



**Regulating the Biological Family:
policy, genetics, discourse, and
diminishing 'Other' bodies**

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Abstract

This thesis starts with the premise that Western ideas about genetic inheritance play a large part in shaping Australian social policy around reproduction and family formation. This premise has gone largely under-discussed in other examinations of policies concerned with these areas and there is a need to redress this. There remains in Western society a dominant belief, built on notions of biological heredity, that we are a product of our genes – they make us who we are (Rose *et al.* 1984: 65). Historically, it has been men's genes and male genetic continuity that has been considered to be of primary importance. This has had significant ramifications for women's bodies.

This thesis identifies and elaborates on the way in which notions of genetic inheritance connect with notions of 'proper' families and hence shape policies concerning reproduction and family formation. Assumptions about the structure and shape of the 'proper' or 'traditional' family – as a heterosexual two-parent unit with biological children – and its claim to naturalness are embedded in policies related to reproductive technologies and family formation. Where the use of 'other' bodies has been necessary to produce children, policy has effectively erased these bodies through creating an 'imagined' biological family. These are families which can be 'passed off' as biological families. However, a number of developments in reproductive technologies and related areas of family formation are producing tensions and contradictions in the policies relating to these areas, in the process challenging the claim to 'naturalness' of the traditional family unit.

This thesis explores the discourses surrounding the following specific policies – surrogacy, IVF, adoption, abortion, child support and posthumous reproduction – to elucidate the frameworks of meaning within which we understand these issues. Surrogacy and IVF are looked at in detail. Attention is paid to the ways in which material bodies, in particular women's material bodies, have been constituted in policies relating to the above areas. It is argued, in these cases, that genetic material is privileged over biological bodies, with negative effects on the material bodies of women. I argue that there is a need for a different approach to policy in this area and suggest that a useful way of proceeding is to employ a body-focussed approach to policy.

Declaration Statement

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material published or written by another person, except where due reference has been made in the text.

I give consent to this copy of my thesis, when deposited in the University Library, being made available in all forms of media, now or hereafter known.

Bronwyn Donaghey

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Introduction

‘Pregnant again to her dead husband’ (Schlink 2002: 37, [United Kingdom]) **‘Gay dads in new surrogate deal’** (Mills 2000: 34, [United Kingdom]) **‘Are you my daddy? The devastating effects of Australia’s internet sperm donation industry’** (Arndt 2004: cover, [Australia]) **‘Born to be cancer-free: gene test detects mutant embryos’** (Taylor & Steen 2001: 1, 2, [Australia]) **‘The Shrinking Family: why we choose life free of kids’** (Maguire 2001a: 43, [Australia]) **‘Born to save brother’** (Marsh 2002: 35, [London]) **‘More turn from traditional family’** (Anderson 2004: 3, [Australia]) **‘Sperm donor ruled legal father in Sweden’** (AP 2002, [Europe]) **‘Women in fear over childbirth: national fall in fertility rates could be linked to worries, say experts’** (Gordon 2001: 14, [Australia]) **‘IVF woman to have her brother’s child’** (*The Advertiser* 2001: 22, [United Kingdom]) **‘Where have all the children gone?’** (Maiden 2001: 19, [Australia]) **‘Infertile couples hit by big fall in sperm donors’** (Curtis 2006, [United Kingdom]).

Above are a small selection of Australian and international headlines from the many newspaper articles and news stories collected during the period of my research. These are by no means the most sensationalist. Consider, for instance, ‘When she became pregnant he sued her for stealing his sperm’ (Graham 1999: 38) or ‘Wife fights for dead husband’s babies’ (Riley 2001: 22). The headlines do not of course give the whole story nor, for that matter, do the corresponding articles but they do provide representations of what is perceived to be at stake and, importantly, what is seen to be of concern in issues to do with reproductive technologies and related policies of family formation.

Let me take three examples from the above headlines to illustrate briefly some of the common themes that can be uncovered in mainstream representations of these issues. For instance, ‘IVF woman to have her brother’s child’ relates to a woman who is attempting to undergo IVF treatment using a donor egg and sperm donated by her brother. The article points out that the debate by ‘experts’ centres on the

issue of whether this constitutes incest. Significantly, the donating of sperm by a brother is perceived to be far more problematic than a sister donating her egg to another sister, a point about which I will be saying more in Chapter 5. In this first instance, if the donation of sperm by the brother to his sister is allowed to proceed, he will be both the child's genetic 'father' and its social uncle. Conversely, his sister will be the genetic aunt and both the legal and social mother of the child. Underlying this debate is the question of the proper nature and shape of the 'traditional family', which is being challenged by developments in reproductive technologies.

The second example, which is discussed in some detail in Chapter 7, 'Pregnant again to her dead husband', refers to the story of Diane Blood, a British woman who in 1997 won a legal case enabling her to use the sperm extracted from her comatose husband prior to his death in 1995, a process generally referred to as posthumous reproduction. She gave birth to a son in 1998.¹ She was, at the time of this article, pregnant with her second child conceived in the same way. The article identifies two primary issues or points of tension. First, there is the question of whether a person's genetic 'property' can be taken and used without their express consent. Similar to the previous example, reproductive material is seen to be, in this instance, different in nature to other body parts. For example, body parts, such as kidneys and hearts, can be extracted from the body in many countries with the consent of the family but without the prior consent of the deceased. Second, there is the concern brought about by the absence or 'lack' of the father in the family. Diane Blood is seen to be *setting out* to create a single parent family. Once again at the core of the

¹ In this thesis there is a conscious effort not to use the first names of children either born with the assistance of reproductive technologies or affected by related issues of family formation. The exception is in cases where courts have given pseudonyms. While arguments can be made that the names of the parents are in the public domain, the same cannot be said in regard to the children.

issues is the challenge to the nature and shape of the traditional family brought about by developments in reproductive technologies.

My third example, 'Where have all the children gone?', reflects the growing concern, both politically and socially, with the decline in the birth rate in Australia. One of the issues raised is how the 'aging' population will be funded in the long term. Here, clear links are made between the size of the family and the economic well-being of the country indicating that debates about 'the family' need to be understood to have both social and economic implications. While not appearing as though it explicitly fits with the other two headlines, again at the centre of this debate is the challenge that is occurring to the shape and nature of the traditional family. Why, it is asked, are families shrinking?

I have begun with these examples for two reasons. First, the above examples support the feminist contention that assumptions about the structure and role of the family are critical to the lives, experiences and bodies of women. Second, they illustrate some of the frameworks within which we understand and debate issues concerned with reproductive technologies and related policies of family formation. In this thesis I use the term 'family formation' to encompass policies which regulate the shaping and forming of families and which have been impacted on, in some way, by reproductive technologies. For instance, child support legislation has been impacted on by paternity testing, which has made possible the enforcing of child support orders where paternity has been denied by 'errant' fathers.² One of the primary goals of this thesis is to elucidate the frameworks within which these issues are understood and debated, frameworks that are reflected in, and reaffirmed by,

² More recently, this technology is being utilised in Australia by men to disprove paternity and, hence, to discontinue paying child support for non-biological children after divorce or separation.

policies which regulate these areas. So far I have drawn attention to some of the most visible frameworks of meaning; later in this Introduction I will look at some of the less obvious ones.

The proliferation of storylines concerned with these issues in popular culture further illustrates that these developments are causing concern not only for policy makers but also in the wider community. Here the issues are ‘played out’ through the experience of characters with which long-term television viewers have a ‘relationship’. For instance, in the legal drama, *The Practice*, one of the central characters, Eleanor, was sued unsuccessfully for visitation rights to her then unborn child by her known sperm donor. In *Beverly Hills 90210*, Matt donated sperm for his infertile brother, later stepping into the parental role after the accidental death of his brother. In the Australian serial *Neighbours*, Lou Carpenter was sued successfully for the custody of his daughter, Lolly, by Lolly’s genetic father. In addition, Leah gave birth to a baby girl in *Home and Away* after undergoing a surrogate pregnancy for her friends, Sally and Flynn. Each of these cases raises issues of the implications for parental identity presented by developments in genetic technologies. I will say more about the importance of these examples appearing in popular culture in later chapters but for the moment we need only to note again that at the core of these issues is the nature and shape of the ‘proper’ family. The question is – ‘why is this causing so much angst?’

Developments in reproductive technologies are impacting on the model of the traditional family. They are also challenging its integrity, a trend which is occurring on a global level. Historically, the family has been understood as consisting of two

heterosexual parents and ‘their’ biological or genetic children.³ While this family is in reality in decline due to, among other factors, the rise in single-parent families through divorce, it remains a powerful image both politically and socially in contemporary society. Moreover, as indicated a moment ago, strong links are made between the strength of the family and the strength of the economy.

At the heart of this thesis is the role of policy in the shaping and regulating of families in the context of the challenges that developments in reproductive technologies are providing to the concept of the traditional family. In particular, I am interested in what happens in an environment dominated by the spectre of genetics and where concerns about the declining birth rate intersect. As I hinted above in the discussion of the newspaper articles, the special status accorded to genetic or reproductive material, and in particular men’s genetic or reproductive material, is central to these issues.

The Genetic Context

On almost a daily basis the role of genes and genetics in ‘pre-determining’ who we ‘are’ and what types of lives we either will, or have the potential to, lead is underscored. Whether we will develop cancer, contract Alzheimer’s, or be prone to alcoholism is attributed increasingly to the genes we inherit. Frequent references occur in the media to new discoveries of genes which are seen to be ‘responsible’ for various conditions and/or behaviours. The mapping of the human genome, known as the Human Genome Project, has augmented this focus. This is not to suggest that this construction of genes as the determining factor in the lives that we will lead goes unchallenged. Indeed, there has been in recent times a great deal of

³ As I will discuss in a moment this conception has not required that the children actually *be* biological but that they appear to be so.

academic and non-academic literature problematising the lack of focus on the social and environmental factors integral to shaping human behaviours.⁴ Moreover, as I will illustrate throughout, tensions are produced by policies concerning reproductive technologies and related issues of family formation due to a need, in some cases, to emphasise the importance of social and environmental factors in the raising of children and, in others, to emphasise the importance of a genetic connection. Nonetheless, while these tensions exist, there remains a trend toward a primacy, in popular culture and arguably in areas of the scientific community, given to genetic explanations.

Genes or DNA are used not only to define relationships but are also appealed to simultaneously in order to locate responsibility and to justify policy decisions (Nelkin & Lindee 1995: 3). While genes themselves are simple molecular entities, the status accorded to certain genes reflects societal assumptions. Genes that are considered to be positive in effect often include those that ‘produce’ traits such as height, physical aptitude and intelligence, whereas negative trait-producing genes are held responsible for characteristics such as mental or physical illness (Asche & Geller 1996: 320). Illustrating the value basis of genes, Barbara Katz Rothman (1999a: 409) notes that in some places having a female child can be seen to be the same as having a child with a genetic disorder. In actuality the role of genes in producing traits is of course a much more complex social and biological process than is generally suggested; however, this complexity is often obscured in the discourse surrounding this area (Hubbard 1995: 45).

⁴ See, for instance, Rose *et al.* (1984), Rose (1998) and Hubbard (1995). This theme will be developed in Chapter 2. Here I want to make it quite clear that I am not disregarding the contribution of genes to the development of people.

At the same time that we are witnessing the elevation of genetic importance in the development of human traits and behaviours we are also seeing related policy changes, and pressures for change, in areas associated with policies concerned with reproductive technologies and family formation. Wide-ranging social implications are involved in these changes. One example is the recent proliferation of legislation allowing children born from donor gametes access to knowledge about their genetic heritage. Australia, Britain and the United States have introduced, or are in the process of introducing, legislation pertaining to this matter. This development undermines the notion of the traditional family structure as a heterosexual two-parent biological unit because it allows or even encourages a child to seek out a connection with a person not of that unit. Simultaneously, other policy shifts reinforce the traditional family structure. For instance, a relatively recent policy change in the Australian Capital Territory (ACT) allowed the genetic parents of a child born through a surrogate arrangement to have their names, and not the birth/surrogate mother, appear on the birth certificate (*Advertiser* 2000: 24). Hence, the role of the birth mother, and the gestating body, is legally removed. These two examples illustrate that the focus on the importance of genetic connections is having complex and uneven consequences on families. As I will argue, the tensions produced by these policy shifts result from the need to deal with ‘other’ bodies in the reproductive process, the use of which can no longer be ignored.

At the same time that we are witnessing these policy trends we are also seeing developments in reproductive technologies such as ICSI⁵, designed to increase men’s chance of biological fertility and, hence, reduce the need for donated gamete material. Interestingly, in a point that will be developed throughout this thesis, there

⁵ Intracytoplasmic sperm injection (ICSI) involves the direct injection of sperm into collected eggs, increasing the chances of infertile men reproducing.

does not seem to be as much *social* importance placed upon finding ways to reduce the use of donor female gamete material and increase the chances of women becoming genetic parents. This suggests that it is the status of men's genes, and its consequent 'link' to the status of fatherhood, that is seen to be most significant.

The Historical Role of Heredity

Assumptions about biology have long factored into Western thought and policy. Policies dealing with issues such as inheritance reflected beliefs concerning the inheritance of socially important traits through biological procreation long before the discovery of the 'gene'.⁶ Prior to the discovery of the gene, the emphasis was placed on the blood link. The biological link or the 'blood tie' that existed between relatives was traditionally given cultural primacy (Smart 1987: 100). Blood ties served a number of social and political purposes as they explained and justified social inequities, such as class relations, as well as regulating the passing down of property (Nelkin and Lindee 1995: 15).

In Western patriarchal societies, children were considered as born to men out of their seed and thus it was the relationship, and biological link, of men with their sons that was important despite the need for the bodies of women to bear these sons (Katz Rothman 1996: 1244). This relationship was legally as well as socially important, as in the legal system property was passed from men to their sons or male heirs (Smart 1987: 99). Hence, intricate systems of society, economics and class were all managed through the passing of property. Ironically, the maintenance of this system necessitated the ignoring of selected blood ties, such as those of 'illegitimate' children, under certain circumstances (Smart 1987: 101).

⁶ This belief is also reflected in much of the nineteenth century literature (Hubbard 1995: 40).

It is clear that tensions existed in the treatment of biological relations or blood ties by law and policy. For instance, in England there was seen to be a need to protect family estates from the claims of 'spurious offspring' or illegitimate children. The concern here was with the 'problem' of ascertaining paternity, which was seen to be reliant on the word of the woman. Maternity, by contrast, was not seen to be problematic due to the relative surety that the birth process produced (Mahoney 1995: 39). In English common law, the potential problems of paternity were mediated by and through the institution of marriage (Smart 1987: 99).

A child born within a marriage was considered to be a child of that marriage or more specifically a child of the marriage's patriarchal head. This was known as the presumption of paternity or *pater est quam nuptiae demonstrant* (O'Donovan 1998: 211). Marriage, not blood ties, conferred automatic paternity (Smart 1987: 101). Consequently, while the biological link was considered to be of great importance, it was not considered to be 'the primary factor' in the legal setting (Smart 1987: 99). The state viewed paternal identity in all cases as questionable. Where this was actually the case it created a fiction of a biological family. By contrast, English common law initially considered an 'illegitimate'⁷ child to be *filius nullius*, or a child of no one (Smart 1987: 101). Under this conception 'illegitimate' children were not entitled to the economic or social benefits from their biological father that were accorded to 'legitimate' children. The legal notion of a child as a 'product of marriage' remains despite policy shifts in regard to the status of children born outside of marriage and property laws. This presumption, as we shall see in Chapter

⁷ With Gail Reekie (1998: 10) and others I find the language of 'illegitimacy' problematic due to the negative connotations of the term and the suggestion that children born outside of marriage are somehow less legitimate than those born within the marriage structure. However, the primacy of the term in the literature I address necessitates its continued use. I continue to place the terms 'illegitimate' and 'legitimate' in quotation marks to highlight their problematic status.

5, has been of vital importance in the treatment of donor material used in IVF technology. While today recognition exists, both socially and legally, of the contribution of genetic material by women and thus of the genetic connection between women and their children, the cultural primacy of the male genetic contribution, I will argue, remains paramount. This obscures the role of the woman's material body in reproduction (Katz Rothman 1996: 1245).

New Technologies – forming 'ideal' and 'imagined' families

Reproductive technologies have at their basis the goal of forming families. Embedded in policies related to these technologies are assumptions about the structure and shape of 'the proper family'. Importantly, reproductive technologies enable the creating of two particular types of families. These I have termed the biologically 'ideal' family and the biologically 'imagined' family. Briefly, the biologically 'ideal' family is a shorthand term for families in which children are genetically related to both parents and not produced by surrogate reproductive bodies. That is, the family is seen to be as 'good as it gets' or 'ideal'. I call families 'biologically imagined' if they can be in a sense 'passed off' as 'real' families. That is, they represent the 'idea' of a family.⁸ Children born into this type of family are produced with the use of donor gametes and/or donor bodies. Here I want to make it clear that at no time am I commenting on the validity of either type of family. Indeed, I use the term 'imagined' because I want to emphasise the creative and romanticised nature of this passing off. Moreover, these families do more than *just* pass. They are for all intents and purposes treated as though they are biologically 'ideal'.

⁸ In the use of the term biologically 'imagined' I employ the much-discussed theoretical concept of 'passing', which I will discuss in detail in Chapter 5 (see for instance Johnson 2002a).

Reproductive technologies can produce either biologically 'ideal' or biologically 'imagined' families. In the creation of biologically 'imagined' families there has been a need to disregard the 'other' bodies involved in the process. 'Other' bodies, in this instance, refers to bodies other than the marital partners. However, a combination of a refocussing on genetics, due in part to the development of the Human Genome Project and related advances in genetic technologies, and a trend toward knowing your 'true' identity, has made the passing off of families more difficult. This latter trend has been brought about not only by the suggestion that genes are responsible for our make-up but also by links made to the experiences of adoptees who increasingly seek out their 'real' parents (see, for example, the NBCC (1988a) report, *Access to information: An analogy between adoption and the use of gamete donation*).⁹

Technological developments in regard to reproductive technologies such as IVF, surrogacy and paternity testing, combined with the renewed emphasis on genetics, are making the legal and social fiction of the presumption that a child is a 'product of marriage' increasingly difficult to justify and maintain. It is now possible to know with reasonable certainty if a child is genetically related to its 'social' parents. Hence, the maintenance through policy of the biologically 'imagined' as a biologically 'ideal' family is under threat. The point here is that new reproductive technologies 'do not, in a singularly deterministic sense' create 'social tensions', but social tensions can be seen operating within the debate that surrounds them (Balsamo 1996: 98). Issues such as citizenship, class, race, ethnicity and family all intersect in the debates surrounding, and in, policies regulating these technologies. Moreover, new technologies are 'invested with cultural significance' and cannot be

⁹ While not wanting to diminish the experiences of adoptees, it is necessary to note that their search for genetic parents cannot be understood outside of the dominant discourse on biological heredity.

understood outside of the context within which they operate (Balsamo 1996: 10). That is, while technology itself may be neutral, its use is invested with the values and assumptions of not only those that operate it but of society as a whole.

The policy shifts around, and the increase in the visibility, of issues to do with reproductive technologies in popular culture, are occurring in a climate increasingly dominated by concerns about declining birth rates. These concerns, both historically and today, focus on the decline in particular populations. In Australia, a large number of newspaper articles herald the decline in the 'fertility rate' of Australian women, specifically of Australian middle-class white women.¹⁰ Interestingly, it was an identical concern which dominated the birth-rate debates at the turn of the twentieth century (Mackinnon 1997, Mackinnon 2000). Corresponding with the media attention, an increasing number of government agencies and related reports and publications address the issue, suggesting that it is indeed a topic receiving policy attention.¹¹ This concern is reflected in other parts of the world. With the exception of Sweden, most developed countries have witnessed a fall in birth rates since the nineteen-fifties (de Looper and Bhatia 1998: 19).¹²

Under these conditions 'infertility' is not considered to be a desirable condition. However, it needs to be noted that this does not extend to everyone. For instance, it does not extend to homosexual couples or to single people (Douglas 1991: xx). Alongside the presumption of the desirability of parenthood lies the presumption of

¹⁰ While the Australian birth rate has increased marginally from its 2001 low of 1.7 births, for each woman of child bearing age, to 1.8 in 2005 (Uren 2006) it remains below the replacement rate of 2.1 and, hence, continues to be seen as problematic.

¹¹ See for instance de Looper and Bhatia (1998), Barnes (2001). In 2004 the South Australian Government released a population policy, *Prosperity Through People: A Population Policy for South Australia*.

¹² Sweden has long been concerned with the issue of declining birth rates (Bacchi 1999: 136). Sweden experienced a dramatic drop in fertility in 1997 due to the recession that occurred in the early 1990s. However, the budget has now been brought back into surplus and conditions are improving (Barnes 2001: 11).

heterosexuality and the heterosexual family (Lewin 1995: 103). Policies dealing with reproductive technologies tend to construct, and thereby create, 'infertility' as a medical rather than a social condition, with wide-ranging implications for particular bodies. Here I want to forecast that throughout I will be talking about 'infertility' as a contested concept.¹³ This is not, however, intended to negate or trivialise the experiences of those unable to have children biologically.

The sanctity of the structure of the two-parent biological heterosexual family unit, then, is 'under threat' from three different but linked directions. Firstly, the numbers and size of biologically 'ideal' families are in decline due to factors such as women delaying childbirth, thus reducing the number of children they have and in some cases making decisions not to have children (Barnes 2001: 5). Secondly, reproductive technologies, which are increasingly required to deal with 'problems' caused by delaying childbirth, often require the use of 'other' bodies such as surrogate and donor bodies. This use of 'other' bodies to supplement the numbers of families is becoming increasingly problematic. In part this is due to the increased focus on genetics which lies behind the demand for access to donor information and which is making it necessary to firm up contractual relationships around surrogacy. Thirdly, reproductive technologies enable the creation of alternative families such as gay and lesbian families, challenging the integrity of the heterosexual family.

In policy analysis it is important to focus on the silences surrounding issues. Hence, it is important to look equally at what is *not* being said as it is to consider what is being said (Bacchi 1999: 2). I intend to argue that a less discussed assumption or silence in debates surrounding family formation is the role that notions of heredity

¹³ The use of the term 'contested concept' comes from Sturman (1997: 1). I will discuss this concept in detail in the next chapter.

play. This thesis takes as its point of entry an analysis of the place of notions related to genetic heredity in policies concerned with reproductive technologies and related issues of family formation. It is particularly concerned with addressing the policy implications of the renewed focus on genetics. It raises questions about the forming, shaping and regulating of families in a climate increasingly dominated by the spectre of genetics and the falling birth rate. The questions raised here include: What makes a family? How are families formed and maintained in this genetic climate? Whose genes matter? And, with so much ‘hanging on’ the genes we inherit, what happens to those families that are formed in non-traditional ways and often with the help of either donated genes or other bodies? Interestingly, the families most at risk from these developments have been the ones traditionally subjected to the least regulation – middle and upper class families – as they are the ones that are in general most able to afford reproductive technologies.

In this thesis I will argue that not only is genetic material increasingly privileged over biologically observable bodies, hereafter referred to ‘albeit somewhat ambiguously’ as ‘material bodies’, in which genetic material is contained, but also that there is a privileging of different types of genetic material. Specifically, I will show that men’s genetic material is in general privileged over women’s genetic material. Moreover, the hierarchical privileging of genetic material has different implications for certain bodies in this policy area. The concentration on genetics provides a basis for competing claims on and over the pregnant body and the fetus. A primary interest of the thesis is the role of policy in the forming, shaping and regulation of bodies. On this point, I will argue that the ways in which bodies, particularly women’s bodies, are conceptualised in policies regulating reproductive technologies and related issues of family formation is problematic.

Feminists interested in theorising the body have long drawn attention to the inadequate ways in which women's bodies are conceptualised around issues relating to reproduction (see for instance Bordo 1983, Balsamo 1996, Martin 1999, Bacchi and Beasley 2002). In these areas, women have historically been conceived of as controlled by their bodies in ways in which men are not (Bacchi and Beasley 2002: 326). Importantly, this is a conceptualisation that continues today and has, moreover, been central to the erasing of women's bodies from the policies regulating the areas examined in this thesis, including IVF, surrogacy and abortion.

In much policy engagement with reproductive technologies and related issues of family formation, such as texts produced by bioethics committees, women's bodies are reduced to a description of parts and stripped of their bodily context. Therefore, we need to ask generally, as Balsamo (1996) does in a different context, 'what are the consequences of breaking up bodies?'. More specifically, we need to ask what are the consequences of breaking up the reproductive body? Significantly, while the refocussing on genetics is increasingly legitimating the primacy of 'men's genes', it is also leading to a targeting and breaking up of (some) men's bodies.

This thesis suggests that a body-centred or, as it will be termed here, a body-focussed approach to policy provides a useful way of thinking through these issues.¹⁴ This approach does not simply seek to 'put women's bodies back in'. Rather, it insists on a consideration and conceptualisation of bodies as grounded, situated, and heterogenous. In simple terms a body-focussed policy insists that attention is paid to the ways in which bodies and body 'parts' such as genes are

¹⁴ It is essential to note from the outset that I am not claiming that this strategy in itself is 'the answer'. As will be illustrated throughout this thesis, policy in this area is complex and often contradictory. A key factor in this complexity is that policy is social. Consequently, one strategy is inadequate to encompass all issues. What is needed is a range of complementary strategies of which a body-focussed approach to policy is one.

conceptualised in policies and the effects of this conceptualisation. This approach draws on theoretical insights from feminist body theory, poststructuralism and discourse theory to look more closely at the potential effects of policies concerning reproductive technologies and related issues of family formation on material bodies.

Chapter Outline

This thesis begins with an introductory chapter outlining the theoretical approach taken to policy analysis. From here it is organised in two distinct but interrelated sections, which are entitled ‘Context(s): looking back in order to look forward’ and ‘Revealing Contradictions’. The first section, ‘Context(s): looking back in order to look forward’, draws on the Foucauldian notion of genealogy, which emphasises the importance of tracing back the evolution of particular concepts or ideas, in order to identify the environment in which debates about policies relating to reproductive technologies and family formation take place. The second section, ‘Revealing Contradictions’, takes a case study approach to a range of policies. The title of the second section is taken from Burr (1995: 164) and refers to a form of deconstruction which will be elaborated on in a moment. In the Conclusion to this thesis I draw attention to some of the ways in which a body-focussed approach to policy can be incorporated in the policy process.

While my location in Australia makes it sensible to concentrate where possible on Australian policy, the global reach of reproductive technologies and related issues of family formation necessitates in part a focus on other countries. Indeed, many of the points that I will make throughout this thesis can be applied to other parts of the world. Increasingly, also, we see reproductive technologies cross borders. Donor gamete material, for example, can be shipped internationally, raising questions

about nationality. However, the focus on Western conceptions of heredity necessitates in general a focus on Western countries.

This thesis, as noted above, draws on a number of theoretical approaches including discourse analysis, poststructuralism and feminist body theory. As will become clear in the next chapter I wish to blend a range of theories, some not traditionally associated with policy analysis, into this analysis. The intention here is to employ these approaches where they enable analytical insights into policies concerned with reproductive technologies and family formation.

1: 'Policy, Discourse, and Regulating Bodies'. The thesis begins with a discussion of policy theory outlining the theoretical approach taken in the thesis. Here the focus is on the usefulness of a discourse analysis approach to policy. This necessitates an initial discussion of more traditional approaches to policy in order to illustrate the value of other analytical approaches. In part, a discourse analysis approach to policy involves a conceptualising of policies as 'texts' (Beilharz 1987: 390). Assumptions within policies can be identified through an analysis of the frameworks revealed in policy texts. Moreover, discourse analysis enables the identification of the more subtle features of control and persuasion contained in policies (Lupton 1992: 149). A further implication of a discourse analysis is an illumination of the ways in which power operates. Power is invested in discourses and also in the discursive effects of discourses. Thus, through discourse, power relations are played out and maintained (Ball 1990: 17). Further, knowledge, which is linked to power, is not only produced through discourses but is also maintained and regulated through them (Bové 1990: 59).

A prime interest of this thesis is the way in which policy shapes people as subjects. Discursive constructions produce effects and importantly we live these effects (Dudley & Vidovich 1995: 31). For instance, Simon Marginson (1989: 22, in Porter 1993: 38) contends that the Australian HECS scheme actually creates the subjects it assumes. He argues that the expectation that University students will gain better jobs, earn more and thus be able to pay off a HECS debt creates a subject concerned with getting a better job to pay off the debt. An economically rational subject is the outcome, not the cause, of an economically rational policy. Relating back to reproductive technologies, policies regulating access to these technologies not only assume the normalcy of heterosexual bodies, they ensure that heterosexual bodies are produced and hence *are* the norm. This is not to suggest that there is no resistance to this. In fact, what we will see is that there is a good deal of contestation around the role of policy in dictating norms. This chapter argues that we need to recognise the ways in which material bodies are conceptualised in policy formulation and outlines an approach to policy to facilitate this process.

Section 1: Context(s): looking back in order to look forward

In this section I set the context through a focus on three key areas that are impacting on current debates regarding reproductive technologies and related issues of family formation. These are the current primacy given to genetic explanations, the concern over the decline in the birth rate, and a particular conception of reproductive bodies in law and policy. In identifying the context(s) this chapter also draws on the concept of genealogy. Taken from Foucault (1980: 83), genealogy allows us to locate the origins of particular discourses, in the process providing spaces for questioning their legitimacy and thus allowing resistance (Burr 1995: 69).

2: ‘A Genealogy of Genetics: eugenics, gendered genes and the birth of the genetic family.’ This chapter looks at the rather chequered history of genetics in order to provide the necessary background to the ideas developed in the second section of the thesis. Genetics is not a new science and has had a long and sometimes controversial record. This chapter tracks the discovery of genes, the growth of the eugenics movement, the development of the Human Genome Project and the current return to sociobiological thought. It looks at the political, economic, and social contexts within which these developments have occurred. The gene is much more than a unit of scientific analysis; it is also a cultural signifier (Nelkin and Lindee 1995). In simple terms, the gene is invested with cultural significance and cannot be understood without reference to this. On this point I will be arguing that ‘the gene’ not only marks gender but has historically also been marked by gendered conceptions. Most importantly, the chapter illustrates that assumptions about genetics have long influenced policies and have had important implications for the policies that I will discuss in the second section. Central to this chapter is a discussion of the relationship between science and policy. Throughout, I will be problematising the notion that science is a value-neutral practice.

3: ‘Reproducing the Family: family, population and government control, and the implications for reproductive technologies’. The second chapter in this section deals with an issue which is rarely specifically linked to policies concerned with reproductive technologies and related issues of family formation – the decline in the birth rate. The concern over the decline is not, as we will see, a recent phenomenon. However, we will see that historically, as well as currently, it has been women’s bodies that have born the brunt of intervention in this area.

In this chapter I also look at the importance of the family to questions of governance and employ Foucault's (1991) text, 'Governmentality', to illustrate why population rates are of central concern to questions of government. Despite the lack of explicit links made between the issues of the birth rate decline and reproductive technologies in political debate, I will be arguing in this chapter that the decline in the birth rate is, and will continue to be, a central factor in debates around both issues. Moreover, given that the factors which impact on the delaying of childbirth are unlikely to change significantly, we will see an increased need for the use of reproductive technologies with wide-ranging implications.

4: 'Fragmenting the Reproductive Body: constituent parts, fetal 'subjects', and competing claims over the pregnant body'. A key theme in this thesis is the impact of the increased visibility of the 'other' bodies necessary in family formation through reproductive technologies. Policies often delineate what bodies can and cannot do (Bacchi & Beasley 2002: 331). Policies concerned with reproductive technologies and related issues of family formation have as their primary focus women's bodies. It is women's bodies that, so far, physically give birth to children. This chapter draws on feminist body theory to look at the ways in which women's reproductive bodies are conceived within policy and law. Historically women's bodies when pregnant have been treated as 'mere' bodies whose main function is the safe production of the fetus and child (Bordo 1993). Technologies such as ultrasound have further been utilised in the construction of the fetus as a separate person/ patient, with detrimental effects for women's bodies and women's claims to bodily integrity.¹⁵ Moreover, the focus on genetics has enabled a tangible link to exist between the biological father and the fetus, hence, impacting on issues of

¹⁵ As I will discuss in this chapter the law has upheld the principle of bodily integrity. This right has, however, not been seen to extend in many cases to pregnant women (Bordo 1993).

father's rights. The use of reproductive technologies has led to a fragmenting of the body (Balsamo 1996: 90-91), which has been further augmented by a focus on genetics. This chapter asks the question: what are the implications of fragmenting reproductive bodies?

Section 2: Revealing Contradictions

In the second section I take a close look at a selection of policies to illustrate the contradictions and tensions produced by, and the consequences of, the interplay between genetics, family formation in the spectre of reproductive technologies and 'other bodies'. Revealing contradictions also involves bringing to the fore 'absent or repressed meanings' (Burr 1995:165). Here it has been useful to employ two case studies, one on IVF and the other on surrogacy, and follow this with a chapter that looks at a selection of additional policy areas concerned with reproductive technologies and family formation – abortion, adoption, child support, the status of frozen embryos and posthumous reproduction.

5: 'IVF: proper families, donor genes and intrusive bodies'. This chapter offers a detailed analysis of a selection of policies pertaining to IVF and related technologies in Australia. Due to the large volume of policy texts relating to IVF not only in Australia but also in much of the Western world it makes sense to focus primarily here on Australian policies. Where necessary I set this in an international context. IVF technology is viewed less controversially than many of the other policies I will discuss in the following chapters but it nevertheless provides an important area to elucidate assumptions about families and genetic material. Given that this chapter is the first of the case studies it is necessary to include an analysis of the social construction of infertility and the effects of this construction on questions of access

to this technology. It is here that I will also fill out the concepts of the biologically 'ideal' family and the biologically 'imagined' family. I will also examine the trend toward the facilitation of the creation of biologically 'ideal' families. Throughout I shall point to the contradictions and tensions produced by the policies regulating this area.

6: 'Surrogacy: the primacy of genetic material and the invisible reproductive body'. In this chapter a wide range of Australian and international policies relating to the issue of surrogacy are canvassed. Surrogacy is not, and is unlikely to become, a preferred solution to infertility. Relatively few children, for instance, are born through this arrangement in comparison to children born through IVF technology. The controversial nature of the practice means that disputes that occur in an international context receive considerable attention in Australia. As I noted earlier and will detail in Chapter 1, policy does not occur in a vacuum and international policies dealing with surrogacy impact on Australian policy. In this context, there is a focus on uncovering some of the common themes and assumptions inherent in both Australian and international policies. Chapter 6 also examines a number of high profile cases to illustrate the tensions produced by assumptions about heredity. Throughout I look at the contradictions inherent in the primacy given to genetic material. Not all genetic material is given equal weight in these matters and, moreover, genetic material cannot be separated from its social context. The chapter further demonstrates the ways in which male genetic material has been privileged in, and by, a number of cases and related policy decisions. I address also the recent trend in policy toward the placing of the names of the genetic parents on the birth certificates of children born through surrogate arrangements and the implications of this for the bodies that give birth.

7: ‘Genetic material in policy: men, families and the control of genetic material’. This chapter looks at a selection of policies, once again both Australian and international, concerned with reproductive technologies and related issues of family formation. Included are abortion, adoption, child support, posthumous reproduction and the status of frozen embryos. Importantly, the chapter does not look at all the issues related to the areas. It is particularly concerned with the role assigned to men’s genes. This is because of the privileged position they have traditionally been given by policy. For instance, in terms of abortion, my interest is in cases where men have tried to prevent a termination on the basis of their rights as genetic fathers. The ability to determine genetic paternity with a degree of certainty has had a significant impact on many of these policies. This chapter also details the presumption of paternity, which is conveyed upon children born within the confines of a heterosexual marriage, due to the integral role that it plays in policy responses to issues of child support. These policy areas illustrate the contradictions produced by the use of technologies for purposes other than those for which they were originally intended. For example, the increasing use of paternity testing by Australian men to disprove their genetic relationship to a child or children in order to cease paying child support is undermining the presumption of paternity.

Conclusion: ‘Giving Weight to Biological Bodies: material effects and implications for future technologies’. The Conclusion draws together the main themes of the thesis. That is, the ways in which policies concerning reproductive technologies and related issues of family formation are shaped by conceptions of the importance of genetic inheritance and assumptions regarding the ‘proper’ structure of the traditional family, and the tensions which are being produced by developments in these technologies.

In addition, the Conclusion looks at the future relevance of the insights that have been identified. We are at the moment witnessing technological developments in relation to issues such as cloning and humidicrib technology, yet it is clear that the frameworks within which we understand these issues are inadequate. For instance, in relation to humidicribs/incubators which keep premature babies alive, it is conceivable that the overlap between legalised abortions and fetus viability will continue to increase. This issue is already receiving attention. Peter Singer and Deane Wells (1984) have taken into account this possibility, arguing that artificial wombs allow women to choose what to do with their bodies while at the same time not requiring the termination of the fetus (Singer & Wells 1984, in Cannold 1998: *xxi*). While at the moment this is only possible in the realm of science fiction it illustrates the difficulty that feminists face from future developments in this area. Moreover, discussions and debates concerning cloning ignore the value and role of pregnant bodies in gestating the fetus. The focus is on the cloning process and the outcome, not on the nine months in between. Given these potential developments it is increasingly imperative that the usefulness of a body-focussed approach to policy, emphasising the essential role of women's material bodies in birthing processes, be identified.

Policy, Discourse and Regulating Bodies

The field of policy analysis is dominated by commentary and critique rather than by research. Abstract accounts tend toward tidy generalities and often fail to capture the messy realities of influence, pressure, dogma, expediency, conflict, compromise, intransigence, resistance, error, opposition and pragmatism in the policy process. It is easy to be simple, neat, and superficial and to gloss over these awkward realities. It is difficult to retain messiness and complexity and still be penetrating (Ball 1990: 9).

The challenge for policy analysts concerned with issues of reproductive technologies and family formation¹ is captured above by Stephen Ball. This is the necessity to avoid both over-simplification of what are in fact complex issues while retaining sharp and incisive analysis. The policy process as Ball notes is complex and at times messy. As we will see throughout this thesis, policies concerned with reproductive technologies and family formation match this description well.

That the policy areas discussed in this thesis can be described in this way should not be surprising given the social nature of policy, the common positioning of issues concerning reproductive technologies within an ethical framework, and the increasing importance placed upon the status and welfare of the child.² Under this rubric, we more often than not have seen the rights of individuals to exercise bodily and reproductive ‘choice’ weighed against, and sometimes set in opposition to, the status, welfare and values of society (see, for instance, NBCC 1988b). Further, these issues have been commonly understood within the context of liberal theory (Diprose

¹ As I clarified in the Introduction, I limit my consideration of policies dealing with family formation to those which have been impacted on in some way by reproductive technologies.

² Here I am not suggesting that the focus on the status and welfare of children is new. Rather as I will illustrate throughout, the rights of the child are being reconceptualized due to the challenges provided to traditional family structures by alternative families such as same-sex families and the increasing weight given to allowing children born from donor gametes access to information pertaining to their biological ‘parents’. Moreover, the discourse of the ‘rights of the child’ is being galvanised by conservative commentators to argue against ‘alternative’ families.

1995). Therefore, frameworks of meaning, such as choice, rights, the role of nature and the principle of the common good, comprise central tenets of the debate. Importantly, developments in technology have occurred at a rate that has meant that policies concerning these areas need to encompass wider issues than those which they were originally intended to address. Moreover, given the rapid rate of developments in areas such as the cloning of animals and stem cell research in humans, this trend seems likely to continue.

It is the positioning of policies concerning reproductive technologies as ‘ethical’ issues that has played a large part in the shaping and development of policy in this area. Policy issues considered to be ‘ethical’ in nature are often those that have physical implications for human bodies or that can be considered to impact on the shape and structure of society. Yet, as I will argue throughout, the ways in which these policies and the ethical engagement which precedes them deal with women’s bodies is highly problematic. This argument is introduced in the section of this chapter on feminist body theory and runs throughout the thesis.

In the main it has been the field of bioethics that has dealt with reproductive technologies. Consequently, as we will see in a moment, a range of interest groups, or ‘policy actors’, including scientists, religious organizations and medical professionals, play a large part in determining discussion and as such in the shaping of policies.³ This thesis seeks to locate the bodies of these policy actors in the policy process. In addition, the perceived need for ethical engagement means that considerable time-delay often occurs between policy issues coming on to the agenda and the developing and implementation of policy. Committees need to be formed

³ As I will discuss later in the chapter, when I look in detail at the makeup and assumptions underlying bioethics committees, given the authority that is vested in these groups, it is important not to underestimate their influence.

and terms of reference set. As a result policy-making in this area is often ‘under pressure’, not only in terms of keeping up with technological developments but also from those parties with vested interests in outcomes. I have already noted in the Introduction that policies in some areas are having unintended consequences in other areas. As I will suggest throughout, much of this can be attributed to an increased focus on the role of genetics in determining ‘who’ we ‘are’. This combination of factors ensures that policies dealing with these issues are complicated, disordered, and often acrimonious.

In this chapter I detail the approach taken in this thesis to policy study. This thesis has three primary goals in regard to its analysis. The first is the elucidation of the frameworks within which we understand issues and the way in which debates are shaped and limited through these frameworks. Specifically, there is an interest in identifying the ‘less talked about’ values and assumptions inherent in policies regulating reproductive technologies and family formation. In addition, there is a concern with identifying the ways in which policy ‘shapes us’ as subjects and the consequences of this shaping. Lastly, the thesis draws attention to the ways in which material bodies are conceptualised in policies and the impact of this conceptualisation on material bodies. This impact is seldom discussed in policy analysis. Underlying these goals is the desire to provide a space to offer alternative understandings and thus to challenge common conceptions, which I argue have a disproportionate and negative impact on women’s bodies.⁴ Here I want to challenge the construction of the policy analyst as a disinterested observer and the suggestion

⁴ It is necessary to note that I do not use the term ‘women’ lightly, nor am I suggesting, as will become clear throughout, that all women’s bodies are affected in the same ways. Where possible, I indicate other fundamental issues such as race, class and sexuality. I also want to make clear that I am not suggesting that the policies under study have no negative impacts on men’s bodies. Indeed, as I will illustrate, men’s bodies are increasingly becoming a site for intervention in this area.

that policy is simply a *response* to social problems. Rather, I am emphasising the role of policy in shaping lives.

What is needed, then, is an approach to policy which makes possible encompassing the above concerns. In order to achieve this it is useful to focus on policy discourses. Importantly, this focus enables consideration and interrogation of the language contained in official policy texts and how this language produces the frameworks within which these issues are debated and understood. Looking at how policy discourses frame issues of reproductive technologies and family formation today reveals much more clearly the terms of reference which have consistently shaped these discourses over time, terms of reference which need, in my opinion, to be placed under critical scrutiny. As I have indicated, there is a need for a focus on, and thus a contesting of, some of the less discussed assumptions that influence policies. In particular, I target the assumptions about the role and importance of genetic material. I intend to examine how these assumptions influence policies around reproduction and family formation with an eye to the impact on the kind of political subjects produced in these policies.

Approaches to policy study benefit from the employment of a range of analytic tools, some of which have not traditionally been associated with policy analysis. Single theories are ineffective at illustrating the complexity of policy both in terms of process and outcome (Ball 1994: 14). Moreover, as will become clear later, despite its usefulness, concentration solely on discourse analysis is inadequate for my purposes. Hence, I incorporate some of the work on problem representations (Edelman 1988, Bacchi 1999) and elements of feminist body theory (Young 1990, Bordo 1993, Bacchi and Beasley 2002). Feminist body theory, as we will see,

provides an important tool for elaborating on the effects of policies on material bodies, bodies which are regulated by the policies under consideration.

The goal here is to capture some of the ‘messy realities’ to which Ball alludes, avoiding over-simplification of these issues. Given this starting point no nice, neat analysis of policies concerning reproductive technologies and family formation will be offered. In contrast, a primary focus is the tensions and contradictions that exist in the initial policy process and in the policies themselves, contradictions that get played out in policy outcomes. These tensions are often shaped by and through competing assumptions contained within the policies. Rather than gloss over or oversimplify these tensions, it is necessary to embrace and incorporate them, if we are to better understand the policies.

Old Ways – the problem/ response model

In recent times many policy theorists have sought to challenge the conventional view that presents policy as simply an instrument of government. Traditionally, policy has been viewed, and continues to be viewed in much writing, as a reactive process. Put simply, policy is seen to be a response to an identifiable and/or identified problem or condition. Recent developments in policy analysis counter this view. Instead, they suggest that the shape of government policies contain particular understandings of problems. In addition, as I noted above, these new analyses highlight the ways in which policies impact on political subjectivities, in some instances creating the subjects they assume, a point expanded on later in this chapter. In this analysis the interplay between material bodies and subjectivities is a central focus.

In order to illustrate the usefulness of discourse methodology to policy analysis it is necessary to start with a brief discussion of what can be termed traditional approaches to policy studies. Here the intention is to outline some of the common characteristics and limitations of these approaches, rather than to provide an in-depth examination of more traditional policy approaches. While it would be misleading to suggest that there is homogeneity among these approaches, some common assumptions can be discerned. These include seeing policy in terms of a discovery/ response model (Watts 1993/94: 116), a belief in the rationality of policy and policy-making, and a conviction that policy is made by those with the appropriate knowledge and authorization. Importantly, these assumptions have influenced not only policy-making but also the field of policy analysis. That is, we see clear links between the field of practice and that of analysis. There are two primary areas where key assumptions can be elucidated: the defining of policy and the approach to policy.

In much political discourse the term policy is used unproblematically, suggesting a fixed meaning. Sturman (1997: 1, 2) draws attention to the work done by a number of theorists who argue that 'key phrases or concepts' contained in policy texts draw their force from what is essentially the inability to define them. He argues that these concepts are 'heavily value-laden' and are essentially contested concepts. This means that there are intense debates and divergent understandings of key terms. We need to emphasise that the same can be said about the term 'policy' itself. I would like to suggest that the term 'policy' should itself be considered a contested concept. Further to this, I would argue that the meaning offered of the term is related directly to how it is used. Hence, it is useful to elaborate the ways in which it generally has

been understood, because these understandings have had important implications for the field of policy study.

Policy is a fluid concept and can be employed to refer to statements about practice as well as to statements about goals (Colebatch 1998: 2, 3). The term can also be used to refer to efforts ‘to move society towards some preferred model or image, through the changing of existing practices of social relations’ (Dudley and Vidovich 1995: 15). In this instance, policy comes to stand for larger societal goals. Whether the emphasis is on practice or goals, the general understanding is that policy is a response to a problem.

Hal Colebatch (1998: 7) identifies three aspects that he sees as central to the traditional understanding of the term ‘policy’ – authority, expertise and order. Each of these, I will argue, depends on an understanding of policy as response or reaction to problems. The notion of authority refers to the idea that policy needs to be seen to have the support of a legitimate ‘decision-maker’. The idea that policy requires knowledge and expertise produces the decision-maker as a ‘skilled problem-solver’. This construction of policy encourages questioning to centre on whether or not the policy ‘works’, with implications for the shape of the field of policy analysis. The focus on order and ‘policy’ as a tool to establish order fits with the idea that its primary task is resolving problems which threaten disorder.⁵

While it is now widely acknowledged in policy texts that what governments fail to do is as important as what they do, there tends to remain an emphasis on the active nature of decision-making (see, for example, Ham and Hill 1993, Fenna 1998: 3). Dye (1992), for instance, provides a definition of policy as ‘whatever governments

⁵ Colebatch (1998: 8) notes that these elements are not always in operation on equal terms at all times and that they may indeed at times operate against one another.

choose to do, or not to do' (Dye 1992: 2, in Taylor *et al.* 1997: 22, emphasis added). However, this leaves the implication that policy makers could have made a different decision which would have produced a different outcome (Colebatch 1998: 10), an implication oversimplifying the policy process. In addition, the focus on *active* decision-making leaves under-theorised the more complex reasons governments 'do not' take particular actions.

