absence of broad, top-down sovereign power. This brings us to one of the unstated anxieties of modernity, a fear engendered by globalization, multiculturalism, feminism and other post modern vehicles of political and social

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the Medical Model in a Changing Health Care System, 10 ADV. NURS. SCI. 22 (1988). Thus, doctors who allow women to guide their own care are therefore failures in the sense that they participate in the assault upon socially and culturally accepted medical norms. *See* Warshaw, *Limitations of the Medical Model in the Care of Battered Women*.

[72] Robert I. Rothberg, *The Failure and Collapse of Nation States: Breakdown, Prevention and Repair*, *in* WHEN STATES FAIL: CAUSES AND CONSEQUENCES 1, 42-44 (Robert I. Rothberg ed., 2003); *see also* COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (Robert Zartman ed., 1995)

[73] *See, e.g.,* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion,* AM. U. J. INT' L. & POL'Y (1997), Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992); Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; Ralph Wilde, *The Skewed Responsibility Narrative of the 'Failed States' Concept,* 9 ILSA L. INT'L & COMP. LAW (2003).

[74] Charles Abiodun Alao, *The Failed State in Africa*, *in* INTERNATIONAL SECURITY MANAGEMENT AND THE UNITED NATIONS 85 (Muthiah Alagappa & Takashi Inoguchi eds., 1999).

inclusion that encroach on the domain of state power and normative customary conceptions.[75] While individual autonomy is arguably one of the hallmarks of life within a republican government, it is not clear that this was ever envisioned as *popular* autonomy that extended to women and other outsiders.

III. CLASS-IFYING BODIES

A. Anxiety #5: Reproductive Technology and Class

The narratives of wealth and poverty run strongly through the telling of Nadya Suleman's story and the cultural reaction to the birth of her octuplets. The "welfare mom" who already had six children brought eight more children into this world. It turns out that the octuplets weren't conceived "by accident." Suleman had been a long-time patient at a California fertility clinic; she was implanted with six embryos fertilized in the lab.[76] How could a woman who receives public assistance for her children afford in vitro fertilization?[77] Reproductive technology is expensive, after all. One cycle of in vitro fertilization costs well into six figures.[78] Suleman's pregnancy itself then became a source of anxiety. At 33, Suleman doesn't fit the traditional notion of the upper-class (white) woman who waits "too long" to have children and therefore needs infertility

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[75] A VEBLEN TREASURY: FROM LEISURE CLASS TO WAR, PEACE, AND CAPITALISM 342-343 (Rick Tilman ed., 1993) (describing how, even though state power appears to have diminished in the wake of modern institutional notions of popular autonomy, state power has become diffuse and may be found in customary usages that circumscribe autonomy.)

[76] Kimi Yoshino et al., *supra* note 30.

[77] Sassy Smith, *Photos: Octuplet Mom Can't Afford Babies BUT Can Afford Plastic Surgery*, Fame Crawler, 10:03 AM, Feb. 11, 2009, *available at* http://www.babble.com/CS/blogs/famecrawler/archive/2009/02/11/photos-octuplet-mom-can-t-afford-babies-but-can-afford-plastic-surgery.aspx ("[H]ow does a woman who can't afford her fourteen children (yes, and never mind how she was able to pay for fertility treatments in the first place!), afford to get her lips enlarged? Explain that to me!").

[78] L. Schmidt, *Effects of Economic Insurance Mandates on Fertility*, 26 J. HEALTH ECON. 431 (2007); M. Griffin & W.F. Panak, *The Economic Cost of Infertility-Related Services: An Examination of the Massachusetts Infertility Insurance Mandate*, 70 FERTIL. STERIL. 22 (1998).

treatment.[79] Here was a woman, who looked black or maybe brown (but definitely *not white*), who already had six children. Three of them were eligible for food stamps.[80] How then could Suleman pay for her infertility treatments, newspapers wanted to know? It turns out that the cry of "food stamps" was only an opening salvo in the ensuing volley of comments about a poor, socially marginal woman's use of reproductive technology.

An oft-repeated concern was whether Suleman's children would be Darwinian sub specimens as the children of a "hopelessly odd" mother, as one observer termed her.[81] An interest in the potential imperfections of Suleman's children is perhaps ironic, given longstanding concerns that reproductive technology could be harnessed by eugenicists seeking to people society with homogeneous, mentally and physically (if not morally) perfect "boys from Brazil."[82] Reproductive technology supposedly is available to people of all backgrounds.[83] But discussions of reproductive technology often lead to discussions of control over genetics, as would-be parents hope for children who are tall,

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[79] For a discussion of the ways in which assisted reproduction technology has often been undertaken by career-oriented women as a way of "time-shifting" motherhood in order to advance in their careers, see Michele Goodwin, *Assisted Reproductive Technology & The Double-Bind: The Illusory Choice of Motherhood*, 9 J. RACE, GENDER AND JUSTICE 1 (2005).