In effect, conventional definitions of 'policy', which imply government decision-making either to do or not to do something, have what can be termed an 'empowering effect' in popular discourse. That is, these ways of talking about policy position policy makers as in control, as having power over societal 'problems'. The implication is that the 'people' would do well to take their 'advice'. A discovery/ response model of policy making is then, by its nature, a control model and one which positions the general population as spectators of a process which will in the end be worked out by the 'enlightened' few. For this thesis it is indeed essential to focus as much on the inaction of government as on direct action since many of the policy issues considered in the thesis are regulated despite a lack of specific legislation.⁶ But drawing attention to the lack of legislation is, as we will see, but a first step to offering a broader understanding of policy. The next step is to challenge the control model.

A key point is that all decision-making models of policy-making assume a rationality in the process. That is, policy makers are assumed to assess 'problems' and then to decide whether or *not* to do something. Taylor *et al.* (1997: 25) note that the rational approach to policy-making relies on a series of sequential development

⁶ For instance, the toleration of altruistic surrogacy agreements in most states of Australia occurs through lack of direct regulation (Stuhmcke 1998: 297, fn2).

steps. Included in these steps are, among other things, defining the problem, identifying the values and goals that are held, ascertaining the options available, choosing and evaluating the ‘course of action’ and finally modifying ‘the programme’ as needed. Policy analysis tends to concern itself with evaluating the stages in development and assessing whether a good outcome has been achieved.

However, as Taylor *et al.* (1997: 25) note, policy is rarely developed in this manner; instead, it occurs in a less coherent and more political mode. Outcomes tend to be assessed favourably – that is as ‘good’ – if they are deemed to fill declared objectives, in the process foreclosing discussion of wider possible ‘goods’. In this way, the whole model of conventional policy analysis produces a self-fulfilling prophecy and a closed circle of analysis. This contributes to the ‘empowering effect’ mentioned above – policy actors are empowered to make decisions about the objectives to be achieved and to judge both the usefulness of these objectives and to move towards those objectives. The decision-making model privileges “‘top-down” approaches to formulating policy’ which are based on the use of scientific knowledge or ‘fact’ (Barns *et al.* 1999: 5). Defining policy in these terms needs then to be recognised as a political action.

As noted earlier, Sturman (1997) argues that the power of certain terms rests on the inability to define them precisely. Moreover, words change meaning depending on the ways in which they are deployed discursively (Ball 1990: 18). ‘Rationality’ is one such word, commonly assumed to be value-free when applied to policy. Dudley and Vidovich (1995: 13) identify three fundamental forms of rationality central to traditional policy-making models: technocratic instrumental rationality, political rationality, and public choice models. Technocratic rational models, linked to the

rational comprehensive model and most commonly identified with Simon (1945), view policy's primary function as problem solving. Here, 'objective rational decision making' is enabled through a reliance on 'scientifically based research and facts and figures' (Dudley and Vidovich 1995: 13). Underpinning this is the belief that there is a 'best collective decision' and that this can be established rationally (Dudley and Vidovich 1995: 17). Hence, there is no room for a consideration of values.

The political rationality model by contrast recognizes the value-based nature of policy-making, arguing that both policy makers and the community should be involved in determining policy decisions (Dudley and Vidovich 1995: 14). This model, associated with Lindblom (1980), moreover disputes the notion that there can be a 'final solution' to a social problem. The main function of the policy maker is to make incremental improvements in a desirable direction (Dudley and Vidovich 1995: 18). However, the suggestion that a 'desirable direction' is readily identifiable indicates a continuing dependence on value judgements, a dependence seldom acknowledged (Bacchi 1999: 20). For Lindblom, incrementalism is a description both of how policy *is* made and also of how it *should be* made, because the approach is seen to avoid the likelihood of making major mistakes (Ham & Hill 1993: 85). Importantly, while recognising the need to discuss the function of values in policy-making, there remains a belief that 'values can be dealt with in a *rational* manner' (Bacchi 1999: 18, emphasis added).

Public choice theory puts forward the argument that theories developed to understand economic behaviour can be used to explain political behaviour (Dalton *et al.* 1996: 97). Central to this theory is the economic model of the 'rational actor'

(Dalton *et al.* 1996: 97). In this argument, individuals act rationally in order to ‘maximise their self interests’ and, given this, are not considered as able to make decisions in the ‘public interest’ (Dudley and Vidovich 1995: 20, 21). Theorists in this group emphasise the role of pressure or interest groups on the policy-making process; however, they argue that this influence leads to irrational decision-making and that in fact these groups also operate in their own self-interest (Dalton *et al.* 1996: 98). In public choice models, the market is applied to policy-making decisions with the argument that it, the market, represents most truly ‘the decision making of the self-interested individual’ (Dudley and Vidovich 1995: 14).

As Dudley and Vidovich (1995: 14) point out, the focus on the ‘decision making’ elements of policy-making is inadequate not only because it offers ‘at best only a partial view of policy-making’, but also because it overlooks among other things the context and environment in which the policy process takes place. It is the ‘politico-cultural environment’, they say, ‘that determines the *broad* patterns and directions of policy’ (1995: 14, emphasis in text). For instance, Meredith Edwards (2001: 3) makes an argument for a rigorous approach to policy-making that will aid in the achieving of good policy outcomes. Her emphasis on ‘rigour’ suggests a degree of disinterest and an ability to distance oneself from circumstances, downplaying the ‘located-ness’ of the policy maker, in both political and social processes. In this kind of analysis the policy maker is positioned as outsider.⁷ The outsider status is considered necessary to rational decision-making. By contrast, this thesis insists on locating policy makers as insiders, as necessarily implicated in specific temporal and cultural world-views.

⁷ Despite my reservations, noted above, with Edwards’ positioning of policy makers, her analysis is particularly useful in illuminating what can be termed the ‘crazed nature’ of the policy process. Edwards’ diary notes in particular show clearly that policy-making is a less than ‘rational’ process.

New Theories – problematisations and problem representations

In contrast to the reactive problem solving-model approach to policy analysis, some recent theorists have argued that the emphasis should be on problematisations rather than on problems. Different theorists, however, use the notions of ‘problematisations’ differently. Some, for example Bacchi (1999), want to focus on competing ways of understanding a ‘problem’; others such as Osborne (1997: 174) claim that:

Problematisations are not modes of constructing problems but active ways of positioning and experiencing them. It is not that there is nothing ‘out there’ but constructions but that policy cannot get to work without first problematising its territory.

Just as I intend to blend a deployment of discourse with a recognition of subject positioning within discourse⁸, I want to start from Osborne’s premise that ‘policy cannot get to work without first problematising its territory’ while focussing on the shape of these problematisations. Osborne seems wary of the notion of ‘construction’ because of the way it implies intent and hence manipulation. The language of ‘problem representation’ allows us to bypass this concern.

In *Women, Policy and Politics* Carol Bacchi (1999) advocates an approach to policy, which she terms ‘What’s the Problem?’. This is a shorthand term for ‘What’s the Problem (represented to be)?’. She (1999: 1) argues that within every policy proposal there is an ‘explicit or implicit diagnosis of the “problem”’. Hence, an integral part of policy analysis needs to be detection, analysis and assessment of representations of the problem. For instance, the introduction of a ‘Baby Bonus’ or payment upon giving birth as a way in which to increase the number of women having babies indicates a very different assessment of ‘what the problem is’ in

⁸ This argument will be developed later in the chapter.

comparison to the introduction of paid maternity leave. A 'Baby Bonus' implies that women need a financial incentive to reproduce while paid maternity leave sees the problem as a need for time-out from paid labour – time-out with financial recompense. The question of 'What's the Problem (represented to be)?' then needs to be asked of every policy proposal. This approach allows the policy analyst to look at not only what goes undiscussed or under-discussed, but also and perhaps most importantly at what goes unproblematised in the debates (Bacchi 1999: 2).

Along similar lines, Marie Danziger (1995: 439) draws attention to the way in which the framing of a policy question is heavily implicated in determining the solution. Moreover, this framing is complicit in the obscuring of other possibilities and solutions that may be observable with a different question (Postman 1992: 126, in Danziger 1995: 438). For example, in discussions surrounding the 'problem' of the declining population rate there is an emphasis on the language of fertility. Questions centre around how we can increase the 'fertility' rate. Corresponding with this has been attention toward addressing why individual women are not having babies and the proposing of 'solutions' to deal with this. This can be seen explicitly when looking at media reporting of the issue where we see articles entitled, for instance, 'Where have all the mothers gone?' with the by-line 'Australian women of child-bearing age are on strike, unwilling or unable to contribute to population growth' (Kemp and Williams 2002: 29). However, we need to think about the implications for the debate if we focus instead on the broader question of how we can increase the birth rate, if indeed this is deemed to be a desired goal, which raises the question of why more babies are not being born. This question raises broader considerations, such as why couples are not having children.

We need to look then at the political implications and the political uses of specific terminology.⁹

Social problems do not just ‘appear’. Indeed, as theorists like Edelman (1988: 32) have argued, the public needs to be receptive to a construction of an issue for it to exist successfully as a social problem. To give an example, in policies concerned with reproductive technologies such as IVF the public needs to be receptive to the presumption that the prospect of a life without children is a *problem* that needs to be dealt with and further warrants public expenditure to ‘solve’ it.

It is worth noting, though, that infertility is not seen to be a ‘problem’ for everyone (Douglas 1991: xx). In the instance of same sex couples and single people, to construct infertility as a social problem would require a re-examination of the institution of the traditional family. Once again this is not to suggest that the ‘traditional family’ is uncontested. Rather, it is to acknowledge the primacy of the model of the *ideal*, or biological, family. However, today, there are increasing contestations, and contradictions, because of the perceived need to raise the birth rate while at the same time maintaining the ‘preferred’ model of the family. I will discuss this in detail in Chapter 3 and will illustrate why the model of the ‘traditional’ family is considered so important to governing.

According to Bacchi (1999: 9), it is impossible to discuss problems outside of their representations. Representations set the terms within which the issue is understood. Moreover, problematisations do not occur outside of the discourses in which they are constituted. The terms of the discourse limit what can be talked about (Bacchi

⁹ This is not to suggest that there are not contestations over the terminology. Indeed debate is continuing to occur over the relevance of using the term ‘fertility’ or ‘population’. What needs to be recognised is that the usage of either term is indicative of an assessment of perceived solutions.

2000: 49). On this issue, Emery Roe's (1994) point concerning the need to identify policy narratives is useful. Roe (1994: 2) suggests that the power of these narratives and their resistance to change even in the face of empirical evidence to the contrary 'is because they continue to underwrite and stabilize the assumptions for decision making in the face of high uncertainty, complexity, and polarization'. Hence, in debates surrounding reproductive technologies the narrative of the traditional family remains dominant even in the face of statistical data that suggests that it is in decline.

Policy 'problems' are constituted in language. That is, language – the words used to 'diagnose' 'problems' and to pose 'solutions' – is central to the policy process. The way in which policy problems are constructed through language also has the effect of investing authority in those who can claim some skill in dealing with the 'problem' (Edelman 1988: 20). For instance, Murray Edelman notes that if poverty is constructed as stemming from individual inadequacies in poor people then authority is invested in psychologists and educators who are 'able' to deal with it and with them. On the other hand, if poverty is seen to be the result of the economy failing to provide enough jobs, then authority is invested in economists as able to deal with the problem (Edelman 1988: 20). Power relations are deeply implicated in defining the 'problem' and relatedly in identifying who is able to speak about the 'problem'.

Policy as Discourse – deconstructing discourses, searching the past, and revealing hidden meanings and contradictions

The focus on policy problematisations in policy analysis draws on discourse theory. Discourse theory has been applied to the field of policy analysis relatively recently. A discourse analysis facilitates the identification of the more subtle features of

control and persuasion operative in policy development (Lupton 1992: 149). Discourse analysis involves, in part, viewing policies as ‘texts’ (Beilharz 1987: 390), allowing identification not only of overt forms of governing but also of the more hidden forms of governing.

The meaning of ‘discourse’ is itself not fixed. Carol Bacchi (2000: 46), building on Paul Bové’s (1990) claim that it is inconsistent to search for a definition of discourse, notes that central to the concept of discourse is the notion that definitions play a role in ‘delineating “knowledge”’. Hence, searching for a definition of discourse is counterintuitive. It is more useful to explore how the term is deployed, the functions it serves. For my purposes, discourse is understood broadly as referring to systems, patterns and frameworks of meaning. This understanding allows for the encompassing of texts, speech, conversation, signs and language. I use discourse to unpack the many meaning systems in policy, bioethical and judicial deliberations and in the texts these produce.

A central element involved in the unpacking of meaning systems is what Burr (1995: 165) terms ‘revealing contradictions’. Revealing contradictions, she argues, entails an analysis of texts, in the case of this thesis policy and related texts, in order to reveal the ‘hidden’ meanings and contradictions inherent in them. This process enables ‘making the absent or repressed meanings present for the reader, showing how we are led by the text into accepting the assumptions it contains’ (Burr 1995: 165). In as much as this approach concentrates on what is actually being said it is also a concentration on ‘what is being rejected’ in the text, that is, what is being argued against (Burr 1995: 166).

I also emphasise the ways in which certain discourses, around authority for example, privilege certain speakers (Ball 1994: 21). That is, discourses place limits around who has the authority to speak as well as around what can be said. For example, the constitution of authority in the medical profession means that medical professionals are imbued with more authority to speak about the condition of infertility. As we will see in the case studies, the constitution of medical authority has placed restrictions upon women's ability to express knowledge about their bodies.

There is a multiplicity of discourses and we are constituted by and within these on a daily basis (Davies 1994: 2).¹⁰ However, discourses are not weighted equally; some discourses are more dominant than others (Murdoch 1997: 63). Chapter 2 illustrates how so-called 'rational' discourses, such as discourses of scientific 'truth', are given a higher weight than other discourses. Medical discourse gains its prestige in part because it is constituted as 'rational'. Here the discourse of 'rationality' as scientific truth serves to privilege medical over lay views on infertility and reproductive technologies. More importantly, this legitimation means that 'new' or 'other' views and ways of thinking about these issues are always measured and must defend themselves against this constituted 'norm' (Danziger 1995: 444). Rationality in Western thinking is disembodied. Reason is set against the body, which is constituted a distraction from rationality (Bordo 1993). A key point in this thesis is that this privileging of mind and rationality ignores while it shapes the experiences of specific material bodies.

¹⁰ I will expand upon the constituting elements of discourse in the last section.

This is not to suggest that discourses are fixed and uncontested. Discourses are fluid and multiple (Davies 1994: 2). There is always room for resistance. Still, some grounding assumptions remain more resistant than others. This certainly applies to the 'traditional family' in policy. As we will see in the coming chapters the model, as the ideal of the traditional heterosexual two-parent family, is not only assumed in policy, but certain policies encourage the production of these types of families. In addition, much policy regulation protects the claim of this family type to 'naturalness'. This is so even while there has been some acceptance of some single-parent families.¹¹ While the traditional family may in reality be in decline, and 'other' sorts of families have gained some sort of acceptance, the primacy of the traditional family as a model remains.¹²

Vivian Burr (1995: 47) identifies two main approaches to the study of discourse. The first, drawing on 'French philosophical traditions of structuralism and poststructuralism', has generally 'been taken up by those interested in issues of identity, selfhood, personal and social change and power relations'.¹³ The second approach focuses on the more performative aspects of discourse, or in Burr's (1995: 47) words, 'what people are doing with their talk or writing, what they are trying to achieve'. Burr notes that this approach 'focuses upon how accounts are constructed and bring about effects for the speaker or writer'. She observes that these two approaches are not incompatible and many writers including Burr herself draw on both traditions. However, Carol Bacchi (2000: 47) draws attention to a tension in

¹¹ As the recent debate over allowing IVF treatment to single women in Australia illustrated, not all single parent families are deemed appropriate. Indeed, we seem to be witnessing in policy debates relating to this area, 'alternative' single families set in opposition to 'traditional' single families. I will discuss this in detail in Chapter 5.

¹² According to a recent report *Diversity and Change in Australian Families* (de Vaus 2004, cited in Australian Institute of Family Studies 2004) the 'traditional' family now represents 47% percent of Australian families, compared to 63% in 1982.

¹³ Burr notes that that some writers in this tradition also draw on psychoanalytic traditions.

some of the discourse literature between the emphasis on what she terms the ‘uses’ of discourse and the ‘effects’ of discourse. She argues that,

in policy-as-discourse theory both the effects and the uses of discourse are described, but that these tend to be applied selectively. That is, there is a tendency to emphasize the effects upon those who are considered to be lacking power, and an equal tendency to insist that discourses can be used but by those holding power (Bacchi 2000: 51).

Others such as Rob Watts (1993/94: 122) also recognize that one of the problems with the focus on discourse in policy analyses is the tendency to ‘stress the constraining and restraining features of discourse’. Hence, discourses are continuously viewed theoretically in a negative light.

In much of the literature, moreover, there seems to be a suggestion that discourses are made by active agents. Bacchi notes that Susan Phillips ‘states explicitly that “[F]or policy studies, however, it is important that discourse as meaning be linked with a subject as the supplier of that meaning and that language and text be understood in relation to the actions of these subjects”’ (Phillips 1996: 256, in Bacchi 2000: 52). Bacchi (2000: 52) goes on to observe that, while there are attempts to redress this and to provide a balance through the suggestion that discourses are ‘conceptual schema attached to specific historical, institutional and cultural contexts’, this leaves un-theorised the sense of power which this type of analysis entails.

One way to reconcile these insights is to stress, as does Rob Watts (1993/94: 121), that ‘[P]eople who possess power do so partly because of their capacity to make their definitions and their meanings more authoritative’ (Watts 1993/94: 121). I wish to add to this insight the role of certain discourses, for example rationality, in

facilitating this capacity. So, actors deploy discourses which give them authority but these discourses are part and parcel of the Western heritage they inhabit. The inability to stand outside of discourse does not mean that people do not benefit from the continuation of certain discursive constructions or have vested interests in these constructions (Bacchi 2000: 53).

A genealogical approach to policy enables us to illustrate the operation of power in and through discourse (Ball 1994: 3). This approach, taken from Foucault (1980: 83), is useful in isolating 'the contingent power relations which make it possible for particular assertions to operate as absolute truths' (Ball 1994: 3). Basically, a genealogical approach involves looking at the history of policies. In Foucault's words genealogy 'allows us to establish a historical knowledge of struggles and to make use of this knowledge tactically today' (Foucault 1980: 83, in Ball 1994: 3). Here, the emphasis is on elucidating 'the practical and social conditions of life' which provide 'a suitable culture for some representations rather than others' to gain acceptability (Burr 1995: 69).

Genealogy allows for identification not only of dominant discourses but also of those that are generally silenced (Ball 1994: 4). Here we need to recognise, though, that the identification of the context within which discourses emerge does not necessarily mean that specific conditions 'produce particular discourses'; indeed Foucault was careful to warn against seeing this as a causal relationship (Burr 1995: 69). His point was that, if we are able to see the ways in which 'our current way of understanding ourselves' emerged, then 'we can begin to question their legitimacy and resist them' (Burr 1995: 69).

Nancy Fraser's (1989) study of 'discourses of needs' provides a useful example in this context. She (1989: 156) emphasises the difference between constructing someone as 'in need' and constructing him or her as 'needy'. The former suggests that there is a legitimate claim on resources whereas the latter defines the subject as problematic, as wanting too much or as a drain on resources. In addition, Fraser (1989: 162) notes that there is a battle over who has the power to define who is 'in need', what constitutes being 'in need' and also what these needs are. It follows that, as Rob Watts (1993/94: 120, emphasis in text) puts it, '[T]o understand the constitutive power of discourses is to recognize the power of language to *selectively*, and to that extent *politically*, assert that a certain state of affairs is this way and not that way'. The discursive construction of policy problems illustrates this process. In some discourse analyses it is considered adequate to describe problem representations (Ball 1993). The kind of policy analysis I offer, however, emphasises the need to examine the effects of problem representations. This I do in the next section.

Policy Effects – material, constitutive and constituting

Problem representations are not simply a matter of representation. They impact materially on our lives, shaping their possibilities. Put simply, they have *material effects*. Moreover, in a point developed in the next section, policies often indicate what material bodies can and cannot do (Bacchi & Beasley 2002: 331). For example, in regard to IVF technology, policy regulates which bodies can become pregnant and whether access to this technology will be a simple or an involved process. The restriction of IVF to those over 18 necessitates that only bodies considered to be 'adult' bodies can become pregnant through these technological means. Underlying this is the assumption that parenthood, especially motherhood, is

best left to adulthood. Other regulations further limit access to this technology. In some places those wishing to access IVF must meet a criteria of clinical, or medical, infertility, effectively ruling out access to donor sperm for many single and lesbian women.¹⁴

In areas to do with reproduction and procreation, women tend to be positioned by policy and bioethical reports as subject to their biological functions (Bacchi & Beasley 2002: 338). This construction allows women, especially pregnant women, to be subjected to increased forms of regulation and surveillance. For example, in June 2001 Netball Australia instituted a short-lived ban on its players playing while pregnant, ostensibly in order to safeguard itself from the legal ramifications of fetal damage occurring in the course of the game.¹⁵ Implicit in the ban was the assumption that pregnant women were unable, or untrustworthy, to make the decision to protect *their* fetus for themselves.

Clear links exist also between policy regulations and social regulations, with policy giving shape to the social context which the pregnant body inhabits. Consequently, the pregnant body becomes also a site for *societal* regulation (Nettleton 1996: 47). The reproductive body has historically been, and continues to be, a site of, and for, public interest (Bacchi & Beasley 2002: 341).

It is essential to remember also that subjects live in the material world (Pile and Thrift 1995: 19). *We* live in a material world. One of the potential problems of a

¹⁴ See, for instance, the Australian states of South Australia and Victoria. Access to donor sperm is considered important for two primary reasons. Firstly, it has been tested for diseases. Secondly, the donating party has (currently) no rights to the child.

¹⁵ One player affected by this decision won a court injunction allowing her to play. Netball Australia abandoned the ban in March 2002. In May 2002 the Australian Federal Government released a set of guidelines regulating pregnant women in sport. Among the guidelines is the suggestion that women sign a waiver in order to play (Kearney 2002: 3).

focus on discourse is the tendency to concentrate solely on frameworks of meaning in language, leading to the dismissal of material effects such as pollution, poverty, racism and sexism. A concern with the material effects of discursive representations produces an emphasis on contesting the socially constructed nature of meaning in order to facilitate social change (Bacchi 1999: 46). However, challenging particular problem representations is inadequate. Real social change necessitates a broader addressing of the social context in which discourses occur (Bacchi 1999: 46).¹⁶

Importantly, policy and other regulations also shape our subjectivities. Here, I will repeat an example used earlier because it describes the process so clearly. Simon Marginson (1989: 22 in Porter 1993: 38) draws attention to the way in which the Australian Higher Education Contribution Scheme (HECS) actually encourages the subjectivities that it assumes. HECS requires tertiary students to contribute to the cost of their education. This can be done through an upfront payment or a delayed payment largely managed through taxation. Students are legally obligated to pay back their HECS debt once their income reaches a certain level. While the argument put forward by the policy makers is that higher education increases job and monetary prospects and thus those that undertake further education should be required to put something 'back in', Marginson notes that the need to pay back HECS influences the choices made by students and the way that they view education (Marginson 1989: 22, in Porter 1993: 38). In addition, he argues that HECS has the ability to encourage students to think vocationally rather than selecting subjects on the basis of interest. Put simply, as a student, if I am encouraged to get a good job to pay off a HECS Loan, I will see my future

¹⁶ In addition, Rose (1999: x) argues that it is not enlightening to be told that something that is thought to be objective is actually socially constructed. This point will be expanded on later in the chapter.

determined by my ability to get a good job. Moreover, at some level, I will see my success as determined by my ability to get a good job.

Here the point is that discursive constructions produce effects and we live these effects (Dudley & Vidovich 1995: 31). Subjects and subjectivities are produced within discursive practices (Walkerline 1995: 312). That is, we are not only constituted *in* discourses but we are also constituted *by* discourses. As we are also hierarchically placed within these discourses, our ability to mediate them is dependent on our subject positioning (Davies 1994: 26). The materiality of discourse ensures that discourse is more than a language game (Bové 1990: 57). As Paul Bové (1990: 57) notes,

‘discourse’ makes possible disciplines and institutions which, in turn, sustain and distribute those discourses ... In other words, these discourses are linked to social institutions which ‘have power’ in the very ordinary sense we mean when we use that phrase: such institutions can control bodies and actions.

Here I am not implying that positioning is a set role or that there is an automatic acceptance of positioning by subjects. Rather, I would suggest with Bronwyn Davies (1994: 23) that positioning is more of a fluid concept. Our positioning within discourses changes as we change. Age, employment and status are just a few factors that affect our positioning in discourses. Issues of power and knowledge further intersect with this positioning. A good example of the fluidity of positioning is the discrepancies within policy and legal treatment of young people seen to be embarking on adulthood. For instance, in Australia while you can legally drive at 16 years of age you cannot vote until you are 18 years of age. Prior to the passing of the *Crimes Amendment (Sexual Offences) Bill 2003* different ages of consent for heterosexual or homosexual activity were applied to boys in New South Wales, producing different scenarios for the ‘legitimacy’ of heterosexual and homosexual

relationships. While the age of consent for boys engaging in heterosexual activities was sixteen, for homosexual activities the age of consent was eighteen.¹⁷ Moreover, the value-based nature of these positionings means that they are subject to change in line with changes in social standards.

Focussing on the production of subjectivity within discourse or as an effect of discourse means paying heed to the multiplicity of discourses – policy discourses, legal discourses, medical discourses, family discourses, and also discourses of appropriate modes of behaviour in society (Davies 1994: 2). Moreover, we need to note that we can be positioned or constituted differently within each of these discourses and, in addition, that the way we are positioned in some discourses may conflict with our positionings in other discourses (Davies 1994).¹⁸

Such a focus is an important part of the analysis offered in this thesis. To repeat, the thesis argues that it is crucial to examine the lived effects of discourse. For example, women can be held culpable socially and also in some cases legally if they pursue ‘risky’ behaviours while pregnant because the status of the fetus is held to be paramount (Nettleton 1996: 47). Pressure from medical practitioners, other health practitioners, the media, and society at large is placed upon pregnant women not to smoke or drink while pregnant. On a legal level, in California a mother, but significantly not the father, was prosecuted for participating in sexual intercourse

¹⁷ The *Crimes Amendment (Sexual Offences) Bill 2003* was passed by the NSW Upper House in May 2003 (ABC 2003). In New South Wales the age of consent for heterosexual and homosexual activity is now 16 for both girls and boys. Interestingly, prior to this Bill the same age of consent applied to girls for heterosexual and homosexual activity (Gay Lesbian Rights Lobby 2002).

¹⁸ Davies (1994) argues that it is empowering to recognise our positionings within discourses and that this recognition opens up the possibility for change. I believe we need to be careful in imbuing discourse theory with too much power for change. While I do not doubt the usefulness of recognising individual positioning within discourses I would argue that recognising that you are accorded very little power within certain discourses is not empowering at all.

during pregnancy (King 1989: 400 in Bessner 1994: 180).¹⁹ Women who engage in practices considered to be 'risky' to the fetus are constituted as unfit and unworthy mothers. The intersection of race and class can also be seen here, with particular bodies targeted for regulation and, in some cases, intervention. When women assume and internalise the guilt associated with this regulation we see the constituting effects of discourse.

As Valerie Walkerdine (1995: 325) notes, '[S]ubjects are created in multiple positionings in material and discursive practices, in specific historical conditions in which certain apparatuses of social regulation become techniques of self production'. She goes on to argue that these techniques are 'imbued with fantasy', noting that the experience of being working class cannot be separated from what is essentially the production of subjectivity through 'fictions and fantasies'.²⁰ Similarly, the experience and thus the production and internalisation of being infertile in a world that 'values' motherhood cannot be separated from these same fictions and fantasies.

In addition, 'we learn to see and to organise our subjectivity in relation to the discourses about what it means to be gendered' (Davies 1994: 5). That is, we learn the 'correct' discourses in which to construct ourselves. Policies both reflect and maintain these constructions. For heterosexual women, dominant discourses inextricably link being female with motherhood. This is reflected and, I will argue, maintained not only in policies regulating reproductive technologies and related issues of family formation, but also in the reports and inquiries that precede and

¹⁹ The genetic 'father' of the fetus was also the sexual partner.

²⁰ Similar claims could also be made about race and ethnicity.

influence these policies. That is, the policies produce bodies and subjectivities that implicitly link motherhood and femininity.

This is not to suggest that discourses *cause* behaviour or difference in a direct sense. When Judith Butler (1993:1) claims that sexual difference is ‘indissociable from discursive demarcations’, this is not the same as saying that there is a causal relationship between discourse and sexual difference. However, Butler notes the normative function of the category “sex.” To put it in her (1993: 1, 2) words,

‘sex’ is a regulatory ideal whose materialization takes place (or fails to take place) through highly regulated practices. In other words, ‘sex’ is an ideal construct which is forcibly materialized through time. It is not a simple fact or static condition of a body, but a process whereby regulatory norms materialize ‘sex’ and achieve this materialization through a forcible reiteration of those norms.

As will become clear throughout this thesis it is my belief that there remains a need to disrupt the dominant discourses (Davies 1994: 49), such as the discourses of science and rationality, which surround debates about reproductive technologies and related issues of family formation. This is due largely to the disproportionate negative impact these discourses have for, and on, women’s bodies and subjectivities. We need to focus on the links between, and the inseparability of, the discursive and the material world. Here the aim is to offer some space for alternative understandings of the policy issues discussed in this thesis.

A Body-focussed Approach to Policy

Throughout this thesis I emphasise that both subjectivities and material bodies are shaped by discourses. That is, the constituting effects of discourse occur on both a subjective level and on a physiological or material level. I also emphasise that these material effects have a disproportionate negative effect on the bodies and

subjectivities of women. To illustrate these effects this thesis incorporates some elements of feminist body theory into the analysis. Though not traditionally associated with policy theory, feminist body theory has important insights for policy analysis, in particular analysis of policies regulating reproductive technologies and related issues of family formation.

The physicality of the body has increasingly been theorised by feminists concerned with theorising the body (Shildrick and Price 1998, Birke 1999: 2, Beasley and Bacchi 2000). Iris Marion Young (1990), for instance, draws attention to the way in which women 'live' their respective bodies. In particular, Young (1990: 155) notes that women live and experience their bodies not only as subjects but also as objects. Policy regulations are implicated in the defining of women's bodies as objects with important consequences for subjectivity and for the treatment of particular bodies. The defining of women's bodies in this way is continuously affirmed through the practices of medical practitioners and regulators, including bioethics committees. Women's bodies, and in particular women's reproductive functions, are continuously monitored and surveyed through practices such as ultrasound, pap smears and breast examinations, further emphasising their 'object' status. Here we need to remember that this monitoring does not occur simply in the realm of representation but is undergone and experienced by material, or physiological, bodies. In addition, the surveillance of women's bodies and especially pregnant bodies becomes a form of social control (Nettleton 1996: 47).

With perhaps the exception of pregnancy, much of the recent attention given to theorising 'the body' has, however, stopped at the surface of the body, with the inner processes of the body largely spoken about 'in a language of certain facts'

(Birke 1999: 2, 3). It is essential, in particular given the focus of this thesis, to identify the ways in which the inner processes of bodies are conceptualised within policies. In Birke's (1999: 21) terms,

by ignoring bodily insides, we run the risk of perpetuating the story of the biological body as fixed and presocial – even when that is apparently denied by arguments that we cannot understand our biological selves *except* through culture.

There is, hence, a need to consider the *whole* biological body 'as changing and changeable' (Birke 1999: 49). The increased primacy given to genes in policy considerations of reproductive technologies indicates the urgency for this re-consideration.

As will become clear throughout this thesis the ways in which policies regulating reproductive technologies and related issues of family formation, and the ethical engagement which precedes them, deal with women's bodies is highly problematic. Historically, around issues to do with reproduction, women have been conceived of as controlled by their bodies in ways in which men are not, a conceptualisation that continues today (Bacchi and Beasley 2002). It is this conception of women as body-controlled which has permitted derogations of agency in certain areas such as abortion and access to IVF. Paradoxically, it is just this conceptualisation of women as controlled by their bodies which makes it possible to write women's bodies out of policy considerations around reproductive technologies such as surrogacy, IVF and cloning. It is because women's bodies are perceived of as 'pure biology', as 'just animal', that their existence can be ignored. Because women's agency is denied, they and their bodies become brute matter in the processes under consideration and hence can be ignored. To bring women back into the picture we

need to question the conceptualisation of women as controlled by their bodies and men as controlling their bodies.

It is necessary to note that I am not suggesting that either of these conceptualisations is correct. The point is that these ways of framing issues have effects. My focus is on the material effects for women. Treating women's bodies as brute matter makes women's embodiment disappear. I argue that a body-focussed policy would alert us to this and the other effects of conceptions of bodies operating in policy discourse.²¹

A body-focussed approach to policy starts from the premise that material bodies 'live' the effects of policy. The approach comprises three primary elements.²² The first element is to locate the ways in which bodies are conceptualised within policy. This requires the elucidation of the frameworks of meaning and 'assumptions about bodies' embedded in policies in order to identify 'the political effects and the possible limits of existing accounts of political subjectivity' (Bacchi and Beasley 2002: 327). A key component is to identify and highlight contradictions and tensions in the conceptualisation of bodies within policy discourses. Moreover, it is necessary to identify 'who' is given the authority to speak about bodies and importantly, whose voices are silenced.

The second element to a body-focussed approach to policy is to recognise that bodies consist of 'living flesh, with blood, bones, organs, and energies' (Rothfield 1995: 189). Bodies do not stop at the surface. Hence, there is a need to insist on a

²¹ The 'messiness' of policy and the policy process, particularly around the area of reproduction and related issues of family formation, necessitates that a body-focussed approach to policy is one of a number of strategies. Indeed, it is my view that for feminist policy analysts interested in challenging long-held conceptualisations that have a negative effect on women's bodies there is a need to embrace a range of tools and theories and to use these strategically.

²² While this thesis illustrates the usefulness of this approach in relation to policy analysis, the Conclusion gives some indication as to ways in which this approach can be employed in the policy process.

recognition that assumptions relating to our body parts, organs and related processes beneath the bodies' surface, are also embedded within policies. Consequently, attention also needs to be paid to the ways in which these are conceptualised within policies. This is particularly important in relation to the increasing primacy given to the fetus and genetic material over the pregnant body.

Finally, this approach to policy identifies the ways in which material bodies are marked by other significant factors such as class, gender and race. Bodies are always situated and relational to other bodies, both physical and regulatory bodies. It is, hence, crucial that a body-focussed approach to policy grounds material bodies within the wider policy environment. This necessitates an emphasis on the importance of policy contexts within policy analysis.

Policy in Context

Context appears on the cusp of both traditional approaches and new theories. As many have remarked, acknowledging context is essential to policy analysis (Dalton *et al.* 1996: 23, Bacchi 1999: 7). Rob Watts (1993/ 94: 123), for instance, notes that a reasonable amount of literature 'ignores the actual social and historical processes, practices and relationships that lie beneath the surface of texts...'. This has certainly been the case in a good deal of policy analysis. Policy, however, does not occur in a vacuum. Nor do policies occur in isolation. Put simply, policies occur and operate in relation to other policies and in relation to specific social contexts. As such, it is vital to address the environment in which the debates and policy decisions are taking place in order to identify common themes in and other pressures impacting on the policy process. As we will see throughout this thesis, decisions regarding reproductive technologies need to be seen in the context of the construction of

infertility as socially undesirable, the decline in the population rate and the advent of 'biotech' companies, points expanded on in Chapters 2, 3 and 5. We need, however, also to be sensitive to the varied ways in which these contexts are represented. That is, we cannot assume that contexts are simply there, waiting to be described, any more than problems are.

In order to encompass context fully in analysis it is essential to identify who is involved in the policy making process. That is, it is necessary to illuminate the role of other bodies in the policy process. Policy does not just simply appear, nor are policies the sole result of *government* decision-making. Pressure groups and interest groups are frequently influential in the decisions that are made. The power and the role of these policy actors in the policy process should not be underestimated. Importantly, professional bodies are invested with authority (Osborne 1997). As noted earlier, the positioning of reproductive technologies as ethical issues has played a large part in the shaping and development of policy in this area. Around the issue of reproductive technologies we have seen the rise of bioethics and an increasing reliance by governments on bioethics committees. Given the important place of the reports and inquiries of these committees in this analysis, it is important to consider some of the key assumptions that underpin this area of knowledge.

Bioethics as a discipline developed out of a growing scepticism concerning the growth of science. There was seen to be a need to 'rein in' *some* areas of scientific growth (Bacchi and Beasley 2002: 343).²³ Generally, bioethics deals with limited issues such as invitro fertilisation (IVF), abortion, cloning, organ donation, human

²³ This point was brought home to me when I attended the Adelaide 'Festival of Ideas' in 1999. One of the events was an open forum on cloning entitled 'Hello Dolly – Cloning, Ethics and the Law', which attracted a large audience and generated heated debate among both the speakers and members of the audience. Much of this debate suggested, in terms of public perception, a discomfort with the rate of advances in, and the potential uses of, these technologies.

subject experimentation and surrogacy, issues where science is seen either not to be capable of regulating itself or not to be trusted to regulate itself. Importantly, bioethics committees are formed for the purpose of writing or influencing policies, laws and regulations (Hynes 1987: 196).

The practice of bioethics, significantly, rests on the assumption that bioethics is a value-neutral process, a view that needs to be challenged (Diprose 1995: 202). Professor Max Charlesworth (1991: 55), a member of the Australian National Bioethics Consultative Committee (NBCC) during the period in which the 1990 *Surrogacy Report 1* was produced, states for instance that ‘ethics is a rational discipline’.²⁴ Implied in this statement is a belief that bioethical decisions will be based on reason, that they will be logical, fair, and sensible. Some of the questions raised earlier about the use of the term ‘rational’ when applied to policy processes arise again here. In both cases the term ‘rationality’ serves to distance spokespeople from context. In both cases the term has an ‘empowering effect’ for these spokespeople, and a corresponding disempowering effect for the general population. Charlesworth is clearly implying that committee members can divorce themselves from the values they hold in order to make a ‘rational’ decision. It follows, in his view, that their decisions have merit and should be listened to.²⁵

The make-up of bioethics committees generally comprises ethicists, medical professionals, religious representatives and legal representatives. The committees, then, are in fact made up of people with vested interests in the fields covered by

²⁴ This committee is now defunct, having been replaced by the National Health and Medical Research Committee. The *Surrogacy Report 1* (1990) is discussed in detail in Chapter 6.

²⁵ Recently Max Charlesworth (2001) has commented that the bioethics movement has in the past had an ‘obsessive fascination with principles’, noting that due to the difficult issues faced by bioethicists it is rare that ‘we can appeal confidently to a principle’ (see Charlesworth 2001 for further details).

bioethics (Hynes 1987: 196). As such, their views arguably reflect these vested interests. Their professional positions mean they have significant interests in the outcomes produced and thus cannot be ‘reasonably’ expected to ignore these. Moreover, their respective views reflect the assumptions of a particular social group and of a particular cultural group. Put simply, bioethics is the voice not of ‘all people’ but of a select few. In Wolf’s (1996: 25) words, ‘bioethics appears to be a conversation among experts’ with those affected by bioethical inquiry constituted as ‘objects of concern rather than full members of the ethical conversation’. Not surprisingly, then, bioethics can never be a value-neutral process. Hence, it is important to interrogate the values held by the members of these committees and consequently the values articulated in the reports produced. A focus on policy discourses provides a valuable tool to do this.

Bioethical engagements with the area of new reproductive technologies have often focussed on the implications for women of these technologies. However, as noted above, the ways in which bodies are conceptualised within these engagements is highly problematic. Bioethics does more than just describe bodies; it is also ‘implicated in the inscription’ of the body (Shildrick 1997: 214). That is, bioethics plays a role in the shaping of bodies.²⁶

It is also important to examine the authority vested in the legal system, given its crucial role in policy determination. As noted earlier, many of the policy issues around family formation result from the lack of specific legislation. It is because of this that courts have become privileged players in determining, for example, paternity in child support cases. Given the role of the courts as privileged players it

²⁶ More will be said about the conceptualisation of ‘bodies’ in bioethics in Chapter 4.

is essential to elucidate the assumptions inherent in legal judgements. But, as Osborne (1997: 175) points out, authority in policy is ‘never just given or constructed in the abstract but always problematised, negotiated and constituted’, a point illustrated in Chapter 7 where in an Australian case *Re Evelyn* the argument that the surrogacy agreement was against public policy was rejected by the courts.

A central argument of this thesis is that not only do policy documents, bioethics committees and judicial judgements *reflect* assumptions which are temporal and cultural, but that they also play a key role in perpetuating and strengthening these assumptions. This can be seen explicitly in the ways in which dominant assumptions based on Western values shape reproductive policies. A study of many Indigenous cultures illustrates the different values pertaining to, and methods of dealing, with infertility in their communities. Mariana Valverde and Lorna Weir (1997: 420), in an examination of the 1991 Canadian Royal Commission into new reproductive and genetic technologies, discussed in Chapter 7, draw attention to the attempts by representatives of the Yukon Indian Women’s Association ‘to educate the commissioners about customary adoption practices’ in the Yukon Indian Community. The Yukon representatives used the language of bloodlines instead of genetics and suggested that ‘kinship might be a more important value than individual health’. Valverde and Weir (1997: 420) note that, not surprisingly, in the Canadian Royal Commission the views of Indigenous groups did not appear in the final report.

Similarly, practices of customary adoption have had a long history in Australian Torres Strait Islander communities (ATSIC 2000: 70). However, in line with the Canadian experience, Indigenous voices remain largely of secondary consideration

within Australian bioethical reports such as the *Surrogacy Report 1*. These examples signal different ways of thinking about childlessness within communities, ways which challenge normative Western views. More importantly, they illustrate how policy gives primacy to certain dominant values through the obscuring of other voices. Identifying this process is a first step to contesting and offering alternative views, which begins Section 1 of this thesis.

This chapter has set out the theoretical background behind the approach to policy employed in this thesis. I have argued that there is a need for a focus on policy discourses in order to elucidate some of the less discussed assumptions contained in policies concerned with reproductive technologies and related issues of family formation. I have also insisted that there is a need to pay close attention to the role of ‘policy actors’, such as bioethics committees, due to the pivotal role they play in policies concerning these areas. It is essential to uncover the values that these committees hold as these values are reflected in the reports they produce, which influence policy. I use the idea of problem representation to examine these values and assumptions. That is, I examine how issues around reproductive technologies are problematised, what kind of problem they are deemed to address. I also emphasise the effects of problem representation – material, constitutive and constituting. I argue that a body-focussed approach to policy is useful in identifying the effects of policy on material bodies. This method of analysis allows us to capture and incorporate the ‘messy realities’ identified by Ball (1990: 9).

Section 1

Context(s): looking back in order to look forward

Preamble

As argued in the previous chapter, it is crucial in policy analysis to address the wider environment or context in which policy decisions take place. This section provides (some) context to the case studies developed in Section 2. It examines three areas which I argue are critical to the framing of debates surrounding policies concerning reproductive technologies and related issues of family formation. A range of deconstructive approaches are drawn on in this section including the Foucauldian concept of genealogy discussed in the previous chapter. A genealogical approach enables the elucidation of the political, social and economic contexts within which discourses emerge (Burr 1995: 69). Foucault's point, in Vivien Burr's (1995: 69) words, is that 'if we can understand the origins of our current ways of understanding ourselves, we can begin to question their legitimacy and resist them'. Consequently, we can see much more clearly the power relations involved in the operation of discourse (Ball 1994: 3). It needs to be noted again that contexts, like social 'problems', can be represented differently. Hence, there is no guaranteed access to the 'truth' of contexts. In each case we are dealing with contested versions of the truth.

In the first chapter in this section, 'A Genealogy of Genetics: eugenics, gendered genes and the "birth" of the genetic family', I examine the historical basis to the discourse of genetics. The 'gene', we discover, emerges as a biological unit in the context of long-held beliefs regarding blood-lines, which influence how the gene is conceptualised. Here similarities are found between eugenic ideas dominant in the

early part of the twentieth century and current gene theory. I illustrate also that rather than being conducted in a neutral and rational environment, scientific research is in fact more often than not conducted in an environment dominated by competition and funding pressures. Moreover, scientific research is conducted by people with values which impact on the nature and findings of the research. For example, these ‘discoveries’ are frequently marked by assumptions about race, class and sexuality.

The second chapter, ‘Re-producing the Family: family, population, government control, and the implications for reproductive technologies’, focuses on the ‘problem’ of the birth rate decline. It identifies important similarities in political approaches to the birth rate decline in Australia in the early 1900s and today. In both instances, women’s bodies occupy the central focus of policies around the issue, with women’s bodies targeted for intervention.

In the third chapter in this section, ‘Fragmenting the Reproductive Body: constituent parts, fetal “subjects”, and competing claims over the pregnant body’, elements of feminist body theory are drawn on to reflect on the ways in which women’s reproductive bodies have been conceived within policy and law in relation to reproduction. Within these spheres women’s bodies, when pregnant, have historically been conceptualised as ‘mere’ bodies, whose main function is the safe production of the fetus and child (Bordo 1993). Moreover, increasingly the fetus is constructed as a body which is separate and distinct from the pregnant body. This chapter looks at technologies such as ultrasound which have been instrumental in this construction.

Together these three chapters elucidate the frameworks of meaning which form the 'backdrop' to the policy areas considered in the case studies. In each chapter, particular emphasis is placed on the social, political and economic factors essential to understanding these issues. My goal here is to open some spaces for challenging dominant constructions regarding the role of genes, the 'naturalness' of the 'traditional' family unit and the ways in which women's bodies have been conceptualised in law and policy.

A Genealogy of Genetics: eugenics, gendered genes and the 'birth' of the genetic family

In the 1990s genetic connections have come to define a new molecular family, one bound together less by history, tradition, or common experience than by shared DNA (Nelkin and Lindee 1995: 58)

Times have changed, and technologies have certainly changed. But many of our cultural ideas have remained strikingly unaltered across the generations. We have a strong faith in the power of heredity to shape destiny, in the ability of modern science to arrive at truths about nature, in our identity as a deeply inscribed property, in the constitution of scientific facts to be neither good nor bad (but just authoritative), and in the ability of those scientific facts to speak for themselves (Marks 2002: 2).

Policies which regulate reproductive technologies and related issues of family formation have played a large part in the maintenance and in many senses in the protection of the 'traditional' family unit. For instance, in cases where a child created through IVF is not genetically related to either parent, policy conceals this and creates what is essentially a biologically 'imagined' family. For all intents and purposes the family is treated from the point of conception, by policy, as though it conforms to the biologically ideal 'norm'. The non-genetic parent is granted the same status, rights and responsibilities, as those of a 'genetic' parent. The body of the gamete donor is eliminated both legally and socially; their name does not even appear on the birth certificate. However, an increasing refocusing on genes as central to the determination of who we are is making this 'illusion' harder to maintain, in the process challenging established conventions of the 'traditional' family.

As we saw in the previous chapter, policies need to be accepted in order to be legitimate. For this to occur, as Edelman (1988: 32) argues, they often rely upon and

reaffirm long-held beliefs. Hence, policy cannot be considered separate from the social, political or economic context in which it occurs. The aim of this chapter is to illustrate how assumptions about biological ties and heredity, increasingly articulated now in terms of genetic ties, have long factored into policy-making. The nature of genetic theories necessitates that we take a broad perspective and consider developments in a number of Western countries. The chapter discusses firstly the concept of blood ties and looks at the shift to the language of genetics which occurred as a result of the discovery of the gene in the nineteenth century. Some of the major developments in genetic theories are also tracked. The chapter elucidates the relationship between science and policy, looking at how scientific, and in particular genetic, theories have long influenced policy. The concern here is not to debate the relative merits of genetic theories in scientific terms but to ‘tease out’ some of the myths and fantasies regarding genes and genetics. In doing this, a critique of genetic determinist modes of thought is offered. A central task of this chapter is to explicate the cultural context in which genetic material is commonly understood and in which genetic research has been, and continues to be, conducted. The gene, as we shall see, is not only a molecular entity but is also invested with strong cultural codes (Nelkin and Lindee 1995), with issues of gender, race, and class intersecting. These codes impact on policies, especially on those policies concerned with reproductive technologies and related issues of family formation.

Ties that Bound, Ties that Defined, and Ties that Determined

The focus on bloodlines and heredity as explanatory mechanisms in Western thought has a long heritage. The belief in inheritance of socially important traits through biological procreation was a major trend in nineteenth century thought and this belief was reflected in much of the literature of the time (Hubbard 1995: 40).

Rose *et al.* (1984: 17-18) draw attention to stories such as *Oliver Twist* where Oliver, born illegitimately of upper middle-class parents, speaks with perfect English grammar and has a genteel manner befitting his *true* class, despite being raised in a 19th century British working-class institution. Oliver is contrasted in the novel with Jack Dawkins, more commonly known as the Artful Dodger, not only in speech patterns but also in physical appearance. Whereas the Dodger is described as ‘snub nosed’, ‘flat browed’, and ‘common faced’, Oliver is, despite being pale and thin, described as embellished with a ‘good sturdy spirit’ (Dickens¹ in Rose *et al.* 1984: 17-18). The literary culture of the time reflected and reaffirmed the importance of blood ties, much as popular culture in regard to genetic ties does today, a primary difference being that today a far wider social and economic audience has access to today’s popular culture than in the nineteenth century.

‘Blood’ ties, importantly, not only defined relationships between people but, as noted in the Introduction and discussed in detail in Chapter 7, also regulated the passing down of property. As indicated in the Introduction this system of passing down property necessitated the ignoring in some cases of actual blood connections, such as those between fathers and their illegitimate children (Smart 1987: 101). The focus on blood ties had another significant purpose, functioning to explain social disparities and inequities (Marks 2002: 29; Nelkin and Lindee 1995: 15). Implicit in this concept was the notion that the social compositions of families were founded on, rather than imitating, biological processes of reproduction (Strathern 1992: 18). That is, the biological structure of a family was considered to be a natural entity.

¹ Rose *et al.* provide no reference to the edition or page numbers of *Oliver Twist*.

Blood remains today, as in the nineteenth century, a powerful metaphor for and symbol of heredity (Marks 2002: 64). As Marks (2002: 242) notes, the significance of the concept of blood has always derived not from its biological properties but from the social meaning given to it. While the symbolic value of 'blood' continues to hold sway, the discovery of the 'gene', significantly, enabled the shift from a more abstract theoretical conception of biological difference to a scientific model, a shift which has had important policy implications. As we will see, it is a shift which also comes with a rather chequered history.

Though it was the Danish plant breeder, W Johannsen, who conceived the terms gene, genotype and phenotype², Gregor Mendel is generally credited as the founder of genetics. In 1865 Mendel published findings based on a series of experiments that he conducted on the colour and shape of successive generations of yellow and green peas. Mendel noticed 'that, depending on the parental plants which he crossed, the features green and yellow, wrinkled and round, appeared in successive generations in simple and reducible ratios' (Rose 1998: 99). For instance, a green pea plant fertilised with pollen by a yellow pea plant produced offspring with yellow peas. Cross breeding among those offspring produced both yellow and green peas in a ratio of almost one green pea to three yellow, a ratio also the same in other characteristics (Rose 1998: 99).

The failure of repeat studies using different plant species led to the virtual ignoring of Mendel's findings for many years (Rose 1998: 101). However, around 1900, researchers Hugo de Vries, Carl Correns and Erich von Tschermak each separately rediscovered Mendel's laws, a rediscovery which led to the founding of the modern

² Genotype refers to the total or sum of an individual's genes while phenotype relates to the outward appearance of an organism (see, for instance, Rose 1998: 102).

science of genetics (Rose 1998: 101, 102, 134 endnote 3). Most important was the finding that Mendel's ratios had other applications, describing in species other than plants the 'transmission of discrete characters' (Rose 1998: 102). One of the species discovered to fit within the ratios were human beings. Studies of family trees, which dated back three or more generations, indicated that specific human characteristics such as eye colour and also the capability of individuals to roll their tongue were 'inherited in proportions' that were able to be 'fitted to Mendelian ratios' (Rose 1998: 102).

Not all research focussed on easily discernable characteristics such as eye colour or tongue rolling. In a book called *Hereditary Genius*, Francis Galton (1869) looked at why certain careers such as those in academia and the judiciary ran in particular families. He argued that the reason for this was due to what can be termed 'biologically inherited' capacities (Hubbard 1988: 226). As Hubbard (1988: 226) notes, a gender element existed in Galton's work. The patterns of inheritance that Galton studied were those that functioned in predominantly male lines. Important characteristics, then, were considered to be passed through male reproductive material and/or practices. Women's biological role was characterised as passive and unimportant, in accordance with the dominant cultural stereotypes at the time. Despite the primary focus on men as the 'bearers of genes', it was to be women's material bodies, as we will see in a moment, which would become the focus of the policies that followed.³

In a trend, which arguably continues today, early research centred on traits and characteristics which could be described as 'noteworthy', whether this was in a

³ As I will discuss in Chapters 5, 6, and 7, men are not always considered as 'bearers of genes' in policy matters.

positive or negative sense (Asche & Geller 1996: 320). Researchers attempted to identify what were considered to be positive attributes such as those that ‘produced’ physical aptitude and intelligence, as well as negative traits such as those that ‘caused’ mental or physical illness (Asche & Geller 1996: 320). Hence, we see early on a dichotomy created between ‘bad’ genes and ‘good’ genes. Consequently, from its very beginnings, genetic research was never separated from either the social meanings of certain behaviours or the social context in which these meanings operated. As Hubbard (1995: 38) puts it, genetics is not only a ‘systematic description of hereditary mechanisms, but to a large extent it is also a reading into nature of hereditarianism and individualism that were dominant during the period when it was invented’.

By the 1920s the socially influential eugenics movement founded by Galton was claiming ‘that everything from feeble-mindedness to sexual promiscuity and criminality were also heritable’ (Rose 1998: 104). Galton had coined the term eugenics in 1883, based on the Greek word for ‘well-born’ (Hubbard 1988: 226). Proponents argued that eugenics principles could be promoted in one of two ways: either in a positive sense by getting better stocks to reproduce or in a negative sense by restraining the lower stocks from reproducing (Hubbard 1988: 226).

The eugenics movement is often associated with its most extreme incarnation – the Nazi Regime. However, as Hubbard (1988: 228) and others have argued, what distinguished Germany from other countries, where eugenic thought was popular at the time, was that the political climate in Germany made it possible to *implement* eugenic programs.⁴ As Hubbard (1988: 229) points out, the people initially targeted

⁴ For a discussion of this see Hubbard (1988).

by Racial Hygiene, as eugenics was known in Germany, were the same 'kind' of people that the eugenicists in Britain and America were troubled about. These were people judged to display conditions such as mental illness, epilepsy or alcoholism, people considered to be unworthy of living. It was not until later that the Nazi Regime initiated programs specifically targeting the Jewish population and homosexuals.

Eugenic theories were not proposed by those at the fringe of society or science. Rather they were taken up by a number of prominent, and in some cases what were considered to be progressive, people in both Germany and other Western countries (Glazier 1993: 100).⁵ In practice, there were several strands of eugenic thought. Nelkin and Lindee (1995: 20) note that, rather than eugenics being a 'single idea', it was in fact more akin to a 'messy public discussion that served many agendas'. They point out that a diverse range of people, from housewives to Baptist ministers to pig breeders, were interested in the subject. It was a discussion, however, with political and practical consequences. These consequences had particular implications for women's reproductive bodies. It needs to be noted, though, that the implications did not apply equally to all women. Issues of race and class shaped the policies, targeting *specific* bodies for *specific* types of intervention.

In the United States the Eugenics Record Office established in 1910 led to two legislative outcomes, which articulated the underlying principles of the movement. These were the Immigration Restriction Act and policies of compulsory

⁵ Glazier (1993: 100) gives the example of Nellie McClung, a former Canadian suffragist and delegate to the League of Nations. McClung wished to curtail the birth of 'unfit' offspring from certain groups considered to be promiscuous or inferior.

sterilisation.⁶ While compulsory sterilisation legislation was first enacted in Indiana in 1907, which was three years before the Eugenics Record Office was established, by 1931 approximately 30 states had passed laws of this type (Hubbard 1988: 228). The sterilisation laws were designed to encompass, among others, ‘drug fiends’, drunks and epileptics. By 1935, it has been estimated, approximately 20,000 people had been forcibly sterilised under these laws (Hubbard 1988: 228). In Canada the provinces of Alberta and British Columbia also passed laws enabling the sterilisation of the ‘feeble-minded’ (Glazier 1993: 99).

Implicit to the carrying out of eugenic action was the perception that it came with the legitimacy of scientific research (McLean 1999: 98). McLean (1999) quotes at length the judgement of Oliver Wendell Holmes in the United States Supreme Court case, *Buck v Bell*, to illustrate the force of science in these actions. Medical evidence had convinced Holmes that the woman Carrie Buck was ‘feeble-minded’, as were her mother and daughter. It is worthwhile repeating, as McLean does, the reasoning behind Holmes’ endorsement of compulsory sterilisation:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for those lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes...Three generations of imbeciles are enough (Holmes 1927: 207, in McLean 1999: 98).

Here, the principle that allows for compulsory vaccination, for the benefit of society or the public good, is invoked to allow for the compulsory sterilisation of a woman.

⁶ In the next chapter I will discuss in detail the links between the restriction of immigration and pronatalist policies.

Importantly, links were made between the duty of the citizen and the duty to, and the burden on, the state. Those deemed 'incompetent' and prime candidates for sterilisation were called on to make a 'lesser' sacrifice. It is worth noting that Carrie Buck's daughter, Vivian, was aged 7 months old at the time of the trial and 6 months old when the initial diagnosis was made (Gould 1999: 530-531).⁷ Carrie Buck's sister, Doris, was also sterilised, though this was done covertly with Doris under the impression that she was having an operation for appendicitis (Gould 1999: 530).

In Australia and England no such legislation sanctioning the compulsory sterilisation of those classified as 'incompetent people' was enacted; however, this does not mean that these ideas were not canvassed. Nor does it mean that beliefs linking heredity and the reproducing of the so-called feeble-minded were not in existence. In Britain proposals to 'exterminate' and somewhat less extremely to sterilise those considered 'undesirable' were discussed among eugenicists (Bacchi 1980: 203). In Australia in 1930, the founder of the Eugenics Society of NSW, Richard Arthur, presented a bill calling for 'sterilisation of defectives' (Bacchi 1980: 205). Those classed as eugenicists in Australia generally seemed to belong to what could be classified as a more 'humane wing' of the theory, in many cases still placing some emphasis on environmental factors in influencing character and intelligence (Bacchi 1980: 204). Despite the lack of legislation enabling compulsory sterilisation of 'incompetent people', evidence from a variety of sources suggests that the number of cases of involuntary sterilisation in both countries was indeed

⁷ The child Vivian was adopted by the same family who had raised Carrie but died aged eight years. Gould (1999: 530) notes that visiting academics and reporters affirmed what a few experts had argued all along, that is, that Carrie Buck was of normal intelligence.

quite high before intervention to prevent the practice through the judicial system (Petersen 1996: 59).⁸

Though the correlation between eugenics and Nazism led to a decline in popularity of the term 'eugenics' and certainly curtailed discussion on some of the more extreme proposals, elements of eugenic thought have persisted throughout the history of genetics. Moreover, despite a reluctance to employ the terminology, many of the basic tenets of the theory continue to resonate today. For instance, practices of sterilising people, predominantly women with intellectual disabilities, continue and not always with the sanction of the state. In December 2000 the Australian Federal Government Attorney-General, Darryl Williams, found it necessary to write to Australian Medical Associations, Colleges and a selection of medical journals noting that some non-therapeutic sterilisation procedures were still being conducted, illegally under current law, against women with intellectual disabilities (Williams 2000).⁹ In New York a general practitioner was banned for attempting to sterilise a woman during a caesarean section. He is reported to have commented before the procedure that 'this woman should be sterilised because all her children are in foster care due to sexual abuse' (Cameron 2000: 40). The point is not that these procedures are happening in large numbers. Clearly they are not. Rather, it is to note the similarities in ideas that underpin these procedures.

In terms of legal sterilisation procedures, the medical profession and the judiciary remain major players in the decisions. As Keywood (1995: 133) argues,

⁸ See Petersen (1996) for a discussion of significant judicial cases. As she (1996: 59) notes, intervention was, in these cases, instigated by 'individuals who had no personal involvement with the families'.

⁹ In a 1992 decision, the High Court of Australia found that decisions regarding sterilisation should be made by an independent body such as the Family Court of Australia or the Federal Magistrates Service and was not 'within the ordinary scope of parents' or guardians' powers' (Williams 2000).

contemporary links between the sterilisation of the 'handicapped' and the prevention of the reproducing of the 'handicapped' are more implied than explicit. The concentration in the Courts, she notes, however, remains on preventing these women from getting pregnant, with significant emphasis placed on the intellectual rather than behavioural capacities of raising children (Keywood 1995: 130). Moreover, the focus on preventing pregnancy appears to be of greater concern than that of providing sex education or ensuring protection from possible sexual abuse and exploitation.

Perhaps the most significant shift in focus in eugenic thought has occurred in the language in which these ideas are couched. Whereas in early eugenic thought there was a focus on the control of particular populations, the focus is now on discourses of 'individuals', 'counselling' and 'individual choice' (Peterson 1998: 64). That is, rather than being coerced or legislatively enforced to participate in programs such as sterilisation, people are now seen to be offered a 'choice' to make their own decisions about reproduction, guided by procedures such as prenatal testing technology. Increasing amounts of genetic knowledge are now available before birth (Andrews 1996: 967) and parents can now 'choose' to terminate unwanted fetuses.¹⁰ But what kind of choice is it? Ruth Hubbard (1988: 232) argues that eugenics and prenatal testing are linked by the belief that disability is an 'unmitigated disaster'. In this context, prenatal testing carries with it the expectation that fetuses exhibiting certain characteristics such as Down's Syndrome or Spina Bifida will be aborted. This expectation coupled with the lack of funding for the disabled has led many to argue that women in those situations experience very little real choice in the matter (Katz Rothman: 1999: 403). Here I want to make it clear that I am not suggesting

¹⁰ Incidentally, the genetic knowledge of the fetus also leads to increased genetic knowledge of the parents.

that economic concerns are the only considerations in terminating a fetus with an identified disability. A range of moral and social factors also impact on these decisions including the level of disability of the fetus.¹¹

The status of the family is increasingly being defined in terms of its genetic health. Those (mothers) who decide to carry on a pregnancy with the outcome of a child with a disability or genetic illness are often characterised as ‘bad reproducers’, not only for carrying what are considered to be ‘bad genes’ themselves but also, more importantly, for passing them on (Ettorre 2000: 411). For instance, in 2002 a deaf lesbian couple in the United States created a furore when they chose a donor who was also deaf in order to enhance their chances of having a deaf child.¹²

Moreover, little acknowledgement is made in the literature accompanying genetic or prenatal testing of the complexity involved in interpreting genetic data or the possibility of disagreements between experts over the interpretation (Peterson 1998: 65). In addition, in a theme discussed in Chapter 1, the emphasis on providing counselling for these reproductive decisions rests on the notion that a ‘rational’ decision can be made in the process, denying the social context in which these decisions are made (Peterson 1998: 65). In a world where disability is constituted as a burden and a liability, we need to question what sort of rationality is implied in this notion, and what sort of choice parents really have.

Decoding the Human Genome

Mendel’s ratios were to dominate for several decades but, increasingly, divergences from the ratios were discovered (Rose 1998: 103). One of these was the discovery

¹¹ I also want to make it clear that at no time am I passing comment on the decisions made by people.

¹² See, for example, BBC News (2002) ‘Couple “choose” to have deaf child’, available at <http://news.bbc.co.uk/1/hi/health/1916462.stm>, accessed 15/8/04.

that a range of traits or characteristics including colour blindness and haemophilia occurred only in male lines (Rose 1998: 103). Moreover, while these only occurred in men they could be carried or inherited through the female line. Indeed, most traits have been discovered not to follow Mendel's ratios, occurring instead as the result of a complex process, and in addition these traits often 'vary continuously' (Hubbard 1995: 45). Height, for instance, provides an excellent example of a trait that is not only the result of complex processes such as the combination of genes and environmental factors, including nutrition, but also varies continuously (Nelkin and Lindee 1995: 196).

Genes remained abstract and theoretical constructs for some time after the rediscovery of Mendel's ratios. The first decades of the twentieth century saw the gene shift from a hypothetical entity to a more concrete object, then to an identifiable piece of chromosome (Hubbard 1995: 39). Chromosomes were identified shortly in the early twentieth century, with the classical geneticists H.J. Muller and T.H Morgan influential in establishing the chromosomal basis for inheritance (Fox Keller 1995: 56). By the mid twentieth century, Francis Crick and James Watson had identified the structure of the chromosome as a double helix of DNA.

A close look at the environment in which scientific thought has been produced challenges the common perception that it occurs within a 'rational' setting. Crick and Watson, for instance, were in a race with other scientists, among them the well-known chemist Linus Pauling, to uncover the structure of DNA (Latour 1987: 1- 6). Pauling had proposed a three chain model. When Watson and Crick were given a copy of the paper in which this theory is elaborated, by Pauling's son, they

discovered the model to be unable to hold the chain together. Watson's description of the moment illuminates the pressures and competitiveness involved:

When his mistake became known, Linus would not stop until he had captured the right structure. Now our immediate hope was that his chemical colleagues would be more than ever awed by his intellect and not probe the details of his model. But since the manuscript had already been dispatched to the *Proceedings of the National Academy*... Then it would be only a matter of days before the error was discovered. We had anywhere up to six weeks before Linus again was in full-time pursuit of DNA (Watson 1968: 104, in Latour 1987: 6).¹³

At stake was not only the quest to uncover the structure of DNA but also the quest to be known as *the first* to uncover the structure. Hence, science is about ego and status, as well as about contribution to knowledge.

While science makes a claim to be objective and to discover a higher truth, scientific thought is never a value-neutral objective, above or separate from the politics within the scientific community or the external political environment (Rose *et al.* 1984: 8). To be clear, I am not suggesting that technology itself has values that drive applications and indeed policy. Rather I am arguing that the production and application of technology operate within a social context. Factors such as funding and competition influence the decisions that are made in scientific processes (Latour 1987: 3-6).

Continuing the theme developed in the last chapter, when we look at the language within which scientific thought is couched, we see contestation over the meanings of key terms. Bruno Latour (1987: 9), for example, problematises the meaning of terms such as 'efficiency' within science. 'Efficiency' has no set and concrete

¹³ Watson's (1968) *The Double Helix*, from which the above quote is taken, is viewed with some controversy by many feminists, in particular for his unflattering portrayal of the physical chemist, Dr Rosalind Franklin, whose work was central to the discovery of the double helix. Franklin died from ovarian cancer in 1958 (Maddox 2002: 311-318).

meaning in science; it is, in Sturman's (1997) terms, a 'contested concept'. Latour (1987: 9- 10) points to the difference between saying something will be efficient when it works and saying that people will be convinced that something is efficient because it works. He notes that what is seen to be 'efficient' rests in part on who succeeds first. It is they who then have the power to define what is seen to be efficient. It is those that succeed first who set the norm.

Moreover, tensions can be seen in the practice of science and importantly in the dissemination of scientific knowledge. As Midgley (2003: 129) notes '[O]n the one hand it [science] aims to represent the hugely complex facts of the world. On the other, it aims at clarity, and for that it needs formal simplicity'. Through this process complex ideas are inevitably simplified with implications for our understanding of these ideas. Moreover, these 'facts', like policies regulating reproductive technologies, do not exist in isolation. Rather they become part of the wider story which science seeks to explain, in the case of this thesis the 'influence' of genes in determining who we are (Midgley 2002: 4).

Above all, science is a process. Scientific discoveries do not just take place but are products of the historical period and of political ideologies. Scientific theories then reflect the agency and the intentionality of their makers (Fox Keller 1995: 53). Simply put, scientific theories are developed by people who are also social actors (Fox Keller 1995: 54). They are products of interpretations of factors by people, people with vested interests in these interpretations. Scientists, like bioethicists and other policy actors, are people with values. The ways in which scientists ask questions are coloured by the scientists' political and social biases (Rose *et al.* 1984: 8). Moreover, science has a vested interest in maintaining its authority in the

dissemination of knowledge because power is invested in the claim to ‘know’ the objective truth. The legitimation of science rests in part on the continuing power of scientific discourse. Moreover, scientists, including biologists, have a vested interest in maintaining their role in the dissemination of knowledge.

The identification of the structure of DNA by Crick and Watson led to the development of metaphors to describe what the structure represented, metaphors which found their way into public discourse (Van Dijck 1998: 179). Words such as ‘language’ and ‘code’ became synonymous with the terms gene and DNA (Van Dijck 1998: 179). The metaphors, which were introduced initially to indicate simply the workings of DNA and to provide a way in to understanding how they operated, have had other far-reaching effects (Van Dijck: 1998: 179). Firstly, the terms suggest that genes provide the system by which ‘our’ bodies operate and invoke the image of biological inevitability or fixity. Put simply, they suggest that we are a product of and are constituted by our genes (Rose *et al.* 1984). Simultaneously, the invoking of terms such as ‘code’ and ‘language’ also hierarchically placed the role of genes in human development over that of the whole organism (Van Dijck 1998: 180), and this has had important consequences for bodies, in particular for women’s material bodies. The image suggests that the biological body is secondary to the role of the genes, a point expanded on later in the chapter.

The early 1970s witnessed the explosive growth of the ‘new science of molecular biology and its application as biotechnology’ (Rose 1994: 190). This technology created the ability to isolate, identify and manipulate genes (Rose 1994: 190). The capacity to isolate genes led to, among other things, the capacity to produce human insulin by firstly isolating a gene, then copying it and finally inserting it into

bacteria to produce a human protein (Rose 1994: 190). The application of molecular biology as biotechnology has meant that this science has turned into a multi-million dollar industry. Hence, biological ‘discoveries’ are driven in part by a parallel need for profit. It must be noted that this is not a critique of these companies, the work that they do or even the motivations behind their doing it. Instead, it is to be aware that these companies have other responsibilities, such as the return of profits to shareholders, which impact on the scientific process.

The 1970s also saw the idea of mapping the human genome articulated within the scientific community (Rose 1994: 197). However, it was not until 1990 that the international organization, HUGO, was established to coordinate the mapping activities of the countries involved (Van Dijk 1998: 147). The term ‘map’ is significant in visually illustrating the aim of the project and suggesting the primary importance of genes to bodily function and meaning. The common perception of a map is as a precise instrument, a perception which obscures ‘the priorities and interests that shaped it’ (Nelkin and Lindee 1995: 8).

The common response of why the human genome needs to be mapped is that it will enable ‘us to find what it means to be human’ (Hubbard 1995: 49). This response reflects and strengthens the notion that we are seen to be the product of our genes (Rose *et al.* 1984: 65). It is our genes that are seen to make us ‘who’ we ‘are’. Biology makes claims as to who we are and why we are here on earth (Rose 1998: 5). This obscures the value-laden nature of biological thought. Hence, what are considered to be important characteristics for being human rest on the values and politics of the time. Moreover, given the genetic diversity of people it is indeed a misnomer to think there is one ‘human genome’ (Marks 2002: 199).

In simple terms the Human Genome Project aims to locate and sequence each of the estimated hundreds and thousands of genes contained in the cells of the human body. Though the project is an international effort, the United States is arguably the primary player both in the official government effort and private enterprise. According to Hilary Rose (1994: 197), the Human Genome Project 'is a product of the political economy of the eighties and unquestionably marked the self-inserted entry of molecular biologists into runaway industrialized science'. In a fashion similar to the discovery of the double helix, the Human Genome Project has witnessed its own 'race'. Private companies and the official government project both endeavoured to become the first to complete the draft and the map. Eventually agreement was reached which allowed for a joint announcement of the working draft of the map between the official government initiative and one of the leading private companies. Incidentally, the announcement of the draft map in June 2000 coincided with a rise in the share prices of many of the biotech companies involved in the project (Nash 2000: 43). More and more it is private companies that are at the forefront of both research into genetics and developments in the field of reproductive technology.

The policy implications of the mapping of the human genome, outside the focus of this thesis, are wide-ranging. Questions have already arisen over the ownership of body parts. Biotechnology has become a multi-million dollar industry. While knowledge gained about the body through the genome project is said to belong to everyone the intervention of private companies into the search for the 'map' has had significant impacts. The issue of patenting the 'maps' has been raised, with biotech companies patenting the processes of discovering and isolating the DNA (Gene

Sage 1999). It seems likely that it is only a matter of time before companies attempt to apply patents to the strands of DNA which they isolate and identify.

Moreover, research designed to enable the identification and isolating of genes produces the potential for employers and insurers to require that their employees and insurees have a good 'genetic profile' before they will either employ or insure them (Rose 1994: 194). The British Government legislated in 2000 to allow companies to refuse to provide insurance or conversely to charge large premiums to those born with a genetic disposition for serious disease or illness (Hackett 2000: 23). A discussion paper released in August 2002 by the Australian Law Reform Commission (ALRC) and the Australian Health Ethics Committee (AHEC) includes in its key proposals the prevention of employers, with restricted exceptions, from gathering genetic information; however, in terms of insurance it maintains the doctrine of 'full disclosure' in regard to information with some safeguards applied (ALRC/AHEC 2002). In the United States a woman who found after pre-natal screening that her fetus tested positive to cystic fibrosis was initially told by her health care provider that they would not pay for the health needs of the child if she chose not to abort – a decision later overturned after a public outcry (Andrews 1996: 986).

At the moment, the idea that the potential exists for the creation of an underclass of those considered to be 'genetically' unemployable may seem to be science fiction. Indeed, to suggest such a thing sounds like a conspiracy theory. However, there has been a long history of using biological difference to prohibit certain groups from gaining employment in some areas. For instance, many jobs including fire-fighting have historically employed a height requirement. Hence, if genetics continue to

dominate our perceptions of 'who' we 'are', it is not inconceivable that some people could be considered not genetically 'suitable' for some jobs. Even the ALRC/AHEC (2002) discussion paper allows room for employers to gather information if occupational health and safety reasons deem it necessary. An important point here is that the structures that deem people unsuitable remain unproblematised in this understanding of the 'problem'.

While James Watson, a major player in the Human Genome Project, has acknowledged that the discovering of 'imperfect genes' will necessitate laws to prohibit the public dissemination of this information, he seems relatively untroubled by the identification of these genes themselves (Watson 1993: 25). What Watson and others fail to see is that genes are simply 'genes'; it is biologists and geneticists who deem some genes imperfect. People give genes their social meaning.

The 'double-edged' nature of genetic advances can be seen clearly with the advent of technologies such as Micro Sorting (Callahan 1996: 14). Micro Sorting enables the 'choosing' of the biological sex of the fetus. This has allowed for the 'screening out' of some sex-linked genetic 'disorders'. However, it also enables parents to 'choose' for social reasons whether to have a boy or a girl. Katz Rothman (1999a: 409) notes that in some cases people are making choices about a particular type of parenting experience; thus the choice is not only to have a male or female child in biological terms but also whether to raise in social terms a girl or a boy. Moreover, returning to the point made in the Introduction, in some places having a female child can be seen to be the same as having a child with a genetic disorder (Katz Rothman 1999a: 409).

The mapping of the human genome carries with it the promise of ‘cures’ for genetically caused diseases. Indeed, as Alan Peterson (1998: 59) notes, it ‘promises a new kind of public health practice in which the health of populations is defined by freedom from risk of genetic disease’. While not doubting the possibilities for the valuable addition to medical knowledge benefiting people, many of the potential problems remain largely absent from the public discourse on the issue. The claim that genetic research will enable the curing of diseases neglects the impact of other factors on health, such as the environment. As geneticists themselves realise, having a particular ‘gene’ does not necessarily mean the acquiring of that trait. A relationship exists between genes and the environment. Cystic fibrosis, for instance, does not result from the presence of ‘a’ gene, but occurs when a particular gene is compromised (Marks 2002: 105). Consequently, biologists realise that phrases like ‘genes for...’ are merely convenient shorthand and do not accurately represent cellular processes (Rose 1998: 115). However, phrases such as the one above operate in the public domain as explanations for how genes work. Perhaps more important is the continual predominance and immutability of this narrative (Birke 1999: 139).

As Steven Rose (1998: 116) points out, while thinking of genes in simplistic terms as ‘individual units’ that shape or determine characteristics such as eye colour is relatively unproblematic, this is not the case when we talk about genes which ‘cause’ homosexuality or ‘aggressive’ behaviour. It is rare, for instance, that judgements are made about our worth on the basis of eye colour. When we talk about ‘genes for’ what are considered to be, in some quarters, anti-social behaviours, we locate social and behavioural difference within the biological body.

What is also implied is not only that we *can* possibly ‘cure’ these behaviours, but also that we *should* do so.

The Human Genome Project has not been the only significant development in the field of genetics. Important developments have also taken place in the field of cloning. For example, recent well-publicised successes in the cloning of animals and the potential applications for human medicine have pressured some governments to relax laws relating to research on human embryos. Much of the technology used in the cloning process has been developed on animals for the purpose of increasing breeding programs. This is also in part due to restrictions in place on the use of human embryos for research. The Massachusetts-based Advanced Cell Technology has already successfully cloned a 12-day-old human embryo, which was then destroyed two days later within United States regulations (Cobain 1999: 4). More recently, the British government gave approval for the cloning of human embryo cells for medical research (Reuters 2001) and in 2006 the Australian Federal Parliament passed a Bill legalising therapeutic cloning (Franklin 2006).

Genetic technologies have also impacted on the ability to test genetic parenthood. With this discovery came the ability to subject what can be termed the ‘assumed fatherhood’, acquired through marriage, to a form of scientific examination. Further advances have meant that it is now possible to test paternity by means of DNA profiling with a 99.9% success rate.¹⁴ Improvements in paternity testing have challenged the legal assumption that children are a product of marriage and, more importantly, the biological, or genetic, offspring of the marriage, the implications of

¹⁴ This claim is made by a number of organizations. See, for example, Fairfax Identity Laboratories (2006).

which will be addressed in Section 2 of this thesis. Relatedly, DNA profiling has also been used increasingly since 1985 in criminal investigations. Calls continue in Australia and other countries for the national registration of the DNA of convicted criminals (Jeffreys 1993: 54). Consequently, genes are increasingly being seen as 'identifying' codes.

As a consequence of mapping the human genome and related advances in genetic technologies the 'mythic importance' to our culture that genes and genetics have been assigned has increased (Hubbard 1995: 51). This is reflected in the mainstream media surrounding the issue. The continual assertion of the importance of the gene has also had important consequences on the policy process. Significantly, mapping the genome has further increased the construction of genes as separate and somewhat alienated from the body.

Genetic Determinism and the Rise of Sociobiology

Related to, and in some cases receiving legitimation from, advances in genetic technologies has been the rise in appeal of ideas associated with biological reductionism or, as it is more commonly known, sociobiology. In biological terms, reductionism is a process in which 'complex wholes', such as molecules, are explained by, or reduced to, a focus on the elements which make them up. Hence, in a simple example, if a society is seen to be aggressive it is because the people who make up the society are aggressive (Rose *et al.* 1984: 5). This produces a focus on the individual at the expense of the whole. Sociobiology posits that genes control a range of complex behaviours including sexuality, aptitude and gender differences (Rogers 1999: 41). Ted Peters usefully terms this type of thought 'puppet

determinism' because genes, akin to a puppeteer, are thought to 'pull the strings that make us dance' (Peters 1997, quoted in Peterson 1998: 60).

As Lesley Rogers (1999: 43) has pointed out, it is important to draw attention to the timing of sociobiology's ascendancy. Sociobiology came to prominence in the 1970s, a time when 'minority' groups such as women and Black people were advocating change and demanding equality. Thus the appeal of, and to, sociobiology can be seen as, in part, a backlash against the demands for changes which were taking place in the society of that time (Rogers 1999: 43).

Here it is useful to consider the ways in which, in the debates that surround sociobiology, 'scientific content' is enmeshed 'with certain influential and emotive views about nature and destiny of our species' (Midgley 2002: 26). In simple terms, sociobiology both reflects and reaffirms dominant constructions of society and the power relations within it. Integral to science, and in particular sociobiology, are a range of 'myths' and 'symbols' which play a central role in giving shape to specific ways of thinking about the world (Midgley 2003: 1).

Consequently, sociobiology's continual appeal lies in its legitimation of the status quo (Rose *et al.* 1984: 235). The acceptance of biological determinism as an explanatory mechanism for factors such as inequality and poverty plays down the need for political, social and economic change (Rose *et al.* 1984: 236). It locates the reasons for social problems within individuals and leaves the system unchallenged. Most importantly, it does this with the legitimation of science (Hubbard 1995: 48). Genes become the reason for lack of intelligence or employment, ignoring possible problems with the school system or a lack of opportunity (Rose *et al.* 1984: 87).

Furthermore, if genes are seen to cause behaviour, it can be argued that 'bad genes' cause 'bad behaviour' (Rose *et al.* 1984: 20).

Significantly, the link between genes and conditions such as poverty and inequality has been, and continues to be, taken up by politicians and other policy actors and groups (Rogers 1999: 43). Biological explanations have long served to legitimate the introduction, and protection, of policies that maintain inequality (Rogers 1999: 43). This is not to suggest that genetic deterministic arguments are not used by more liberal commentators or that social conservative commentators do not also bring into play elements of environmental determinist thought in order to explain, and maintain, factors related to inequality. Nelkin and Lindee (1995: 106) note, for example, that social conservatives employed environmental arguments in the 1970s to justify women's role in the home: 'if the achievements of children were finely calibrated to their training and environment, then mothers were needed at home and entirely responsible for their children's behaviour'.

It is an oversimplification to think of genetic determinist ideas in the singular. There are, as there was with eugenic thought, different versions of genetic determinism, some of which are no longer sustained today (Kaplan 2000: 9). Most of the strictly determinist ideas, for instance, receive very little credence. Rose (1998: xi) argues that while 'vulgar sociobiology' might be out, what he terms 'neurogenetic determinism' is strongly entrenched. Neurogenetic determinism is the 'philosophical and political offspring' of a coming together of the sciences of genetics and the brain, commonly referred to as neurogenetics. Neurogenetics is said to offer 'the prospect of identifying, ascribing causal power to, and eventually modifying genes which affect brain and behaviour' (Rose 1998: 275-276).

However, there remains a tension in studies which on the one hand want to deny genetic determinism, while on the other hand engage in research where the gene is central to the study (Kaplan 2000: 10).

Popular works such as Richard Dawkins' (1989) *The Selfish Gene* have been significant in influencing public perceptions of the gene. The popularity of this bestselling book, even in the wake of scientific evidence complicating and in some cases challenging its theories, can be attributed, in part, to its capturing of 'a set of beliefs increasingly pervasive in popular culture' (Nelkin and Lindee 1995: 185). Dawkins' book places the gene at the centre of evolution. According to Dawkins, genes are selfish because 'they are seen as the driving force for reproduction' (Rogers 1999: 41). In this understanding, complex human behaviour is reduced to a 'by-product' of the desire and need to replicate (Rogers 1999: 41). Moreover, the body is constructed as little more than a container for the genes (Birke 1999: 139). As Steven Rose (1998: xii) argues, the problem with Dawkins' work is not only its genetic reductionism but also the role it plays in influencing public perception of these issues. In Rose's (1998) terms, Dawkins' work provides the frameworks within which the general public understands the debate.¹⁵ Consequently, they impact on the policy environment. On this issue, I want to return to Edelman's (1988: 33) point that there needs to be acceptance of a construction of a condition for it to gain popular support. Hence, the influence of popular books such as *The Selfish Gene* should not be underestimated.

¹⁵ Rose makes similar claims about the philosopher Daniel Dennet's (1995) work *Darwin's Dangerous Idea: Evolution and the Meanings of Life*.

Genes and Their Relationship to Biological Bodies

As I noted in the last chapter, we are constituted daily by a multiplicity of discourses (Davies 1994: 2). Biological models then have important social effects due to our constitution within them (Martin 1999:186). Whether we are constructed as normal or abnormal within and by a biological discourse affects our lives and also has biological impacts on our bodies. I drew attention earlier to the way in which being constructed as 'feeble-minded' enabled the forced sterilisation of a person's body. Some bodies were deemed not to be appropriate reproductive bodies, allowing this intervention. Importantly, biologically deterministic modes of thought have had different impacts on the bodies of men and women.

Genetics is above all the study of differences (Rose 1998: 113). It is a study concerned with why some people are born with certain characteristics while others are not. The point, though, is not the differences themselves but the meanings ascribed to the differences (Rose *et al.* 1984: 154), and also that a greater weight is given to some differences than others. Great weight has historically been given, and arguably still is given today, to the differences between white people and people of colour. The emphasis on differences has traditionally had negative effects for those characterised as different from the 'norm'. For instance, biological determinist arguments have often been used against Indigenous peoples, African Americans and peoples from other racial and ethnic backgrounds as genetic legitimations for racism (Rose *et al.* 1984: 19).

In the United States, where it is possible to sell human eggs, there has been a noticeable trend in the privileging of certain types of genetic material. For instance, 'Ivy League' eggs can sell for between \$35,000 and \$50,000 U.S. dollars (Katz

Rothman 1999b: A52). As Barbara Katz Rothman (1999b: A52) observes, this equates to half a college education or a German sports car. Intelligence is considered a privileged commodity that is worth paying for and importantly genes are seen to be the key to this. Similarly, Katz Rothman (1999b: A52) notes a shift from advertisements for sperm donors targeted at medical students in the 1970s to business students in the 1980s, which she suggests is linked to the increased status of the business culture. We can only guess at what will be the next target group. Yet it is not only intelligence which is privileged. Race, sexuality, weight and perceived familial mental stability are all determinants in factoring the worth of genetic material (Katz Rothman 1999b: A52). According to Katz Rothman (1999b: A52), it is unlikely that a student of African American descent would be able to finance her education through donating her eggs.

Biological determinism makes a claim also to *explain* gender differentiation (Rose *et al.* 1984: 19). It claims that the differences between men and women are a result of ‘our’ genes. Hence, men are seen to be more likely to be promiscuous because ‘their’ biological imperative tells ‘them’ that they must replicate their genes. Women, on the other hand, are seen to be more likely to be monogamous because they make a greater biological contribution than men due to their ‘natural’ nurturing capacities and a nine-month gestation period (Rogers 1999: 42). This supports the dominant cultural assumption that women’s ‘natural’ role is in the private domestic sphere.

Genetic discoveries tend to reflect assumptions about race, class and gender. Emily Martin (1999) draws attention to the way in which male and female reproductive practices, as described in texts by biologists and other researchers, reflect the

cultural stereotypes of and assumptions about men and women. She (1999: 181) argues that women's reproductive function is seen to be inferior to that of men because, where men continue to produce sperm, women are born with a set number of eggs at birth, which then 'degenerate' over time.¹⁶ Moreover, texts have historically constructed eggs as passive and sperm as active participants in the reproductive process. Sperm are seen to 'deliver' genes to the egg, which waits to be penetrated (Martin 1999: 181, 182). Women's reproductive organs are constructed in this scenario as waiting, in the same way that women are seen to 'wait' for men. An impact of this is the continuous downplaying of the role of women's bodies as active participants in reproduction.

A relatively recent television production on reproduction, tellingly entitled *The Miracle of Love* (1999), highlights the continuing dominance of gendered constructions of biology. The narration of the processes involved in conception is filled with comments such as 'sperm are outstanding swimmers', 'if the woman hasn't ovulated recently the sperm must wait here until an egg comes rolling by', the 'winning sperm', 'victor delivers its genetic package', 'moment egg has been waiting for'. The message is clear: sperm deliver and eggs receive. These narratives are also reflected, and reaffirmed, in popular culture. Nelkin and Lindee (1995: 111-112) point to images, such as that in a Larson *Far Side* cartoon where the egg is portrayed as a housewife 'besieged by clever sperm masquerading as a phone repairman, an insurance salesman, and a postman, all trying to get a foot in the door'. Another Larson (1990) *Far Side* cartoon, printed on a greeting card, has a

¹⁶ Recent research suggests that men also experience a decline in their fertility as they age. A United States study, for example, found that in comparison to men aged under twenty five, men who were aged forty five and over experienced approximately 'five times as much difficulty in contributing to a pregnancy' (Crouch 2003: 19).

sperm powering ahead of the other sperm toward the egg, through the aid of a boat motor, with the caption ‘see ya around, guys...“Ha ha ha ha ha ha”’.

This representation is contested by biological research that has led to a reconstruction in some areas of the thought. For example, during fertilisation it is the mitochondria of the egg that is retained whereas the mitochondria of the sperm is ignored (Marks 2002: 83). Moreover, the egg has been shown to be much more active than commonly assumed. However, as Martin (1999: 183) argues, this reconstruction merely replicates the dominant construction of men and women but in a different form. The egg is now constructed as the aggressor which ‘traps’ the sperm. While the egg is no longer constructed as ‘passive’, Martin (1999: 185) notes that in the process of constructing the egg as active the egg becomes the dangerous aggressor, the *femme fatale* who victimises men.

The *influence* of biological determinist explanations for differences between men and women can be seen also through the popularity of books such as John Gray’s (1992) *Men Are From Mars Women Are From Venus*, Anne Moir and David Jessel’s (1991) *Brain Sex: the real difference between men and women* and A. and B. Moir’s (1998) *Why Men Don’t Iron: the Real Science of Gender Studies*. Gray (1992: 3), for example, characterises the differences between men and women as natural and ‘to be expected’. Women are constructed as passive and waiting while men are constructed as active, inventive and forward-thinking, reflecting cultural stereotypes identified above by Martin. Gray goes on to argue that the key to successful relationships between men and women is to accept difference not to challenge it. That is, we should accept the status quo. This argument is also put forward by Moir and Jessel in *Brain Sex*. In their (1991: 7) words ‘[T]he best

argument for the acknowledgement of differences is that doing so would probably make us happier'. They go on to note that '[T]he understanding that the roles of father and mother are not interchangeable might make us better parents'.

The point here is not to enter into an argument over the merits of the activeness accorded to either the egg or the sperm or, for that matter, of men and women. Nor is the point to suggest that this construction has a causal effect when it comes to policies dealing with reproductive technologies and related policies of family formation. Indeed, in the case studies (Section 2) I will draw attention to the complexities involved in the transmission of populist scientific ideas to public policy. Rather, the point is to illustrate the power of discourse. These are biological processes but they are given their meaning through language. Scientific 'facts' are invariably transmitted through analogies and metaphors which carry established meanings. Moreover, as subjects, we are constituted by and within these discourses.

The scientific focus on genes obscures the organism as a whole (Birke 1999: 18). As Lynda Birke (1999: 18) notes, '[I]t is precisely those issues of how whole organisms – including whole bodies – come into being that are omitted from genetic determinism.' Specifically excluded, in the emphasis on human genetics, is the role of the pregnant body. The pregnant body becomes little more than a container for fetal genetic material. Yet organisms are actually the products of the interaction between genes and the environment, including the gestational environment (Rose *et al.* 1984: 95).

The stand-off between nature and nurture, whether genes or environment make us who we are, is not so extreme today given the growing evidence that experience can actually change biology and the growing public awareness of that evidence (Rogers

1999: 2). However, as has been argued in this chapter, public discourse continues to be dominated by socio-biological thought. The continual linkage between genes and complex behaviours in the popular press reaffirms this link.

Scientific information is increasingly receiving attention outside of academic quarters and in the public domain. Media outlets, including news bulletins, newspapers, magazines and current affairs programs all give space to the reporting of new discoveries. But the ways in which information is transmitted gives a shape to those discoveries, a meaning which contains value implications. This belies the supposed neutrality of scientific fact. Just like policy, science is a process which is imbued with the values of those who shape and describe it. And these values feed back into public perception and the production of subjectivities. Most importantly, this complex mix of 'fact' and representation produces a range of effects on the bodies of its subjects.

Conclusion

The study of genetics is more than a biological study. As noted earlier, it says as much about beliefs about heredity as it does about genetic processes (Hubbard 1995: 38). Part of the importance and appeal of biological determinism is its claim to be scientific (Rose *et al.* 1984: 29). Sciences such as biology with their claim to objective truth are dominant discourses in our society and are weighted higher than discourses such as sociology. Hence, what can be classified as scientific discoveries are given more legitimation in the public domain.

As Steven Rose (1999: 105) has noted, the legacy of genetics includes sterilization legislation in Germany, Canada and the United States, anti-immigration legislation, and Nazi death camps. While it is unlikely that these extremes will ever be revisited

there remains the possibility of social control through genetic manipulation. Perhaps one of the greatest dangers of the intersection between the renewed focus on genetics and reproductive technologies such as prenatal screening is that we have the potential to screen out what Susan Hawthorne (1996: 497) would term the 'wild types'. These are the people who are considered to have "undesirable" genes' – for instance, genes that cause disabilities. These are the people who make other contributions and 'add imagination and diversity to the world' (Hawthorne 1996: 497).

This chapter has provided an overview of the history of genes and the science of genetics. Some of the major developments in genetic science and their implications for material bodies have also been tracked. Throughout it has been emphasised that science is a process, a process impacted on by the politics and values of the time. The chapter has also looked at the renewed dominance of sociobiological thought and argued that this has had important ramifications for the policy process. The renewed focus on genetics is leading to the creation of a new type of family, the genetically healthy family (Peterson 1998). What has been alluded to also is the way in which genes are seen in isolation from the body. This is a point that will be expanded upon later in the thesis. I want now to look at the second major factor influential in, and related to, debates regarding reproductive technologies and related issues of family formation – the decline in the Western birth rate and the challenge it is presenting to the maintenance of the traditional family.

Re-producing the Family: family, population, government control and the implications for reproductive technologies

The family appears in political theory, as it does in history, in a number of ways: it has been perceived as the 'basic unit' of political society, as the economic unity of society, as the repository of tradition, custom and morality, as a mode of safely siphoning off the disorderly dangers of sexual passion. It has also been perceived as the most practical mode of rearing children and replacing those lost in battle, or of replacing the labour power of the industrial proletariat (O'Brien 1981: 11).

As Foucault (1991) tells us, in Western political thought 'the family' plays an essential role in the production and maintenance of the state. It is also created as a 'natural' phenomenon. However, the family is more than a privileged place for producing and raising children/citizens. As Mary O'Brien (1981: 11) notes in the opening quote, the family serves a variety of political, economic and social functions, including the (re)production of economically productive citizens. O'Brien also emphasises that there are two factors that underpin conceptions of the family historically and in political theory. The first is 'the conviction that the family is necessary. The second is that the family is the proper sphere of women' (O'Brien 1981: 11).

The policy issues discussed in this thesis are all, at some level, concerned with the regulation and production of families. As indicated in the first chapter, considerable policy effort goes in to ensuring the production of a particular type of family, namely that of the heterosexual two-parent unit. This type of family is perceived by a number of conservative commentators to be under 'threat' due to the rise in single parent families, the creation through reproductive technologies of alternative family

types such as same sex parent families, and the decline in the Western birth rate. These challenges to the conventional family have led to its vociferous defence.

Despite the prominence in public and political discourse of issues relating to reproductive technologies and the decline in the birth rate, few explicit links are made between these issues. This is ironic when you consider that both sets of issues are intimately connected with the formation of families. Indeed, in both instances, it is the status of the family that is at the heart of much anxiety regarding these issues. Where links have been drawn, the focus has tended to be on reproductive technologies, such as contraception and abortion, that limit families. Few connections are made between the newer technologies that have as their focus the production of families, the overcoming of infertility, and thus the potential to increase the birth rate.