[80] *See supra* note 18.

[81] John Tamny, *Nadya Suleman & John Stuart Mill: What is the Nature of the State's Obligation to the Octuplets?* http://www.forbes.com/2009/02/27/nadya-suleman-octuplets-opinions-columnists_john_tamny.html (March 2, 2009)

[82] *The Boys from Brazil* is a novel which details a plot to reinstate Nazism by creating 94 Adolph Hitler clones who will reach adulthood and create a Fourth Reich. IRA LEVIN, THE BOYS FROM BRAZIL (1976).

[83] Ideology aside, assisted reproductive technology is still the province of the well to do. *See* Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215, 1225 (2007) (citing Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage,* 84 FERTILITY & STERILITY 221, 221 (2005) for proposition that assisted reproductive technology is effectively unavailable to the lower and middle classes and indicating that "the average person in need of ART is straight, older, married, white, educated, and financially well off. Many statistics show that African-American and Latinas are underrepresented in the population of ART consumers, as are poor people and people with less than a high school education.")

intelligent and good-looking.[84] Implicit in these efforts to counter a presumed recession toward the genetic mean[85] is the notion that science provides people with the ability to produce superior children.

B. Anxiety #6: Bodily Perfection and Class

Given the obsession with perfection seen in the deployment of reproductive technology, can it ever be acceptable to knowingly bear children who may be physically or mentally flawed? Some argue (to great opposition) that it may morally appropriate to abort fetuses with physical or mental defects and even to commit euthanasia once such an infant is born.[86] But there is a countervailing ethic that mediates for greater acceptance of children with disabilities.[87] For example, George Will, a politically conservative columnist, stated that "In America, more than 80 percent of the babies diagnosed prenatally with Down syndrome are aborted. This is dismaying to, among others, the American Association of People with Disabilities, whose premise is that "disability is a

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[84] *See* Dorothy M. Roberts, *Reconstructing the Patient, Starting with Women of Color*, *in* BEYOND REPRODUCTION, *supra* note **_ERROR! BOOKMARK NOT DEFINED.**, at 116, 138 (Susan M. Wolf ed., 1996) ("research on infertility, pregnancy and childbirth has allowed men to insert more control over the production of more perfect children"). Charles P. Kindregan et al., ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW & SCIENCE 263 (2006). Consider for example the proliferation of couples seeking to produce, smart, attractive children by seeking egg donors among Ivy-League educated women. *See e.g.,* Bridgewater, *supra* note 83, at 1225 (discussing the market for reproductive services and the fact that donors has particular traits and characteristics may be paid a market "premium," and citing a case wherein one couple who offered to pay $ 50,000 to an egg donor who was a tall, Ivy League student with an SAT score greater than 1400).

[85] Scientists have argued that there is an observable regression towards a mean intelligence quotient (IQ) in all persons within large groupings, notwithstanding the intelligence of any one person in the group, and that blacks have a higher regression toward the mean than whites. Nathan Brody, *Jensen's Genetic Interpretation of Racial Differences in Intelligence*, *in* THE SCIENTIFIC STUDY OF GENERAL INTELLIGENCE 397, 405 (Arthur Robert Jensen & Helmuth Nyborg eds., 2003). Others argue that regression is a statistical and not a genetic phenomenon and and as such provides no evidence for either genetic or environmental determination of I.Q. *See* Brian Mackenzie, *Fallacious Use Of Regression Effects In The I.Q. Controversy*, 15 AUSTR. PSY. 369 (1980)

[86] *See* Peter Singer, PRACTICAL ETHICS 175-177 (1993)

[87] *See* George F. Will, *Eugenics by Abortion: Is Perfection an Entitlement*? WASH. POST, Apr. 14, 2005, at A27.

natural part of the human experience."" Will described his own experience as the parent of a relatively high-functioning son with Down Syndrome. Will does not acknowledge the role that race or class privilege played in his experience and hence the shaping of his opinion. When culturally privileged members of society choose life for "defective" fetuses, they encounter substantially less opposition than less privileged people who do so. As the public reaction to Nadya Suleman highlights, toleration turns to outright scorn when that unprivileged individual has conceived using artificial means.