The decline in the birth rate is receiving considerable attention in many countries, including Britain, parts of Europe, and Australia. That the issue is seen to be one of significance in Australia is evident when you look at the wide range of groups, including sections of the business community, academic circles, and media outlets expressing concern about the 'problem' and articulating 'solutions'. Increasingly, this issue is also one which is generating interest in the political sphere and appears to be gaining a firm place on the policy agenda. A particular concern is the 'problem' of an ageing population and the related demands on government health dollars. In Australia, both major political parties have acknowledged the birth rate as an issue that requires policy action. For example, the Liberal Prime Minister John Howard (2002) identified as a key challenge for his government, 'the great modern day challenge of balancing work and family responsibilities'.

The birth rate is not only considered to be an issue of Federal concern. In 2004, for example, the South Australian State Labor Government released a population policy entitled *Prosperity Through People: A population policy for South Australia*. The policy is explicit in identifying the potential consequences of South Australia's projected birth rate decline.

The debate about South Australia's population is ultimately a debate about what kind of society we want, what kind of lifestyle we want, where we want to live, what value we place on cultural diversity, what types of jobs we want, and what balance we want between our younger and older people...

A declining population, and a declining economy, provide a less competitive business environment with fewer viable producers, with a restricted variety and choice of products and services available to consumers. (Government of South Australia 2004: 2)

Hence, more is at stake in the debate than the decisions made by individuals whether or not to have children, and the personal ramifications of these decisions – there are perceived social and economic consequences for the State that flow from these 'choices'.

This chapter looks at the connections between the decline in the birth rate, the refocussing on genetic theories discussed in the previous chapter, and reproductive technologies. In order to illustrate the importance of the family unit to political theory the chapter also draws upon a theory of governance, described as governmentality, which received prominence through a series of lectures given by Michel Foucault in 1978 and 1979. For my purposes, governmentality draws attention to the mechanisms through which governance takes place. As indicated at the outset, Foucault sees the family as a central mechanism of governance. The place of conceptions of family in the discourses around reproductive technologies is

a central theme in this thesis. So, too, are the governing effects of family discourses – the shaping of ‘cooperative’ or self-regulating subjectivities and docile bodies.¹

Consistent with the theoretical perspective outlined in the first chapter in this section this chapter employs a genealogical approach to the issue of the birth rate decline. The chapter begins with a brief discussion and ‘unpacking’ of the current conceptualisation of the family as a heterosexual two-parent unit before looking at some of the key themes of the governmentality approach that are useful to this thesis. From here we move on to a discussion of the birth rate decline. A brief examination of the birth rate ‘crisis’ in Australia in the early 1900s illustrates the dominant discourses which have historically framed the issue and also indicates their continued relevance. They reveal not only how the issue is represented but also the suggested ways of dealing with the ‘problem’. These, in turn, reveal what the ‘problem’ is seen, or represented, to be. The chapter then discusses the current concern with the birth rate decline. While there is a focus here on the Australian situation, where possible I draw attention to global, predominantly Western, developments. Lastly, the chapter looks at the ramifications of the recent trends in the birth rate for reproductive technologies and related issues of family formation, in light of the current refocussing on the importance of genetics. Two major implications are identified. Firstly, it is likely that the uses of reproductive technologies will increase. In addition there will be an increase in the need for particular genetic populations, populations that fulfil the requirement of an economic contribution. Both these implications, I argue, signal a need for continued

¹ Given that, as Mitchell Dean (1991: 4, 5) comments, many scholars have contributed to the field and study of governmentality and consequently that there is no one governmentality paradigm, it is necessary, as Dean does, to observe that what will be employed here will not be a clear-cut ‘Foucauldian’ approach. Nor, for that matter, is the role of this chapter an in-depth critique of governmentality theory. Rather the theory will be drawn upon selectively to develop its core argument.

interrogation of the frameworks within which we debate policies regulating reproductive technologies and related issues of family formation.

In keeping with the focus on language and discourse in this thesis it is necessary to make some brief comments on terminology. The language of ‘fertility’ and ‘fertility decline’ dominates the debates about the birth rate as they appear in policy documents, political statements, and media reports. Statistics are collected on the total fertility rate (TFR). Mackinnon (1997: 62) notes how this rate blends biological and social factors. Fertility comes to be seen as simply something *in* people rather than the result of decisions made *by* people. In Mackinnon’s words fertility as a term thus ‘operates to ground reproductive issues in a natural universe uncontaminated by social change. It confines women and men to “the natural” as bodies without intentionality’. The implication is that infertility is a physiological problem rather than the result of decisions being made on the basis of factors such as employment and/or financial considerations. In this thesis the term ‘birth rate’ is employed as it allows a focus on the number of children being born and on the intentions of the mothers/women and partners who decide either to have or not to have them, rather than locating the ‘problem’ within a biological pathology.

Which Family is the Traditional One?

The dominance of the construct of the ‘traditional’ family as a heterosexual two-parent unit has meant that ‘other’ family types such as same-sex parent families and single-parent-headed families have been measured, often unfavourably, against this ‘norm’. As Carol Johnson (2002b) points out, it is only possible for the ‘traditional family’ to operate in this way in a political sense through the exclusion of ‘other’ family types from ‘legitimately belonging to it’. The conception in public and

political discourse of the 'traditional' family as operating in a pre-existing and natural formation, mentioned earlier, aids in imbuing this family with a sense of fixed identity and a seemingly timeless quality. Moreover, 'the family' operates on another level, providing a romanticised 'safe haven', offering protection from threats from the outside world (Johnson 2002b). This image remains despite evidence of domestic violence which puts in question the idea of a 'safe haven'. Moreover, importantly, not everyone is granted access to this 'haven'.²

Despite the claim to universality, most commonly made by conservative commentators, the current conception of the 'traditional' family is of relatively recent origin. Linda Nicholson (1997: 29) distinguishes two meanings of family that are useful in distinguishing shifts in models of 'the family'. The first refers to what we understand today more commonly as the 'nuclear' or 'traditional' family which consists of two parents and their 'biological' children. This family type includes both biologically 'ideal' and 'imagined' families as defined in the Introduction. The second meaning relates to more extended forms of 'kinship' and includes other people such as grandparents, aunts and uncles to whom we are related either through biology or through marriage. In this second instance, Nicholson argues, a claim can be made that this type of family occurs across most cultures and can be considered as a universal model. No such claim, however, can be made concerning the 'nuclear' family.

As Nicholson (1997: 29) notes, when conservative commentators talk about the decline in the 'traditional' family they are generally referring to the first of her two meanings, that is, to the nuclear family. However, they do so with a claim to the

² For instance, members of the Indigenous community in Australia were forcibly removed from their families.

universality of 'the family'. In her words, 'there is a slippage in the use of language so that the universality of one type of institution becomes claimed about another only because the two institutions share the same name, that is, "the family"'. The nuclear family becomes a slimmed down version of the 'universal' extended family despite anthropological evidence which points to a wide variety of kinship formations (Nicholson 1997: 29). For example, in the Na society, found in the southwestern Chinese Yunnan Province, sibling relationships are considered more important than 'love affairs or sexual relationships', with the raising, support and education of children born by the daughters in the family the joint responsibility of the brothers in the family (Coontz 2005: 32-33). While no one form of family can be said to be universal, the term 'family' comes to mean in the current discourse the two-parent heterosexual model (Nicholson 1997: 29). Here, it is worthwhile remembering the point in Chapter 1 that key concepts gain power from the inability to define them (Sturman 1997: 1, 2).

Indeed, the 'traditional' nuclear family, as it is understood today, is a product of the social changes that took place during the eighteenth and nineteenth centuries in North America and Western Europe (Nicholson 1997: 28). Its appearance is marked by a number of shifts in social relations, including the disconnection from larger kinship links of the parent-child unit, the significance given to the partnership between husband and wife, and an increased importance placed upon the responsibility of the mother in the raising and shaping of children (Nicholson 1997: 31). Prior to the latter part of the eighteenth century marriage was considered in the majority of societies to be a central institution for organising social, political and economic relations and, hence, far too important 'to be left entirely to the free

choice of the individuals involved'. However, after this period the idea that marriage should be based on love gained currency (Coontz 2005: 5).

In the nineteenth century a general acceptance of the concept of 'husbands as providers' and 'women as nurturing homebodies' occurred in Western Europe and Northern America. However, it was not until the mid twentieth century that a majority of families were able to subsist on a single-income wage (Coontz 2005: 7-8). Coontz (2005: 8) argues the traditional family of the 1950s was a product of 'a package of ideals about personal life and male-female relations that emerged at the end of the eighteenth century and gradually became the norm across Western Europe and Northern America'. Similarly, the notion of the traditional nuclear family remains today a fluid concept and is a product of the social, political and economic changes, including the rise of feminism, that have taken place in the last fifty years. When we compare the 'traditional' nuclear family of the 1950s to that of 1990s and indeed the early twenty first century we see significant differences. The most obvious of these is the increased numbers of mothers in the workforce today (Nicholson 1997: 28).

Governmentality, Population and the Changing Role of the Family

The family has been implicitly, and historically, linked to questions of governance. Foucault (1991: 87) indicates how, between the sixteenth and eighteenth centuries, the family operated as a model *for* and *of* good government. The question became how to establish in the administration of the state the 'meticulous attention of the father towards his family' (Foucault 1991: 92). As Foucault explains (1991: 99-100), this model altered in the nineteenth century with the emergence of the 'problem' of population. The increase of numbers of people to be governed made

the character and behaviours of those people a prime governmental concern. For Foucault the population comes to be seen as the 'ultimate end of government', as it is on the population that government acts either directly or indirectly. Population was seen to have its own irregularities and was thus considered to be irreducible to the family (Foucault 1991: 99).

Consequently, the family, with the exception of 'a certain number of residual themes of a religious or moral nature', was no longer regarded as 'the model for government'. Foucault sums up this shift noting that

prior to the emergence of population, it was impossible to conceive the art of government except on the model of the family, in terms of economy conceived as the management of a family; from the moment when, on the contrary, population appears absolutely irreducible to the family, the latter becomes of secondary importance compared to population; no longer, that is to say, a model but a segment (Foucault 1991: 99-100).

However, the family remains for Foucault a 'privileged' segment of governance, as whatever information is needed of the population is 'obtained through the family'. Hence, the family becomes understood as an instrument of government, as 'the privileged instrument *for* the government of the population and not the chimerical model *of* good government' (Foucault 1991: 100, emphases added).³

At its most basic level, governmentality refers to the question of 'how to govern' or to the 'art of government' (Gordon 1991: 7). Mitchell Dean (1999: 16-19) distinguishes two meanings of governmentality in Foucault. Firstly, governmentality was seen to deal 'with how we think about governing' and thus could be understood as a collective activity. Secondly, governmentality was seen to

³ It needs to be noted that Foucault's conception of the family as purely an 'instrument' of government denies in many ways the importance of kinship links, a factor I intend to stress throughout this thesis.

mark 'the emergence of a distinctly new form of thinking about and exercising of power in certain societies'. As Dean (1999: 19) goes on to note, '[T]his form of power is bound up with the discovery of a new reality, the economy, and concerned with a new object, the population'.

Foucault set apart the topic of governmentality from other more traditional categories of state theory (Gordon 1991: 7). At the heart of this distinction was the question of the operation of power. Whereas state theory was seen to attempt 'to deduce the modern activities of government from essential properties of the state, in particular its supposed propensity to grow and to swallow up or colonize everything outside itself', for Foucault the state was seen to have no such intrinsic predispositions and as such it (the state) could not be seen to have an 'essence' (Gordon 1991: 4). Within the governmentality framework the exercise of power is understood as a complex set of relations involving the state but moving well beyond the state, and consequently as anything but clear-cut and obvious (Dean 1999:9).

Implicit to the governmentality approach is the shaping of the conduct of the populace. Government in general was defined by Foucault as the 'conduct of conduct', meaning it was understood as 'a form of activity aiming to shape, guide or affect the conduct of some person or persons' (Gordon 1991: 2). Foucault's definition embodies multiple meanings of 'conduct', with the term understood as both a noun and a verb (Dean 1999: 10). Conduct not only refers to a set of behaviours but it also 'implies some sort of calculation as to how this is done' (Dean 1999: 10). Put simply, 'conduct of conduct' refers to the means by which we manage and organise our behaviours.

Inherent to the understanding of the 'conduct of conduct' is the notion that subjects of government must be 'willing to exist as subjects' (Gordon 1991: 48). Implied here is the idea that we, as subjects, must in some ways be complicit in our governance. According to Rose (1999: 10-11) '[C]itizens shape their lives through the choices they make about family life, work, leisure, lifestyle, and personality and its expression. Government works by "acting at a distance" upon these choices'. Hence, effective governance of subjects necessitates for those subjects a perceived freedom of choice.

Importantly, various agencies and authorities are implicated in government through and by the 'conduct of conduct' (Dean 1999: 3). Policies concerned with reproductive technologies and related issues of family formation are key areas in which the shaping, and the influencing, of the structure of the family and of particular populations occurs. In addition, official policy texts relating to the birth rate decline can be seen, as I will discuss in a moment, to shape the conduct of women, as well as of the population in general (Mackinnon 2000: 110).

Central to forms of governance within the governmentality framework is the collection of statistics on the population. Statistics become practices of inscription (Rose 1999: 6). Significantly, the collection of numerical data impacts on the way we think about categories of people and their activities (Hacking 1991: 182) and, hence, has important effects on both subjects and subjectivities. The family plays a key role in statistical collection. Not only is information gathered on the family, but it is also gathered through 'the family'. Statistics are implicated in the determining of 'the form of laws about society and the character of social facts' (Hacking 1991: 181). The collection of statistics is, however, not a value-neutral process. Nor for

that matter is the interpretation of these statistics. Rather, as Rose (1999: 6) argues, the collection of statistics on the population enables the population to be 'rendered into a form in which it could be used in political arguments and administrative decisions'.

Gail Reekie (1998: 27) describes the role of statistics in the transformation of a 'biological event...into a social problem'. While her target is illegitimacy her argument applies equally to the 'problem' of the birth rate. In both cases, demographers play a key role in producing the desired statistics. And in both cases the collected statistics produce the problem as a particular sort of problem. Hence, demographers are implicated in the 'producing of knowledge' (Reekie 1998: 14). This chapter elucidates the character of the 'problem' of the birth rate.

'The Baby is the Best Immigrant'

Alarm over the decline in the birth rate is not a recent phenomenon, nor is it one confined to Australia or to Western countries for that matter. Historically, the 'ancient Babylonians, Greeks and Romans' all endeavoured to increase birth rates through methods including the introduction of laws designed to encourage marriage and support the family (Caldwell, Caldwell and McDonald 2002: 7). Pronatalist movements, which existed in France from the latter part of the nineteenth century, were also in operation during WWI in Britain and Germany (Caldwell, Caldwell and McDonald 2002: 7). The symbolic nature of the birth rate as a statement of 'national well-being' meant that there were nationalistic as well as economic concerns that flowed from either increases or decreases in the rate (Mackinnon 2000: 112).

In Australia, concerns about the declining birth rate have arisen at various times in the late nineteenth century and throughout the twentieth century, resulting in a number of related reports and inquiries.⁴ Statistics produced by Timothy Coughlan, the New South Wales government statistician, noting a reduction in the number of children born to women from seven in 1870 to four in 1900, caused a great deal of anxiety at the turn of the twentieth century. Much of the motivation behind the alarm over the decline centred on the fear of ‘any dilution of the Anglo Saxon “race”’, due to a perceived possibility of ‘invasion’ from the ‘populous north’ or Asia. The concern was ‘race suicide’, a fear which lay also behind the attempted genocide of the Indigenous Australian population (Mackinnon 1997: 16- 21).

The alarm generated by fears of racial ‘dilution’ was also reflected in and reproduced by the introduction of the *Immigration Restriction Act 1901* (the ‘White Australia Policy’), which barred the immigration of non-white citizens. As discussed in the previous chapter, restrictive immigration policies were a central tenet of eugenic thought and were introduced in several countries, including the United States. These policies were designed to ensure that only the ‘better stocks’ were brought into the country. Still, fears of social division and of cheap labour have historically kept the preferred emphasis on increasing the ‘home-grown’ population. This preference, expressed in the well-known phrase ‘The baby is the best immigrant’, indicates a desire to reproduce and increase the existing population. Opponents of immigration and multiculturalism have historically made,

⁴ See Mackinnon (2000) and (1997) for an excellent overview of these reports. As Mackinnon (2000: 111) notes, there was initially a dual focus in these debates, with the emphasis not only on increasing the birth rate but also on decreasing the mortality rate in babies.

and continue to make, links between immigration and the undermining of national identity (Castles 1999: 35).⁵

The concern over 'race suicide' at the turn of the twentieth century was to have major implications for the bodies of women. This is because, in Mackinnon's (1997: 21) words, '[W]omen's major task as citizens in the newly federated nation of Australia was as mothers, as producers of the next generation'. Hence, it was considered women's duty to the nation to reproduce. This duty was not one that applied equally to all women, however. Along with the fear of 'race suicide' there were concerns about the numbers of 'feeble-minded' being born and about the 'differential' birth rate, the outbreeding of the middle and upper classes by the lower classes (Bacchi 1980: 202). Here, ideas grounded in eugenic thought once again intersected with these debates. Whereas the focus on 'persuading' some women not to reproduce was centred on women from the lower classes, the burden for increasing the birth rate and thus replenishing the 'better stocks' was placed largely on white middle and upper class women. Hence, race and class factors have never been far from debates over reproduction and consequently over reproductive technologies.⁶

The concern of race suicide led to a concentration 'on the family as the mainstay of European civilisation' (Mackinnon 2000: 113). The 'proper' construction of a family was understood in the early 1900s, as it is today, in a narrow way, despite the occurrence of 'other' family forms, such as single-parent families. A family was

⁵ In 2001 the Australian Federal election saw significant weight given to issues of border protection and the 'threat' posed by asylum-seekers, many of whom are from countries such as Iran, Iraq and Afghanistan. Continued debate is occurring over whether mandatory detention, in particular of children, is appropriate.

⁶ As we will see the Birth Rate Commission recommended the restriction of birth control information and contraceptives to women (Bacchi 1980: 202).

seen to consist of a man, *his* wife and *his* offspring, a definition which was later reflected in the 1907 *Harvester Judgement*. This judgement was significant in laying down a basic 'living wage' for men and *their* families (Ryan and Conlon 1989: 89-93).

An early illustration of the political and public concern produced by a reduction in the birth rate can be seen in the 1903 *New South Wales Royal Commission into the Decline of the Birthrate and the Mortality of Infants*. Significantly, the Commission 'provoked a public expression of social tensions' (Mackinnon 1997: 17). This text is noteworthy as it illustrates the way in which the problem of the birth rate decline was initially conceptualised in Australia. It also allows for identification of the dominant discourses within which the issue was framed.

The report of the inquiry, which was produced in 1904, found that women were clearly implicated in the decline in the birth rate. According to the Commissioners, women were accountable for

- i. An unwillingness to submit to the strain and worry of children
- ii. A dislike of the interference with pleasure and comfort involved in childbearing and child rearing
- iii. A desire to avoid the actual physical discomfort of gestation, parturition, and lactation; and
- iv. A love of luxury and social pleasures, which is increasing (New South Wales Parliamentary Papers 1904: 17, quoted in Kingston 1975: 8).

This clearly placed the responsibility for the decline of the birth rate on women and their perceived self-centeredness, largely ignoring other factors such as the economic conditions that impacted on decisions about having children. Dominant discourses regarding women were reflected in, and strengthened through, the Report. The discourse of morality was ever-present, echoing the notion of the time that the moral order was 'the basis of all order'. Consequently, 'birth control was a form of moral pollution' and women who practised forms of family limitation were constituted as selfish and immoral (Mackinnon 1997: 23-24).⁷ In particular, middle-class women were held accountable for the failure to reproduce (Bacchi 1980: 201). As I will argue in a moment, despite differences in policy approaches toward the 'problem' today, women's perceived responsibility for the birth rate decline has not diminished. Moreover, middle-class women continue to be a prime target for policy interventions.

Following the Royal Commission, a series of pronatalist policies were introduced, including the restriction of abortion and the limiting of access to information regarding contraception (Bacchi 1980: 201). Both policies clearly represent the problem as women's disinclination to have children. The problem was represented to be one of women's attitudes and priorities. The knowledge of, use of and access to contraception and abortion have historically been linked to population concerns (Cook 2000: 128). In the United States, for example, the concern in the mid-19th century that the practice of abortion by Anglo-Saxon Protestant women was leading to a lower birth rate than among the migrating southern European Catholic women, who were not using abortion, contributed to the pressures which led to the criminalizing of abortion. As Bacchi (1999: 149) notes, when the focus is

⁷ As Mackinnon (1997: 25-26) notes, there was resistance by many of the participants of the inquiry to this construction.

population '[T]he physiological facts of pregnancy and childbirth produce women and their bodies as the focus of surveillance'.

In the post World War II years Australia experienced 'one of the largest proportional increases in population numbers among developed countries'. Immigration programs contributed significantly to this (de Looper and Bhatia 1998: 9). In more recent times, however, this trend in population growth has dissipated. Moreover, neither politicians nor demographers consider immigration to be a 'solution' to the 'problem' of the decline in the birth rate today. This is due in part to the large numbers of immigrants that would be needed and to the competition among western countries over skilled workers (Barnes 2001: 16). While the *Immigration Restriction Act 1901* (the 'White Australia Policy') ended officially in 1958 immigration policies remain targeted. Today there is an emphasis on attracting skilled workers who will make an *economic* contribution to the country.

Bryson, Strazzari and Brown (1999: 31) note that 'we seem almost certainly headed for a new moral panic about falling birth rates', a panic reflected in both public and political discourse. As in the early 1900s, the collection of statistics and the work of demographers are playing a large part in these debates. Given this, it is useful to take a brief look at some of the figures that are causing such anxiety.

Currently the birth rate is 1.81 for each woman of child-bearing age (Uren 2006). While the birth rate is up from the low of 1.7 children in 2001 (Caldwell, Caldwell and McDonald 2002: 3), it is significantly lower than the rate of 3.6 in 1961 and, moreover, remains below the replacement rate of 2.1. However, the number of births per year is still in excess of the numbers of deaths and as such at the moment we are still witnessing growth in the population from what is generally termed

'natural increase'. The addition of immigration figures further increases population growth (Barnes 2001: v, 4). With the exception of Sweden, most developed countries have also seen a fall in the birth rate since the 1950s (de Looper and Bhatia 1998: 19).⁸

While Australia's birth rate remains low in comparison to the replacement rate, a study by the Australian Institute of Health and Welfare (de Looper and Bhatia 1998: 17-19) has found that it still compares favourably with other developed nations, appearing in the upper third of the twenty countries against which it was compared.⁹ Indeed, the study found that if the immigration factor was omitted the possibility existed for the contraction of populations in some European countries. Germany, Italy and many Eastern European countries, for instance, are at the moment experiencing more deaths in their populations than births (Barnes 2001: 11).¹⁰ It needs to be noted that not all countries that are experiencing low birth rates are troubled by this situation, due to a sensitivity to the impact of population growth on the environment and to a global concern with the impact of increases in population in other parts of the world. Moreover, those countries, such as those in Eastern Europe, that are experiencing a decline not only in their birth rates but also in their overall population often have far more pressing economic and social challenges to deal with (Caldwell, Caldwell and McDonald 2002: 11).

⁸ Sweden experienced a dramatic drop in its birth rate in 1997, which has been linked to the recession that occurred in the early 1990s. Unemployment rose to between 8-10 percent from a relatively stable 4 percent. The budget has now been brought back into surplus and conditions are improving (Barnes 2001: 11).

⁹ The countries that Australia was compared with included Canada, Denmark, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Switzerland, United Kingdom and the United States.

¹⁰ Concerns over a declining population are not confined to Western countries. Singapore, for instance, has policies offering monetary inducements to encourage young women to have babies (Bryson, Strazzari and Brown 1999: 31). Here women receive an increased payment the earlier they have their first child.

Alongside the drop in the birth rate in Australia there has been an increase in the average age of birth mothers. The average age of mothers having their first baby in 2005 was 30.7 years (Uren 2006) compared to 29.1 years in 1998 and 25.4 years in 1971 (Barnes 2001: 5). The rise in the age of women having their first child is accompanied by an increased need for reproductive technologies, given that biological fertility¹¹ difficulties increase with age. In addition, there is a corresponding increase in the number of women who are having no children at all and a decrease in the numbers of women having in excess of three children (Barnes 2001: 7).¹² This decrease in the number of children produced is occurring among most groups of women when they are compared by age, education, occupation, marital status and labour force participation. However, higher birth rates remain in groups and regions characterised by high rates of unemployment and low rates of education and occupational skill (Barnes 2001: 8, 9). For example, women in capital cities have lower birth rates than women in rural areas (Barnes 2001: 8).¹³

Importantly, the economic and social profiles of women are the primary focus of statistical collection in regard to the birth rate. Similar statistical concern does not exist in regard to the economic and social situation of men or fathers. Moreover, no data is collected on the number of children men are having, how many men are remaining childless or their ages at first birth. Nor are we looking at the TFR (Total Fertility Rate) for men. The lack of data in relation to men places the responsibility

¹¹ This is due to the decline in the number and quality of eggs produced with age. Interestingly, as noted in the previous chapter, little attention is paid to the declining 'effectiveness' of sperm that occurs with age.

¹² For women born in the early 1950s 11 percent of them 'remained childless at the end of their reproductive life'. This figure is expected to increase to around 28 percent for women 'entering and passing through their reproductive lives in the 1990s' (Barnes 2001: 33).

¹³ It has also been found that there are increasing rates of childlessness for women with lower standards of education (Barnes 2001: 33).

for the decline in the birth rate with women, shaping the problem as a 'women's issue'.

Birthing the Economic Citizen

The primary fear in debates surrounding the issue of the birth rate decline is the possibility of a negative impact on the workforce dependency rate with the shift in population (Barnes 2001: v).¹⁴ A major political issue for developing countries is the predicted increases in the population of aged peoples. With this projected increase comes the expectation that there will be comparable increases in costs associated with the maintenance of 'older' populations, due to health and medical treatment. At the same time, the fall in the birth rate is expected to lead to a decline in the primary tax base (Barnes 2001: 10).

A major concern here is that traditional families are declining in number and in size. Traditional families have historically played a crucial role in social support. Hence, there is a fear that there will be an increased demand on government for services (Barnes 2001: 15, Government of South Australia 2004: 15).¹⁵ This fear helps explain John Howard's (2002) eulogy for the family: 'families are a nation's greatest resource and ... a united caring loving family is the best social welfare system that mankind has ever devised'. Through all these developments the decline in the birth rate is linked directly to the reduced capacity of families and individuals to be self-reliant (Barnes 2001: 42). In each case the concerns are economic in nature.

¹⁴ The workforce dependency rate relates to 'the ratio of those in the workforce to those not in the workforce' (Barnes 2001: v).

¹⁵ Further concerns include the impact that the birth rate decline will have on the numbers of schools and universities and thus employment in these industries (Caldwell, Caldwell and McDonald 2002: 16).

These economic concerns sit alongside a moralistic discourse about the decline of the ‘traditional’ family. Indeed, the two issues are often related. The dominance of the economic discourse does not negate the anxiety that the decline in the ‘traditional’ family is causing as the two issues are inextricably linked. Indeed, in many cases strong connections are made between the decline in the traditional family and the birth rate decline. Here it is useful to draw attention to comments by the then Treasurer of the Australian (federal) Liberal Party, Malcolm Turnbull¹⁶, who was quoted as saying that in order to arrest the birth rate decline there needs to be more emphasis on marriage and reproduction (Turnbull 2002a in Grattan 2002). Turnbull questioned whether tax and social welfare arrangements are ‘providing an incentive’ in reinforcing marriage or whether ‘they are providing a disincentive to be married’ (Turnbull 2002b in Robinson, Douez & Szego 2002). Ross Cameron, a (now former) federal Liberal MP, takes this a step further, suggesting that ‘financial inducements’ be provided for couples who remain married.¹⁷ He notes that ‘women in particular – but not exclusively – say that they would like to be married before they have children’. (Cameron 2002 in Crabb 2002). Hence, lower levels of marriage are seen to be indicative that something ‘undesirable or pathological is happening to the family’ (Caldwell, Caldwell and McDonald 2002: 9) due to the grounding of marriage in the natural.¹⁸

It is of course completely possible that the rise in the divorce rate and the rise in single parent families helps explain the decline in the birth rate. As a radio report on

¹⁶ Now member for the Federal seat of Wentworth.

¹⁷ Ross Cameron lost his seat in the 2004 Federal Election.

¹⁸ Interestingly under 15th century canon law two people were considered to be ‘legally married if they showed “marital affection” for one another, exchanged private vows, and then engaged in sexual intercourse, without necessarily securing the consent of their parents or having a priest perform the marriage’, illustrating the constructed nature of the concept of marriage (Miller 1998: 21).

The Europeans (2002 ABC) indicated, the figure we need to watch – if we are concerned about declining birth rates – is the number of women who stop at one child. This could easily be due to the break-up of a marriage or relationship and the related financial burden of raising a family alone. So, while commentators like Turnbull and Cameron may well be correct in their focus on reinforcing marriage, this does not mean endorsing their framing of the problem as moral or the shift from ‘traditional’ families as pathological. The connection they draw between conventional families and the decline in the birth rate is, however, important for this thesis because it helps explain the turn to reproductive technologies as a means of bolstering ‘traditional’ families. It also helps explain the keen desire to limit access to these technologies to married, heterosexual women, a point I discuss in detail in Chapter 5. Finally, the intense desire to produce families which can pass as biological helps explain policies which have as their goal the disappearing of the ‘other’ bodies involved in the process. As this thesis argues, the desire to replicate families which can pass as biological and, hence, conventional means that some bodies are simultaneously used and rendered invisible. As we will see the increasing dependence on genetic narratives is posing some problems for this strategy of population increase.

Despite the attempts at gender-neutral language in official policy texts and speeches it is clear that the major responsibility for the decline in the birth rate remains today with women, as it did in the 1903 Birth Rate Commission. For instance, in 1999 the then Victorian Premier, Jeff Kennet, was quoted as saying

our women are not producing enough to simply maintain our population levels...it is important that we keep our population increasing so there are enough young people meeting the demands of

the society (Kennet 1999 in *The Advertiser* 20/4/99: 3 quoted in Bryson, Strazzari and Brown 1999: 31).

These comments were made to a group of female students at a secondary school 'for academically gifted girls' and were interpreted by some feminists as an attempt to exert pressure on women to increase reproduction. Moreover, the media attention attributed to the comments highlights the sensitivity 'associated with the topic' (Bryson, Strazzari and Brown 1999: 31).

Media reports surrounding the issue confirm that women are perceived to be responsible for the birth rate decline. For example, an Australian newspaper, the *Adelaide Advertiser*, which has devoted considerable attention to this 'crisis', has offered headlines such as 'Born losers when it comes to babies' with the caption 'More women put their careers ahead of babies' (Pengelly 2001: 3); 'Women in fear over childbirth' with the subheading 'National fall in fertility rates could be linked to worries, say experts' (Gordon 2001: 14); 'Where have all the children gone?' with the subheading 'Babies and how to make Australian women have more of them, is one of the pressing public issues of our time' (Maiden 2001: 19); 'Families Go Into Decline' (Williams 2004: 1); 'No Rush to the Altar' with the subheading 'Why we don't want to be tied down with marriage and children' (Williams 2005: 23); and the previously mentioned 'Where have all the mothers gone?' with the subheading 'Australian women of childbearing age are on strike, unwilling or unable to contribute to population growth' (Kemp and Williams 2002: 29). This last story significantly had a photograph of babies on an Australian flag emphasising the nationalistic implications of this situation. In a fashion similar to that of the 1903 Birth Rate Commission, the problem in many instances is represented to be largely attitudinal, indicated for example in the last reference to women going 'on strike'.

Policy proposals ‘addressing’ the decline also target woman and their attitudes. As argued in Chapter 1, policy proposals are not solutions to problems. Rather they construct the problem in particular ways. The following examples illustrate this point convincingly. In 2002 the Australian Federal Government introduced the *Taxation Laws Amendment (Baby Bonus) Bill 2002*, commonly referred to as the ‘Baby Bonus’. This policy allowed women who stay at home, access through taxation to what was essentially a first child refund for a period up to five years. The maximum amount claimable was \$2,500, representing one-fifth of the tax payable on an income of \$52,666 (AUD). While the ‘Baby Bonus’ was transferable to the father if he should ‘choose’ to stay at home the policy was aimed particularly at mothers. A media statement by the Federal Treasurer, Peter Costello (2002), illustrates this clearly. In his words

‘[T]he Baby Bonus allows a *mother* to average *her* income for tax purposes. A *Mother* on a salary of \$30,000 in the year before the birth of *her* baby pays \$5,380 in income tax. If *she* averaged that \$30,000 over the five years when *she* was out of the workforce with a child, then *her* income would be below the tax free threshold and *she* would pay no tax at all’, (emphases added).

Hence, the emphasis remained on encouraging women to return to the private sphere and to keep having babies. Significantly, no provision was thought necessary for a same-sex partner who is not the biological parent to stay at home with the same tax benefits. Only those families that fit the conventional model were viewed as desirable.

In the 2004 Australian Federal Government Budget, the 'Baby Bonus' was combined with the Maternity Allowance¹⁹ into a 'new' Maternity Payment. The new payment provides a 'lump sum' payment (from 1 July 2004) of \$3000. The payment is to rise 'to \$5000 by 1 July 2008' (Costello 2004a). On Budget night Peter Costello (2004b) made a statement, ostensibly in jest, again highlighting the links between the birth rate and nationalistic concerns. 'If you have children, it's a good thing to do. You should have, if you can – not everyone can – but one for your husband, one for your wife and one for your country'.

The recent debate on paid maternity leave in Australia is directly connected with the desire to encourage women in 'traditional' families to have more children. Australia is one of the few OECD countries that does not, as yet, offer a form of paid maternity leave as a matter of formal policy.²⁰ The debate is linked to attempts to get women to have more children. When looking at the debates two things become apparent. The first is that the discussions rarely mention that there is a need or indeed a desire for men to take paid paternity leave. The second is that the focus on the maternity leave debate is on facilitating a period of leave from the labour market, acknowledging that many women are combining paid work and family responsibilities. Here the idea seems to be that if women are allowed a few months off to 'recover' from a birth then the problem of too few babies will be solved.²¹

¹⁹ The Maternity Allowance was 'a one-off payment of \$842.64', which was available to families 'eligible for Family Tax Benefit A' (see, Family Assistance Office http://www.familyassist.gov.au/Internet/FAO/fao1.nsf/content/payments-maternity_allow for further details, accessed 22/10/06).

²⁰ Some women, in both government and private sectors, do receive access to limited paid maternity leave through Enterprise Bargaining agreements. In 2002 a discussion paper on the issue, entitled *Valuing Parenthood*, was released by the Federal Sex Discrimination Commissioner Pru Goward.

²¹ The emphasis on returning women to paid work in order not to interrupt their career patterns leaves unproblematised a range of issues such as the possibilities for change in the taxation system in order to support an ageing demographic. Moreover, it overlooks and belittles the skills needed for motherhood and indeed parenthood, skills which are not seen to be of significant use to employers.

We have seen that historically debates on the birth rate issue have laid the blame for falls on women and their ‘selfishness’ (Mackinnon 1997, in Bryson, Strazzari and Brown 1999: 31). While there has been resistance to this framing of the problem, it arguably remains a prevalent attitude, as the headlines mentioned a moment ago indicate. Considerable attention is given to women postponing reproduction in favour of a career.²² However, a recent Organisation for Economic Cooperation and Development (OECD) (1998) publication notes that families are more likely to be formed when both partners in a couple have attained more security in their careers (in Barnes 2001: 26). This suggests that the delaying of reproduction is indeed in many cases a joint decision.²³ Moreover, the birth rate is, and has been, most under pressure in times of uncertainty (Bryson and Mackinnon 2000: 1). Periods of recession and high unemployment correlate highly with birth rate declines, suggesting that mothers and indeed fathers are making decisions on the basis of wider factors than career advancement.

Significantly, many people report that it is becoming increasingly difficult to find a balance between family life and work due to the increase in working hours and working intensity (Probert 1999: 62). Figures suggest that in the countries where there are policies that are more supportive of gender equity ‘birth rates have dropped less precipitously’ while in general those countries where there are increased impediments to women combining motherhood and work are experiencing falls in their birth rate (Bryson and Mackinnon 2000: 2). While there is some focus on the need for workplace reform so far this has not translated into

²² Bryson, Strazzari and Brown (1999: 33) have noted that current international demographics suggest that women in the future will give increased precedence to employment if they are unable to choose both paid employment and child rearing.

²³ Incidentally a study by Evans and Kelly (1999) found that nearly three quarters of those surveyed rejected childlessness on the basis of personal choice (cited in Barnes 2001: 19).

significant policy reform. Attempts to make workplaces ‘family friendly’ appear to have failed in making significant changes to and in the structures of workplaces (Probert 1999: 63). While according to a survey conducted by the federal Department of Employment, Workplace Relations and Small Business many workplaces are providing ‘family friendly’ measures (DEWRSB 1998 in Barnes 2001: 31), these measures are conceived of in a narrow way and rarely challenge the structure of the workplace. As a result, policies including maternity leave, carer’s leave and workplace childcare can be seen to be of minor relevance over the longer term for most women (Probert 1999: 61). As Probert (1999: 64) notes, there has also been a corresponding lack of policy with a focus on enabling fathers to find a balance between family and work in spite of continued evidence of the difficulties involved in achieving this. Incidentally, Sweden is often championed by demographers as an example of a country that has ‘got it right’; however, it needs to be noted that they have not experienced a dramatic rise in their birth rate despite the introduction of more gender equitable policies. Where attempts have been made to redress the gender imbalance in regard to the responsibility for the care of children, such as in Sweden, difficulties have occurred in convincing men to access these.

The focus on women as responsible for the declining birth rate and in need of policy encouragement to fulfil their responsibilities leaves unproblematised the role of the workplace in decisions made by families and individuals to postpone reproduction. Women are seen to be the problem, as lacking in ‘appropriate’ dedication to the important social duties of mothering and reproduction. Women are hence constructed in many of these policy measures as in need of ‘special measures to overcome their handicaps’ (Probert 1999: 64). In addition, while policies such as the Baby Bonus allow for women and men to, on an individual level, ‘adopt the other

sex's gendered role' – hence, enabling men to stay at home and raise the children and for women to return to work – this leaves unchallenged 'the roles themselves' and the impact they have on decisions regarding reproduction (Probert 1999: 63).

While those concerned about the declining birth rate tend to concentrate, as we have seen, on women in their reproductive prime and their choice of workplace over children, this ignores the reduction in teenage pregnancies, which occurred in the 1970s and stabilised in the mid 1980s. Contributing factors here included increased access to contraception and abortion (de Looper and Bhatia 1998: 17). This decline has contributed to the decrease in the availability of children for adoption. Other factors that have influenced the reduction in the number of babies available for adoption include an increased social acceptance of children born outside of marriage and an increase in financial support for sole-parents. This is important for several reasons. First, the reduction of the number of babies available for adoption has been a major impetus for the use of reproductive technologies. In the past, adoption has been an option for many couples who were unable to have their own biological children. Secondly, and importantly for the argument in this thesis, adopted children could in many cases, and especially in the past, 'pass' as members of a biological family. As I will argue, the interest in specific forms of reproductive technologies indicates an attempt to continue this 'charade'.

The dominant framing of the issue today constructs reproduction largely as a matter of choice within an economic context (Mackinnon 2000: 120), though as previously indicated issues of morality still resonate. The Federal Sex Discrimination Commissioner, Pru Goward (2002), in response to criticism of paid maternity leave, for instance, states that 'we need to make sure family payments support the choices

families face in having and raising children. In my view there is a group of women who are currently being forced to choose between work and children'. John Howard (2002) also employs the language of choice, though in a different context, when addressing the issue of supporting families' rights to have one partner stay at home. In liberal ways of governing the perceived freedom of subjects is directly related to 'securing the ends of government' (Dean 1999: 15). Hence, families are positioned as though they have the ability to make choices but we need to question, as we did in Chapter 2, what types of choices are actually available.

If indeed governments are serious in wanting to provide choices for families they would perhaps need to look at a range of factors, including changing the shape and structure of the workplace and providing increased financial support for young families. Bryson and Mackinnon (2000: 4) recommend that the family needs to be conceived of as a public good and as such 'a greater emphasis should be placed on policies based on the principle of horizontal equity for all families'. The strength of liberal non-interventionist ideology, however, means that governments are unlikely to intervene directly to impose changes on the workplace (Caldwell, Caldwell and McDonald 2002: 19).²⁴ John Howard (2002) states specifically that 'the role of government is not to tell people how to behave in relation to their families'. Frances Olsen (1985: 837) makes a useful point here. She argues that the idea of non-intervention is a myth because the state is always directly 'implicated in the formation and functioning of families'. Hence, 'it is nonsense to talk about whether the state does or does not intervene'. Not providing legislated paid maternity leave, then, is a form of intervention. If the government, as Olsen says, is intervening all the time, the task becomes identifying the forms of 'intervention' deemed

²⁴ Here it needs to be noted that this reframing of the problem still assumes that the decline in the birth rate is a problem.

acceptable and how these construct the problem. As we will see, the area of reproductive technologies is one area where intervention is considered to be not just acceptable but indeed necessary. Here, the intervention generally attempts to shape the problem as the need to reproduce conventional families, whether these families be biologically 'ideal' or 'imagined'.

Ramifications of the Birth Rate Decline for Reproductive Technologies

It is interesting to note how few explicit links are drawn between the birth rate issue and new reproductive technologies, given that they are issues which both receive considerable media attention. This lack of connection between the issues is reflected in reports into the birth rate decline. For instance, *Low Fertility: a discussion paper* (Barnes 2001) is silent on the implications of and for reproductive technologies to this debate. Indeed the decline in the birth rate and reproductive technologies are treated as though they are two entirely separate areas. Yet the issues intersect in two important ways. Firstly, as the number of babies 'suitable' for adoption continues to decline and the ages of birth mothers increase, there is an increased need for technologies such as IVF and surrogacy in order to produce families. We need to remember that fertility, referring to biological fertility, declines after the age of 37. The responsibility accorded to women in this debate places increased pressure on women to access these technologies. Moreover, the high costs associated with them, in many cases, restricts access to those people from higher socio-economic positions, regulating the types of families that will be produced. The emphasis remains, though less explicitly, on encouraging the reproducing of the 'better stocks'.

Second, in a point I addressed in the last chapter, because risks of genetic and other ‘defects’ increase with maternal age, we will see increased use of screening procedures and increased pressure on mothers/parents to terminate what are considered to be ‘undesirable’ pregnancies (Weir 1996: 378). Here the point is that the birth rate debate is being driven by economic concerns.²⁵ High rates of population are deemed necessary to provide purchasing power and the taxes to support the ageing demographic. Given this emphasis, it is not surprising that not *all* babies are, or will be, considered to be the ‘best immigrants’. The new reproductive technologies and the related focus on genetic theories means that some babies are more desired than others. With the focus on the economic implications of the birth rate decline it is arguable that there will be an increased focus on providing babies that can fulfil their economic obligations.

In addition, the advent of the Human Genome Project and advances in reproductive and genetic technologies have meant that ‘new genetic categories of people are being created’ and counted (Finkler 2001: 236). Populations are not defined and marked simply on the basis of gender, ethnicity or class, but are being increasingly assessed also on genetic identity.²⁶ For example, the discovery of cancer genes, such as those that cause breast cancer, enables the marking of particular populations as susceptible to cancer. Similarly, in regard to reproductive technologies, carriers of certain genetic conditions are being identified as at risk of transmission, leading

²⁵ Again I want to make it clear that I am not suggesting that economic considerations are the only factor in decisions to terminate pregnancies where the fetus will be born with a disability.

²⁶ This is reflected in the Human Fertilisation and Embryology Authority (2001: 23) *Code of Practice* s4.12 which states that ‘Screening for Tay-Sachs, thalassaemia and sickle cell anaemia should be carried out in appropriate population groups’. Here it needs to be emphasised that I am not suggesting that this screening should not be undertaken. Children born with Tay-Sachs, for example, suffer significant physical disabilities and generally only live until the age of four or five. Rather the point is to note the ways in which particular populations can be marked by genetic indicators.

to the forming of 'risk groups' (Weir 1996: 382). Importantly, the identification of the 'risk' enables the increased scrutiny and surveillance of the subjects so identified. African-American populations have, for instance, historically been identified as at risk of sickle cell anaemia and have been historically tested for the sickle cell anaemia gene, in many cases without consent (Andrews 1996: 1003). It is the identification of the population as 'at risk' which allows for screening to occur without consent.

This chapter began by illustrating that rather than a universal model, the 'traditional' family – as a two-parent heterosexual unit – is of relatively recent origin. This chapter has also looked at debates surrounding the birth rate decline in Australia. We have seen that it is women who have been held accountable for the decline. Women, and their 'choices', are constituted as the 'problem' within policies addressing the issue. Throughout, there has been a focus on the dominant discourses surrounding the issue and the interconnections between the birth rate debate and eugenic thought. Here, I have emphasised that current debates centre around the economic implications of the birth rate decline with significant implications for reproductive technologies.

While the birth rate debate is, as I have illustrated, an old one, reproductive technologies provide a new twist to the debate. On one level, we can predict that birth rate concerns will give a legitimacy, if not an urgency, to research in this area. At another level, reproductive technologies provide more direct means of shaping the kind of population which will be produced. Specifically, they provide the means of creating families which 'pass' as biological, whether these are ideal or imagined. The central concern, however, has not changed. Population concerns remain a focus

of governments. Technology and economic concerns produce modified scenarios of how these concerns get played out. In each case the motives and bodies of women provide the primary targets for intervention. Both of these signal a need for a continued analysis of the areas.

***Fragmenting the Reproductive Body:
constituent parts, fetal ‘subjects’,
and competing claims over the pregnant body***

Although law and medicine claim to have a unified and coherent tradition concerning individual rights, in fact two different traditions have been established, one for embodied subjects, and the other for those who can be treated as mere bodies despite an official rhetoric that vehemently forswears such treatment of human beings (Bordo 1993: 72).

Reproductive technologies provide the means for exercising power relations on the flesh of the human body. These power relations are institutionalised in several ways – not only through the development of medical centres that offer reproductive services, but also through the establishment of reconstructed legal rights and responsibilities of parents, donors, fetuses, and resulting children (Balsamo 1996: 82).

The gender-neutral language which underpins the significant proportion of Australian legislation dealing with reproductive technologies and related issues of family formation obscures the reality that reproductive technologies, and their corresponding regulatory frameworks, have as their primary focus the material bodies of women (Gill 1999). It is women’s bodies, for instance, that physically undergo abortions. It is women’s bodies that carry and (sometimes) give birth to children through surrogacy arrangements and/or IVF.¹ It is women’s bodies that experience invasive treatments such as ‘Oocyte (egg) pick up’ (OPU) for IVF or egg donation. It is women’s bodies that are the focus of practices such as amniocentesis, chorionic villi sampling and ultrasound during pregnancy.² And, it is also, most often, through intervention into women’s bodies that the ‘problem’ of male infertility finds its solution (Shildrick 1997: 200, van der Ploeg 2001: 2).

¹ It is important to recognise that not all IVF or surrogacy pregnancies end in the birth of a child or children.

² As will become clear in Section 2, I am not suggesting that there are no physical requirements placed on the bodies of men or, for that matter, that men are not affected by policy frameworks which deal with reproductive technologies.

Consequently, while the gender-neutral language of individual policies may suggest that legislation regulating reproductive technologies is concerned with regulating both male and female bodies, it is, in the main, women's bodies which are implicitly the primary focus for regulation.³ As indicated previously, I argue that, around the area of reproduction, women tend to be situated problematically in policy as less autonomous than men. In simple terms, women are constituted as in need of protection and this produces certain conclusions about women's bodies. Policy regulations around the areas covered in this thesis define women's bodies as objects of concern, a defining which has important consequences for women's subjectivity and importantly for the treatment of women's material bodies. I argue that a body-focussed approach to policy is one way of drawing attention to the material effects of these conceptualisations.

This final chapter of Section 1 traces several key developments which have contributed to the problematic conceptualisation of women's bodies in policies dealing with reproductive technologies and related issues of family formation. The chapter starts with a brief consideration of the conceptualisation of the body in mainstream (Western) biomedicine. However, rather than provide a historical overview of the body in biomedicine, here the focus is on identifying some of the key assumptions about the body which have implications for the treatment of reproductive bodies in the policies considered in this thesis. In this section I look also at the links between the dominance of the biomedical model and the authority accorded to biomedical practitioners to speak about bodies, drawing on one anthropological study to illustrate the tensions implicit in speaking about the

³ Interestingly, while men's bodies engage in reproduction their material bodies are not, in general, constructed in policy considerations as 'reproductive' bodies. For men, it is their product – that is, their genetic material – that is of central concern in policy considerations.

reproductive body. The chapter then explores in more detail the ways in which bodies are conceptualised in the related field of bioethics. While the role of bioethics committees has been discussed elsewhere, their crucial role in the policy process necessitates further consideration of the assumptions about the body underpinning much bioethical engagement in this area.

While pregnant women have long been aware of the fetus (Bordo 1993: 85), technologies such as ultrasound, fetal heart monitoring, amniocenteses, chorionic villi sampling, and relatively recent advances enabling surgery on the fetus, increasingly enable outside parties to claim knowledge over and monitor directly its (the fetus') progress. In this context, the chapter considers in some detail the impact of ultrasound technology on the conceptualisation of the pregnant body and the development of fetal rights. The chapter then moves on to consider how women's bodies have been historically conceptualised in law and policy. Particular attention is paid to developments in the United States where a series of cases have dealt with the competing 'rights' of the fetus and the pregnant body. Lastly, I use Balsamo's (1996) inquiry framed by the question, 'what are the consequences of breaking up bodies?' to ask the more specific question, what are the consequences of breaking up the reproductive body?

Elucidating assumptions about bodies in policies relating to reproductive technologies and related issues of family formation necessitates an understanding of the 'body' as constituted in and constructed by discourses. However, I want to make clear again that while the body is 'understood through discourse' and, hence, cannot be understood 'outside of' discourse, this thesis does not suggest that the body exists merely as a discursive object. Such a narrow understanding negates the

interaction between the material and the discursive (Rothfield 1995: 181, 188; Blackman 2001: 210). Linda Birke (1999: 25) encapsulates this tension when she notes, '[L]ike many women, I have trouble thinking about theories of social construction that ignore my bodily pain and bleeding, or that ignore the ways that desire (however constructed) finds expression through my material body'. So, while 'discourses inscribe bodies' they 'do not totally produce them...bodies have a substance, a materiality, which can be explored through practice and altered in a number of ways' (Rothfield 1995: 196). Interactions occur between the material and the discursive – the body is at the same time, and inseparably, a social and biological phenomenon (Seymour 1998: 13).

The 'Body' in Biomedicine – a fragmented body

This thesis is primarily concerned with the conceptualisation of the body in a Western context. Dominating Western understandings of the body is the biomedical model. As a consequence, it is biomedical practitioners who are given the authority to speak about bodies. Within the biomedical model, the body is seen to be, and is treated as, a series of parts and processes operating in a unitary fashion. Dominant biomedical discourses reduce individual bodies to their 'constituent parts', for example, genes, organs, bones and blood. This language of parts and processes plays an integral role both in the ways in which we 'understand the biological body' and also in 'how we *live* our bodies' (Birke 1999: 159, emphasis added). Rather than conceiving our bodies as a whole we are encouraged to think of, and live, them in terms of their isolated parts. As Birke (1999: 159) asks us to consider, '[C]an anyone now, in the West, experience severe pain in the chest without imagining that specific organ, the heart?'

The conceptualisation of the body as a series of parts and components negates, however, the interdependence and moreover the continuity of the body in which 'processes connect to one another, even if particular structures do not' (Birke 1999: 160). It further constitutes the biological body, in a language of unchanging pre-determinedness, as untouched by cultural conceptions (Birke 1999: 21).

Implicit within the bioscience medical model is an assumed 'split between mind and body whereby the knowing subject is disembodied, detached from corporeal raw material' (Shildrick 1997: 13-14). This split draws on a Cartesian dualism in which the mind is ascribed 'the powers of intelligence and animation, spirituality and selfhood'. The corporeal body by contrast 'becomes simply a machine susceptible to a mathematical-causal analysis of functioning' (Shildrick 1997: 16).⁴ In simple terms the mind is privileged over the body. The mind/body dichotomy aligns with other dichotomies including nurture/nature and male/female. Importantly, women have been historically associated negatively with the body. Biology is seen to be the cause of 'women's inferiority' (Birke 1999: 25).

As feminists and others interested in theorising the body have illustrated, the 'universal' body, constituted as the norm in biomedical texts, is actually a body which is neither gender nor racially neutral. Reflecting the cultural assumptions of the period in which development of biomedicine occurred, the 'universal body' is actually a body which is implicitly embedded with the values and constitution of a white male (see, for example, Birke 1999: 35). This construction has had important implications for 'other' bodies, such as women's bodies, which are set in opposition to, or are considered secondary and of less value in relation, to the 'universal' body

⁴ Shildrick (1997: 16) notes that the concept of a split between mind and body was not 'new to the early modern period' but can be seen, for example, to be a dominant form of understanding from 'the inception of Christianity'.

(Birke 1999: 160). Physiological processes specific to women's bodies, for example, including menopause and menstruation, are characterised in deficit terms and language. Hence, women's bodies are seen to be 'more "naturally" in need of technological intervention' (van der Ploeg 2001: 18-19).

Bodies are marked as 'different' through indicators such as gender, race and (dis)ability by society, science and medicine. Still, even in this context the 'naturalness' given to particular bodies remains. For example, within the construction of gender there occurs a legitimation of what are considered to be 'natural' bodies for men and 'natural' bodies for women, through the linking of the biological with the natural (Seymour 1998: 3).⁵ This construction remains dominant despite the fact that specific bodies, such as intersex (or hermaphrodite) bodies, which challenge the boundaries drawn between male and female bodies, contradict claims of a singular knowledge of sexed bodies (Rothfield 1995: 170). Balsamo (1996: 9) argues that gender, like the body, is a boundary concept; yet not only does this concept remain strongly defended, it also 'remains a naturalized marker of human identity'.

Biomedicine is more than 'a practice that works directly on bodies'. Significantly, it is also a field of knowledge and as a consequence it has 'a privileged place in disseminating knowledge about what a body is, how it functions, and what its capabilities are' (Diprose 1995: 213). Within biomedicine it is the medical profession, in its role as practitioners of biomedicine, that is invested with the authority to speak about bodies, including women's reproductive bodies. Around

⁵ Historically, men's bodies have been marked as superior to women's bodies and this has had far-reaching effects on social life (Seymour 1998: 3). However, the marking of men's bodies as superior has not extended to all men. Policies of slavery, for instance, rested on the notion of the slave body as a 'no' body.

the policy areas covered in this thesis, biomedical practitioners play a significant role, as we will see, as policy actors in the policy process.

The power relations implicit in reproductive technology treatments and the subjectification of the reproductive body have been illustrated clearly in anthropological studies of women undergoing IVF. These power relations are crucial in the policy process. For this reason, I want to spend some time now drawing on one such study to look at the demands placed on women's bodies throughout the initial IVF process and the ways in which women's bodies are conceptualised by both medical practitioners and significantly also by the women involved in the process.

IVF technology requires the extraction of eggs from a woman's body, either the person undergoing the treatment or a donor body. In contrast to the production of sperm, which is achieved generally through masturbation, egg retrieval is a far more invasive and time-consuming process for the person providing the oocyte/s. Fertility drugs are given to increase the number of eggs and also to control the timing of the egg ripening. This often requires a schedule of drugs, including nasal sprays, tablets and injections, to be undertaken over a period of two to three weeks, with potentially significant impacts on personal and professional lives (Franklin 1997: 109, 112). In addition to this, egg development is monitored via ultrasound, and hormone levels are also checked by means of blood and urine samples, as it is critical to remove the eggs at the right time of development (Genetics and IVF Institute 2001). The need for continued monitoring is not only time-consuming but also has the propensity to take over daily life (Franklin 1997: 113).

When 'ready', the eggs are collected via practices such as the transvaginal procedure known as 'follicular aspiration' or Oocyte (egg) pick-up (OPU).⁶ In this instance a hollow needle is inserted through the vagina and guided via ultrasound to retrieve eggs from the ovaries, a process requiring either anaesthesia or sedation. A pioneer of IVF technology, Sir Robert Winston (1996: 6), notes that advances in the technology have enabled the quickening of the procedure and lessened the amount of anaesthetic required. Hence, in his terms, it is an improved process. A study by Franklin (1997: 103) illustrates, however, a tension between the description of IVF in accounts by medical practitioners and in the accompanying literature provided to patients undergoing the treatment, and the experience of the procedure by the recipients of the treatment.

Representation of the IVF procedure as 'simple' and 'natural' are affirmed through the dominance of the clinical description of IVF (Franklin 1997: 103). These descriptions obscure and thus fail to convey what is actually involved in undertaking the process. Many of the participants in Franklin's study described the pain associated with the procedure:

...the first time I had the eggs, what do they call it, the aspiration, it bloomin' hurt and in this leaflet it said there may be some slight discomfort, but this will be perfectly bearable, and it must have been a man that wrote that... (Mavis Norton quoted in Franklin 1997: 117).

The pain, oh I just couldn't believe it, and I just lay very still because I remember him saying if you move Mrs Lewis *we will lose the eggs, and they will go into your body* and that will be that. So of course I had to suffer it... (Catharine Lewis quoted in Franklin 1997: 119, emphasis added).

⁶ Eggs are not always produced nor do eggs always develop successfully.

Hence, not only is the procedure painful but it also differs from the medically described experience. Moreover, reflecting the assumptions of the biomedical model of the body, the medical professional speaks about Mrs Lewis' body in terms of its fragmented parts – the eggs are the focus. The reproductive body is constituted as a dangerous space with the potential to swallow up the eggs, thereby undermining the success of the procedure. The point here is that it is the voices of the medical profession that are invested with authority in the policy debate to discuss the implications for women's bodies of these technologies.

Franklin (1997: 119) draws attention to the way in which the narratives of the participating women are not only descriptions of the pain felt during the aspiration procedure, but are also significant in revealing 'certain features of women's self image during treatment'.

...I remember bits of the operation, I remember crying during the operation, I could hear myself crying, and I could hear the nurse saying you are doing very well, it won't be long now, and I could hear (the clinician) saying there's one and there's another one (Jane Caldwell quoted in Franklin 1997: 119).

Franklin (1997: 119) suggests that the above narrative is illustrative of two differing views of the self, 'one from within and one from without'; the narrator speaks from the inside in remembering crying and from the outside in hearing herself crying. The experience is both subjective and as an object. Moreover, she notes, 'it is clear the woman is instantiated in a complex web of mediated gazes, including her own, through which her body is objectified at the same time that her insides are "disembodied" via the monitor'. As a consequence, a split occurs between the reproductive body and the self. In such procedures there is a constitution of the reproductive body as a 'productive' (like a broody hen) 'alienated' body with a

subjective will that submits to this body.⁷ This construction, I argue, is reflected and reproduced in policies regulating reproductive technologies.

The Body in Bioethics

The ‘split’ between mind and body, which underpins much conventional biomedicine, is also reflected in the discipline regulating the biosciences, such as surrogacy and IVF – bioethics. A key assumption within bioethics is that autonomy is an essential principle and, hence, one which should be respected (Jonsen 1998: 334). In the context of bioethics, autonomy is generally characterised as ‘informed, rational, free choice’ (Dodds 2000: 214). Minds, it is assumed, are able to make choices for, and over, bodies. Not all political subjects are, however, seen to have autonomy. Around the area of reproduction women tend to be constituted in bioethics as lacking autonomy, as ruled by their bodies, a constitution which is seen to justify paternalistic treatment (Diprose 1995; Bacchi and Beasley 2002).

Those deemed rational are also, not surprisingly, those deemed to have a right to autonomy (Shildrick 1997: 120). The focus on rationality and autonomy in bioethics means that, in general, bodies are given the status of passive objects. In Diprose’s (1995: 202) words, what bioethics ‘assumes it regulates is not so much the relation between biomedicine and bodies but the relation between biomedicine and autonomous, disembodied individuals’. This way of theorising bodies leads to the dismissal of women’s physiological role in reproductive technologies such as surrogacy and IVF.

⁷After the retrieval of the gamete material the eggs are then fertilised with the collected sperm and cultured for two to three days in a medium of artificial fluids which are similar to body fluids. The fertilised embryos that have successfully divided are then implanted in the uterus of the recipient. A number of factors can impact on the success rate of IVF including a lack of suitable eggs, failure of the egg fertilisation process, failure of the embryos to develop properly and problems after transference of the embryos.

It is not the case, however, that women are always positioned as subjected and, hence, lacking in autonomy. Bacchi and Beasley (2002: 325) identify a dichotomy underlying policy texts between citizens that are deemed to be in ‘control of their bodies’ with accompanying entitlements to ‘political autonomy’ and those that are deemed to be ‘controlled by their bodies’ who are subjected to modes of regulation. Those, they (2002: 326) argue, that are positioned as ‘controlled by their bodies’ are seen as ‘lesser citizens’. While women appeared on both sides of this dichotomy, depending on the policy, importantly for this thesis, around areas to do with reproduction and procreation women were positioned consistently as subject to their biological functions (Bacchi and Beasley 2002: 326).⁸

The British *Committee of Inquiry into Human Reproduction and Embryology* Report (Warnock 1984), commonly referred to as the Warnock Report, offers insights into the problematic ways in which (women’s) bodies are conceived in bioethical reports around reproductive technologies and related issues of family formation. The terms of reference for the Inquiry required a deliberation of ‘recent and potential developments in medicine and science related to human fertilisation and embryology’. The Committee canvassed a wide range of issues including surrogacy, Assisted Insemination (AI) both by husband and donor, IVF, embryo donation and a range of related research areas. Consideration was also to be given to what appropriate ‘policies and safeguards’ should be enacted and ‘the social, ethical and legal implications of these developments’ (Warnock 1984: 1.2). For the

⁸ Around the policy area of cosmetic surgery Bacchi and Beasley (2002) found that women and men were positioned as autonomous subjects, controlling their body choices.

purposes here I want to focus specifically on their consideration of one area – surrogacy.⁹

The section on surrogacy in the Warnock Report is short but telling in its treatment of women. Attention to bodies in the consideration of surrogacy is limited to a discussion of body parts. The physiological body is never constituted as a whole body but is instead fragmented into uteri, eggs, sperm and embryos. The body ‘parts’ are discussed as though they exist separately from other bodies. Indeed, in some cases the body parts are themselves invested with agency. In a discussion of gestational surrogacy the Report notes that ‘the resultant embryo is transferred to and *implants* in the carrying mother’ (Warnock 1984: 8.1, emphasis added). By implication the pregnant body plays a passive role in the process.

Reflecting beliefs about minds making decisions about bodies, the Report notes in the arguments against surrogacy that ‘it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else’s child’ (Warnock 1984: 8.10). The uterus is constituted as a separate and extractable part of the body, a position the Report does not challenge. Hence, the Report constitutes the pregnant body as a fragmented body, and its parts as objects of concern over which other regulating ‘bodies’ such as the medical profession, or problematically even the woman herself, have control.

Significantly, an analogy is made between medicine’s treatment of the ‘malfunctions of the human body’ and the inability to have children as a form of malfunction (Warnock 1984: 2.4). Hence, infertility is constituted within the Report as a clinical condition enabling control of the treatment of infertility to be kept

⁹ I will look at the Report’s consideration of the issue of surrogacy in more detail in Chapter 6.

within the hands of the medical profession and constituting the body as an object of concern. In cases where infertility treatment was considered inappropriate, the decision was to be left to the medical practitioner to exercise their 'clinical judgement'. The Committee recognised that the medical practitioner was to 'make social judgements that go beyond the purely medical' and recommended that full reasons be given in cases of refusal (Warnock 1984: 2.12, 2.13). Nonetheless, there remains an implicit assumption that medical practitioners can exercise a rational and fair choice over the bodies of women in relation to reproduction.

What is missing from this Report – and as I will argue in the next section other bioethical texts discussed in this thesis – is a more complex understanding of embodiment. As Diprose (1995: 210) puts it, the 'assumption in biomedical ethics that the body is merely an appendage to the self over which we ideally have sovereignty gives biomedical practice an unethical foundation'. Given that biomedicine is implicated not only in the demarcation of normal from abnormal bodies but also in the 'constitution of the body', it is essential that bioethics encompasses an adequate consideration of the role of physiological bodies, in particular in regard to bioethical deliberations around new reproductive technologies – women's bodies (Diprose 1995: 213). While we may or may not agree with the outcomes of the Warnock Report with regard to the area of surrogacy we nonetheless need to question the underlying assumptions within the Report. Specifically, we need to be wary of the lack of attention paid to the differences among women. We should also recognise the costs of positioning women as either passive or vulnerable and their bodies as objects of concern. Moreover, we need to challenge the way in which this conceptualisation invests so-called 'rational'

bodies, such as the medical profession and indeed bioethical committees themselves, with control over women's bodies.

Visualising Through the Pregnant Body

Technological innovations alter in subtle and in some cases, such as plastic surgery, explicit fashions what can be thought of as a “natural” body’. Increasingly we are witnessing a blurring of the demarcation between the ‘natural body’ and technological intervention (Balsamo 1996: 1). In Balsamo’s (1996: 5) words, the body has become reconceptualized as a boundary concept, ‘belonging simultaneously to at least two systems of meaning – “the organic/ natural” and “the technological/ cultural”’. In this context, what we are observing is an ideological struggle over opposing systems of meaning that are implicated in defining ‘the material struggles of physical bodies’.

Advances in a range of techniques, such as IVF, linked to medical intervention into reproduction, have coincided with the increasing subjectification of the fetus (Weir 1996: 382). The constitution of the fetus as a subject, and the according of subjectivity to it, is dependent on two primary assumptions. First, it requires the disappearance of the subjectivity of the woman who is pregnant and the conception of the function of the pregnant body as little more than an incubator for the fetus (Stabile 1994: 71). Second, it necessitates decontextualising the embryo/fetus from its location within, and its dependence on, the reproductive body (Stabile 1994: 71).

Visual technologies, such as ultrasound, have played an integral role both in erasing the pregnant body and de-contextualising the fetus from the environment within the pregnant body. In enabling the visioning of the fetus as an autonomous individual these technologies have the ability to be exploited by, among others, pro-life groups

to construct the pregnant environment as an ‘inhospitable wasteland, at war with the “innocent person” within’, thus legitimating the use of fetal protection legislation such as enforced caesareans (Stabile 1994: 70). In this context the fetus becomes an entity in its own right and as such is held to possess rights. However, as the fetus is unable to ‘claim’ its own political autonomy, it is the State and other interested parties such as bioethical committees, medical practitioners and religious organisations that intervene on its behalf. At the same time as we are witnessing the increased subjectification of the fetus we are also witnessing an increased push for father’s rights, in particular in regard to abortion (Bordo 1993: 89).

The development of fetal rights has had particular consequences on the ways in which debates concerning reproductive technologies are structured. Importantly, fetal rights arguments can also be utilised for political purposes. An example of this occurred during the 2001 Australian Federal Election campaign in which an advertisement featured in the *Adelaide Advertiser* newspaper, authorised by Right to Life Australia Inc (2001), suggested that the ALP candidate who they claim ‘endorses abortion on request’ and ‘is on Emily’s List a political network of “prochoice” ALP parliamentarians and candidates’ be preferenced last on the ballot paper. The position of the ALP candidate is contrasted with that of the sitting Liberal member who it is said ‘opposes abortion (except in cases of rape)’. The caption below a large photo of what appears to be a new born baby reads ‘Kill her now it’s murder... Kill her in the womb it’s abortion’. In viewing the advertisement,

it is the visual of the 'fetus' that is immediately striking.¹⁰

Ultrasound technologies have played a crucial part in the development of fetal rights. According to many advocates of the technologies, ultrasound is both impartial and passive (Mitchell 1994: 146).¹¹ While it is true that the technology itself is impartial the uses of the technology are not. In simple terms,

It is not as some feminists would argue that technology alienates women from their bodies, but that technologies reflect the interests of institutions that depend upon such alienating effects (Stabile 1994: 71).

Hence, we need to acknowledge explicitly that practitioners conducting ultrasounds have values and assumptions and, perhaps most importantly, in many cases reflect also the values and assumptions of their profession and society at large. In simple terms, ultrasound technicians are neither impartial nor passive in the ultrasound process. The equation of the ultrasound with that of a camera or video recording obscures the reliance on the technician to provide a reading and understanding of the images (Mitchell 1994: 154). It is the technician who is responsible for providing the context for the image.

Ultrasound techniques have increasingly become a routine part of pregnancy.¹² However, the increasing use of this technology has occurred with little questioning of the ways in which these technologies may impact on the experience of pregnancy at an individual level and also on the management of pregnancy in the medical

¹⁰ Other themes drawn attention to in the advertisement included statistics on the rate of one abortion for every three babies born and the funding through Medicare of abortion in Australia. (Right to Life Australia Inc, 2001: 31). Whether this advertisement had any real bearing on the outcome of the Federal election is of course difficult to gauge. However, the point is that it is the very conflation of the fetus as an autonomous entity with a full-term baby that allows for this image to be 'legitimately' produced.

¹¹ Similarly the use of prenatal testing has also been argued to be value-neutral by medical practitioners.

¹² Ultrasound techniques are of course not confined to reproductive management but also have a wide variety of other medical purposes.

context (Mitchell 1994: 155). There is also little questioning of the potential impact on ‘the meanings which “fetus”, “baby”, “mother”, and “pregnant woman” hold for physicians, women, men, indeed for any of us’ (Mitchell 1994: 155). The use and control of the technologies invest the medical profession with greater and in some cases new powers with the effect the challenging of assumptions and knowledge about pregnancy (McBride Stetson 1996: 212).

A study by Mitchell (1994: 147) is illustrative in this context. The study found that there is an awareness by clinicians of the potential of ultrasound to encourage the maternal/fetal bond, especially in cases where this bond is seen to be lacking. However, it is not only the bond between ‘mother’ and ‘baby’ which is shaped:

Ultrasound “windows” are influential in shaping the *social relationships* of pregnancy, including medicine’s claim of authority over the management of pregnancy and the relationship between a pregnant woman and her fetus (Mitchell 1994: 147, emphasis added).

The provision of ultrasound pictures or ‘baby’s’ first pictures, as they are referred to by some people, augments this development. Significantly, ultrasound technologies allow a relationship to be formed with other interested parties. Hence, in the case of surrogacy it can enable the social or commissioning parents to view the fetus prior to the birth, increasing the ‘claim’ they have to ‘their’ property. The ultrasound technician is involved explicitly in the bonding of the fetus to the mother, whether this be the social or birth mother, and society at large. In this context, birth mothers involved in surrogacy arrangements can receive two highly contradictory messages. While they are supposed to bond with the fetus in order to protect it and deliver it safely to the intended parents, at the same time they are supposed to consider the fetus as a separate entity, as belonging to someone else. Where donor material is used, such as in cases of Artificial Insemination (AI) or IVF, the ultrasound allows

for bonding to the fetus and the obscuring of the lack of genetic relationship to one or both of the parents. So ultrasound technology has the ability to augment a genetic relationship or supersede it, depending on the individual circumstance.

The ultrasound image also serves as proof for the pregnant woman that she is pregnant before obvious physical movement of the fetus (Mitchell 1994: 153). In line with this, Mitchell (1994: 153) found in her study that this allowed women to shift language from that of the fetus to baby. The change in terminology signals an important shift in the relationship to the fetus and further marks it as an entity separate and individual from the body in which it develops and in which it is nurtured.

The production of the ultrasound image has the effect of increasing the focus on the fetus as a patient and in addition underlies the increasing mistrust of women to care for the fetus (Mitchell 1994: 148). Dominant assumptions about the importance of genetics further complicate matters leading to the construction of the pregnant body as an environment, which primarily permits, or in some cases fails to permit, 'the child to develop to its full genetic potential' (Katz Rothman 1999b: A52). When this assumption is coupled with IVF technology, where embryos are screened for potential 'defects', the stakes are raised for pregnant women not to engage in any behaviour that could be detrimental to the fetus.

Mitchell's study further identified the ways in which women, in addition, can be reminded through this technology of the negative light in which their bodies can be held through pregnancy. The body is seen to be an obstruction to the viewing of the fetus, the health and status of which is the primary focus of the ultrasound. The body becomes something that must be negotiated and in a sense overcome in order

to achieve a proper outcome. Interestingly, Mitchell found that obese women were often told that it was more difficult to view the fetus because of their weight and were, hence, 'reminded that their bodies hinder a thorough examination of the fetus'. Obesity, which is both medically and socially constructed as detrimental to a person's health, is further problematised because it is seen to be a potential danger to the health of the fetus as it hinders the medical management of the pregnancy (Mitchell 1994: 151).

A significant outcome of ultrasound technologies is the diminishing of the need for medical practitioners to rely on women's experience and knowledge for information regarding the pregnancy (Stabile 1994: 88). Whereas the due date was commonly based on the last period of the woman, this information can now be ascertained and in some cases 'corrected' through the ultrasound. Women's information regarding their last period can be disregarded in the light of the 'factual' information obtained from the ultrasound. Hence, women become alienated from their knowledge of their bodies. The medical monitoring of pregnancy serves not only in the managing of pregnancy but also to devalue woman's understanding of, and ability to speak about, their bodies (Stabile 1994: 88).

Significantly, and in particular in relation to cases of IVF and surrogacy, technologies such as ultrasound can lead to the altering of 'the maternal/fetal relationship' (Bessner 1994: 170). The bond between the fetus and the pregnant body, which has traditionally been held in such high esteem, is challenged by these technologies as a further bond between the fetus and society is affirmed. Moreover, this has had a significant impact on the construction and understanding of the pregnant body. In a culture, which is largely dependent on visual imagery, visual

technologies such as ultrasound play an integral role ‘in erasing women’s bodies’ from the process of reproduction and pregnancy (Stabile 1994: 70). Moreover, visualizing the body through this technology and other techniques such as endoscopy, in which a camera is sent inside the body, ‘contribute to the fragmentation of the body into organs, fluids and gene codes, which in turn promote a self-conscious self-surveillance, whereby the body becomes an object of intense vigilance and control’ (Balsamo 1996: 5).

Ultrasound, in conjunction with other techniques such as amniocentesis, builds not only a visual image of the fetus but also a genetic picture of it in terms of its health and sex/gender, with wide-ranging implications for the autonomy of reproductive bodies. I noted in Chapter 2, for example, the United States case where a woman was initially told by her health care provider that they would not pay for the health needs of her child if she chose not to undergo an abortion, after her fetus had tested positive to cystic fibrosis during pre-natal screening (Andrews 1996: 986). At the same time that these techniques have been developed there has been a corresponding rise in associated occupations and services such as ‘contract motherhood, genetic counselling and the speciality of medical genetics’ (Weir 1996: 384). Hence, an intricate relationship exists between the subjectivity increasingly accorded to the fetus and these professions. In terms of genetic counselling and medical genetics much of the power of this field of knowledge is dependent on the maintenance of some idea of the fetus as a subject in its own right.

The positioning of the fetus as a subject in its own right is also integral to the more recent construction of it (the fetus) as a ‘patient’ ‘who’ has a corresponding right to medical intervention to address ‘problems’ such as congenital abnormalities (van

der Ploeg 2001: 36, 50-51). While ultrasound technologies have long been used to identify instances of disability in the fetus it is only recently that treatment *in-utero* has been attempted. As with the 'problem' of male infertility, in the use of fetal surgery women's reproductive bodies are the target for medical intervention to address problems which are in fact related to the bodies of 'others' (van der Ploeg 2001: 36). Moreover, the conceptualisation of the female body as 'a natural object for intervention' has meant that it appears 'medically and biologically inevitable to treat others via this route' (van der Ploeg 2001: 36). In simple terms women's bodies become subjected rather than subject.

Surveying the Pregnant Body

The special status accorded to the fetus means that even in what can be considered to be a 'normal' pregnancy the actions of the pregnant woman are 'considered to be a legitimate target for moral concern' and regulation (Diprose 1995: 207).¹³ For example, a recent South Australian Government policy initiative, released in early 2005, 'Pregnancy and Alcohol Don't Mix', recommends that women 'drink no alcohol' during pregnancy (Government of South Australia 2005). Advertising for the campaign is widespread, including the use of billboards in addition to radio and television airtime. The campaign is significant in its overt increasing of the surveillance of the behaviour of pregnant women. For example, in the accompanying media release for the above initiative the then South Australian Health Minister Lea Stevens (2005) is quoted as saying:

¹³ Reproductive technology processes, such as IVF, enable and also heighten continued monitoring of the reproductive body throughout the pregnancy. The surveillance of the pregnant body is further increased in pregnancies created through reproductive technologies because not only the couple and society but also the physicians involved have a stake in the outcome. Consequently, there are competing interests over the reproductive body. As Diprose (1995: 216) notes, while there are differing levels of public scrutiny applied to the pregnant woman and 'the medical practitioner who directly monitors her... neither party can easily extract itself from this relation without attracting the condemnation of the community'.

Importantly this campaign recognizes that pregnant women are part of the wider community... Their families, friends and health professionals all *need knowledge* to better *support* them to make healthy choices during pregnancy (emphases added).

Hence, a responsibility is placed also on ‘the community’ to participate in the surveillance of the behaviour of pregnant South Australian women. It is useful at this point to revisit Sarah Nettleton’s (1996: 47) argument that women can be held culpable if they pursue ‘risky’ behaviours while pregnant because the status of the fetus is held to be paramount. The surveillance of the pregnant body leads to the internalisation of a form of Foucauldian disciplinary power of what is ‘good’ and ‘proper’ behaviour for pregnant women (Nettleton 1996: 47).

It is important to acknowledge that there are genuine concerns regarding the impact of factors such as alcohol on the long-term health and development of the fetus. However, the concern regarding pregnancy, and pregnancy outcomes, must also be seen in the context of what Diprose (1995: 217) describes as ‘the political investment of “healthy”, productive bodies suitable for exchange in a labour market’. As the previous chapter illustrates, the State’s concern with population guarantees that more is at stake in policy dealings with (reproductive) bodies than the regulating of individual bodies – bodies are central to ensuring the continuation of the population and hence are inextricably linked with the government of the population. Links can also be seen with eugenic thought and the pressure to terminate fetuses diagnosed prenatally with disabilities.

Disproportionate responsibilities and legal obligations to and for the fetus continue to be imposed on men and women. Women’s primary role in the protection of the fetus further constructs the pregnant body as responsible for the health and status of the fetus. While much is made of the effects of behaviour associated with the

mother, such as drug use, smoking and drinking alcohol, little is said of the effects that the behaviour of the father may have. For instance, while evidence exists to suggest that sperm can be affected adversely through consumption of illicit substances and alcohol and that heavy smoking of the prospective father can have an effect on the fetus, prospective fathers have not as yet been subjected to legislative regulation (Bessner 1994: 180). Here it is useful to remember the United States case, mentioned earlier, where a mother but significantly not the father was prosecuted for participating in sexual intercourse during the pregnancy in California (King 1989: 400 in Bessner 1994: 180), illustrating that around reproduction women are accorded lesser autonomy.¹⁴

The regulation and scrutiny of pregnant women has far-reaching effects for women in general and for pregnant women in particular that go beyond legislative jurisdiction. Daniels (1993: 7, in Balsamo 1996: 100) captures this point well,

The very attempt to prosecute pregnant women for addiction has created a powerful social mythology about women. The power of this mythology may at times eclipse the power of the law. Although women's rights may ultimately be upheld in the courts, a broader public culture may continue to endorse resentment toward women and more subtle forms of social coercion against those who transgress the boundaries of traditional motherhood. Social anxiety and resentment are most easily projected onto those women who are perceived as most distant from white, middle class norms. Political power may ultimately rest not on the technical precedent of legal rights, but on the symbols, images, and narratives used to represent women in this larger public culture.

For pregnant women in Australia, though not as yet subjected to the same legal constraints as women in the United States, these same 'symbols, images, and narratives' influence the construction and behaviour of pregnant women.

¹⁴ However, it is possible that there will be increased surveillance of men's behaviours as information about the impact of these behaviours on the fetus becomes available.

Pregnant Bodies, Fetal Containers and Disappearing Subjectivity

There is a long history both in law and policy texts of treating women's reproductive bodies as little more than fetal containers or incubators, particularly in the United States (Bordo 1993: 90). Susan Bordo (1993: 73), for example, notes in a United States context the differences between treatment of 'conscious subjects' and 'mere bodies'.¹⁵ She draws attention to a number of cases where the notion of bodily integrity has been sanctioned through the judicial system, including a case in which a man was able to refuse legally to give a bone marrow transfer to his cousin who later died of leukaemia. Bordo (1993: 73) goes on to argue that while many may find the action above morally problematic the law was clear in protecting the notion of 'informed consent' to a medical procedure. As she explains, this notion

is, in a very real sense, a protection of the *subjectivity* of the person involved – that is, it is an acknowledgement that the body can never be regarded merely as a site of quantifiable processes that can be assessed objectively, but must be treated as invested with personal meaning, history, and value that are ultimately determinable only by the subject who lives 'within' it (Bordo 1993: 74-75, emphasis in text).

Bordo contrasts the cases where bodily integrity has been sanctioned in law with a series of cases concerning court-ordered obstetric interventions in which judicial decisions have constructed the pregnant body in her terms as a 'mere body'. These decisions include forced caesareans, detaining of pregnant women considered a threat to their fetus and the keeping alive of clinically brain-dead women in order for a fetus to be brought to term.¹⁶ She (1993: 78) points out that many analysts see

¹⁵ The dichotomy outlined by Bordo, between 'conscious subjects' and 'mere bodies', links with the control of body/controlled by body dichotomy identified by Bacchi and Beasley (2002).

¹⁶ In a recent case, a brain-dead woman from Arlington, Virginia, has been kept on a ventilator in the hope that her fetus can be brought to a stage of viability outside of the womb (see, for example, McCrummen (2005) for details). The decision was made by the woman's husband and her parents. Here, I want to make clear again the point that I make no judgements on the decisions taken by families in these instances.

no legal justification for the differences in the treatment of pregnant and non-pregnant bodies. Rather, issues such as gender ideology, racial prejudice and the notion of proper roles and behaviours for pregnant women influence these decisions.¹⁷

In this regard, the law constructs the pregnant body as little more than a biological machine whose main function is the preserving and delivery of the fetus (Bordo 1993: 79).¹⁸ Discourses regarding appropriate forms of motherhood are also important here. Within these discourses, for a pregnant woman to be a 'true' or 'proper' mother she must be prepared to forgo her right to subjectivity, implied in the notion of bodily integrity, if it conflicts with that of the fetus (Bordo 1993: 79). At the same time as there has been a decrease in the subjectivity of the pregnant woman there has been an increase in the subjectivity of the fetus (Bordo 1993: 85).

In the context of the United States, court decisions illustrate that the pregnant woman and *her* fetus are considered to be two distinct patients who have at times conflicting interests (Bessner 1994: 170). A dichotomy emerges then between the fetus and the pregnant body (Stabile 1994: 74). In cases where the interests conflict the question for the judiciary and policy makers becomes 'whose rights are given primacy?'

What is missing in this construction is the fact that the fetus exists in a one-sided and interdependent biological relationship with the pregnant body, absorbing

¹⁷ As Bordo (1993: 76) notes, there are class and racial elements to the treatment of pregnant women with poor and non-Anglo women coming 'as close as a human being can get to being regarded, medically and legally as "mere body"'.

¹⁸ A range of cases found once again in the United States illustrate that bodily integrity can also be overridden by the 'need' for genetic information. For instance in South Carolina a woman was ordered by the court to undergo a test for 'the gene that causes Huntington's disease' in a case brought by the woman's ex husband for the termination of her parental rights if she did indeed have Huntington's (Andrews 1999: 22).

nutrients from the mother's body (Stabile 1994: 80). Significantly, within a certain period the fetus is unable to survive outside of the environment of the pregnant body even with the event of medical intervention. Moreover, in effect this construction ignores the fact that all human existence is essentially given life by the pregnant body (Katz Rothman 1996: 1246).

Recent legislative intervention in one Australian state reflects the growing emphasis placed on ensuring the well-being of the fetus. In 2004 the Queensland *Child Protection Act* 1999 was amended by the *Child Safety Legislation Amendment Act* 2004. This *Act* inserted a new s21A into the *Child Protection Act* as follows:

21A Unborn children

- (1) This section applies if, before the birth of a child, the chief executive reasonably suspects the child may be in need of protection after he or she is born.
- (2) The chief executive must take the action the chief executive considers appropriate including, for example—
 - (a) having an authorised officer investigate the circumstances and assess the likelihood that the child will need protection after he or she is born; or
 - (b) offering help and support to the pregnant woman.
- (3) The purpose of this section is to reduce the likelihood that the child will need protection after he or she is born (as opposed to interfering with the pregnant woman's rights or liberties).¹⁹

¹⁹ The *Act* further amended s22 ('Protection from liability for notification of, or information given about, alleged harm or risk of harm') of the *Child Protection Act* to state

- (1) This section applies if a person, acting honestly—
 - (a) notifies the chief executive or another officer of the department that the person suspects—
 - (i) a child has been, is being or is likely to be, harmed; or
 - (ii) an unborn child may be at risk of harm after he or she is born; or
 - (b) gives the chief executive, an authorised officer or a police officer—
 - (i) information about alleged harm or alleged risk of harm to a child; or
 - (ii) information, relating to an unborn child, about a suspected risk of harm to the child after he or she is born...

It is significant that the policy talks in terms of the 'child', clearly imbuing the fetus with subject status. Though the *Act* is careful to state that its intention is not to interfere 'with the pregnant woman's rights or liberties', it increases the level of surveillance of the behaviour of pregnant women, in effect explicitly limiting these 'rights' and 'liberties'. Moreover, resting on the notion that the fetus can be considered a separate entity from the pregnant body, implicit within this statement is an assumption that the rights of the pregnant women may be in conflict with those of the fetus.

Perhaps most significantly, the policy does not define what these rights and liberties encompass. Are these the rights accorded to autonomous individuals held to be in control of their bodies? Or are these the 'rights' accorded to those held to be controlled by their bodies (Bacchi and Beasley 2002)? In this regard we need to be concerned with the ways in which the interests of pregnant women have been positioned in relation to the interests of 'others' such as the fetus. Almost invariably, as the above cases and considerations of issues relating to reproductive technologies in bioethical texts indicate, it is the interests of these 'others' which are invariably privileged over the pregnant woman.

One pregnant Queensland woman has already been the subject of a notification order to Queensland Child Protection Authorities as a consequence of this amendment, reportedly for her refusal, against doctor's advice, to have a third

Caesarean and missing an antenatal appointment.²⁰ While in this instance no action was taken after the initial investigation, the case represents a significant Australian policy shift in this area and signals a willingness for the state to intervene on behalf of the fetus.

What are the Effects of Breaking up the Reproductive Body?

The breaking up or fragmentation of the female body effectively reduces women to their 'culturally significant parts and pieces'. Reproductive technologies such as IVF and surrogacy construct women in terms of their raw reproductive material (McBride Stetson 1996: 219). Moreover, these technologies encourage women to take responsibility for problems, such as male infertility, which reside in other bodies (van der Ploeg 2001: 2). In the processes used to create children through reproductive technologies it is the parts, such as eggs, wombs and blood, that are important. Thus, the female body is viewed in terms of its fragments – the womb or uterus, ovaries and eggs. As this chapter has illustrated, clear links can be seen between the fragmentation of the female body and the naturalisation given to management of reproduction by science and medicine (Balsamo 1996: 80, 81).

The fragmentation of the reproductive body erases the pregnant body as lived by the pregnant woman from the process of reproduction. In erasing the pregnant body from this process, the nine-month biological contribution of the reproductive body in bringing the fetus to term is also erased (Stabile 1994: 91). The pregnant body is characterised as a passive body and its active engagement in both pregnancy and

²⁰ There is some confusion in the media reports as to whether it was the intention not to have the Caesarean or the missing of the ante-natal appointment that actually triggered the notification (see for instance, Daily Telegraph (2005) 'Now it's the birth police', 4/2/05, <http://www.dailytelegraph.news.com.au/story.jsp?sectionid=1260&storyid=2607892>, accessed 5/2/05 and ABC (2005) 'Legal implications emerge for Qld women who ignore doctors' advice', PM 3/2/05, <http://www.abc.net.au/pm/content/2005/s1295480.htm>, accessed 5/02/05). The woman gave birth (vaginally) to a healthy baby.

labour is ignored. The disappearance of the pregnant body from reproduction has important long-term effects, for as long as we continue to ignore the role of the body in pregnancy, 'the discourse of fetal autonomy is going to be difficult to overcome' (Stabile 1994: 94). Moreover, the devaluing of women's reproductive bodies means that in policy considerations around the area of reproduction men's genes can be privileged over the bodies of women. This theme is developed in subsequent chapters.

Fragmenting the reproductive body also has important consequences for women's subjectivity. As this chapter has demonstrated women have historically tended to be situated as less autonomous than men around the area of reproduction. Within the medical management of pregnancy and reproduction 'the female body is subjected rather than subject' (Shildrick 1998: 189). Moreover, authority is given to biomedical practitioners to speak about women's bodies. Women's knowledge about their bodies is ignored. Importantly, there is some evidence that women internalise some of these messages and self-regulate accordingly.

The constitution of women as less autonomous and consequently in need of protection around the area of reproduction, moreover, produces certain conclusions about women's bodies. Susan Bordo writing in 1993 noted that the ideology of the woman as a fetal incubator is stronger than ever. I would suggest that more than a decade later this ideology shows no sign of declining despite repeated attempts to challenge it. In fact, as we will see in the next section, the focus on DNA as a tangible entity is in many cases strengthening this very idea. However, as we will also see, there are tensions and contradictions within this conceptualisation driven in part by developments in reproductive technologies.

Section 2

Revealing Contradictions

Preamble

As Burr (1995:165) has argued, and as I noted in the Introduction, ‘revealing contradictions’ involves bringing to the fore ‘absent or repressed meanings’. In this section I take a selection of policies to illustrate the contradictions and tensions produced by, and the consequences of, the interplay between genetics and family formation in the context of reproductive technologies and intrusive ‘other bodies’. As I hinted in Chapter 1, the focus of this thesis is not on providing a nice and neat analysis. Rather, it is on identifying the ‘messy realities’ of policy (Ball 1990: 9) which are inherent in these policy areas due to the social nature of policy. Going further the thesis offers insights into the tensions created by the collision between deeply held meaning systems, such as beliefs about ‘proper’ family formation and genetics, and processes of social change, including technological developments. Reminding us of the complexities and contradictions that emerge serves as a protection from expecting quick fixes or easy answers.

This section comprises two case studies, one on IVF and the other on surrogacy, and concludes with a chapter which addresses a selection of additional policy areas concerned with reproductive technologies and related issues of family formation including abortion, adoption, child support, the status of frozen embryos and posthumous reproduction. The chapters employ the body-focussed approach to policy analysis, outlined in Chapter 1. To revisit briefly, a body-focussed approach to policy starts from the premise that material bodies ‘live’ the effects of policy. It consists of three primary elements. First it seeks to locate the ways in which bodies

are conceptualised within policy and seeks to elucidate the frameworks of meaning and 'assumptions about bodies' embedded in policies. Identifying and highlighting the contradictions and tensions in the conceptualisation of bodies within policy discourses is of key importance in this regard. Second, it insists on a recognition of the assumptions relating to our body parts, organs and related bodily processes, which are embedded within policies under consideration in this thesis. Bodies do not stop at the surface. Finally, it focuses on identifying the ways in which material bodies are marked by other significant factors such as class, gender and race. Simply put, it is necessary to ground bodies and recognise that they are always situated and relational to other bodies. Particular focus is placed on the ways in which women's bodies and body parts are constituted.

The first chapter in this section offers a detailed analysis of a selection of policies and policy texts which are concerned with regulating IVF and related technologies in Australia. The focus here is primarily on Australian policies and the chapter draws upon the large volume of policy texts relating to IVF not only in Australia but also in much of the Western world. The policy considerations around IVF provide an important means to elucidate assumptions about families and genetic material. This chapter also provides an analysis of the social construction of infertility and the effects of this construction on questions of access to this technology. It also expands on the concepts of the biologically 'ideal' family and the biologically 'imagined' family introduced earlier in the thesis (pp 10-11) and examines the trend toward the facilitation of the creation of biologically 'ideal' families.

In the second chapter a wide range of Australian and international policies relating to the issue of surrogacy are canvassed. The controversial nature of the practice

means that disputes that occur in an international context receive considerable attention in Australia. Hence, in contrast to the chapter on IVF, this chapter addresses the issue in both an Australian and an international context. The chapter examines a number of high profile cases to illustrate the tensions produced by assumptions about heredity. It also addresses three of the key bioethical considerations associated with the practice to examine the underpinning assumptions regarding women's bodies. Throughout, a focus is placed on the contradictions produced by the primacy given to genetic material. Not all genetic material is given equal weight in these matters and the genetic contribution of the social parent/s often forms a basis through which other issues such as class get played out.

The last chapter in this section addresses a selection of policies, once again both Australian and international, which are concerned with reproductive technologies and related issues of family formation. Included are abortion, adoption, child support, posthumous reproduction and the status of frozen embryos. However, rather than looking at all the issues relating to these areas the focus is placed on the role assigned to men's genes due to the privileged position they have traditionally been given in public policy. These policy areas illustrate the contradictions produced by the use of technologies for purposes other than those for which they were originally intended.

Throughout, the case studies illustrate that the focus on the importance of genetic connections is having complex and uneven consequences on families.

IVF: proper families, donor genes and intrusive bodies

Thus, while the techniques of assisted conception may themselves be original, at present the structure within which the techniques are made available have not been revolutionised (Millns 1995: 82).

As a method for providing infertile heterosexual couples with children, in today's political climate, IVF attracts little controversy. This becomes quite apparent when the debates surrounding IVF are compared to those surrounding (some) other reproductive technologies, such as surrogacy, where considerable disquiet remains about the validity of the practice itself.¹ Where controversy exists it is more than likely to be in regard to specific, often unforeseen, applications of the technology such as the use of 'left over' embryos for research purposes; the varied applications of pre-implantation genetic diagnosis (PGD) outside of preventing the transmission of genetic 'diseases'; the potential for the use of IVF in the creation of 'alternative' families; and the increasing legislative trend toward providing children born from donor gamete material through IVF with identifying information pertaining to their genetic origins.

Implicit in the political mainstream acceptance of the application of IVF has been the assumption that the technologies will be used specifically to form a 'traditional' family unit, an assumption embedded in, and produced by, policies regulating the technologies. Contained within the policies are further assumptions about the importance of notions of heredity, the historical basis of which has been discussed in Chapter 2. Hence, we see that where children born as a result of IVF technology

¹ While surrogacy in general is seen to raise a number of ethical and social issues, some forms of surrogacy arrangements are, as we will see in the next chapter, considered to be more problematic than others.

are not genetically related to one or either parent this is effectively concealed through policy, with the resulting children legally and socially presumed to be the children of the 'social' or custodial parents.² Gamete donors are simultaneously accorded no rights to, nor responsibilities for, 'their' resulting children.³ Embedded in this practice has been a need to protect the status of men's genes and the status of men as bearers of genes. The legal erasing of the bodies of the gamete donors not only enables, but also actively encourages, the erasing of these bodies socially. However, recent developments in genetic technologies and the related importance given to genetic information as a central factor in self-knowledge are problematising this practice. As a consequence, 'other' bodies, such as those of gamete donors, are being (re)inserted metaphorically and in some cases physically into the traditional family unit.