IV. EXCEEDING BOUNDARIES

The traditional nuclear family, consisting of a man and a woman who are married to each other and who have a limited number (somewhere between two and three) of shared offspring,[88] is becoming less common as other types of families proliferate in our society.[89] However, the notion of the traditional nuclear family still holds tremendous ideological sway. Variations from this norm are met with unease and resistance.[90]

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[88] While the production of large families among white, middle class women was encouraged not so long ago encouraged, there was a radical change in the discouse at the turn of the century. Crusaders such as Margaret Sanger assailed large families, calling them "wicked" and "immoral" because of their "injury" to members of those families and to society itself. MARGARET SANGER, WOMAN AND THE NEW RACE PAGE (1920). While some laud Sanger as having the health and welfare of women at heart, others accuse her of having eugenicist views and for wanting to limit the growth of immigrant families. *See, e.g.,* LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA 186-196 (1976); CAROLE R. MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES, 1916-1945 100 (1999); JAMES REED, FROM PRIVATE VICE TO PUBLIC VIRTUE: THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY SINCE 1830 (1978).

[89] *See, e.g., Households and Families: 2000*, Table 1: Households by Type: 2000 (Sept. 2001), http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf. Family households constitute 68.1% of American households, where a "family household" consists of a "householder" (the owner or renter of the residence) and "one or more people living together, who are related to the householder by birth, marriage or adoption," whether or not other people unrelated to the householder also live in the residence. *Id.* at 2. 51.7% of families include married taxpayers. *Id.* Female householders with no husband present are 12.2% of families. *Id.* Male householders with no wife present are 4.2% of families. *Id.* Two or more unrelated persons living together are 6.1 of all households. *Id.* Single taxpayers living alone comprise approximately one-quarter of all households (25.8%). *Id.* For a discussion of the law's treatment of diverse families in the wealth transfer context, *see* Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. (2005) and Browne C. Lewis, *One Size Does Not Fit All: A Proposal to Create a Flexible Intestacy System that Equitably Balances the Interests of the State,*

A. *Cherchez L'Homme* (*Absent*) and Other Assaults on Family Values

The female-headed household is often cited as the bane of society and the source of numerous social problems. The absence of fathers in households is often seen as a principal reason for juvenile delinquency, poverty, illiteracy and plummeting graduation rates, as well as the prime reason for multigenerational illegitimacy.[91] Rallying their followers with a demand for a return to "family values,"[92] conservative leaders frequently point to and assail the numerous other ways in which contemporary family configurations undermine established familial norms: living in families in which the parents are gay or lesbian partners, living in families where there are multiple generations or collateral relatives, living in families involving transnational or transracial adoption, or, finally, in families that are larger than average. Nadya Suleman, the unmarried mother of fourteen, ten of whom were born in a multiple births, clearly breaches the heterodoxy.[93]

Marital Children and Non-Marital Children 1-2 (Feb. 18, 2007), *available at* http://ssrn.com/abstract=963919.

[90] Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. STATE L. REV. 1 (2005) The author a examines less well-explored conception of family caregiving within the feminist and queer legal theory literature, revealing the way that family caregiving can be a liberating practice for caregivers whose practices challenge mainstream norms.

[91] Sara S. McLanahan, *Father Absece and the Welfare of Children in* COPING WITH DIVORCE, SINGLE PARENTING AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE (E. Mavis Hetherington ed., 1999).

[92] Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J. L. AND FEMINISM 105 (1988).

[93] Multiple births, especially in the era before fertility drugs and other assisted reproductive technologies, were often met with fascination. That fascination, however, sometimes turned to scorn when the parents belonged to a disfavored social group. Consider, for example, the treatment of the Oliva and Elzire Dionne, who in 1934 gave birth to what are believed to be the first quintuplets to survive their infancy and the first known set of female identical quintuplets. Their parents, poor, French-speaking and Catholic, existed as members of a minority subclass in Canada, and their Outsider status likely hastened the government's findings that they were unfit parents. The Dionne Quintuplets were taken from their parents and raised in a government compound, Quintland, where for several years they were put on public display. JAMES BROUGH, "WE WERE FIVE": THE DIONNE QUINTUPLETS' STORY FROM BIRTH THOROUGH GIRLHOOD TO WOMANHOOD (1965). In adulthood, some of the siblings spoke bitterly of the way in which the press treated them as objects and animals. The Ontario government apologized to the three surviving sisters in 1998. Barry Brown, *Dionne Sisters to Get Settlement, Ontario's Apology*, BUFF. NEWS (Mar. 7, 1998) ("Though the sisters generated up to $350 million as wards of the province on public display at the Quintland theme park for 9 1/2 years, they saw little, if any, of that money."). More recently, black parents