Australian policies regulating these technologies have historically guaranteed that, where possible, the families produced resemble, if not match identically, the 'traditional' model through the use of criteria to regulate access. However, recent legal decisions which have held that the criteria of marriage used to restrict access to IVF to married and de facto couples is inconsistent with the *Sex Discrimination Act 1984* have to a large extent undermined this practice. These decisions illustrate clearly that, rather than traditional family forms occurring as a natural result of IVF technologies, the policies regulating the technologies actually play an integral role in the creation of these family types and the limiting of other alternative family formations.

² It needs to be noted that tensions existed over this issue as the Family Law Council (FLC) (1985) report, discussed later in this chapter, indicates.

³ There is a need here to stress that this is the case in relation to children born from IVF technology. The case law regarding children born from Donor Insemination from a known donor is more complicated, a point I will pick up later in the chapter.

This chapter focuses on the policy implications of the dual issues of intrusive ‘other’ bodies and ‘other’ families in regard to IVF technologies in light of the challenges these are presenting to the ‘integrity’ of the ‘traditional’ family.⁴ In order to give some grounding to the discussion that follows, the chapter starts with a fleshing out (so to speak) of the key concepts of the biologically ‘ideal’ and the biologically ‘imagined’. The essential role that notions of ‘infertility’ play in the regulating of policy and related policy debates necessitates also an exploration of this concept. From here, some definitions and explanations of IVF technologies are given followed by an overview of primarily Australian policies. In addition, the chapter takes a close look at some specific issues in relation to the policies, through a focus on a selection of Australian policy texts, including the *Infertility Treatment Act 1995*.

Policies regulating IVF technologies play a crucial role in the protection of the ‘traditional’ family. In this context the chapter discusses the recent Australian Federal Court case, *McBain v State of Victoria & Ors*, which challenged the legality of the criteria of marriage in Australian IVF policies.⁵ Throughout, the chapter pays particular attention to the ways in which genetic material is treated and the challenges that this treatment presents. It also discusses briefly the trend toward the facilitation of the creation of biologically ‘ideal’ families. In the next chapter I will look at how the body of the birth mother in the practice of surrogacy subverts and challenges both ‘ideal’ and ‘imagined’ families.

⁴ As indicated previously, IVF technology encompasses a range of other technologies such as GIFT, ZIFT, ICSI and Micro Sperm Sorting.

⁵ The McBain decision essentially followed the South Australian 1996 case *Pearce v South Australian Health Commission & Others*. However, the decision in McBain attracted far greater controversy. The case went on appeal to the Australian High Court.

'Ideal' Families and 'Imagined' Others

In the Introduction the concepts of the biologically 'ideal' and the biologically 'imagined' family were briefly introduced. These terms are employed in this thesis for more than mere convenience. Indeed, they serve a particular theoretical purpose, as distinguishing between these family types enables us to discern some of the grounding assumptions about the family and notions of heredity contained in policies concerning reproductive technologies and related issues of family formation. Given that this chapter and the following two chapters deal specifically with the tensions created by, and within, these families it is useful at this point to revisit and briefly expand upon this distinction.

Reproductive technologies such as IVF and surrogacy enable the creation of two types of families, which I term biologically 'ideal' and biologically 'imagined'. In biologically 'ideal' families the resulting child is created with the assistance of technology but without the use of 'other' biological bodies. Neither donor gamete material nor 'surrogate' reproductive bodies are needed. Within the policies surrounding this mode of reproduction this form of family is perceived largely as the embodiment of the proper family type. To put it plainly, it is 'the best it can be'. In biologically 'imagined' families, by contrast, the child is not genetically related either to one or, in some cases, to both of the 'social' parents, or is created with the aid of an(other) gestating reproductive body. Simply put, donor material, whether known or anonymous, has been used to create this child.⁶ Nonetheless, the family in all other aspects resembles a biologically 'ideal' family, as a heterosexual two-parent unit with children. In these instances, policy regulations overcome the lack of actual genetic ties and create legally a facade of biological relatedness. Simply,

⁶ It should be noted that technological intervention is of course not always necessary in the creation of 'imagined' families.

these families are considered to be good enough to 'pass' both in legal and social terms.⁷ However, they do more than *just* 'pass'; policy imbues them with authenticity, indeed policy *imagines* them as 'ideal' families.

The concepts of 'ideal' and 'imagined' draw theoretically on the notion of 'passing', an analytical concept that has been applied to a range of areas including sexuality and race. For instance, in terms of sexuality there has been an illumination of, among other issues, the ways in which homosexual men and women pass as heterosexual in public spaces such as the workplace (Johnson 2002a: 318). With Johnson (2002a: 318), I want to extend the concept 'beyond some of the more conventional ways it is used', such as in the above instance, to 'focus on political discourse'. As Johnson (2002a: 320) notes, in regard to sexuality, 'the politics of passing is an important way of asserting heterosexual privilege' and encouraging the production of a particular political subject, in her case 'a "good homosexual" subject'. Similarly, in IVF practices, a 'politics of passing' is implicated in the privileging of biologically related 'traditional' families and consequently in the production of 'proper family' subjects.

While biologically 'imagined' families have been encouraged by policy to 'pass', the families themselves become to an extent complicit in this process when they withhold information from children about their genetic origins. In effect the parents 'keep the political secret'. Here, Rose's (1999: 10, 11) point that a key principle in the government of the population, in light of 'the conduct of conduct', is that it 'works by "acting at a distance"' upon citizen's choices is useful. In the case of IVF, the perception of choice is crucial in the willingness to be governed. The

⁷ Here it is worth reiterating that at no time am I making a judgement about the status of either family type created through reproductive technologies.

willingness or desire to 'pass' reflects the power of normative assumptions about the shape and nature of the 'proper' family.

'Imagined' families not only 'pass' in a political sense but are also encouraged to 'pass' in a social sense. This social 'passing' is made possible in conjunction with political means, for example through policies regulating IVF technologies. Social 'passing' is further accomplished through the trend of choosing donor material on the basis of shared similar characteristics with the parent that the donor 'steps in for'. This suggests that in the creation of a biologically 'imagined' family there is a need and a desire to maintain the appearance of a biologically 'ideal' family, specifically a need to maintain the appearance of biological fertility. For example, an information booklet on issues relating to donor insemination, prepared by the Western Australian Reproductive Technology Council (2005: 16), notes that in regard to male donor material, '[M]ost couples choose to match the characteristics of the donor as closely as possible with those of the husband'. In regard to female donor gametes they observe that despite the limited availability of donor eggs 'most clinics will match several characteristics of the donor woman with the recipient' (Western Australian Reproductive Technology Council 2005: 22). Hence, not only does the booklet reflect people's desire to maintain an appearance of biological fertility it in effect reaffirms the legitimacy of this practice.

In the creation of 'ideal' and 'imagined' families IVF is intrinsically linked with the creation of 'particular' types of families and thereby particular populations, specifically (as we shall see) those that are more likely to fulfil an economic requirement. Thus it is not only a question of biological relatedness but also of biological 'perfectibility'. Policies such as the Victorian *Infertility Treatment Act*

1995, for example, specifically allow for IVF to be used in the prevention of the transmission of genetic diseases, thereby ‘saving’ parents and society the costs involved with supporting a child with a ‘disability’.⁸ One of the newer technologies implicitly involved in this practice is Micro Sperm Sorting, which enables couples to increase the chances of having a child of a particular gender. This technology has two primary uses: first, as a method of limiting the chance of the transmission of a sex-linked disease such as Huntington’s disease; and, second, as a method for family balancing practices – that is, for parents to choose to have a boy or a girl. This latter use is still seen as problematic in Australia. Micro Sperm Sorting technology is often used in conjunction with pre-implantation diagnosis to further reduce the chances of having a child with a sex-linked genetic disease.⁹

Infertile Bodies and Technological Solutions

A key assumption embedded in policies regulating reproductive technologies and, in some cases, related issues of family formation is that there is a right to have children. However, this is not a right shared equally by all citizens. Implicit in policies regulating IVF are assumptions about who should be, and significantly who should not be, encouraged to (re)produce children. The historically high costs associated with the treatment have provided an initial economic barrier for many people. Estimates put the cost of IVF treatment in Australia at approximately \$8000

⁸ Again I want to make clear that I am not suggesting that economic concerns are the only reasons for undertaking genetic screening. It also needs to be noted that there is a tension in the use of IVF technologies to reduce incidences of children born with disabilities and the evidence suggesting that children born with the assistance of IVF are more likely than children born from ‘natural’ conception to have disabilities (see for instance, Norman 2007).

⁹ See Chapter 2 for a discussion of the problematic nature of the language of ‘choice’ that is generally associated with this technology and the consequences that can follow from a decision not to undertake this procedure.

per treatment cycle.¹⁰ Relatedly, the large time commitments involved when undertaking the process can further impede access. Hence, not only do people need to be able to afford the procedure(s) but they also need to be in a position to undertake the procedure(s).

Other, more explicit, barriers to access exist within the policies, centering largely around the concepts of 'marriage' and 'infertility'.¹¹ A key principle in Australian policies is that IVF technology will be used to treat *infertile* couples, as the aptly named Victorian *Infertility Treatment Act 1995* suggests. This Act unambiguously lists in its Guiding Principles that '*infertile couples* should be assisted in fulfilling their desire to have children' (ITA s5(1)d, emphasis added).¹² More will be said about the criteria of marriage later in the chapter but first it is necessary to 'unpack' the implications of the criteria of infertility.

Reproductive technologies such as IVF enable both 'infertile' and 'fertile' bodies to reproduce (Murphy 1999: 103). However, 'fertile' bodies are expected to reproduce in the 'natural' way; hence, Australian policy largely limits access to IVF technology to 'infertile' bodies. The criteria of infertility has been an important means by which access to IVF has been limited in relation to the potential uses of the technology in the formation of 'other' family types such as those headed by

¹⁰ It has been estimated by the Australian Government that with the advent of the Medicare Safety Net, many couples can now become eligible to be reimbursed for '80 per cent of any out-of-hospital expenses' during the 'first cycle' (Abbott 2005). However, access to the treatment still requires a substantial initial financial commitment. In 2005, the Australian federal Health Minister, Tony Abbott (2005), announced an independent inquiry into Assisted Reproductive Technologies. The terms of reference for the review call for a consideration of 'the clinical and cost effectiveness of assisted reproductive technologies (ART) for the purposes of public funding under the Medicare Benefits Schedule'.

¹¹ Access to treatment has also been refused in some states, such as South Australia, to people with convictions for violent offences. A review panel has been set up in South Australia to deal with appeals against this refusal (South Australian Council on Reproductive Technology 2000: 28, 35)

¹² This is the fourth and last Guiding Principle. The others are (a) an emphasis on the welfare of the child (b) the importance of the preserving and protecting of human life and (c) the need for consideration of the 'interests of the family'. They are to be understood and applied in 'descending order' (s5(2)).

same-sex and single-parents. Debates about IVF and related technologies, such as surrogacy, take place within the context of a discourse about the social meaning of the 'condition' of infertility, a concept which is today implicitly linked to the status of childlessness. In the context of a declining birth rate and long held assumptions about heredity, childlessness, in the current political climate, is not looked upon as an appropriate lifestyle 'choice', in particular for middle-class women.

Rather than 'infertility' being a quantifiable condition, feminist theory has illustrated the contested nature of its meaning. Hence, it is necessary to look at the social construction of infertility as critical to the framing of policy.¹³ In policy terms, infertility is generally reliant on medical definitions, suggesting a degree of certainty in its application. Within this framework, infertility is commonly characterised as the inability to conceive after one year of unprotected sexual intercourse. Needless to say, 'unprotected sexual intercourse' in this instance means heterosexual intercourse. Other medical definitions point to a period of two years of consecutive miscarriages and stillbirths (Holm 1996: 65). Holm (1996: 65) notes that if we accept these definitions then twenty five percent of women may be infertile for some period through their lives. Infertility then, despite its appeal in policy to medical certainty, is a relational concept, even in biological terms.

¹³ However, it is necessary to note that the fact that infertility is a socially constructed concept matters little to those who want to have children but are unable to do so. In short, at no time am I wishing to trivialise the experience of infertile people or couples, nor am I suggesting in any way that people impacted on by infertility are either 'dupes' or being 'duped' (Millns 1995: 79).

Medical definitions of infertility locate the problem within the biological body,¹⁴ an emphasis reflected in and reproduced by policy. Under s8(3)a of the Victorian *Infertility Treatment Act 1995*, for treatment to occur on a woman,

a doctor must be satisfied, on reasonable grounds, from an examination or from treatment he or she has carried out that the woman is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure...

The emphasis on the biological cause of infertility illustrates clearly that grounding the policies regulating these technologies are heterosexual norms. While the role of the 'husband' is, as will be illustrated, no longer central to accessing treatment in Victoria, the emphasis on biological infertility remains in the legislation. Moreover, we see that the power to 'define' infertility, and hence to designate infertile bodies, is invested in the medical practitioner.¹⁵

Lesbian couples would, of course, technically fall under the definition of failure to conceive after one year of unprotected sex, still they are disqualified from this definition by the heterosexual and biological focus. In addition, lesbian couples are often not infertile as individuals and are excluded from treatments on this basis. Common assumptions that lesbian women and consequently lesbian couples will

¹⁴ There are a number of factors which can cause medically defined infertility including, in women, blocked or scarred fallopian tubes, 'failure' to produce eggs, and damage to the uterus due to infection, scarring, or abnormal development (Winston 1996: 9). In men the primary cause is generally a low or poor sperm count, often caused by the damaging of the pipes leading from the testes or failure by the testicle to provide enough sperm, though quality of the sperm can also be a factor (Winston 1996: 50). In addition, couples can be simultaneously infertile, for instance, a combination of a woman with scarred fallopian tubes and a man with a poor sperm count (Winston 1996: 9). In a percentage of cases infertility in couples remains unexplained. Not all the factors that impact on fertility mentioned above are suitable for treatment by IVF (Winston 1996: 9).

¹⁵ In October 2002 an inquiry into the *Victorian Infertility Treatment Act 1995* and the *Adoption Act 1984* was announced by the Victorian Attorney-General. The Inquiry, which is being conducted by the Victorian Law Reform Commission (VLRC), is considering the 'feasibility of changes' to the above Acts 'to expand eligibility criteria in respect of all or any forms of assisted reproduction and adoption'. Consideration is to be given to 'the public interest and the interests of parents, single people and people in same-sex relationships, infertile people and donors of gametes' (VLRC 2005: v). More will be said about this Inquiry later in the chapter.

not reproduce (Murphy 1999, Lewin 1995) and, more specifically, that they do not possess reproductive bodies continue to prevail. Motherhood and mothering are commonly equated with the presumption of heterosexuality (Lewin 1995: 103). Thus not only is lesbian motherhood seen as a violation of 'the natural order' but it also 'seems to subvert the causal link between sexuality and procreation' (Lewin 1995: 106, 107).¹⁶ The social 'undesirability' associated with single persons or same-sex couples having children means that infertility is not considered to be a serious problem for these groups of people (Douglas 1991: xx). Hence, the biological criteria of infertility embedded in policy causes little angst among the mainstream population, and debates about other 'types' of infertility are largely muted.

There have of course always been infertile men and women, and couples (Pfeffer 1993: 1). However, the construction of infertility as a medical 'problem' is of relatively recent origin. McCormack (1996: 200) indicates significant shifts in the way that infertility has been conceived. For instance, in biblical times infertility was thought of as the consequence for men's disobedience of, and to, God. In this context '[W]omen were passive partners who carried the seed but were not responsible for it'. Despite this construction it seems that women were still responsible for the facilitation of the producing of children. In the biblical story, discussed in more detail in the next chapter, it is Sarah who makes the surrogacy deal with her maid to bear Abraham a son. In the seventeenth century, McCormack

¹⁶ These arguments apply equally to homosexual men who are similarly not expected to reproduce. Murphy (1999: 103, fn 10) suggests that the term 'relational infertility' may be of some use when describing lesbian infertility though as she notes this is not a term found in medical discourse. She observes further that the term could be seen to 'accompany lesbian relationships' and that this would have the effect of legitimating access to services and also to the accompanying legal benefits with regard to the status of children born from donor games. Similarly homosexual male couples and single men and women could be said to be 'relationally infertile'.

(1996 201) observes, the focus moved to women and ‘by the twentieth century, infertility had become medicalized and defined primarily as a female disorder’.

According to this account,

[W]hat began as a male problem in the earliest forms of patriarchal society became degendered when women were active as midwives and healers and when the treatments were more magical than medical, more herbal than technological. It was regendered in the age of science and technology, and when men controlled the professions (McCormack 1996: 201).

Significantly, with each shift in the understanding of infertility there occur distinct responses to the problem of infertility with corresponding different impacts on ‘infertile’ bodies.

The ‘gendering’ of infertility has had very different consequences for the bodies of men and women. The common positioning of the female partner as responsible for the failure to produce a child means that it is most often the fertility of the female partner which first comes under scrutiny (Douglas 1991: 103). Motherhood and womanhood are culturally intrinsically linked. In this construction, infertile women can be perceived to be ‘culturally deviant’ because of their failure to reproduce (Sandelowski 1990: 147) – they are, in simple terms, not seen to be ‘whole women’ (Hynes 1987: 203). Hence, there is an added pressure for women to embark on and undertake whatever it takes to have and produce a child.

Women’s infertility, then, ‘has never been protected from scrutiny in the same way as men’s’ (Fisher and Sommerville 2000: 209). Similarly, women’s use of their *fertility* past a ‘responsible’ or ‘reasonable’ age is also held up for scrutiny. While men can procreate well into their later years with little attention accorded to them, women who give birth in ‘later’ life are often subjected to intense media and social

attention (Fisher and Sommerville 2000: 209). The case of a 53-year-old woman who gave birth to triplets in Adelaide, South Australia, in May 1998, as a result of IVF assistance, produced considerable media and community debate, focussed primarily around the question of allowing access to IVF to a woman considered past her reproductive years (South Australian Council on Reproductive Technology 1999: 17).¹⁷ In contrast, little attention is generally paid to the age of the husband or male partner and consequently only minor discussion occurs in relation to limiting access to IVF to men who could be considered to be beyond a reproductive age.

Many feminists note that a chasm exists, and is moreover created in discussion papers and policies, between fertile and infertile women. Some suggest that indeed it is only fertile women who have a right to 'choose' whether or not they have children (McCormack 1996). A dichotomy is also created between the 'fertile' and the 'infertile' woman as the voluntarily childless woman is deemed to be in control of her fertility (Pfeffer 1993: 3). However, it needs to be remembered that in the context of the birth rate debate the 'voluntary' childless woman has historically been constituted as selfish in her 'choice' not to have children. Treatments to enhance fertility, and consequently to combat infertility, are most prominent in countries such as Australia, the United States and a number of European countries.

¹⁷ The South Australian Council on Reproductive Technology formed a Working Party in 1998 to establish guidelines dealing with the issue of an age limit in relation to reproductive technologies. While they found that 'It is neither equitable nor practicable to place an absolute age limit on access to treatment or access to donor oocytes (or embryos)' they did find that age was a consideration and recommended that 'additional resources be specifically allocated to educate *women about their infertility* and the decline that occurs between 30 and 40 years of age.' (South Australian Council on Reproductive Technology 1999: 19, emphasis added). The media attention continued to focus on the triplets' development with their third birthday receiving a media spread in the Adelaide *Sunday Mail* (Maguire 2001: 8, 9).

Not surprisingly these are also, in the main, the countries with, and also a fear of, lower birth rates (Winkler 1996: 106).¹⁸

That it is women's role to 'overcome' infertility is both a grounding assumption of, and reaffirmed by, policies relating to reproductive technologies. The *Infertility Treatment Act 1995* leaves us in no doubt that the 'problem' of infertility is the concern of women, specifically locating the focus of treatment on women's bodies: 'A woman who undergoes a treatment procedure...' (s8(1)); 'Before a woman undergoes a treatment procedure...' (s8(2)). While the policy focus on women and their bodies might seem to be commonsense, given that it is women in general that undergo the greater part of the treatment, the positioning of women's bodies within the policy is problematic. The policy constitutes 'the problem' within, and as, women's reproductive bodies. Moreover, within the Act (s8(3)a) it is the medical practitioner that must be convinced that the criteria of infertility are met, in the process placing control and knowledge of the reproductive body in the hands of the practitioner.

The common construction such as in the above instance, of infertility as a 'medical' condition has increasingly placed control of the 'problem' in the hands of the medical profession. In this context, medical treatment of the condition of infertility

¹⁸ However, reproductive technologies are of course not 'limited to the promotion of fertility' but continue to be used in some countries such as Africa, parts of Asia and Latin America to counter "'over production" particularly among women' (Winkler 1996: 106). In addition, within Western countries the ways in which these technologies are utilised varies. For instance, in the United States 'poor white women and African-American women are the recipients of treatments to reduce their fertility' (Winkler 1996, see fn 9 p106). Hence, particular 'kinds' of populations continue to be the target for limiting reproductive capacity. Embedded in this, I argue, is a concern regarding which and whose genes are being passed on. The limiting of reproductive capacities has, as noted in the second chapter, a long history dating back to the eugenic movement with the primary focus on regulating female fertility. As Winkler (1996: 106) puts it, '[T]he notion that female fertility, not male-dominated sexuality, is out of control serves as a justification for the development and use of anti-fertility technologies'. Hence, women are seen to be responsible for procreation and it is women's bodies which need to be monitored and manipulated where necessary. The passive role attributed to women's reproductive organs validates the manipulation of them.

has now become a social requirement and refusal to participate in ‘medical-technical solutions to infertility or disability’ is becoming increasingly ‘socially unacceptable’ (Winkler 1996: 105). An expectation exists that undertaking infertility treatment is a ‘natural’ step in overcoming childlessness. This is not to suggest a causal effect in any simplistic sense, with regard to people’s desire to seek infertility treatment, but to emphasise again that reproduction does not occur outside of its social context (Winkler 1996: 105). Thus the primacy given to technological advances encourages the perception that not only can ‘problems’ be fixed but also that they ought to be. Significantly, attention has been focused on the ‘cure’ for infertility rather than the prevention of it (Raymond 1996: 241), obscuring the fact that reproductive technologies rarely actually cure infertility; rather, in most instances, they circumvent it (Evans 1996: 5, Holm 1996: 65).¹⁹

Historical Conceptions

In 1978 the first ‘test tube’ baby was born in England. The birth represented a breakaway from what was seen to be ‘the oldest route to conception, that is, heterosexual intercourse’ (Millns 1995: 79). This was followed in Melbourne, Victoria, in July 1980 by the first Australian, and the world’s fourth, IVF birth (Senate Standing Committee 1985: 1). IVF technology represented another step in the ‘endeavour’ to deal with the issue of childlessness following other procedures such as Artificial Insemination (AI) and traditional forms of surrogacy.²⁰ Where IVF differs from other early attempts at dealing with infertility is in the process of

¹⁹ Despite the media focus on successful outcomes the success rates of IVF treatments remain small. Many clinics often measure success in terms of the rate of pregnancy per cycle. However, this does not necessarily mean that a pregnancy will be carried to term (Ewing 1992: 5). As Franklin (1997: 107) points out for the participants in IVF ‘[I]n theory, each stage leads to the next but in practice each stage becomes a potential source of failure, and thus an “obstacle”’. Nonetheless, it needs to be noted that for those unable to conceive without the use of the technologies a ‘small’ success rate is not small when the alternative is none.

²⁰ As discussed in the next chapter, in traditional forms of surrogacy the birth mother is inseminated with the sperm of the social father. Hence, the child is genetically related to the birth mother.

fertilisation, which takes place outside of the womb and inside a laboratory.²¹ Like many other reproductive technologies, such as cloning, its first development and usage was in regard to animal husbandry.

IVF, as distinct from AI, requires the retrieval of gamete material from both men and women. This material may come from those undergoing the treatment or conversely from a donor. While male gamete retrieval and donation has a long history, with it first reportedly being performed in 1799, egg retrieval and donation has been a relatively recent development (Lessor 1993: 393). In comparison to AI the requirements of IVF treatment, as outlined in Chapter 4, entail that there are disproportionate effects on the bodies of men and women, with women bearing the brunt of the treatment. However, within medical discourses women's contribution in the treatment and the role of women's bodies in the reproductive process is often minimised. The following quote describing the birth of the first 'test tube' baby provides a useful example in this context:

After many years of frustrating research, Drs Edwards and Steptoe had succeeded in removing an egg from an ovarian follicle, fertilizing it in a dish, and transferring the developing zygote to a uterus where it implanted and was brought to term. (Robertson 1986: 943 quoted in Woliver 2002: 31-32).

In Woliver's (2002: 31-32) words, '(T)he women involved are erased', reduced to a description of passive body parts. The ovarian follicle is stripped of its bodily context and the uterus constituted as a vessel which exists separately from the body of the pregnant woman.

²¹ Other IVF techniques include GIFT where the ovaries are stimulated, as they are in IVF, to produce multiple eggs. The eggs are then retrieved and mixed straight away with the collected sperm before being immediately inserted straight back into one of the fallopian tubes. This technique does not require the culturing of the embryo in the lab. Another related technology, and cheaper alternative, is intrauterine insemination (IUI). In this technology sperm, which have been washed and prepared, are placed in the uterine cavity during the time of ovulation. The difficulty with this technology is that it is more likely to be effective when the ovaries are stimulated to produce more than one egg, increasing the chances of multiple births (Winston 1996: 10,11).

As a practice, IVF necessitates the use of ‘other’ bodies in the reproductive process including, but not exclusively, donor bodies, regulating bodies and medical practitioners, inevitably compromising the claim that reproduction is a ‘natural’ practice that occurs within the private sphere of the family. By its very nature IVF is a process under the control of the medical profession, who are key players in the policy process. In their analysis of the NSW Law Reform Commission’s 1984 discussion paper, *Human Artificial Insemination*, Bacchi and Beasley (2002: 332) point out that the advent of IF resulted in a change in approach to AI, which until then had been considered ‘little removed from sexual intercourse’ (NSWLRC 1984: Ch.2: 13 quoted in Bacchi and Beasley 2002: 332). The success of the IVF as ‘another form of artificial conception’, it seems, led the Commission to conclude that some forms of AI also needed to be regulated. The key factor determining the need for regulation was the involvement of doctors. The discussion paper drew a distinction between ‘private acts’ and ‘public practices’. The latter, determined by the involvement of the medical profession, required legal oversight. The Commission concluded: ‘If the law confined its attention to AI in this way it would in our opinion not be necessary to attempt to regulate or prohibit its performance when self-administered or when done by “consenting adults in private”’ (NSWLRC 1984: 36 quoted in Bacchi and Beasley 2002: 332).

An Overview of Australian Legislation

The constitutional inability of the Australian Federal Government to regulate reproductive technologies means that policies dealing specifically with IVF and related technologies in Australia are state-based. In the majority of Australian states no specific legislation exists that deals with issues of reproductive technologies. As

with the issue of surrogacy, while there have been calls for uniformity in legislation this has yet to happen in a formal manner (see, for instance, FLC 1985).²²

In cases where there is no specific legislation, Australian states rely on the ethical guidelines developed by the National Health and Medical Research Council (NHMRC) and the Fertility Society of Australia's Reproductive Technology Accreditation Committee (2002) *Code of Practice for Centres Using Assisted Reproductive Technology* to govern their practices. The guidelines cover all facets including issues such as counselling, research, storage of gamete material, and disclosure of identifying information. The states act in accordance with these guidelines except in cases where there is overriding legislation. New South Wales, Queensland, and Tasmania, as well as the Australian Capital Territory (ACT) and the Northern Territory, rely on these guidelines in their regulating of reproductive technologies although some of these states, as will be seen in the next chapter, have legislation specifically dealing with the issue of surrogacy (Seymour and Magri 2004: 25).²³

Some slight differences can be seen in the reliance on and use of the NHMRC guidelines by the states. For instance, in New South Wales some aspects concerning reproductive technologies are covered under the *Human Tissue Act 1983*. In the Northern Territory services relating to reproductive technologies are provided through South Australian clinics and are consequently bound by South Australian legislation. However, the Northern Territory has considered that legislation, which deals with assisted reproductive technologies, is exempt from the *Sex*

²² A number of reports and discussion papers canvassing the issues relating to IVF have been prepared by both states with and without legislation.

²³ The specific need to regulate surrogacy suggests that it is seen as a far more problematic issue than IVF technologies.

Discrimination Act 1984 and, hence, the Northern Territory excludes single and lesbian women from treatment. As I will discuss shortly, challenges to South Australian and Victorian laws render the validity of this position suspect. While Queensland is also reliant on the NHMRC guidelines, the technology is restricted to married and de facto infertile couples. A recent court case, *Jennifer Morgan v GK*, heard eventually by the Anti-Discrimination Tribunal, affirmed that a medical practitioner could deny access to reproductive technology treatment if the woman is not medically infertile (Seymour and Magri 2004: 25).²⁴

The states of Western Australia, Victoria, and South Australia all have specific legislation dealing with reproductive technologies. In Western Australia reproductive technologies are regulated through the *Human Reproductive Technology Act 1991 (WA)*. The Act allows for treatment of infertile women whether they are single, married or in a de facto relationship. Access to IVF is restricted to infertile women or ‘couples’ – couples in this instance refers to heterosexual couples. However, single and lesbian women can ‘access artificial insemination, under the direction of a licensee’ (WARC 2005: 13). While previously special consent needed to be given by the sperm donor in the case of use by single women due to uncertainties surrounding the law regarding paternity (WARC 1998: 9), amendments in 2002 to the *Artificial Conception Act 1985* have clarified ‘that a “donor” of gametes or embryos used in an artificial fertilisation procedure is not a parent of a resulting child’ (WARC 2005: 9).

²⁴ This case was brought about by the refusal of a Queensland practitioner to provide treatment to a woman in a lesbian relationship. It was held that the practitioner had not discriminated against the woman on the basis of her sexuality but rather that she had been denied treatment as she was considered to be medically fertile. The matter was heard initially by the ‘Queensland Anti-Discrimination Tribunal, the Queensland Supreme Court and the Court of Appeal’ (see Seymour and Magri 2004: 25 for further details).

Reproductive technologies are regulated in South Australia through the *Reproductive Technology (Clinical Practices) Act 1988* and the accompanying regulations.²⁵ Initially the South Australian Act refused treatment to single and, hence, lesbian women. However, the 1996 South Australian Supreme Court judgement, *Pearce v South Australian Health Commission & Others*, determined that access based on marital status in South Australian legislation was contrary to the Commonwealth *Sex Discrimination Act 1984*. In this case Gail Pearce was refused IVF treatment because she was separated from her husband, hence no longer meeting the criteria of marriage. She appealed the decision to the Full Court of the South Australian Supreme Court, which found in her favour. The conflict between Commonwealth and State law constitutionally rendered the State regulations void (Sandor 1997). The criterion of marriage was consequently dropped from the legislation. Nevertheless, the criteria of medical infertility or carrying a genetic 'defect' remain.

In Victoria reproductive technologies are regulated through the aforementioned *Infertility Treatment Act 1995*. The Infertility Treatment Authority was created under this Act in order to 'regulate the performance of assisted reproductive technology in Victoria' (ITA 2001: 5). The Act requires informed consent by both spouses to the process as a prerequisite to treatment. The Act previously required that access to infertility treatment be restricted to heterosexual married and de facto couples. However, in December 2000 the Infertility Treatment Authority ruled that it was acceptable to allow access to single and lesbian women on the condition of clinical infertility (Women's Health Victoria 2003). This decision was prompted by

²⁵ The South Australian Council on Reproductive Technology (SACRT) was set up to oversee the regulations.

the outcome of *McBain v State of Victoria & Ors*, which is discussed in detail in the next section.

A key element to Australian policies regulating IVF is that access to treatment is restricted, effectively limiting the types of families that can be formed. While the use of IVF technologies by infertile heterosexual couples is, as indicated previously, relatively unproblematic, this is not the case when it comes to offering IVF to single and lesbian women. Susan Millns (1995: 82) argues that while reproductive technologies make possible alternative families, it is this potential that is 'perceived as one of the greatest dangers of the new technologies'. She draws attention to the fact that, while the technologies of assisted reproduction may be themselves of recent origin, they operate within a social structure based on long-held assumptions about reproduction. Simply put, reproductive technologies operate within a social context that values the construct of the family within a narrow confine.

The Trouble With 'Other' Families – IVF and the Sex Discrimination Act 1984

In light of the above, the year 2000 provided an important milestone in relation to the regulation of IVF treatment in Australia with the Federal Court decision in *McBain v State of Victoria & Ors* finding that it was contrary to s22 of the *Sex Discrimination Act 1984* to refuse treatment to women based on their marital status. In itself the decision is of little consequence, as it essentially followed the previously discussed 1996 Pearce decision. Rather, its significance lies in the resulting public controversy and the intense public debate that it generated about a range of policy issues, effectively allowing an insight into the issues which have traditionally framed debates surrounding reproductive technologies.

In simple terms the court case was brought about through the inability of IVF specialist John McBain to legally treat an infertile Melbourne woman, Lisa Meldrum, within the parameters of Victorian legislation due to the fact that she was unmarried. The case was based on the claim that, in line with *Pearce v South Australian Health Commission & Others*, there was a conflict between the Victorian *Infertility Treatment Act 1995* and the Commonwealth *Sex Discrimination Act 1984*.²⁶ On Friday 28th July 2000, Justice Ross Sundberg found in favour of McBain and Meldrum, ruling that Victorian laws were indeed discriminatory, a decision which in the short term effectively allowed single and thereby also lesbian women access to IVF treatment.

Unlike the Pearce decision, which garnered little controversy (Sandor 1997), the McBain case attracted and generated considerable media coverage. It was given, for instance, front-page newspaper attention by the national *Australian* and the Melbourne *Age* newspapers. While none of the parties to the action in the Federal Court sought to appeal, the decision was appealed unsuccessfully by the Australian Bishops Conference and the Australian Federal Government Attorney-General in the High Court. Significantly, in regard to the outcome of the High Court appeal, they (the Australian Bishops Conference and the Attorney General) were not parties to the action in the Federal Court.²⁷ The Federal Liberal Howard government responded to the Federal Court's decision with legislation to amend the *Sex Discrimination Act 1984* in order to allow states in effect to discriminate on the

²⁶ Previously women who did not meet the criteria set by the Victorian Infertility Authority were required to travel to NSW to access treatment.

²⁷ In a controversial move the Australian Government granted the Catholic Church a rarely used fiat enabling its intervention in the action. The High Court did not rule on the validity of the initial decision. Rather they found that the parties did not have a valid claim for action (see *Re McBain : Ex parte Australian Catholic Bishops Conference; Re McBain; Ex Part Attor* [2002] HCA 16 (18 April 2002) for further details).

basis of sexuality and marital status in specific cases, which if successful would have nullified the effect of the court decision (*Australian* 2000: 1).

It is interesting to note that in this case the action was brought by the medical specialist, John McBain, on behalf of Lisa Meldrum and the appeal was sought by the Attorney General and the Australian Bishops Conference. Meldrum herself effectively disappeared from the process. This disappearance supports the suggestion that around issues to do with reproduction, women are denied an active citizenship status since they are conceived of as controlled by their bodies (Bacchi and Beasley 2002). As I have argued (see p53), this conception of women as body-controlled around the area of reproduction denies women's agency. The woman's body is constituted as an object *over which* decisions must be made.

In August 2000 the Victorian State Government announced that it would allow access to IVF for single and lesbian women on the condition of clinical infertility (Women's Health Victoria 2003) and in December 2000, the Victorian Infertility Treatment Authority affirmed this decision, ruling in a similar manner to the South Australian legislators when they were confronted by the Pearce ruling. The reliance on the definition of clinical or medical infertility effectively continues to exclude many single and lesbian women from accessing the treatment. Here, the productive nature of the policy in generating 'traditional' families becomes apparent.

The *Australian* (2000: 1) newspaper succinctly summed up the argument, generated by the McBain decision, as 'a fundamental debate on the shape of the Australian family and basic civil rights'. Highlighted throughout the resulting debate was the dominance of the model of the traditional family in discussions relating to reproductive technologies and the challenges 'other' family types provided to it.

Significantly, the concern by proponents for the amending of the *Sex Discrimination Act 1984* centred on the impact on the children produced. As a number of commentators noted, the reaction of the Prime Minister John Howard reflected his conservative views concerning family structure.²⁸ Howard explicitly stated that children are seen to have a fundamental right to ‘have the reasonable expectation, other things being equal, of the care and affection of both a mother and a father’, an expectation reflected in and reproduced by policy (Howard 2000a: 1, quoted in, Gordan and Farrant 2000: 1). He denied that he was attacking single mothers or that he was anti-homosexual:

We don’t seek in anyway to discriminate against people who are homosexual. *That’s their business*. The issue here is the rights of the children (Howard 2000: 1, quoted in, *The Australian* 2000: 1, emphasis added).

The distinction between private acts and public practices affirmed in the NSW LRC discussion paper, discussed earlier, was once again brought into play. Moreover, John Howard’s view reflected notions of the normative homosexual subject who passes as heterosexual (Johnson 2002b: 320). Allowing access to reproductive technologies would legitimate lesbian reproduction in the public sphere. The focus on the rights of the child enabled him (Howard) to avoid publicly a debate on the status of alternative families. However, in spite of this focus much of the media coverage during this period provided many images of lesbian couples and lesbian mothers in a favourable light.²⁹

During the debate, and indeed throughout the initial court case, the UN Convention on the Rights of the Child ratified by Australia in 1990 became a focus for proponents who wished to ban access to IVF treatment for single and lesbian

²⁸ See, for instance, coverage in *The Age* and *The Australian* from 2-3 August 2000.

²⁹ For example, see coverage in *The Age* and *The Australian* during the period 2-3 August 2000.

women. In a submission to the McBain case hearing, the Catholic Church argued that the Convention implied the right for children to know both their parents (*The Age* 2000). The Chief Executive of the Victorian Equal Opportunity Commission Diane Sisely commented at the time, however, that there is a need to be clear on the exact nature of those rights, noting that, while the Convention states that ‘a child, wherever possible, grow up in the care and under the responsibility of his or her parents. The gender or number of parents is not stated’. Sisely observed further that, more importantly, the Convention states that ‘a child should grow up in an atmosphere of affection and moral and material security, a spirit of understanding and tolerance and should be protected from any discriminatory practices.’ (Sisely 2000: 14).

The perception in the debate that the rights of the child exist over the parent’s right, in this case to have a child, is at the very least contradictory, given that in reproductive technologies the child does not exist until these decisions have been made (Stoffell 1997 in Dutney 2000: 32). In Andrew Dutney’s (2000: 32) words, ‘if, in an extreme situation, consideration of the paramountcy of the child’s interests led to the overriding of the prospective parent’s interest in having a child then the prospect of there even being a child with interests would disappear’.

Significantly, the expectation of the care of both partners in a heterosexual traditional family that John Howard and others alluded to during the resultant debate seemed reliant more on myth than on reality. Census figures from that period highlighted that the traditional family is in decline, with figures also demonstrating a growing number of same-sex families (Crawford 2002: 1, 3). However, the model

of the traditional family is intrinsically coupled with reproductive technologies. As

Susan Millns (1995: 82) succinctly puts it,

the ideology which underpins access to reproductive technology is one which seeks the reconstruction of the heterosexual family despite the widely acknowledged breakdown of this institution, and despite the deconstruction of the female body in the new process of reproduction. Those women deemed suitable for access to the technologies are precisely those who, prior to the reproductive revolution, would have been perceived as suitable mothers, that is those who will uphold and reinforce the crumbling model of heterosexual family life.

Reproductive technologies are clearly implicated in the production of these family types.

It seems quite clear that while John Howard and others were articulating, and continue to articulate, the claim that children have a right to both a mother and a father they are in fact arguing for the right to a father. It is the father's role and presence that is challenged when single and lesbian women are able to access these treatments and when women-headed and women-centred families are produced. It is the body of the father which is erased. Hence, it is the role of the patriarchal head and notions of proper order that are undermined and destabilized by the practice of creating alternative families. Implicit here is an assumption that male authority is needed in the raising of children and that women are not capable of 'doing it alone'. Indeed, the British Human Fertilisation and Embryology Authority (2003: 3.14) states in its *Code of Practice* that,

Where the child will have no legal father the treatment centre is expected to *assess* the prospective mother's ability to meet the

child's/children's needs and the ability of other persons within the family or social circle willing to share responsibility for those needs (emphasis added).³⁰

Implied in this statement is that women are unable to make this decision for themselves. Again we see correlations with the argument that in terms of reproduction women are deemed to be controlled by their bodies and, hence, are unable to exercise autonomy, thereby legitimating intervention and surveillance (Bacchi and Beasley 2002: 332).

While the emphasis in the debate remained on the rights of the children it is clear that underlying these discussions were questions over the status of 'alternative' families such as same-sex and single-parent headed families. Access to motherhood is seen to correspond with heterosexual norms of sexual behaviour (Shildrick 1997: 191). However, there is an added policy concern for conservative commentators. Current policies regulating IVF technologies imbue these families with a legal authenticity with the same 'rights' as biologically 'ideal' families. In effect, the policies designed to protect the traditional heterosexual family are designed specifically to legitimate and support 'imagined' families in the public sphere.

IVF and the Status of Parenthood

The problematic nature of the legal status of parenthood is one which has dogged IVF policies. Historically, as noted in the Introduction, children have been seen to be a product of marriage and this has overcome the need to reflect on genetic heritage (Eichler 1993). However, what constitutes being a 'product' is problematised by reproductive technologies as the biological basis to the family is

³⁰ The previous version of the *Code of Practice* (2001) was more explicit in this requirement stating that 'where the child will have no legal father. Centres are required to have regard to the child's need for a father and should pay particular attention to the prospective mother's ability to meet the child's needs throughout their childhood' (Human Fertilisation and Embryology Authority 2001: 3.15a).

known rather than assumed. Reflected in the policy discussion papers dealing with IVF is a deeply-held concern about the status of children and thereby the status of parenthood in light of children born from donor gamete material.³¹ Gill (1999: 24), in her study of the *South Australian Reproductive Technology Act 1988*,³² points out that the Act ‘indicates a concern with the creation of multiple parents: “social”, “biological”, and “gestational”, which pose a threat to the nuclear family’.

The Family Law Council (FLC) (1985: 48) report, *Creating Children: A uniform approach to the law and practice of reproductive technology in Australia*, is illustrative of the tensions involved in policy discussions surrounding reproductive technologies. An emphasis existed in the discussion on the genealogical use of birth records. The FLC noted that one of the functions of the birth record is ‘a record for each individual of his or her blood or genealogical connections, of his or her progenitors’. Embedded in their discussions are assumptions about the importance of the role of genetic ties. The FLC (1985: 51) overcame this tension through the recommendation that there be the maintaining of ‘a record of both the biological and the social parent/s of the child, thus ensuring the integrity of birth records’.

Interestingly, the focus is centred on the problems of ensuring paternity – maternity is seen to be less problematic due to the validation by the pregnant body.³³ Bacchi and Beasley (2002: 334) observe that embedded in the NSW Law Reform Commission discussion paper on Human Artificial Insemination (NSW LRC: 1984) is ‘an acceptance that, where genetic paternity is not achievable’ due to issues

³¹ Interestingly, this is not only a social concern in many Western countries. A report in the Russian *Gazeta.Ru* notes that through lack of legislation governing reproductive technologies Russian children ‘have the right to become heirs to their biological fathers, irrespective of the circumstances of conception. Also, a biological father can be given legal custody of a test-tube child whom he had never seen’ (Zyger, *Gazeta. Ru* www.gazeta.ru/spermoney.shtml, accessed 17/04/01)

³² Now called the *Reproductive Technology (Clinical Practices) Act 1988*.

³³ In the next chapter we will see the alternative to the validation of motherhood through pregnancy.

arising from male infertility, 'familial paternity will suffice'. As they note, this position was sanctioned in legislation enacted in the same year, with an emphasis on consent given by the husband. By 1988 the NSW Law Reform Commission had endorsed a 'new notion of paternity' (quoted in Bacchi and Beasley 2002: 334) along the following lines:

Where a married woman, in accordance with the consent of her husband, has undergone a fertilization procedure (using donor sperm) as a result of which she has become pregnant, the husband shall be presumed, for all purposes, to have *caused the pregnancy* and to be the father of any child born as a result of the pregnancy. (NSW LRC 1988: 9, quoted in Bacchi and Beasley 2002: 334, emphasis added).

That the husband is said to have 'caused the pregnancy' is important. It illustrates that at issue is not only ensuring the role of the 'social' father after birth and the legal status of the resulting child, but also in erasing the body of the gamete donor not only legally but also socially. The gamete donor may provide the genetic contribution but he in no way 'causes' the pregnancy. Here, the body of the 'social' father is constituted as an active participant in the pregnancy through his giving consent. Significantly, the reproductive body is constituted in and by the policy as a passive body.

The position of the NSW LRC is consistent with the historical notion that in patriarchal kinship systems children are often thought of as 'being born to men, out of women' (Katz Rothman 1996: 1244). Though as Katz Rothman (1996: 1244) argues, modern thinking is no longer 'classically patriarchal', such assumptions about parenthood have not disappeared and are reflected in both policy and society. Many children, for instance, still receive the surname of their social and/or genetic father, validating patriarchal lineage.

The right of paternity to a child born from donor assisted IVF is recognised, as indicated above, through the couple's marital or de facto status. Regulations surrounding the use of male donor gamete material effectively protect 'imagined' heterosexual families against claims from the genetic father. By contrast, the non-birthing partner of a lesbian couple is not accorded the same parental rights in law (Murphy 1999: 106). This has had important ramifications for both birthing and non-birthing mothers and in some cases sperm donors. For instance, in the case of *Re Patrick* ([2002] FamCA 193) the genetic father, who was a known donor, was granted access to 'Patrick' against the wishes of his lesbian parents. In this instance there seems to be some misunderstanding between the parties about the amount of contact between 'Patrick' and his genetic father. Significantly, the court did not rule on whether the genetic father was a 'parent' under the *Family Law Act 1975*, but noted that under the Act other people such as grandparents can bring applications for contact and, hence, considered the genetic father to be one of these (South Australian Council on Reproductive Technology 2002: 2). Here the point is not to comment on the validity of the ruling. Rather, it is to note that had the couple had access to male donor gamete material they would have been protected by legislation from this claim.

In terms of custody disputes, decisions are not always clear-cut and biological distinctions often matter. The United States case of *Michelle G v Nancy S*, in which Michelle G sued Nancy S for visitation rights to the two children 'she calls her son and daughter' provides a useful example in this context. In her suit, Michelle G pointed to a conception of motherhood that focussed on the care and time given to the children – the role normally associated with motherhood (Lewin 1995: 115). However, Nancy S' lawyer explicitly defined the boundaries in which 'true'

parenthood is understood: 'These children were produced by Nancy, and Michelle is not the legal or biological anything to them' (quoted in Margolick 1990:10 in Lewin 1995: 115). The state appeals court denied the right of Michelle G, stating that 'her status was not the same [as that of] a biological or adoptive parent' (Sack 1991: 20 quoted in Lewin 1995: 115). Similarly, the Victorian Law Reform Commission (VLRC 2005: 16), in their recent inquiry into the Victorian *Infertility Treatment Act 1995*, received evidence of non-birthing mothers in Australia being refused contact with their children after separating from their partners as a result of the lack of legal recognition of same-sex relationships.

The Australian legal action *B v J* ((1996) FLC 92- 716) is illustrative of some of the legal difficulties involved in cases where the lesbian non-birthing partner is not granted parental rights and the uneven consequences this can have in a policy context (Sandor 1997). In this case an order had to be sought by a sperm donor that he was not liable to pay support for the children produced through the agreement. Mr B had provided sperm in 1988 and 1993 for his friend Ms J who was at the time in a lesbian relationship with Ms R.³⁴ The relationship between the women ended and in 1995 Mr B was informed by Ms J that, according to the then Department of Social Security, she would lose her pension unless she applied for child support from him, hence, the court action. Ms J did not oppose the order brought by Mr B (Sandor 1997). Interestingly, the judge found that the private agreements made between the parties could not be relied upon (Sandor 1997). While the judge found that Mr B could not be considered a parent under the *Child Support Assessment Act* and as such was not liable for the payments, it was the lack of legislation concerning

³⁴ There was an agreement that Mr B would have no financial obligations toward the children. With his agreement, Mr B was registered as the father on the birth certificate (Sandor 1997).

non-traditional families that allowed the case to proceed so far. Sandor (1997) notes that the legal action did not resolve this.

The judgement does not, however, decide the position of a parent *against whom* a claim can be made (such as Mr. B), *outside that scheme*, and in particular, whether Mr. B can formally agree with Ms. J and Ms. R that the latter shall stand in for Mr. B as the first person liable to pay support (emphases in text).

In addition, the judge implied that it was still possible for Ms J to make an application for maintenance under the *Family Law Act* (Sandor 1997). Had Ms R been given automatic parental rights on the birth of the child, she would have been made liable for child support.³⁵

‘Other’ Bodies’ – IVF and identifying donors

Recent trends toward making the provision of identifying information pertaining to gamete donors available to the resulting children have further undermined the policy production of ‘imagined’ families. Factors such as the increasing importance placed on having access to knowledge of our genetic origins for medical purposes mean that there is currently an increased impetus for this information to be made available and this has been reflected in Australian policies. For example, amendments to the *Human Reproductive Technology Act 1991(WA)* in 2004 now allow for ‘donor conceived persons’ to have access to identifying information regarding their donor once they have reached the age of sixteen years and ‘provided they have undertaken approved counselling’ (WARC 2005: 26).³⁶ In Victoria children born as a result of

³⁵ Sandor (1997) notes that Ms J was considering this action. He draws attention to a case in Australia where a lesbian mother was successful in obtaining monetary provisions for the raising of the two children produced through artificial insemination from her lesbian relationship (*W v G* (1996) Fam LR 49). In Sweden a known sperm donor who provided sperm to a lesbian couple was found liable for child support. An action was brought by the biological mother after the couple’s relationship ended. It needs to be noted that at the time the procedure would have been illegal under Swedish law which did not allow access to artificial insemination to same-sex couples (AP 2002)

³⁶ However, no retrospective right exists for the children conceived prior to the enactment of the amendments (WARC 2005: 26).

donor procedures have, since 1st January 1998, been allowed access to identifying information concerning their donor (ITA 2001: 15). In addition, the National Health and Medical Research Council (NHMRC) (2004: 23) explicitly state in their *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* that children ‘born from reproductive procedures using donated embryos are entitled to know their genetic parents and of the existence of any genetically related siblings’.³⁷

As Gill (1999: 24) argues, in terms of the South Australian legislation where donor identity has been protected until the resulting child is over 16, and providing the donor has given consent, the result is the protection of the nuclear family ‘as the donor remains anonymous and uninvolved with the child whilst they are young’. She asserts that this provision indicates a contradiction in the Act which also emphasises the importance of taking the donor’s genetic history. Tensions are produced through the perceived need to maintain the sanctity of the family, which may contradict the belief in the importance of biological or blood ties.

Proposals to allow children born from donor material access to information from the genetic donor seem to complicate the ‘right’, evoked in the IVF debate sparked by the McBain case, to have both a mother and a father as they allow for the distinguishing of the parental role from the genetic. They also problematically insert another body or in some cases bodies into the reproductive practice and, hence, into

³⁷Questions regarding the provision of identifying information to children born from donor gamete material have been considered elsewhere. Britain is one such country which has canvassed the issue, and from 2005 gamete donors have had to give written consent to the provision of identifying information. According to a report in the *Guardian Unlimited* this has led to a severe reduction in the supply of sperm, and has resulted in increased costs to recipients as clinics pass on to patients their costs in sourcing the sperm. The report also notes that some clinics are turning away new patients. Interestingly, the article’s title, ‘Infertile couples hit by big fall in sperm donors’, highlights the dominant view that donor material is to be used to treat infertility in heterosexual couples (Curtis 2006).

the traditional heterosexual family unit. In some cases a child born as a result of IVF may have a genetic mother, a genetic father, a social mother and a social father. Perhaps not surprisingly in cases of surrogacy, as I will discuss in the next chapter, there is no such legal push for identifying information concerning the surrogate birth mother, who may indeed also be the genetic mother of the resulting child, to be made available.³⁸

Arguments for donor information to be made available to the children produced through IVF are often made on the same basis as those which argue for adopted children to have access to their biological parents. However, the reasons behind adoptees seeking their biological origins are complex and cannot be simply expressed as a desire to know *who* they are (NBCC 1988a: 5-6). As the NBCC report (1988a: 26), *Access To Information: an analogy between adoption and the use of gamete donation*, points out, there are major differences between adoption and the use of gamete material, including the intentions of the parties concerned.

It is significant to note that there has not as of yet been the same focus or media coverage of the need for identifying information pertaining to egg donors as there has been toward sperm donors. In part, I argue this is because of the historical basis of the birth mother being considered in law as 'the mother'. A trend in surrogacy cases toward the legality of genetic parentage, discussed in the next chapter, may indeed challenge this.

³⁸ As I noted previously (p176, fn19), and will discuss in detail in the next chapter, in traditional forms of surrogacy the birth mother is inseminated with the sperm of the social father. In gestational surrogacy the birth mother is not genetically related to the fetus.

Donor Material and Familial Links

While familial gamete donation³⁹ remains illegal in some states of Australia it is arguable that as the availability of donor material decreases it will become more common. An ABC (2000) news bulletin, for example, reported that in one state in Australia there have been incidents of fathers of infertile men donating sperm for IVF treatment. The children produced then are the biological children and the social grandchildren of the sperm donor. This trend suggests that genetic inheritance from the patriarchal line is seen to be an important factor.

A study of sister-to-sister egg donation in the United States by Lessor (1993: 394) provides some important insights into the dynamics of this process. She notes that in the United States there has been an increase in the use of egg donation between sisters due primarily to the decrease in the availability of donor eggs. The delaying of childbirth by women to later years is also likely to have an impact. Perhaps not surprisingly, sister-to-sister egg donation seems culturally more acceptable than brother-to-brother sperm donation. A portrayal of such a situation in an episode of the television series, *Beverly Hills 90210* (2000), interestingly entitled 'Fertile Ground', placed significant emphasis on the competitive nature between the two brothers. The inability to genetically reproduce is seen to be a source of shame and implicated in the relations of power between the male siblings.

Lessor (1993: 405) found in her study that while there was a valuing of the genetic link that the recipients gained through the donation, the recipients did not conceive of themselves as the 'genetic aunt' of the future child. Instead the focus was on the importance of 'the "heritage" or "family line" which would connect them with their

³⁹ Familial gamete donation refers to the donation of gamete material, such as sperm and eggs, from immediate family members, including parents.

child'. Moreover, the participants in Lessor's (1993: 406) study emphasised the validity of their motherhood status through their carrying of the child. Hence, in this instance the pregnant body is seen to validate the status of motherhood.⁴⁰

Of particular interest in Lessor's (1993: 402) research are the cultural differences she found in the attitudes of the participants, highlighting and simultaneously challenging the dominance of western conceptions of heredity. For instance, one of the two Vietnamese families in the study, who were first generation immigrants, noted that 'while the procedure of egg donation may be new, the idea is very compatible with Asian culture' given that 'Vietnamese customs dictate that if a parent dies, the aunts and uncles take on the children as their own with no distinction between their biological and adopted children'. As Lessor comments, '[S]uch blurred family distinctions contrast with the insularity of the nuclear family in North American culture'. She (1993: 407) concludes in the case of the two pairs of Vietnamese sisters that,

while one cannot generalise with only two cases, their greater acceptance of the blending of mother and aunt roles might indicate that what is problematic about sister-to-sister egg donation is rooted in Western nuclear family arrangements.

Importantly, familial gamete donation can be seen to be a further attempt to produce as biologically 'ideal' families as possible.

(Re)producing the Biologically 'Ideal'

The continued emphasis technologically on creating, where possible, biologically 'ideal' families is influenced I argue by two major factors. First, there has been a decrease in the availability of donor gamete material. Second, there is an increased

⁴⁰ I will be contrasting this position with that taken in attitudes toward the issue of surrogacy in the next chapter.

emphasis both medically and socially on the importance of genes in determining 'who' we 'are', which has been further heightened by among other things the mapping of the human genome (see Chapter 2).

An increasing importance is being placed on technological advances which will increase the chances of infertile men producing their own genetic children. Intracytoplasmic sperm injection (ICSI), for instance, involves the direct injection of sperm into collected eggs and, according to the GIVF clinic, 'permits the establishment of pregnancy in even the most difficult types of male infertility, including men who have fewer than 100 sperm in their semen' (Genetics and IVF Institute 2006). Non-surgical sperm aspiration (NSA) enables the collection of sperm from men who have no sperm in their semen. These technologies enable the creation of children that are biologically related to the father in cases where previously donor sperm would have been necessary. Hence, the chance of the creation of a biologically 'ideal' family is increased.

Bacchi and Beasley (2002: 334) argue that the 'continuing interest in micro-injection of sperm', which increases the chances of genetic paternity, 'indicates the continued relevance of Mary O'Brien's (1981) hypothesis in highlighting 'the importance of male genetic continuity in Western society's conception of kinship lines'. The importance placed on 'male genetic continuity' has, of course, been based in many cases as much on imagination as on genetic reality. However, the dominance of genetic theories, which has led to an increased push for providing identifying information regarding donors to children born from donor gamete material, and related developments in paternity testing, are challenging the sanctity of the traditional family and in particular the role of its patriarchal head. In short,

neither we nor the state are able to continue to 'pretend' that families created with gamete material from 'other' bodies are 'ideal' families. And in the case of male donor material, we are no longer able to pretend that another 'man' has not been involved in creating the pregnancy. In effect, these families can no longer simply 'pass'.

In Western culture considerable significance has been attributed 'to the association between fertility and power' (Dewar 1989, quoted in Fisher and Sommerville: 2000: 210). Men's prowess has historically been measured by their ability to produce children, specifically sons, to carry on the lineage. Donor insemination in this context has historically preserved what is seen to be 'the shameful secret' of the male unable to reproduce while simultaneously affirming his fertility power (Dewar 1989, quoted in Fisher and Sommerville: 2000: 210). The Warnock Report acknowledged this trend noting that 'there is a temptation for the couple to conceal the true situation when a child conceived as a result of AID, in order to hide the fact that the husband is infertile and to avoid unfavourable reactions among relatives and friends' (Warnock 1984: 26 quoted in FLC 1985: 49). Significantly, this has historically been both protected and encouraged by policy.

Moreover, we need to recognise that the focus on enhancing men's chances of producing genetically related children is occurring in the context of increased uses of reproductive technologies outside of their original intentions, such as by single people and same-sex couples. Thus it can be suggested that this trend is also a partial response to the 'problematic' creation of 'alternative' family forms and a

reaffirmation that reproductive technologies should be used in the creation of 'traditional' families.⁴¹

As this chapter has argued, genetic material and related notions of heredity play a significant role in policies dealing with IVF. Policy has historically protected 'traditional' families, created with the use of donor gamete material, through the creation of an 'imagined' family status. However, the increased focus on the importance of genes in determining 'who' we 'are' has problematised this practice. Genes provide conformation and support for 'ideal' families but challenge the 'imagined' families created by these procedures. There is an implication that, despite the focus on gender-neutral language, this challenge is more problematic for men and the role of the patriarchal head. Recent attempts to amend the *Sex Discrimination Act 1984* in Australia to prevent broadening access to IVF technologies are also concerned with maintaining the heterosexual family and a patriarchal role for men in that family.

Women's bodies are constituted within policy considerations around this area problematically as passive bodies and subject to the authority of medical knowledge. By contrast, men's bodies are constituted as active participants. In the next chapter I will look at how the importance of genetic material is played out in policy considerations of surrogacy and the implications for women's bodies.

⁴¹ The search for technological advances to enable the creating of biological children in those who would otherwise be unable to have them is not, it should be noted, focussed solely on men. A report in the *Advertiser* newspaper notes that in the United States technology has enabled the transplanting of ovaries, approximately the size of a golf ball, into the arms of women who have undergone early menopause due to cancer treatment. Hormone replacement therapy was initially given to help the ovary work. Ovarian tissue is reportedly being stored 'for cancer patients as young as 10 with the aim of performing transplants when they are ready to start a family'. The report notes that this technology 'could also give career women the chance to delay starting a family' highlighting the dominant fear that women are leaving it too late (Marsh 2000).

Surrogacy: the primacy of genetic material and the invisible reproductive body

Indeed, why not admit that the child might have two mothers and even two fathers and that all the parties involved might learn to cope and even flourish with that arrangement? (Warnke 1994: 473)

The relative public and political acceptance of IVF as a means of dealing with the ‘problem’ of infertility has yet to extend to the focus of this chapter – surrogacy. Although some forms of surrogacy arrangements, such as those between family members and those in which no money is exchanged, are considered more acceptable than others, surrogacy in general continues to generate considerable disquiet in the Australian policy environment. This disquiet is reflected in other countries. The Warnock Committee (1984: 8.17), for example, in their *Inquiry into Human Fertilisation and Embryology*, observed of the question of surrogacy that it ‘presented us with some of the most difficult problems we encountered’. Fourteen years later another British Report commented that they did not find the ‘task any easier than...the Warnock Committee’. Signifying the perceived discomfort with formally intervening in the private sphere which marks many of the policy considerations around this area, the authors explicitly noted that ‘[S]urrogacy involves an intimate and emotional area of life’ (Brazier, Campbell and Golombok 1998: 2.3, Foreword).

As a method for overcoming ‘infertility’, surrogacy predates IVF technologies. Indeed, it is often argued that surrogacy has been around since biblical times. Many, for instance, view the ‘arrangement’ that Sarah made with her maid, Hagar, to provide Abraham with a child that Sarah would raise as her own, in Genesis 16 of the *Old Testament*, as representative of an early surrogacy arrangement (see, for

example, McEwan 1999: 274, Lascarides 1997). The NBCC (1990: 4) *Surrogacy Report 1*, while alluding to the social and economic disparities of the time, notes that this story is ‘at least witness to the fact that surrogacy was accepted in early Jewish society as a legitimate way of infertile couples having children and creating a family’. While it seems unwise to depict this as a surrogacy arrangement according to our current understandings, given the unequal power relations between the parties, the example nevertheless illustrates that alternative practices of providing ‘proper’ couples with children, and thus creating traditional ‘imagined’ families, is not a recent phenomenon. Moreover, the use of ‘other’ bodies to facilitate this practice is also not of recent origin.

Unlike IVF, where the ‘other’ bodies needed to produce a child have been up until recently effectively erased through policy, the ‘other’ bodies needed to create a child through a surrogacy arrangement have always been more visible and, hence, not as easily ignored in either policy or social terms. Whereas in IVF donor material is viewed as though it exists independently from the donating body, thereby enabling it to be treated as playing only a minimal role in the production of the child, the same cannot be said for the body of the birth mother in a surrogacy arrangement. The pregnant body is a public body and a site for public scrutiny. This does not mean, however, that the birth mother’s body is treated in any meaningful way. Within surrogacy arrangements the birth mother’s body has been constituted as little more than a fetal container, something to be monitored and controlled during the pregnancy and disposed of after the event, a constitution reflected in and reproduced by recent policy decisions.

Developments in IVF technologies, which increasingly allow for the intended social parents to be also the genetic parents, thereby facilitating the creation of genetically related families, have significantly changed the context in which surrogacy agreements are made and understood. However, the recognition of the birth mother as the mother at law and in some cases the birth mother's husband as the legal father, a situation protecting non-genetic parents in regard to IVF, has meant that in regard to surrogacy the genetic connection between the child and the intended social parents has not been automatically recognised legally. Recent judicial decisions allowing the names of the genetic social parents to be placed on the birth certificates of children born through surrogacy arrangements, decisions which reflect and reaffirm the importance of genetic ties, not only challenge historical legal conceptions of parenthood but also simultaneously produce tensions in other areas such as IVF. Moreover, these decisions further constitute the pregnant body as playing a minimal role in the production of the child. Indeed, they play a crucial role in erasing the role of the pregnant body.

It would be misleading to suggest that the issue of surrogacy is highly placed on the policy agenda or is an issue of immediate policy concern in Australia. Surrogacy is not, and is unlikely to become, a preferred alternative in attempting to resolve problems of fertility, a position reflected in the various reports into the area. Relatively few children are born from these agreements in comparison to IVF and the continuing legal uncertainty surrounding the parental status of the children born means that this is not likely to change in the near future. Moreover, evidence suggests that it is only in a minority of cases that problems arise (NBCC 1990: fn20, Brazier, Campbell and Golombok 1998: 3.38) and this, coupled with the relative silence surrounding the practice, means that surrogacy as an issue generally appears

only sporadically on the public agenda. Nevertheless, surrogacy arrangements continue to be made and children continue to be born from the practice. In addition, it is a subject that continues to be played out in popular culture storylines and, when issues arise, generates considerable media attention.¹

This chapter concentrates on the tensions produced by, and embedded in, policies relating to the issue of surrogacy in light of the increased focus on genetic theories. As with IVF there are key debates around issues of ‘other’ bodies and ‘other’ families, and assumptions regarding the importance of genetic connections underpin the policies regulating this area. However, in contrast to the challenges that the focus on the importance of genetic connections is presenting to families formed with the aid of IVF technologies, in regard to surrogacy we see in many cases this connection used by ‘commissioning’ or ‘social’ parents to increase (their) claims on children born as a result of surrogacy arrangements. Significantly, this occurs at the cost of devaluing the role of the surrogate woman’s pregnant body in the carrying of the fetus and the birth of the child.

In keeping with the theoretical focus outlined in Chapter 1 it is necessary to start by ‘unpacking’ some of the common terms employed in these debates. As noted in Chapter 1 it is essential to look at the political uses and implications of specific terminology. From here I will look at policy around the area of surrogacy and elucidate some of the common themes. In addition to the Australian policy context a particular focus will be placed on policy in the United Kingdom, Canada and the

¹ For example, the Australian soapie *Home and Away* introduced a storyline dealing with the subject. Sally Fletcher and her then partner Flynn Saunders first attempted a surrogacy arrangement, with Sally’s (foster) sister Sophie, in order to become genetic parents. Sally had a hysterectomy as a result of ovarian cancer but stored some eggs prior to the procedure. This attempt was unsuccessful. However, a second attempt with Sally’s friend Leah produced a baby girl. This is not the first time *Home and Away* have dealt with the issue. In a previous storyline Irene acted as a birth mother for her daughter.

United States. Global developments in regard to surrogacy necessitate that an international perspective is taken. These developments have been widely reported in the Australian media and have influenced Australian policy-making.² Given that in disputes concerning surrogacy agreements the judiciary are privileged players, there is a need to address within these discussions some of the key surrogacy cases. In these cases genetic contributions form the basis through which other issues such as class and race are played out. This treatment of genetic material necessitates a view of genes as distinguishable from the pregnant body, a consequence of which is the fragmentation of material bodies – in particular, women’s material bodies. Lastly, the chapter addresses three key bioethical texts which have dealt with the issue of surrogacy. These Reports constitute women as in need of protection, supporting the contention that around the area of reproduction women tend to be situated as less autonomous than men, and thereby investing other bodies such as the medical profession and indeed bioethical committees themselves with control over women’s bodies.

The Productive Nature of Terminology

Policy, and other related documents, generally define surrogacy as an alternative reproductive practice whereby a woman, commonly termed the surrogate, agrees to gestate and then hand over a child to another person or persons. Often there is an emphasis within the defining of the practice on the handing over to an infertile heterosexual couple (see for instance NBCC 1990: 3). Surrogacy is primarily considered an option in cases where the ‘problem’ is female ‘infertility’ and, hence,

² The National Bioethics Consultative Committee (NBCC) (1990) *Surrogacy Report 1*, for example, includes an appendix (Appendix 3) summarising enquiries and legislative dealings on the issue of surrogacy drawn from these countries. More recently, the Victorian Law Reform Commission has also surveyed international responses to the issue of surrogacy in their inquiry into the *Victorian Infertility Treatment Act 1995*.

it is a practice which enables men to reproduce genetic children. Commonly, in these cases, the female partner is either unable to supply the eggs and/or unable to gestate a fetus.³ As with the case of IVF, while in the past surrogacy has been used to construct more 'traditional' families, in more recent times there has been an increase in the use of surrogacy arrangements for the provision of single people and same-sex couples, usually male same-sex couples, with children.

Many feminists express discomfort with the term 'surrogate mother' arguing that the word 'surrogate' suggests that the birth mother is not actually a mother. In this context, more recently there has been a trend toward the use of terms such as commissioning parents, commissioned woman, and commissioned offspring. These terms, it is said, are more reflective of the relationships involved in surrogacy practice. Margrit Eichler (1993: 196), however, takes issue with the use of parental terms such as 'contract *mother*' or 'commissioning *father*' arguing they are also not appropriate as they presuppose a successful arrangement, which is not always the case. Not only do miscarriages occur but also in some cases pregnancies are not achieved.⁴ As a consequence, Eichler prefers the term 'commissioning man' to the term 'commissioning father'.

As Lyndon Shanley (1993: 618) points out, where one is positioned in the surrogacy debate is often reflected in the language that is used. Hence, whether one is either a

³ Medical conditions that make gestating a fetus untenable include multiple sclerosis, kidney disease, a history of spontaneous abortion and a damaged or absent womb (Stuhmcke 1996: 6).

⁴ Eichler bases this claim on a 1988 study she conducted with Phoebe Poole, which found that out of thirty cases nine had not resulted in a live birth (quoted in Eichler 1993: 198). The study, conducted for the Law Reform Commission of Canada, looked at the incidence of surrogacy agreements, or preconception agreements as they are known in Canada, involving Canadians, with the data drawn from the files of the American surrogacy agency Noel Keanes. Although they identified 118 cases that involved Canadians, of that number there were thirty-two cases with comparable data. See Margrit Eichler and Phebe Poole (1988) *The Incidence of Preconception Contracts for the Production of Children among Canadians*, a Report Prepared for the Law Reform Commission of Canada, Montreal, for details.

proponent or an opponent of the practice is indicated through the terminology employed. She notes, in this context, that supporters of surrogacy tend to be more accepting of the term 'surrogate motherhood' whereas those with reservations toward the practice resist this term.

The desire to advocate an approach to policy, based on taking into account the ways in which material bodies are conceptualised, necessitates careful consideration of the language used. A central theme in this thesis is the disappearance and fragmentation of material bodies, and in particular women's reproductive bodies, that occurs in policies concerned with reproductive technologies and related issues of family formation. In this context, terms such as 'surrogate' are inadequate in that they have the effect of diminishing the link between the body of the woman carrying, and hence caring for the fetus, and the fetus, thereby constituting the pregnant body as a *mere* fetal container. Highlighting the contested nature of the term, Stuhmcke (1996: 8. i) notes that, given that the birth mother 'is presumed at law to be the mother' in most states and territories of Australia, in effect the commissioning or social parents could be referred to as the surrogates.⁵ Similarly, the term gestational mother is inadequate as it again suggests alienation between the fetus and the pregnant body.

The use of terms which are preceded by commissioning or commissioned are also problematic, suggesting through the language a 'distaste' for the arrangement and a positioning of the commissioning parents as cold and calculating. Eichler's suggestion of replacing the parental terms with 'man' and 'woman' further compounds this position. This is of course not to suggest that many surrogacy

⁵ As will be illustrated later in the chapter the position of the birth mother as the mother in law has been challenged by a number of court decisions.

arrangements are not exploitative or to overlook the fact that there are often class differences between the parties.⁶ However, it is unhelpful to position intended parents as necessarily and intentionally exploitative. Moreover, in regard to Eichler's point, while it is indeed the case that not all surrogacy agreements result in live births, it is problematic to suggest that 'parenting' begins after birth.

While recognising the difficulties with all terminology, in the main those that commission a woman for a surrogacy arrangement are termed here the social parents or social mother or father. The woman that is commissioned is termed the birth mother, with the intention of emphasising *her bodily* role in the process. These terms are intended to encompass instances where no child results from the arrangement. The decisions made here reflect a desire not to construct through terminology a moral positioning for either side and thereby, in discussion of cases where problems have arisen, heroes and villains. However, Stuhmcke's (1996: 8) point is taken here that given the language of 'surrogacy' is in such wide use, especially in policy documents, such terminology is not easily abandoned. Hence, for simplicity's sake the terms surrogacy and surrogacy arrangements will be used to describe the practices that surround the issue.

Policy texts generally make distinctions about the practice of surrogacy along two primary lines – the genetic connections produced, and the nature (commercial or otherwise) of the arrangement. In the first instance, surrogacy is generally distinguished by the terms 'partial' and 'full'. In 'partial' surrogacy, historically the first type of surrogacy, the birth mother uses her own egg but is inseminated, usually artificially, by the social father. In this case the birth mother has a genetic

⁶ Eichler's study also indicated class differences between the parties.

connection to the child, which she is expected to socially and legally sever, along with her legal parental rights, after the delivery. This process sometimes, though not always, necessitates medical intervention. 'Full' or 'total' surrogacy, also known as gestational surrogacy, has been enabled with advances in IVF technology. In this instance the birth mother provides a 'gestational' service for a couple that supplies the fertilised embryo. Often in these cases the 'social' parents provide all the genetic material, though sometimes a donor egg or donor sperm is used.⁷ Here there is no genetic connection between the birth mother and the child, although in most countries she (the birth mother) remains presumed in law to be 'the mother' at birth. Thus there remains a need for her to sever her parental rights. 'Full' or 'total' surrogacy is becoming more common with advances in technology and it seems likely that an increasing number of social parent/s will, where possible, use this type of arrangement as the status of the resulting child, as the child of the social parent/s, is attained through a genetic relationship and affirmed in law.

Surrogacy is further distinguished in law and policy texts through the delineation between the terms 'altruistic' and 'commercial'.⁸ 'Commercial' surrogacy is used to describe a situation where money is paid for the surrogacy service. In 'altruistic' surrogacy, on the other hand, no money is exchanged. While the term 'commercial' implies a purely business relationship, the term 'altruistic' suggests that the surrogate pregnancy is done for love or a greater good, hence rendering it more acceptable than a paid arrangement (Stuhmcke 1996: 8. iii). However, Surrogacy Agencies and birth mothers who accept payments for their 'services' challenge this

⁷ In many cases social parents use donor eggs in a surrogacy arrangement in order to minimise the birth mother's claim to the child. A British same-sex couple Tony Barlow and Barrie Drewitt, for example, used donor eggs for this specific reason. This case will be discussed in more detail later in the chapter.

⁸ These distinctions have in some cases proved important in the legal setting.

distinction, emphasising the altruistic nature of the decision to enter into a surrogacy agreement, which is not viewed by them as inconsistent with the acceptance of payment.⁹ Many writers also challenge the distinction between ‘altruistic’ and ‘commercial’ surrogacy. Stuhmcke (1996: 8. iii), for instance, points out that the distinction is ambiguous. In her words ‘it is unclear as to when an altruistic arrangement becomes commercial – for example an arrangement may include payment of the surrogate mother’s medical travel and home-help expenses yet remain classified as an altruistic arrangement’. Reflecting the ambiguity, the NBCC (1990: 10) term the distinction ‘a very confused one’ which ‘to a large extent prejudices the discussion of surrogacy’.

International Approaches

While legislation between countries varies, most Western countries, with the exception of some states of the United States, prohibit payment for surrogacy services and discourage the practice. This occurs through making surrogacy contracts unenforceable and the prohibition of advertising, which effectively prevents the rise of surrogacy agencies such as those found in the United States. Countries that specifically ban commercial surrogacy include France, Germany, Britain, Italy, Canada and Israel. While altruistic surrogacy is allowed in Britain and Canada, Germany and France prohibit both types (commercial and altruistic) of surrogacy (Health Canada 2004). Israel, while prohibiting commercial surrogacy, introduced legislation to legalise surrogacy in 1996 (McEwan 1999: 286). In this instance a contract is required to be signed by the social parents and the birth mother, which is then subject to approval by the health minister. The legislation also

⁹ For instance, an agency in the United States devoted to surrogacy, Surrogate Mothers, Inc, (2002) states explicitly that the women in their program ‘become surrogates to help people have families...Their fee...is a factor but never the main reason for their participation’.

requires that the intended social father must provide his own sperm and provides compensation for the birth mother's time and suffering, as well as covering insurance and legal expenses (McEwan 1999: 286 fn126). The influence of Britain, Canada and the United States on Australian policy necessitates spending some time discussing policy and key judicial cases in these countries.

United Kingdom

Legislation allowing so-called altruistic surrogacy, *Surrogacy Arrangements Act 1985*, was passed in 1985 in Britain. While commercial surrogacy remains illegal there is a provision for reasonable expenses to be paid to the surrogate. However, what constitutes 'reasonable expenses' is open to contestation. The legislation does not recognise surrogacy as a binding agreement for either party. Under the *Human Fertilisation and Embryology Act 1990* the birth mother is considered the legal mother and the social parents must apply either for a parental order or to adopt the resulting child or children (Brazier, Campbell and Golombok 1998: 1.25, 1.26). As a consequence, if the birth mother decides she is unable to give up the child, 'she is legally entitled to do so' as she is considered at the law to be the mother. In addition, the birth mother and, in cases where she is married or in a de facto relationship, her husband or de facto partner, remain legally responsible for a child born from a surrogacy arrangement if the child is rejected by the social parents (Seymour and Magri 2004: 45). It is illegal to advertise for surrogates.

In 1997 the United Kingdom Health Ministers commissioned a review of selected issues in regard to surrogacy arrangements in Britain. The Review Team comprised a representative from the disciplines of law, ethics and psychology and produced a report in 1998 entitled *Surrogacy Review For Health Ministers Of Current*

*Arrangements For Payments And Regulation Report of the Review Team.*¹⁰ The Review Team's recommendations included the limiting of payments to those specifically 'occasioned by the actual pregnancy', the development of a Code of Practice and the enactment of new legislation which would 'ban payments other than expenses' and 'require the registration of surrogacy agencies' (see Brazier, Campbell and Golombok 1998: ii for details). The recommendation of new legislation was not taken up at the time.

There have been two significant legal cases in Britain, both of which received considerable publicity in Australia. The second case, involving twins born to a same-sex couple, will be discussed in detail later in the chapter. The first case is commonly referred to as the *Baby Cotton Case*. In this instance Kim Cotton entered into a paid surrogacy contract that was arranged through an Agency based in the United States. After being artificially inseminated by a United States man whom she had never met, Cotton successfully gave birth to a girl in 1985. As per the agreement the baby was left at the hospital and 'the father initiated wardship proceedings requesting that he and his wife be granted custody of the child' (McEwan 1999: 283). The court granted this request ten days after the birth of the child and the social father returned to the United States with the baby. The case caused controversy in Britain with much public anger directed against Kim Cotton because of her perceived ability to give up *her child*, a decision seen to go against community perceptions of appropriate motherhood. Significantly, the resulting

¹⁰ Within the Terms of Reference the following issues were to be considered: the continued allowance of payments, the potential need for a body or bodies to regulate surrogacy arrangements, and whether changes to current legislation were needed. The Inquiry was to be conducted in the context that surrogacy arrangements should not be enforceable and that there should be no commercialisation of surrogacy (Brazier, Campbell and Golombok 1998: 1.2, 1.4).

public outrage pressed the government into the hurried enacting of the 1985 legislation, discussed above, to deal with such matters (McEwan 1999: 283).

Canada

In the majority of Canadian provinces surrogacy arrangements – or as they are known in Canada ‘preconception’ agreements – are not specifically prohibited. Canada faced its first public preconception case in 1982, in a case involving a Toronto couple who entered into a paid agreement with a woman from Florida in the United States. In return for this payment the woman agreed to be inseminated by the social father’s sperm and successfully gave birth to a child. As was agreed, the birth mother left the child at the hospital. Despite the agreement, the hospital refused to allow the social father ‘to take custody maintaining that the child had been abandoned by its mother’ (McEwan 1999: 285). The intended social father eventually obtained custody through adoption. The lack of legal action taken against the couple was construed at the time ‘as an indication that surrogacy agreements were lawful’ (McEwan 1999: 285).

In 2004 Bill C-6 was assented to.¹¹ The *Assisted Human Reproduction Act 2004* makes payment for a surrogacy arrangement illegal. It is also illegal to pay ‘another person to arrange the services’ of a birth mother. However, a birth mother may receive reimbursement for expenditure related to the surrogate pregnancy upon presentation of a receipt and in addition can receive compensation for ‘loss of work-related income incurred during her pregnancy’. A series of judgements in Canadian provinces have enabled social parents to have their names legally recorded on the

¹¹ This was not the first time Canada had attempted to introduce legislation dealing with surrogacy. In 1996 *Bill C-47, the Human Reproductive and Genetic Technologies Act* was introduced to the Canadian Parliament. This Bill was to take into account laws relating to human cloning but would also have banned commercial surrogacy and the selling of eggs and sperm (McEwan 1999: 285). The Bill was later modified and renamed C-247 taking into account only human cloning.

birth certificate in cases where children are born from gestational surrogacy arrangements (Seymour and Magri 2004: 43).

United States

Legislation relating to surrogacy agreements in the United States is state-based and as such responses range from prohibition to full acceptance of surrogate arrangements. For example, while both paid and unpaid surrogacy contracts are forbidden in Michigan and Arizona, other states such as Florida allow for a 'gestational surrogacy contract' to be enforceable (Seymour and Magri 2004: 34, 40). Commercial agencies have been set up in states where surrogacy is legalised and payments are allowed. There have been several influential cases relating to the issue of surrogacy in the United States which are relevant to current understandings.¹²

Muñoz v Haro represents an early example of what McEwan (1999) terms the 'transnational' possibilities for surrogacy cases. In this instance a 19 year old woman from Mexico, Alejandra Muñoz, entered into a surrogacy arrangement with her American cousin Nattie Haro. Muñoz was brought into the United States illegally and inseminated with the sperm of her cousin's husband. Muñoz sought to have the surrogacy agreement declared invalid as she was under the impression that she was only to carry the fetus for a few weeks after which it would be flushed from her uterus and placed in the womb of Nattie Haro. The Haro couple produced a note that Muñoz had signed, despite her inability to read the Spanish in which it had been

¹² There has been one major report by the US Congress, Office of Technology Assessment 1988, entitled *Infertility: 'Medical and Social Choices'*. The Report focussed on existing state regulations and responses and did not 'define a position in relation to surrogacy' (NBCC 1990: 72). While 'a range of ethical themes' including 'the right to procreate', 'parenthood and parent-child bonding' and 'intergenerational responses' were identified, a stance was not taken in relation to the themes (NBCC 1990: 72).

written, in which she (Muñoz) had agreed to hand over the child for a payment of US \$1500. Although the judge was not forced to rule on the contract, as the Haro couple withdrew their contract claim, the significance of the case lies in the Supreme Court finding that ‘the right to procreation is protected under the constitutional right to privacy’. Hence, in the United States there is a ‘constitutional right to enter into surrogacy contracts’ (McEwan 1999: 288). Effectively, the court found that there is a constitutional right to ‘pass on’ genetic material.

There are two further cases from the United States that are of critical importance – Baby M and *Calvert v Anna J*. The ‘Baby M case’ is perhaps the best publicly well known case involving a surrogacy dispute. In this instance Mary Beth Whitehead agreed to be artificially inseminated with the sperm of William Stern and carry a fetus to term. Upon birth the child was to be handed over to William Stern and his wife, Elizabeth Stern.¹³

As part of the agreement Whitehead was subjected to certain requirements, including that she was only to obtain an abortion upon the wishes of William Stern and that neither she nor her then husband, Richard, were to form a ‘parent-child relationship with any child she conceived’ (Warnke 1994: 467). Hence, Whitehead was not only expected to sign over control of her reproductive body but there was a further expectation that she would practice a form of self-alienation from her body in order not to bond with the fetus. As a further part of the agreement, both the Whiteheads were to terminate their parental rights and to willingly take part in any proceedings necessary to enable William Stern’s name to be placed on the birth

¹³ Elizabeth Stern had been advised not to become pregnant as she suffered from Multiple Sclerosis.

certificate (Warnke 1994: 467).¹⁴ After the birth of a baby girl Whitehead found herself unable to give up the child and court proceedings were initiated by the Sterns.

The initial trial terminated Whitehead's parental rights and awarded full custody to the Sterns, with a directive made to enable Elizabeth Stern to adopt the child immediately. Significantly, the surrogacy agreement was not considered to be baby-selling in the lower court. In the words of the trial judge 'the father could not buy what was already his' (re Baby M, 525 A.2d 1128, 1157 (N.J. Super. Ct. 1987) quoted in Radin 1995: 136) Hence, William Stern's genetic contribution was intrinsically linked with *ownership* of Baby M. Whitehead was not only vilified by the court for renegeing on the agreement but also attacked personally. Psychologists, such as Dr Marshall Schecter, diagnosed Whitehead with a 'Mixed Personality Disorder' based in part on, among other things, her dyeing her 'prematurely white hair' and her incorrect playing of the children's game "patty cake" (Warnke 1994: 469). Consequently, in the trial other issues were at play with Whitehead's child-rearing methods questioned and her education and vocation levels also scrutinised (Warnke 1994: 469). At question, then, was the 'type' of family Baby M would be raised in and who would make the best mother? In the end the court upheld the surrogacy contract on the basis of the best interests of the child (NBCC 1988b: 5).

On appeal to the Supreme Court the decision on the legality of the contract was reversed and Whitehead's parental rights restored. Although custody of the child remained with the Sterns, Whitehead was allowed visitation rights. Custody was granted to William Stern on the grounds of the 'best interest of the child' (Janu

¹⁴ As the husband of Mary Beth Whitehead, Richard Whitehead attained parental rights as the law considered the child born to be a child of the marriage and, hence, a child of the patriarchal head.

1995: 203).¹⁵ Notably in the decision regarding the best interests of Baby M social class became a major factor, with the Sterns of higher education and economic status than the Whiteheads. While this case is important in United States law, the judicial weight of the New Jersey Supreme Court also gives it significance. Moreover, it is significant in that William Stern's genetic contribution *formed the basis* through which other issues such as class were played out. Although the New Jersey Supreme Court held that the contract was invalid, custody remained with William Stern, the genetic father.

The case of *Calvert v Anna J* has had major ramifications for surrogacy cases in the United States. In this instance, Anna Johnson agreed to enter into a 'gestational' surrogacy agreement for Crispina and Mark Calvert. Crispina Calvert was unable to gestate a fetus due to a prior hysterectomy but could, however, supply her own eggs. In return Anna Johnson was to receive a payment of US \$10,000 and a life insurance policy worth US \$200,000 was to be taken out on her behalf. When relations between the parties soured, legal proceedings were initiated. In the resulting case the court held that the birth mother who has no genetic link to the child she gestates has no parental rights (Lascarides 1997: 1243). Under the *Uniform Parentage Act Cal. Fam. §§ 7600-7620* (West 1994), 'maternity could be established either by genetic relationship to the child or by proof of having given birth to the child' (McEwan 1999: 280). As both Anna Johnson and Crispina Calvert fulfilled one of these requirements the court decided on the basis of the intentions of the parties. The court stated that when maternity is able to be proved in

¹⁵ Many feminists claim that the decisions of both courts rely on stereotypical notions of women. For instance, the New Jersey Supreme Court in some ways suggested that the inability of Whitehead to comply with the contract redeemed her as a woman – see Warnke (1994: 468) for details. Parallels can be seen here with the *Baby Cotton Case*, where, as noted previously, Kim Cotton's ability to 'give away' her child was perceived to be contrary to the actions of a proper mother.

two different women then ‘she who intended to procreate the child – that is, she who intended to bring about the birth of the child that she intended to raise as her own – is the natural mother...’ (Johnson, 851 P.2d at 782, quoted in, McEwan 1999: 281). Hence, motherhood was equated with intentions and the merely incubatory status of the pregnant body reaffirmed. As Nelkin and Lindee (1995: 153) note, the significance of the decision rests in its framing. The decision could have enforced the contract, or decided on the best interests of the child, or in favour of Anna Johnson and focussed on the biological link in pregnancy. Instead it reaffirmed the genetic linkage between the Calverts and the child, ignoring the central role Anna Johnson was playing in the child’s creation.

At play in the case were issues of race and class (Ikemoto 1996: 1023-1024). Anna Johnson was African-American whereas Mark and Crispina Calvert were white and Filipino respectively. As in the aforementioned Baby M case, the Calvert’s genetic contribution formed the basis through which these other issues were played out. The importance of the role of Anna Johnson in carrying and gestating the child was not, however, seen to be of significance. Rather, the law made a distinction between genetic material and the ‘gestating’ womb – in effect hierarchically placing genes over the pregnant body.¹⁶

¹⁶Further court cases have reaffirmed the importance of the genetic relationship between the social mother and the child born as a result of a gestational surrogacy arrangement. In 1994, for instance, in the case of *Belsito v Clark*, a court in Ohio ordered that the genetic mother’s name appear on the birth certificate (Lascarides 1997: 1243). In this case both parties, a married couple and the wife’s sister, wanted the social genetic mother’s name on the certificate (see Lascarides 1997: fn 136 for details). A more recent case involved a couple who wanted their names on the birth certificate before the actual birth as to avoid the lengthy adoption process. The birth mother was the intended social mother’s sister. Their lawyer, Melissa Brisman, is quoted as saying ‘[T]he genetic parents feel this is their child, their biological baby in somebody else’s womb for nine months’ and accordingly they wanted this recognised before the baby’s birth (Brody 2000). Parenthood and genetics, then, are inextricably linked, with the genetic connection privileged over the body of the birth mother. The court decided that the birth mother would have three days after the birth in which she could change her mind after which the social mother’s name could appear on the birth certificate (see Brody 2000 for details).

Challenging International Borders – citizenship and other families

Highlighting the global implications of surrogacy arrangements is the 1999 case of the Barlow-Drewitt twins, the first born children to gay fathers Barrie Drewitt and Tony Barlow.¹⁷ This case warrants separate attention, as it not only raises issues of ‘other’ families, genes, and ‘other’ bodies, but also raises questions about citizenship and international law. The case received significant publicity both in England and in Australia, with much media attention focussed on two main themes outside of the ‘problem’ of same-sex families. The first was that Barlow and Drewitt had been in a long-term relationship and the second was that they were independently wealthy. Thus, Barlow and Drewitt’s positioning in relation to other social status symbols – relationship status and income level – was considered to be important and arguably a contributing factor in the largely positive focus of the coverage.

The Barlow-Drewitt twins, a boy and a girl, were born in the United States out of a surrogacy agreement in December 1999. After unsuccessful adoption and fostering efforts, Drewitt and Barlow decided to hire an American woman to act as a birth mother in order to provide them with children. Following a failed first attempt, a second birth mother was hired. She was implanted with embryos that contained donor eggs inseminated with sperm from one or both of the men and successfully conceived and carried to term the twins. It has been reported that each man is the genetic father of one of the twins (Tremlett 2004). In early media interviews Tony Barlow and Barrie Drewitt, the children’s fathers, stated that while they know which one of them is the genetic father of the twins, this is not important to them (*Sunday* 2000), challenging in the social setting beliefs about the importance of genetic ties.

¹⁷ The couple now have a third child, a boy born in 2003 (Tremlett 2004).

However, United States judicial cases suggest that in the event of a custody dispute between the men the genetic relationship will become important in the legal context (see, for example, Lewin 1996 for details).

Surrogacy arrangements, such as the Barlow-Drewitt case, problematise the perceived 'naturalness' of the traditional family. The twins each have a genetic father, a social father, a birth mother, and a genetic mother. As previously indicated, whereas the donor bodies are in effect erased automatically through policy in relation to IVF this is not as easily done in regard to surrogacy. Incidentally, the choice to use an egg donor was a conscious effort on the part of Drewitt and Barlow to negate the potential claim that the birth mother could have on the twins, a decision highlighting once again the dominant view that the body of the birth mother provides merely an incubatory and disposable service. Indeed, after relations had soured with the birth mother, Barrie Drewitt described her in a televised interview as an 'employee' (*60 Minutes* 2000)¹⁸.

Prior to the birth of the twins a US court gave Barlow and Drewitt the right to have both their names on the birth certificates of their children (Mills 2000: 34). This occurred with the consent of the birth mother who terminated her legal parental rights. However, as a direct consequence she (the birth mother) disappears from legal recognition of her role, in the process leading to the idealistic notion that male same-sex families can be created without women's bodies. So, we see in 'alternative' or 'other' families, the dominance of heteronormative norms regarding the structure of the family as a 'two-parent' model.

¹⁸ Since the children's birth Barlow and Drewitt have had disagreements with both the birth mother of the twins and the egg donor (of all three children) reportedly due to the two women selling their story at different times to tabloid papers. At the time of writing they had reconciled with the birth mother but remained estranged from the egg donor (Tremlett 2004).

Both the Drewitt-Barlow surrogacy case and the ability to ship genetic material internationally present challenges to constructions of national identity and laws relating to citizenship. Questions arise as to when genes enable citizenship. If genetic connections give rights to parenthood then it seems logical to think that genetic connections give rise to citizenship. However, this is not necessarily the case. On this issue genetics intersects with perceptions of the constitution of the 'proper family' – the structure of which remains constituted along traditional lines. While Drewitt and Barlow are English, both the birth mother and the genetic mother are American and the twins were born in the United States. The twins were refused English citizenship rights on the grounds that Barrie Drewitt and Tony Barlow were not married. However, the prohibiting of marriage between same-sex couples under English law meant that it was impossible for Barlow and Drewitt to fulfil this requirement. In addition, despite the United States Court judgement giving Barlow and Drewitt the right to have both their names on the birth certificates of their children this decision was not recognised in England. Hence, inconsistencies between jurisdictions made UK citizenship unattainable for the twins. In simple terms, while surrogacy facilitates the creation of 'alternative' family forms, the legitimacy of this practice is still impeded by other policies related to family formation.¹⁹

Australian Responses

The Australian Government's lack of constitutional power to legislate uniform laws regarding reproductive technologies means that, as with policies dealing with IVF in Australia, laws and practices relating to surrogacy differ from state to state. In

¹⁹ The twins were granted residency in order that they could remain in Britain (*Sunday 6/8/00*). The family has now moved to Spain and it has been reported that the move was an attempt to avoid harassment and vilification (see, for instance, Tremlett 2004).

general, however, Australian policies ban commercial surrogacy but tolerate the use of altruistic surrogacy practices. The exception is Queensland, which bans all forms of surrogacy. Importantly the toleration of altruistic surrogacy arrangements occurs mainly through lack of legislation dealing specifically with the issue rather than intent on the part of legislators (Stuhmcke 1998: fn2). In addition, advertising is prohibited, effectively preventing the rise of surrogacy agencies such as those found in the United States.

The states of NSW and WA and the Northern Territory have no specific legislation relating to the regulation of surrogacy.²⁰ Queensland regulates surrogacy through the *Surrogate Parenthood Act 1988 (Qld)*. Under this Act, as noted above, prescribed contracts are void and parties who enter into prescribed contracts 'may be liable for a fine, imprisonment or both' (Stuhmcke 1996: 25). It is also illegal to advertise in relation to surrogacy arrangements. However, as discussed in detail in a moment a decision in the Family Court (*Re Evelyn*) has made the illegality of surrogacy contracts and indeed the status of the child resulting from an arrangement such as this a little ambiguous.

Surrogacy is regulated in South Australia under the *Family Relationships Act 1975 (SA)*. Under South Australian law, s10G (1), surrogacy contracts are illegal and, hence, void. Procuration contracts are also illegal. Section 10 (d) (1) of the *Act* provides that a child resulting from artificial insemination is presumed to be the child of the husband provided that he has given his consent.

²⁰ NSW has recently put out for consultation the *Assisted Reproductive Technology Bill 2003*, which deals in part with the issue of surrogacy. However, at the time of writing this Bill had not been proclaimed through parliament (Bell 2006: 17).