The Suleman story unfolds to reveal a complex picture. She doesn't work, but she is not entirely without income. Over an eight-year period, Suleman received disability payments of approximately $170,000 on account of a work-related injury.[94] But that's not all that is suspicious about Suleman. She is divorced and, at the time of the octuplets' births, lived at home with her parents in a 3-bedroom home.[95] By the way, her mother was behind on the mortgage payments, too.[96] Most distressing of all, there is no father in the children's family portrait.[97] Suleman's former husband is not the father of the octuplets.[98] A former boyfriend says he might be the father, but he wants DNA testing.[99] So what woman with no husband wishes to be implanted with multiple

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of multiple birth children have complained about the disparate treatment they received—less media attention or unfavorable media attention about their families, fewer product endorsement contracts, and less public charity. *See, e.g.,* The How and Why of Sextuplets, Quintuplets, and Other? Miracle? Multiple Births, http://www.syl.com/articles/thehowandwhyofsextupletsquintupletsandothermiraclemultiplebirths .html (last visited Mar. 15, 2009) ("Some claims have been made recently that companies provide assistance to white families, but not to black families with sextuplets. One African-American couple in D.C., whose sextuplets occurred naturally, received far less attention than an Iowa couple who also gave birth to sextuplets at about the same time."). *See also* The Harris Family Sextuplets: America's First Surviving African-American Sextuplets, http://www.harrissextuplets.net/background.shtml (last visited Mar. 15, 2009) ("Despite some family an [sic] community support and public appearances including the new home they received through the Extreme Makeover Home Edition TV show, the couple has found meeting the financial demands of their large family a constant struggle. They rely on their faith in God to keep them going.").

[94] Kimi Yoshino et al., *supra* note 30. Suleman worked in a psychiatric hospital and was injured in a patient riot. *Id.*

[95] Shaya Tayefe Mohajer, *Octuplets' Grandpa Buys 4-Bedroom Home, Mom OKs Nursing Care for Babies*, SAN JOSE MERCURY NEWS, at 4A, Mar. 10, 2009.

[96] *Id.*

[97] *See* posting of Anonymous to usmagazine.com, Feb. 18, 2009, 09:18 EST ("I wouldn't watch a show with Nadya Suleman.The poor children don't even have a father let alone she is having her own mom take care of the children while Nadya doesn't have a job, gets money from the government and basically she does nothing. I think it is so sad...").

[98] *See* Smolowe, *supra* note 19.

[99] Bill Hutchinson, *I Wanna Be Octodad! Mystery Man, Who Dated Mega-Ma in '90s, Hopes He's Babies' Daddy*, N.Y. DAILY NEWS (Feb. 22, 2009) at 2 ("A former boyfriend of a Los Angeles woman who gave birth to octuplets is willing to submit to a paternity test to see if he's the father. . . . The man claims in an interview with the network to have dated Nadya Suleman from 1997 to 1999 and that he donated multiple times to the sperm bank she used.").

embryos, when she already has six children? If she is not racially Other, then she must be plain crazy.

B. Anxiety #8: Baby Crazy in California

Definitions of mental health have varied over time and within particular contexts.[100] Some early definitions focused on the ability to adjust to new situations and to handle problems without marked distress.[101] Other definitions noted the ability to be active and productive, having a life purpose, and accepting limits. The definition has expanded over the years, but these core aspects have remained.[102] These definitions, however, rely upon normative parameters that exclude consideration of gender, race or class and the ways in which these identity markers may intersect. [103] Raced, classed and gendered others may, for example, exhibit what some commentators have described as "cultural paranoia"—a heightened level of vigilance necessary to navigate an alien and or hostile social setting.[104] They may also have an alternate ideas about life priorities born of their own unique, Outsider experiences. When women of all colors, racial minorities or other outsiders exhibit these differences, they are more likely than their white male counterparts to be labeled as "crazy." Witness the case of Nadya Suleman.

First, observe that even without other indicia of outsider status, Nadya Suleman is a Californian. For some critics, Suleman's geographic location made it all the more

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[100] Diane R. Brown & Verna M. Keith, *The Epidemiology of Mental Disorders and Mental Health Among African American Women*, *in* IN AND OUT OF OUR RIGHT MINDS: THE MENTAL HEALTH OF AFRICAN AMERICAN WOMEN 23, 24 (Diane Robinson-Brown, & Verna Green eds., 2003)

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

likely that she was crazy. California is derided as the "land of nuts and fruits."[105] Second, and more importantly, Nadya Suleman's choice to bear fourteen children while being unmarried and without visible means of support marks her as crazy for many. In a culture that is only nominally child-friendly, the decision to center one's life around caring for so many children (perhaps to the exclusion of seeking market employment or, its presumed alternative, a man) strikes many observers as evidence of impaired judgment. A number of media accounts, apparently in an effort to bolster the narrative of her mental impairment, suggested that Nadya Suleman had acted erratically even before the birth of her octuplets. One series of stories, for example, seized upon the fact that several months ago she called 911 when she noticed that one of her children, a five-year old was missing.[106] Suleman frantically reports that her son is missing, worrying that he has been kidnapped: "I'm losing my mind . . . Please, God, help me . . . oh, God, I'm going to kill myself . . . I'm going to kill myself . . . .[107] While Suleman is on the line with the 911 operator, the child returns; he had taken a walk in the neighborhood.[108] Is it

[105] Because of what many deem to be the proliferation of unusual behaviors and lifestyles and less rigid norms of sexual identity, Californians are frequently subjected to the slur (or the good-natured ribbing, depending on whom you ask) "nuts and fruits" indicating mentally unstable and the homosexual. *See* People v. Feagley, 535 P.2d 373, 393 n.25 (Cal. 1975) (describing how California prison guards would mock mentally ill inmates at "nuts, and fruits, and sex fiends"). *See also* THOMAS TRYON, CROWNED HEADS 331. One character in that fictional story says to another, "Wimp, you're in California, the land of nuts and fruits. They're used to this sort of thing. You can get out in seven years, with good behavior." *Id.*

[106] *OctoMom 911 – We Got the Calls!* post to TMZ.com, 18:33 PM, Mar. 4, 2009; *see also* Good Morning America, ABC television broadcast, Mar. 9, 2009. In that recording, Suleman screams, ""Where's my son? Where's my son? Where's my son? . . . Please help me . . . . I'm going to die . . . oh, God, help me, God help me … Where's Jay-Jay? Where's Jay-Jay? . . . I'm losing my mind . . . Please, God, help me . . . oh, God, I'm going to kill myself . . . I'm going to kill myself . . . . I'm sorry [to the Operator]." *Id.*

[107] TMZ.com.

[108] *Id.*

really so "crazy" for a parent to call 911 when a child is missing? Many, many mothers and fathers would do just that.[109]

CONCLUSION: MULTIPLE ANXIETIES AND THE LIMITATIONS OF TOLERANCE

Applying mocking, scolding, jeering or (supposedly) humorous epithets to Nadya Suleman makes (and marks) her clearly and distinctly as the Other. Calling Suleman the "Octomom" is to liken her to an animal. To call her "octopussy" is to make Suleman into a metonymic body part, a fictional character or a crude joke.[110] The choice of a woman to risk her own health and the health of her children, when she has no visible means of support, is not a wise one. Such woman will need tremendous support of all kinds and from all corners. It is legitimate to be curious about and even to criticize that choice. But make no mistake that for choice to have any meaning at all – in theory and in practice – then we must embrace the complexity and ambiguity arising out of a commitment to a woman's right to control her own body. Derision of Suleman reveals the limitations of tolerance for women who deviate from prescribed norms, including norms of "choice." Suleman's story is not just about multiple births, then, but about society's multiple anxieties when a woman breaches the bounds of racial, class and gender expectations.

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[109] Some television commentators sympathized with Suleman. *See, e.g.*, Today Show, NBC television broadcast, Feb. 10, 2009 (comments of reporter Natalie Morales) ("[W]e're talking a little bit more about Nadya Suleman, the mother of the octuplets, of course, and the controversy that was sparked by that 911 phone call . . . . Some moms [are] sympathizing with her because if you have that moment of panic when your child is missing . . . . If you've been there, you know what that's like. But at the same time, others saying this could be another example of perhaps her being a not fit mother.").

[110] In the film *Octopussy*, the 13th in the James Bond series, a mysterious wealthy woman known as "Octopussy" (played by Maud Adams) hopes to avenge her the suicide of her father, an officer in the British Sercret Service whose dishonesty had been discovered Agent 007, James Bond (played by Roger Moore) OCTOPUSSY (MGM/UA Entertainment Co. 1983).