In Victoria surrogacy arrangements are regulated under the previously discussed *Infertility Treatment Act 1995 (Vic)*.²¹ The Act prohibits payment for surrogacy services, bans advertising and voids all surrogacy agreements (s59, s60, s61). Victorian legislation also effectively bans forms of gestational surrogacy in Victoria through the section 8 requirement that ‘a woman who is married (or in a heterosexual de facto relationship) and who intends to act as a surrogate may access ART only if she is “unlikely to become pregnant” or likely to transmit a disease or genetic abnormality to the a child’ (Seymour and Magri 2004: 33).²²

In the ACT surrogacy is regulated under the *Parentage Act 2004 (ACT)*. Under the Act it is an offence to enter into a commercial agreement and to advertise with respect to a surrogacy arrangement. Altruistic surrogacy is not, however, prohibited, ‘provided no advertising or intermediaries are involved’. In addition, ‘payments to cover expenses are allowed’ (Seymour and Magri 2004: 48). Significantly, the Act provides for the social parents to establish parentage of the child. In instances where neither the birth mother nor her partner are the genetic parents of the child, ‘there is a [non-commercial] substitute parent agreement, and at least one of the substitute

²¹ The *Infertility Treatment Act 1995 (Vic)* superseded the *Infertility (Medical Procedures) Act 1984*, though the effects of the legislation are essentially the same. This Act was discussed in relation to IVF in the previous chapter.

²² Surrogacy through artificial insemination is further complicated in Victoria through s 10c of the *Status of Children (Amendment) Act 1984* which ‘deems the resulting child of a surrogacy arrangement to be that of the surrogate mother and her husband (if applicable) while denying the relationship between the child and the commissioning sperm donor’ (Stuhmcke 1996: 13). Hence, the social parents have to rely on the ‘relevant adoption and guardianship and custody statutory provisions to achieve a successful surrogacy agreement’ (Stuhmcke 1996: 13). The strict requirements of the *Adoption Act 1984 (Vic)* make this difficult as they not only prohibit private adoption but also dissuade adoption by relatives. As Stuhmcke (1996: 5) points, out altruistic surrogacy arrangements are most likely to occur among relatives and friends. In 1993 consideration was given to changing the law to ‘allow a woman related to an infertile couple (or a close friend) to become a surrogate mother’, however, this was abandoned after pressure from backbenchers and child welfare groups (Janu 1995: 205, 206). As Penne Watson Janu (1995: 203) notes, this would have to all intents and purposes ‘become the law in Australia as couples could naturally travel to Victorian clinics for IVF and/or other procedures’. Moreover, the planned legislation would have allowed for ‘surrogate mothers to receive medical costs and other expenses during pregnancy from a commissioning couple’ (Janu 1995: 206).

parents is a genetic parent, then an application may be made to the Supreme Court for a parentage order in respect of the child' (Seymour and Magri 2004: 48-49).²³ Hence, in this instance the genetic relationship between the social parents and the child forms the basis for the creation through policy of an 'imagined' family. As a consequence, the body of the birth mother is erased.

Under Section 7 of the *Surrogacy Contracts Act 1993* (Tas), surrogacy contracts both commercial and altruistic are unenforceable in Tasmania. Criminal penalties apply in relation to advertising and commercial arrangements. It is illegal under this Act to receive or give a payment or reward in relation to an arrangement such as this. Moreover, third parties are also prohibited under s5 from supplying services (either technical or professional) in order to attain a pregnancy where it is known to be in relation to a surrogacy contract (Janu 1995: 207, Seymour and Magri 2004: 47).

Australia has had two key surrogacy legal cases, the best-known of which is perhaps that of Maggie and Linda Kirkman. In this altruistic arrangement Linda Kirkman agreed to be a gestational surrogate for her sister Maggie. Maggie was unable to gestate a fetus due to a hysterectomy some years beforehand; however, her ovaries were still functioning. The embryo was created from eggs harvested from Maggie and inseminated with donor sperm, as Maggie's husband was also infertile. The resulting embryo was then implanted in Linda Kirkman, who successfully gave

²³ In 2000 the ACT Supreme Court, after an amendment to ACT surrogacy laws, recognized the genetic parents of a child born through a surrogacy arrangement with the child's 'aunt' as the legal parents of the two-year-old boy and allowed their names to be placed on the birth certificate (*The Advertiser* 2000: 24). The amendment to the Act enabled the genetic parents to apply for a parentage order thus allowing their names to appear on the birth certificate and removing the need to adopt the child. Also removed is the body of the birth mother, further facilitating the creation of a biologically 'imagined' family where no other bodies are 'seen' to be needed.

birth to a baby girl in May of 1988. The child was handed over to Maggie and her husband.

The Kirkman case is interesting in illustrating some of the complexities concerning what constitutes motherhood. Linda Kirkman, for instance, has noted that she could never have given away a child created with her genetic material and, moreover, that she developed an aunt/niece relationship with the child during pregnancy (NBCC 1990: 5). Hence, family relationships are equated in this understanding with genetic connections. In contrast, another sister, reflecting a belief in the primacy of pregnancy, was prepared to donate an egg but felt unable to gestate the fetus (Goodall and Robinson 2000: 183-184).

Interestingly, the donor, a friend of the family, was chosen due to his apparent resemblance to Maggie's husband (NBCC 1988b: 4). Hence, we see an attempt made to create what can be termed a 'biological' façade in regard to the family formation and the creation of the biologically 'imagined' family. As Goodall and Robinson (2000: 184) note, the sisters refer to the sperm 'as "donated to Sev"' (Maggie's husband) and, hence, in this context it is constituted as 'his surrogate genetic substance just as Linda is Maggie's surrogate womb'. Reflecting beliefs about the importance of the biological or genetic ties between men and their children, Maggie comments that while they 'are profoundly grateful to our sperm donor, one of the many men prepared to share their genetic material... Sev is her father and we cannot help taking advantage of the plasticity of infant features to see the father mirrored in the child' (Kirkman and Kirkman 1988: 308-309, quoted in Goodall and Robinson 2000: 187).

The genetic connection between Maggie and the baby was emphasised in the resulting dealings with the state.²⁴ In Maggie's words, 'I... wonder if they realise the significance of the use of my egg, an egg which I did not donate to Linda but which *she is gestating on my behalf*. The child is *genetically mine*' (Kirkman and Kirkman 1988: 235, quoted in Goodall and Robinson 2000: 184, emphases added). Hence, the pregnant body is constituted in these dealings as a vessel – little more than a fetal container whose role is the production of the child of, in this instance, the genetic mother.

Re Evelyn

As noted above, many states in Australia, including South Australia, have legislation that prohibits the enforcing of surrogacy contracts. In 1998 the South Australian legislation was tested in this regard in the case of *Re Evelyn*. It was found to be lacking. The significance of this case lies in its provision of the first opportunity to see how Australian courts will deal with custody disputes arising from surrogacy arrangements.

Briefly, 'Evelyn'²⁵ was born in December 1996 as a result of an altruistic partial surrogacy arrangement between a Queensland couple (termed by the court Mr and Mrs Q) and a South Australian couple (termed Mr and Mrs S) who had had a longstanding friendship. Mrs Q had undergone a total hysterectomy as a result of ovarian cancer. Mrs S offered to conceive and carry a child for the Qs which would

²⁴ At the time, questions were raised as to the legality of the arrangement under Victorian law which was introduced the same year and effectively banned gestational surrogacy. The Solicitor General, though, found it to be legal at the time. His reasoning was that 's 12 would have specifically referred to surrogacy if it had been intended by the Victorian parliament to cover surrogacy arrangements, and also that because the commissioning husband in the Kirkman case had had a vasectomy, this would constitute "infertility" under the Victorian Act' (Janu 1995: 205). As Janu (1995: 205) notes, this appeared to be a broad interpretation of the law.

²⁵ 'Evelyn' is a pseudonym given by the Court.

then be relinquished to them upon birth.²⁶ Following the child's birth the Qs took her ('Evelyn') to Queensland. However, Mrs S found it difficult to cope with the relinquishment and what she perceived to be a lack of adequate communication between the couples and removed 'Evelyn' to South Australia. Both couples instituted proceedings in the court.

Significantly, one of the arguments put forward by Mr and Mrs S was that the agreement was contrary to South Australian (and other) public policy and, hence, should be void. This argument was, however, rejected by the Family Court trial judge, a decision upheld by the Full Court of the Family Court. Had this argument been accepted and the surrogacy agreement voided, Mrs S ('Evelyn's' biological and genetic mother) would have under South Australian law automatically retained custody of 'Evelyn'. Instead, the case was decided upon the 'best interest of the child'. In this case it was decided that the child 'Evelyn' should be placed with her biological mother. The case went on appeal to both the Full Court of the Family Court and also to the High Court with the judgement being upheld.

In essence, the Ss case rested on the notion that 'Evelyn should be with her natural mother and that such a placement would provide Evelyn with a sense of completeness and have the benefit of enabling her to be raised with her biological siblings' (FamCA 55 (15 May 1998)), hence emphasising the importance of genetic connections. In contrast, the Qs argument emphasised the social elements of parenting:

it is in Evelyn's best interests to remain with them. They contend that she has grown very attached to them and their son Tom and that they are able to provide her with a settled, secure and familiar

²⁶ 'Evelyn' then is the genetic child of Mr Q and Mrs S.

environment. They contend that to remove Evelyn from her home of the past twelve months may well be traumatic to her (FamCA 55 (15 May 1988)).

The Qs also expressed reservations about Mrs S retaining contact. One of the arguments put forward in a Q affidavit was that they believed ‘that Mrs S is placing her interests above the child’s interests and above her duties to her husband and her three children’ (FamCA 55 (15 May 1998)), in essence implying that Mrs S was not fit to be a ‘proper’ mother.

The importance of genetic connections also played a part in the outcome of the trial and were subsequently canvassed on appeal. The trial judge found that Mrs S was ‘best equipped’ to deal with issues relating to ‘issues of abandonment and identity through her adolescence’. He also found that ‘the loss of Evelyn of not growing up with her biological half siblings outweighs her loss of her adopted brother, Tom’ (FamCA 55 (15 May 1998)). The trial judge stated

that, on balance, a child in Evelyn’s situation is more likely to cope readily with the prospect of being required to visit the home of her biological father and step-brother from the comfort of the home of her biological mother and her two biological sisters and one biological brother, than she would an alternate arrangement.

Again, in the longer term, I am of the view that the prospect of Evelyn having problems arising as a consequence of a sense of loss of the opportunity to be raised with her biological siblings is a greater loss than that likely to be occasioned if she is now separated from Tom (Jordan J quoted in FamCA 55 (15 May 1998)).

This was attacked on appeal by the Q’s lawyer as hypothetical, who also argued that if this approach was approved by the court it would mean that in disputes such as these the genetic birth mother would always retain custody. The Full Court found that there was no presumption in favour of the genetic parent or specifically the genetic mother, arguing that his Honour in fact weighed up the alternatives of

placing 'Evelyn' with either side and, as trial judge, he was in the best position to do so. They did, however, express reservations with his Honour's conclusions concerning the 'generality' of the assumption regarding 'Evelyn' and her siblings but found that this was an additional factor rather than the basis of his decision (FamCA 55 (15 May 1998)).

Simply, what is clear is that in any surrogacy dispute before the Family Court 'the best interests of the child' will be of paramount importance (Stumke 1998: 302), signalling a willingness on the court's part to apply the findings in cases that deal with traditional family formulation disputes, such as custody actions, to the issue of surrogacy. Once again we see that the genetic contribution forms the basis through which other issues are played out. We have yet to see, however, how the court will react when class is a more significant factor, as is often the case in surrogacy arrangements.²⁷ In international cases, such as Baby M, issues relating to social class and the 'best interests of the child' often intersect generally to the detriment of the birth mother.

Bioethical Engagement with Surrogacy – situated bodies situating bodies

As indicated throughout this thesis, in many countries, including Britain, Australia and Canada, there is a trend toward the use of bioethical engagement in making policy around the area reproductive technologies. Given the importance of bioethical considerations to the policy process below a more detailed analysis is undertaken of the ways in which women are positioned in regard to surrogacy

²⁷ It can be surmised that the Qs and Ss were of similar class status. In the judgement Mr Q and Mr S are described as a 'manager of a family company in which he was a shareholder' and medical practitioner respectively. Both Mrs Q and Mrs S are described as trained midwives who are available to provide full time care to 'Evelyn'. Moreover, there is no explicit suggestion that either family will undergo severe financial hardship with the court-ordered travel arrangements, which involve interstate travel.

within three key bioethical reports – the British, Warnock Report²⁸, the Canadian Report, *Proceed with Care*, and the Australian report by the National Bioethics Consultative Committee (NBCC), *Surrogacy Report 1*.²⁹

The Warnock Report – protected bodies

As discussed in Chapter 4, the British Warnock Report briefly canvassed the issue of surrogacy in their *Committee of Inquiry into Human Reproduction and Embryology*. The Committee observed that it gave some couples their only chance of having children and recognised the right of ‘some women’ to enter into surrogacy agreements (NBCC 1990: 68). Nevertheless, it noted that where there were financial interests involved the risk of exploitation was high. In the end the majority Report recommended that commercial surrogacy agreements be made unenforceable and that criminal penalties for agencies that recruited birth mothers be applied (NBCC 1990: 68).³⁰ Surrogacy, when used for convenience, was found to be ethically intolerable. Moreover, the utilization of birth mothers, despite the perceived benefits in providing infertile couples with children, was ‘classified as essentially unethical in nearly all cases’ (Brazier, Campbell and Golombok 1998: 15).

Aside from the moral implications of the technology, other issues were seen to impact on the acceptability of the practice. Significantly, attention was given to the

²⁸ In Chapter 4 I discussed the constitution of women’s bodies within the Report in regard to surrogacy. The importance of this Report from a policy perspective necessitates a broader consideration of the ways in which women are situated within the Report.

²⁹ The Reports maintain a similar approach in their attitude to commercial surrogacy, condemning the practice and recommending it be made illegal. In addition, all three Reports recommended the legal unenforceability of surrogacy contracts. However, the Reports differed in their approaches to altruistic surrogacy. The British and Canadian Reports recommended that the practice be discouraged and that third parties such as professionals be criminally liable for assisting with surrogate pregnancies (Warnock 1984, 8.18; Royal Commission 1993, 619). On the other hand, while not advocating the unfettered legalisation of surrogacy, the Australian Report recommended a model where surrogacy would be allowed but regulated.

³⁰ Two members of the committee provided a dissenting report calling for regulation of surrogacy arrangements. See Brazier, Campbell and Golombok (1998: 13-15) for an overview of the minority view.

potential for a social father to ‘be *vulnerable* to a claim by the carrying mother for an affiliation order if she keeps the child...’ (Warnock 1984: 8.9, emphasis added), reflecting dominant assumptions about the need to protect men from the claims of ‘devious women’ and their ‘spurious offspring’.

The Warnock Report (1984: 2.11) was explicit that it was concerned only with discussing the treatment of infertility within a heterosexual context. While acknowledging the potential for the technologies to provide single women and same-sex couples with children, the Commission believed ‘that as a general rule it is better to be born into a two-parent family, with both a father and mother’, though this did not necessitate marriage. This position reflected the wide belief that new reproductive technologies should be used to form traditional heterosexual families and access should be limited to those that would uphold this model (Millns 1995: 82). The focus on the heterosexual conventional or traditional family meant that assumptions about women’s role in the family as primarily ‘reproducers’ were embedded in the Report. Reflecting this, the Report pays more attention to the potential of these technologies to facilitate the creation of children who are genetically related to their social fathers. However, in regard to surrogacy this was seen to be overridden by the need to ‘protect’ birth mothers. As discussed in Chapter 4, women’s bodies in the Report are problematically reduced to a description of parts and stripped of their bodily context.

The Royal Commission on New Reproductive Technologies – vulnerable bodies

There have been two major Canadian reports which have dealt with the issue of surrogacy. The first, by the Ontario Law Reform Commission (1985), addressed questions raised by surrogacy in its *Project on Human Artificial Reproduction and*

Related Matters. Its significance lies in the majority finding which favoured legislative regulation on the basis that surrogacy was not immoral and a concern that prohibition would in effect send the practice underground (NBCC 1990: 70). Though the Report's recommendations would have been technically restricted to the province of Ontario, as McEwan (1999: 285) points out they would be able to 'serve as a foundation for legislation at the national level'.³¹

The Canadian Government then commissioned a national task force – termed the Royal Commission on New Reproductive Technologies – to deal with the issue of surrogacy and other bioethical issues such as IVF, assisted insemination, genetic screening, sex selection and the use of fetal tissue for research. The Commission resulted in a second report in 1993 entitled *Proceed with Care* [national report]. The termination of four appointments, the requiring of two extensions and an estimated cost of (at the time) Canadian \$28.2 million has meant, however, that the Report is viewed with some controversy.³²

Informing the Report was the principle of an 'ethic of care' (Canadian Royal Commission on New Reproductive Technologies 1993: 51). Encompassed in this principle was a priority 'on helping human relationships to flourish by seeking to foster the dignity of the individual and the welfare of the community'. Eight other principles were identified in order to 'enable decisions to be made that give concrete expression to the ideal of care' (Canadian Royal Commission on New Reproductive Technologies 1993: 52). These included Individual Autonomy, Equality, Respect

³¹ The province of Ontario did not take up these recommendations.

³² The termination of the four appointments was reportedly due to acrimony between some Commissioners and the Head Commissioner, Patricia Baird. The two most outspoken feminists were among those terminated, and it is argued the resulting controversy necessitated that Dr Baird be seen to give some credence to feminist concerns, though there are questions as to the extent this was successful (Valverde and Weir 1997: 420).

for Human Life and Dignity, Protection of the Vulnerable, Non-Commercialisation of Reproduction, Appropriate Use of Resources, Accountability and Balancing Individual and Collective Interests. The Report is interesting in its refusal 'to grant the principle of personal autonomy', considered to be an essential principle in bioethics, a 'privileged status', instead insisting 'that it be balanced by the other concerns identified' (Sherwin 1995). However, as Burfoot (1995: 504) notes, the Report is liberal in its approach and there is an emphasis on people's freedom to make decisions about their lives and their bodies.

Unlike the Warnock Report, access was not seen to be limited to heterosexual couples. Indeed, the Report recommends, for instance, access to AI for lesbian and single women be allowed (Burfoot 1995: 503). However, as with the NBCC (1990) *Surrogacy Report 1*, discussed in a moment, the Canadian Report reflects a largely Western view of procreation and valorises the traditional Western concept of the family. In regard to non-commercial surrogacy arrangements between family members or close friends, for instance, the Report notes the problems that the insertion of (an)other body into the family unit may cause, identifying a 'potential for confusion on the part of the child, because of continuing contact between the birth mother and the commissioning parents' (Canadian Royal Commission on New Reproductive Technologies 1993: 689). The traditional family form and the roles within it are seen as sacrosanct.

Women are positioned in the section on surrogacy as inherently vulnerable. While this is especially the case in regard to birth mothers, intended social mothers are also constituted, to some extent, in this way. The Commission questioned 'the voluntary participation of commissioning women' in surrogacy arrangements due to

the pressures placed upon them as a consequence of the weight society gives to the genetic connections between men and their children and the untenable situation that is raised by a man having a child essentially with another woman (Canadian Royal Commission on New Reproductive Technologies 1993: 676). Hence, infertile women are considered at best misguided in their wish to have children and by implication it is the state's role to *protect* them from themselves and others.

Birth mothers are positioned as vulnerable in (nearly) all cases and consequently also in need of social and legislative protection. Commercial arrangements were considered to 'offend human dignity by commodifying women's reproductive capacities and commodifying children' (Canadian Royal Commission on New Reproductive Technologies 1993: 683). While the Report explicitly states that it upholds 'women's right to autonomy', surrogacy rather than enhancing a woman's autonomy is seen to diminish it because of the limitations placed on the personal behaviour of the birth mother, through contractual obligations, by the social parents (Canadian Royal Commission on New Reproductive Technologies 1993: 683, 684). Women's bodies are, hence, constituted as vulnerable and objects of concern. Significantly, the Commission as a 'rational', 'value-neutral' body is positioned as able to recognise this and prevent birth mothers from making ill-founded choices.³³ While the Commission's recognition of the social pressures placed on women in regard to reproduction is noteworthy, its conceptualisation of women's bodies as objects over which other bodies, such as regulatory bodies, are given the authority to make decisions about remains problematic.

³³ McCormack (1996: 204) argues that the Report gave little voice to infertile women who in her opinion should have been a privileged voice.

Regulated Bodies – the consideration of surrogacy by the NBCC

While, as noted in the previous chapter, the Australian Federal Government does not have the constitutional power to regulate surrogacy, the referring of the issue of surrogacy, in May of 1988, by the Council of Social Welfare to the National Bioethics Consultative Committee (NBCC) represented a move toward the introduction of uniform laws and practices relating to the area. The inquiry resulted in the 1990 *Surrogacy Report 1*, which followed a number of state-based enquiries and a report by Family Law Council (1985).³⁴

In its Introduction, the Report (1990: 1) set apart its ‘distinctive contribution’ to the debate. Firstly, the NBCC saw as its function to ‘provide a national perspective...in the hope that some kind of national approach might be adopted’. A second emphasis was placed on the need ‘to provide a distinctively ethical approach to the problems raised by surrogate motherhood to complement the predominantly legal and social approaches of the various State Governments and Law Reform Commissions...’ (1990: 1 emphasises in text). Hence the framework and boundaries within which the issue of surrogacy was to be understood was established early on.³⁵

The NBCC further clarified the framework within which the issue was to be discussed and understood. As with the general approach of the Warnock Report, surrogacy was to be considered specifically in relation to ‘the alleviation of

³⁴ There have been a number of other state based inquiries into the issue including the NSW Law Reform 1988, *Artificial Conception: Surrogate Motherhood Report*, the Victorian *Report on the Disposition of Embryos Produced by In Vitro Fertilisation 1984*, the *Queensland Report to enquire into Laws Relating to Artificial Insemination, In Vitro Fertilisation and other Related Matters 1984*, the Select Committee 1987, *Report on Artificial Insemination by Donor In- Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia* and the *Report of the Committee of Inquiry to Investigate Artificial Conception and Related Matters in Tasmania 1985, Final Report* (Stuhmcke 1996: fn 29). The majority either ‘expressed grave reservations’ about surrogacy in Australia or indeed recommended its prohibition (Andrews 1993: 2 in Stuhmcke 1996).

³⁵ I have already discussed the importance of the role of bioethics committees in policy considerations in Chapter 1.

infertility for couples in a heterosexual relationship for whom other forms of infertility treatment were inappropriate'. While it was recognised that surrogacy could be used by single persons and same-sex couples, the Report noted that this was 'not the situation at present' (NBCC 1990: 2). Surrogacy was to be treated as an alternative practice of 'traditional' family formation. Heteronormative values and a presumption of the need for a father were to structure the Report, indicating a bias toward the conventional family form.

In keeping with this focus, inherent in the Report, and reaffirmed by it, is the Western notion of the importance of biological heredity. The Report (1990: 4) noted other practices of providing infertile couples with children such as Indigenous cases of customary adoption where children are gifted to infertile couples, stating that '[S]imilarly in cultures where biological parentage is not as strongly emphasised as wider kinship links, it is commonly accepted that women may bear children for other women'. However, these were not deemed relevant to the rest of the discussion with the Report going on to note that 'in European Cultures, while surrogacy has undoubtedly been practised in the past it has never been formally recognised by law'. Family relations then were to be understood in a narrow and conventional way. A further consequence of this focus was that, as with the Royal Commission on New Reproductive Technologies (1993) *Proceed with Care* [national report], the voices of Indigenous women were largely silent in the Report.³⁶

³⁶ I acknowledge that my body-focussed approach to policy is similarly underpinned by Western conceptualisations of bodies. However, this does not diminish the value of the approach. I would, however, like to signal the need for a further project to address the ways in which bodies are conceptualised in other cultures.

Grounding the NBCC report were liberal democratic assumptions. In particular three principles were openly identified. These were the principle of personal autonomy, the principle of justice and the principle of the common good. (NBCC 1990: 14). Considerable attention was given to the principle of personal autonomy. As the Report itself acknowledges this principle caused much discussion among the submissions with those in support of surrogacy generally also in favour of the principle while those not supportive of surrogacy arrangements expressing reservations about the principle (NBCC 1990: 86).³⁷

The defining of the concept of ‘personal autonomy’ within the NBCC Surrogacy Report occurred in ‘classic liberal terms’ (Bacchi and Beasley 2002: 337). The Report notes that in the principle of personal autonomy or self-determination there is an assumption that people should be able to ‘make their own life decisions for themselves so long as those decisions do not involve harm to others’ (NBCC 1990: 14). The Report then goes on to explain how in regard to surrogacy this could be interpreted. There were seen to be two primary elements

- (a) that a couple should, as far as possible, be free to make their own procreative arrangements to form a family so long as this does not involve demonstrable harm to others... and
- (b) that a woman should be free to make decisions about the use of her own body and to gestate a child for another woman so long as this does not demonstrably harm others... (NBCC 1990: 14)

In regard to the principle of autonomy, the body is constituted within the report as a ‘passive’ object over which the individual has personal control (Diprose 1995: 204). However, this control is limited by the edict that harm should not be caused to others. Consequently, limitations are placed on what can be done with women’s

³⁷ Indeed, the two dissenting reports by Sr Mary Regis Dunne and Heather Dietrich express concerns with the use of the principle.

bodies by the larger social body. Significantly, it is rare to see men's bodies talked about in these terms (Rowland 1991: 73).

Interestingly the Report constructs surrogacy, and also sees it historically, as a practice that occurs among women. For instance, the above quote specifically states the right of a *woman* to 'gestate a child for another *woman*' (NBCC 1990: 14, emphasis added). However, this is to take an idealised and even perhaps romanticised view of surrogacy arrangements. On this point the United States academic Susan Sherwin's (1994: 186) observations are useful:

in the reality of contractual arrangements, these relationships are commonly determined and mediated by men, specifically by the man who is the biological father and the husband of the adopting mother. He is the one who retains parental status no matter what custody decision is finally made by the birth mother and, in the event that she does have second thoughts about surrendering her maternal rights, it is he, not his wife, who will have standing in any courtroom deciding custody.

Moreover, there is a tension in the Report between the view of surrogacy as a practice that occurs among women and the focus on genetic connections in the discussion of embryo transfer. Here, the Report (1990: 6, emphasis added) notes that in cases where a woman is 'unable to sustain a pregnancy: *her* child ... may be transferred to the uterus of another woman who freely offers her services'. Implicit here is that the genetic connection between mother and child is the determinant of true parenthood – the 'other' uterus is simply a vessel to facilitate this.

Rosalyn Diprose (1995: 202) argues that the NBCC Report centres on a notion of the split between the self and the body as it is reliant on a belief in the autonomous disembodied individual. According to Diprose, then, in failing to take into account the embodied pregnant body the Report fails to address adequately the issue of

surrogacy. Diprose also identifies a contradiction in the discourse of the autonomous individual. The NBCC Report, as she notes, concluded that women required some sort of protection regarding surrogacy. Hence, women are in effect not considered autonomous in the same way that men are because there are other interests involved – the fetus/child and a concern for population. Women’s bodies in this way are produced as sites of and for regulation and surveillance.

Each of the Reports discussed in this section uphold and reaffirm an unsatisfactory model of ‘minds making decisions for their bodies’ (Bacchi and Beasley 2002: 337). Women are conceptualised as passive or vulnerable and, hence, not capable of exercising the ‘right’ to exercise sovereignty over bodies. Moreover, little attention is paid to relevant differences among women. Hence, the attention paid to the implications for women participating in surrogacy arrangements is undermined by the problematic ways in which women and women’s bodies are situated within these Reports. To repeat the point made in Chapter 4, the constitution of women as in need of protection produces certain conclusions about women’s bodies and justifies intervention and decision making over women’s bodies in the area of reproductive policy. These Reports again support the contention that around the area of surrogacy, as in reproduction in general, women tend to be situated in simple terms as controlled by their bodies.

Conclusion – The Right to Procreate, the Construction of Proper Families and Fragmented Bodies

As with other reproductive technologies, surrogacy is above all a practice of creating families. While historically the practice has been used to create genetic links between the male social parent and *his* child, developments in reproductive technologies increasingly mean that this genetic relationship also exists with the

female social parent. As with IVF, while surrogacy arrangements facilitate the creation of alternative family types, such as male same-sex headed families, assumptions in other policies regarding the constitution of a proper family undermine the legitimacy granted to these families.

In many surrogacy cases we see that the genetic material of the social father, and in some instances the social mother, forms a basis through which other issues such as class and race are played out. Increasingly, the genetic material of the social parent/s is privileged in policy decisions over the birth mother's body, thereby constituting the body of the birth mother as little more than a fetal container for the production of the child. Judicial and policy decisions which enable social (genetic) parents to place their names on the birth certificate, for example, effectively erase the role of the pregnant body in the reproductive process. The body of the birth mother is, hence, constituted as something to be monitored and controlled during the pregnancy and disposed of after the event. This constitution of genetic material as separate from the 'reproductive body' results, I argue, in the fragmentation of the birth mother's pregnant body.

McCormack (1996: 211) argues that, given that pregnancy is socially constructed, assisted surrogacy or (to use her term) preconception agreements are no more alienating than pregnancy and childbirth. However, for the birth mother there are demands on her body that are significantly different from those expected of the social parents and, in cases of commercial surrogacy, other 'employees'. Pregnancy 'involves significant physical and psychological demands', which result in 'dramatic physiological, hormonal and social changes in a woman's life' (Sherwin 1994: 188). In addition, surrogacy also requires a form of self-alienation from the

body which is further increased through the use of ultrasound technology in the regulation of pregnancy.³⁸ The perceived separation between the fetus and the birth mother's body ultimately increases the rate of 'disappearance' of the birth mother's body in the surrogacy process. While, with other forms of employment, there is the opportunity, either real or imagined, to quit (Sherwin 1994: 188), in most surrogate agreements the ability to 'quit' or abort the fetus is controlled by the social parents.³⁹ In effect, the individual woman's 'right' to personal autonomy is measured against the autonomy of others. In the next chapter I look more generally at how genetic material is constituted in a range of practices related to reproduction and the implications of this constitution for women's and men's bodies. A particular focus is placed in the next chapter on the growing tensions and contradictions in the different policies.

³⁸ Gillian M. Goslinga Roy (2000: 131, 132), in her study of a gestational surrogacy arrangement, notes, for example, that the ultrasound pictures became representative of the body of the child for one intended social mother. Moreover, it meant that she no longer felt the need to feel the baby move through the stomach of the birth mother. The commissioned woman conceptualised her feelings that *her* child was 'away from her parents who want to love and hold her' (quoted in Goslinga Roy 2000: 132). The political uses of ultrasound technology has been discussed in detail in Chapter 4.

³⁹ In addition, other forms of surveillance can be placed on the birth mother. A sample surrogacy contract, for example, available at one of the online surrogacy agencies, requires the birth mother to not only abstain from drinking and tobacco products but also to submit to any 'reasonable medical test'. See for example, Surrogate Mothers Online (2006) 'Sample Traditional (AI) Surrogacy Contract'. Moreover, in cases where the birth mother is in a (heterosexual) marriage her husband will have to consent to the surrogacy pregnancy, otherwise he will be declared the father of the child.

Genetic Material in Policy: men, families and the control of genetic material

Unlike motherhood, fatherhood has posed complicated problems for a legal system that has based the ownership and inheritance of property on descent through the male line – on that is, patrilineal and primogenital ordering (Smart 1987: 99).

As the previous two chapters have illustrated, policies and legal institutions have taken different and often conflicting views on whether parenthood and families are constituted by genetic or social relationships. In most Western Countries, for example, policies regulating IVF technologies have upheld the concept of children as a ‘product of marriage’ even in cases where there is explicit knowledge that donor gamete material has been used to create the child. In the case of surrogacy the situation is more complex. In some states of the United States, where surrogacy is legal, children born from surrogacy agreements have often been presumed in law to be a child of the intended social parents. In other jurisdictions, including some states of Australia, surrogacy contracts are unenforceable and in these instances the child is presumed to be the child of the birth mother.¹ More recently, there has been a trend in a number of places towards enabling the genetic and social parents of a child born from a surrogacy arrangement to have both their names on the birth certificate thereby erasing the role of the birth mother’s body.

Nonetheless, what can be said is that the theme of the creation of traditional families is given primacy in most debates and disputes surrounding the issue of IVF and this

¹ However, the Australian test case of *Re Evelyn* decided custody on the basis of the ‘best interests of the child’. In this case ‘Evelyn’s’ birth mother who is also her genetic mother attained custody. Importantly, as noted in the previous chapter, in the case of *Re Evelyn* both parties that fought for custody of ‘Evelyn’ could be said to fall into the category of the traditional family. Moreover, the parties were both of similar economic status. As a result the question of custody revolved around which family rather than which ‘type’ of family.

trend can also be seen in debates surrounding the issue of surrogacy. As Smart (1987: 100) succinctly puts it: 'The price to pay for the reward of children becomes conformity to the nuclear family ideal'. Hence, we see that in many cases policy overcomes a lack of genetic relatedness between social parents and their children through the creation of a biologically 'imagined' family.² However, tensions can be seen in the creation of (some of) these families as a result of an increasing focus which is being placed on the importance of genes in determining 'who' we are and a consequent policy trend toward giving children born from donor gametes the 'right' to know their genetic origins. Significantly, this focus on the importance of genes is also having policy implications elsewhere, for example, in areas such as child support and abortion.

This chapter looks at a further selection of policy areas where genetic material can be found to play a role and examines how the factors mentioned above operate in the discourses surrounding these areas. Specifically, a focus is placed on policy areas where men (or the state on their behalf) have had claims either on or against paternity as a result of their genetic 'contribution'. The policy areas considered in this chapter include child support, abortion, adoption, posthumous reproduction and the status of frozen embryos. In common with the two previous chapters, these areas are all concerned in some way with the process of reproduction and family formation. Moreover, they have been affected by advances in reproductive and genetic technologies.

The chapter teases out some of the differences, tensions, contradictions and contestations that can be found in the discourses that frame our understanding of the

²It needs to be noted that until the advent of reproductive technologies there were rarely questions in regard to maternity due to the birth process (Mahoney 1995: 39).

issues related to the above policy areas. Within the discussion there is a concentration on specific issues and, as a consequence, the chapter does not provide an overview of all the key debates surrounding each policy area. For instance, in terms of abortion the discussion concentrates on the claims of (some) men to prevent an abortion but does not address the arguments concerning pro-life and pro-choice positions. In addition, the lack in many instances of Australian case law again necessitates a focus on both Australian and international cases. As in the previous two chapters there is a focus on elucidating how women's bodies are conceptualised in policy considerations around these areas. However, a focus is also placed in this chapter on identifying the ways in which men's bodies are conceptualised. Not all men's bodies are given equal status. First, however, it is necessary to elaborate further on the historical background to the legal relationship between children and their parents and the concept of paternity that I touched on in the Introduction.

Parental Responsibility and the Assumption of Paternity

IVF, and its related technologies, offers a degree of scientific assurance concerning the knowledge of a child's genetic parents as conception takes place in a lab and is, hence, subject to a number of regulatory processes. However, this surety has not historically been seen to be the case for families conceived through what are generally considered to be more 'natural' methods (Smart 1987: 100). While the birth process has traditionally guaranteed the birth mother her place as the child's biological mother (Mahoney 1995: 39), the situation for prospective fathers has historically been considered to be more problematic. Consequently, the question of the status of children born in marriage, and indeed outside of marriage, in regard to parenthood is one that has concerned legislators in Western democracies for many

years. Joan Mahony (1995: 38) neatly sums up the perceived difficulties faced by governments:

Many of our social mores (such as the value placed on virginity for women, and the greater penalty for adultery by women than men) derived both from the role of marriage as a vehicle for the transmission of property from one generation to the next and from the inability to know for certain what man fathered what child, unless the mother of the child were known to have had sexual relations with only one man. (And of course, only the woman could know or verify this.)

Underpinning this concern is the assumption that it is problematic to rely on women to stipulate paternity – in essence, women cannot be trusted to be truthful. Not surprisingly, then, legislative concern regarding parental rights has centred on the status of children in regard to fatherhood. The passing of property through the patriarchal line meant that at issue for legislators were economic consequences and issues of societal ordering as well as those of the biological and cultural implications of fatherhood (Smart 1987: 99).

As noted in the Introduction, English law mediated the ‘problematic’ nature of paternity, and the question of the relationship between men and ‘their’ children, by and through the institution of marriage (Smart 1987: 99). The presumption of paternity, or *pater est quam nuptiae demonstrant*, meant that children born within a marriage were considered to be a child of that marriage or more specifically a child of the marriage’s patriarchal head (O’Donovan 1998: 211). With this presumption the male head of the family gained total ownership over ‘his’ children (Shanley 1995: 222).³ Consequently, the biological or genetic link between men and their children, while seen to be significant, was not considered to be ‘the primary factor’

³ Significantly, the control over the children was an extension of the control over his wife. As such, any assets that she brought to the marriage were considered to be the property of her husband (Shanley 1995: 222). It needs to be noted that while this conferred great power on men it also made it difficult for them to rid themselves of their obligations (Smart 1987: 104).

in the legal setting (Smart 1987: 99). The state dealt with cases where genetic paternity was lacking through the creation of biologically ‘imagined’ families.

The perceived need to protect family estates from the claims of so called spurious offspring, or ‘illegitimate’ children, led to the consideration in English common law of an ‘illegitimate’ child as *filius nullius*, or a child of no one (Smart 1987: 101). Under this conception ‘illegitimate’ children were not entitled to the economic or social benefits of ‘legitimate’ children. In this instance, genetic links were considered to be immaterial. ‘Illegitimacy’ was defined by a lack of marriage rather than a lack of biological or genetic connections.⁴

Embedded in the legal relationship between children and their fathers were assumptions about the financial responsibility and care of the resulting child or children. The legal relationship established that biologically ‘ideal’, or in some cases biologically ‘imagined’, fathers should contribute to the upbringing and well-being of ‘their’ children (Smart 1987: 102). One of the primary motivations of the state has always been, and as I shall argue in a moment continues to be, the question of who should be financially responsible for children. Reflected in this concern is a desire to minimise the duty of the state to provide for what is considered to be someone else’s offspring. As Smart (1987: 102) observes, at times this concern led the state, and other institutions, into taking active steps to recoup their monetary contributions:

⁴ By 1841 mothers were entitled to sole custody of their ‘illegitimate’ children though the position in relation to fathers had yet to change (Smart 1987: 101). Under these conditions ‘illegitimate’ children were still not entitled to inheritance of either property or name. Similarly in the United States under common law while a man had complete control over the children that were born to his wife he had no responsibility or legal relationship to children that were born outside of marriage (Shanley 1995: 222). Though today protections against claims by ‘illegitimate’ children have been largely eradicated (Shanley 1995: 224), as Smart (1987: 101) observes there has been a long struggle to establish the legal relationship between the ‘illegitimate’ child and the genetic father.

At various moments in history the state would help mothers to extract maintenance through affiliation orders from their lovers; at other times the Poor Law Guardians were only interested in keeping the money to recompense the parish for the maintenance of the 'bastard'.

However, putative fathers 'had little to fear from the laws of affiliation unless they provided support voluntarily or admitted paternity'. Not only was there a social cost involved for women who went to court and admitted to sexual relationships outside of marriage but, in addition, these women could also easily be subjected to allegations of promiscuity, by the men they were claiming against, in an attempt by the men to contest the claim (Smart 1987: 103).

The state, then, has always had dual and inextricably linked, and sometimes conflicting, concerns in the maintaining of the traditional patriarchal family. In the presumption of paternity the law has at times acted against the interests of individual men because of the higher goal – the protection of the patriarchal family and the maintenance of the upkeep of citizens (Smart 1987: 105). Subsequently, the law has been prepared to override individual rights where necessary to attain this goal. As a result, the state has historically been reluctant to 'bastardise' children because of the fear that it would leave children as no longer financially supported (Smart 1987: 104).

The historical concept of the presumption of paternity, as we have seen in the previous two chapters, continues to underpin policy considerations around the area of reproduction and family formation. The Australian *Family Law Act 1975*, for example, states at 69P (1) that '[I]f a child is born to a woman while she is married,

the child is presumed to be a child of the woman and her husband'.⁵ Interestingly, though not surprisingly, women's reproductive bodies are constituted in the Act as passive. The child is born to the woman – she does not give birth to the child. Reflecting state-based policy approaches in the area of reproductive technologies the Act (60H) also makes provisions for children born as a result of 'artificial conception' procedures. In addition, the Act deals with the status of children born in de facto relationship under 69Q 'Presumption of paternity arising from cohabitation'. This section states that a 'child is presumed to be a child of the man' if 'at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married'. While policies such as the *Family Law Act 1975* have recognised societal changes, for example dealing with the status of children born as a result of reproductive technologies and children born outside of marriage, current policy continues to reflect historical notions of heredity.⁶ However, advances in genetic technologies are challenging this practice.

⁵ The Act further defines the conditions under which a child is presumed to be a child of the marriage stating:

- (2) If:
 - (a) at a particular time:
 - (i) a marriage to which a woman is a party is ended by death; or
 - (ii) a purported marriage to which a woman is a party is annulled;
 - and
 - (b) a child is born to the woman within 44 weeks after that time; the child is presumed to be a child of the woman and the husband or purported husband.
- (3) If:
 - (a) the parties to a marriage separated at any time; and
 - (b) after the separation, they resumed cohabitation on one occasion; and
 - (c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and
 - (d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the divorce of the parties; the child is presumed to be a child of the woman and the husband (*Family Law Act 1975* 69P).

⁶ Under the Act the court can make an order for parentage testing (see sections 69W-69Z *Family Law Act 1975* for further details).

Implications of Paternity Testing – intended and unintended consequences

Prior to the 1980s blood tests were of use in disproving, with relative accuracy, paternity but could not actually determine if the person tested was the genetic father (Smart 1987: 102). In simple terms, they could tell a man that he was not the genetic father, but could not with any certainty tell him if he was the genetic father. The ability to genetically test parental identity⁷ with a degree of certainty has meant that questions of paternity and in rare cases maternity, and indeed questions arising out of financial concerns such as child support, can now be subjected to genetic ‘proof’.⁸

Paternity testing has historically fitted in to two distinct legal categories – voluntary testing where the parties involved have agreed, and court-ordered testing arising out of a dispute (O’Donovan 1998: 212). An obvious advantage of paternity testing for the state is that genetic fathers, not assumed to be fathers at law because the children are born outside of either a marriage or a de-facto relationship, who do not fulfil their parental responsibilities can be made accountable. While child support has long been a contentious issue for governments it has increased as a ‘problem’ along with the increase in the divorce rate and the greater legal acceptance of children born outside of marriage.

⁷ It is necessary to note that in the main when we are talking about testing parental identity we are talking about the testing of paternity and, hence, the identification of genetic fatherhood. As noted previously it is rare that maternity is in question. However, there have been a number of cases where there have been mistakes in IVF labs and also cases where newborn children have been given to non-biological parents.

⁸ Agencies, which carry out paternity testing, claim that it is now possible to test paternity by means of DNA profiling with a 99.9% success rate (see for example, Fairfax Identity Laboratories 2006). It is still not possible to determine definitively genetic parentage. The ascertaining of paternity and maternity rests, rather, on statistical probability (O’Donovan 1998: 219; ALRC/AHEC 2003: 35.17-35.19).

The introduction in 1999 by the Australian Federal Government welfare body, Centrelink, of a policy of enforcing minimum child support payments from non-custodial parents through the Centrelink system is illustrative of the importance placed by governments on this issue. Under this system parents receiving welfare payments were initially expected to contribute a minimum of Australian \$260.00 a year, which worked out as approximately ten dollars per fortnight (Centrelink 1999: NAT 2893-3.1999).⁹ While this can be considered to be a minimal contribution, it is significant in making parents, primarily 'errant fathers', undertake some responsibility for the upkeep of their offspring. However, there are other consequences of implementing this type of regulation. By enforcing child support payments the state also participates in the re-inscribing of the role of the patriarchal father as responsible for the upbringing of the child. Hence, even though the family is fractured, the state attempts to maintain it along patriarchal lines where possible.

Despite the ability to ascertain paternity with a degree of certainty through testing, laws dealing with the question of paternity suggest that there is in fact some uncertainty and disquiet with the issue. In O'Donovan's (1998: 211) words, '[I]n so far as popular opinion assumes legal and genetic paternity to be unitary, the law creates a fiction'. As with other issues raised by reproductive technologies, the law, and policy, has in many cases yet to catch up to the questions raised by advances in paternity testing.¹⁰

⁹ The minimum assessment amount for child support is currently \$320.00 per year. It is indexed to the CPI. Factors such as the parent in question having major care of the child or children can reduce the payment. It is also possible in some circumstances to appeal to the Australian Government Child Support Agency to reduce the 'minimum assessment to nil' (Australian Government Child Support Agency 2006).

¹⁰ It has been estimated that approximately twenty five percent of people that initiate paternity testing find out that the child is not theirs. This is said to translate into approximately 5% of the population (Macdonald 2000).

Advances in the technology now enable paternity testing to be carried out successfully through the use of bodily material such as hair samples (taken at the root) reducing the requirement of more formal DNA testing.¹¹ Significantly, this method allows the test to take place without the mother's DNA and, hence, without her knowledge or consent. In simple terms, this type of testing enables the ascertaining of paternity in secret (O'Donovan 1998: 216) and consequently suspicions about lack of paternity can be settled outside of the public sphere. While at present this method is not admissible in Australian courts and another court-approved test must be undertaken, it enables often-costly court challenges to proceed with an increased chance of a successful outcome for the 'social' or biologically 'imagined' father challenging his parental responsibilities.¹²

In 2001 the Australian legal system was presented with its first test as to how it would react in cases dealing with disputes arising out of DNA testing or, as it is often termed by the media and father's rights groups, 'paternity fraud'.¹³ The case, *Magill v Magill*, heard initially by the Melbourne County Court, involved a lawsuit by a man against his ex-wife for the mental anguish that he claimed to have felt at the discovery that the two youngest children, conceived during the period of their

¹¹ This type of test is relatively inexpensive when compared to the more traditional methods of testing such as blood testing. Online agencies such as DNA Solutions (2006) offer paternity testing through this method from Australian \$495.00 for one child. The premium test, which is recommended by the agency, is currently \$595.00. It is said to be 100 times more accurate. The test requires the collection of five hair samples from each participant, which are then placed in separate snap lock bags or collection bags labelled father, son etc and then sent in for analysis. The test results are available within three weeks (for further details see www.dnasolutions.com.au/asfaq.htm, accessed 24/09/06). Questions have been raised about the accuracy of this method given the possibilities for interference and sabotage. It has been reported that two men have already been convicted of attempting to switch a DNA sample in a lab. Moreover, the potential to send in hair samples of other people falsely labelled has also been of concern (Macdonald 2000).

¹² Increases in the rate of Australian men accessing DNA testing is reflective of a trend witnessed in other countries such as the United States. According to a report on the ABC television *7:30 Report*, in the United States some DNA laboratories are performing approximately 50,000 tests per year (Courtney 2001).

¹³ The term 'paternity fraud' not only reflects dominant discourses of (some) women as the devious 'femme fatale' out to 'trap' innocent men but also reaffirms this notion.

marriage, were not his biological children. Mr Magill had financially supported all three children after separating from his wife in 1992. However, DNA tests taken in 1999 showed that Mr Magill was not the genetic father of the younger children. He sued his former wife for fraud claiming that she had known all along that the children were not his. Mrs Magill, for her part, claimed that in 1995 she alerted him to the fact that one of the children may not have been his but had not intentionally deceived him. In the initial case, the County Court awarded Mr Magill \$70,000 in damages. However, this judgement was overturned in the Court of Appeal (Gregory 2005). The case went on appeal to the High Court. As with the surrogacy case of *Re Evelyn*, the High Court gave an indication that ‘best interests of the child’ would again be a key factor. In the hearing, Justice Kirby drew attention to the importance of Article 3 of the Convention on the Rights of the Child which, he notes, binds courts ‘to take as the starting point ... in any problem that comes before a court the best interests of the children’ (*Magill v Magill [2006] HCATrans 163 (7 April 2006)*).¹⁴ What constitutes the ‘best interests of children’ is of course based on interpretation and influenced by socially dominant values.

The Magill case is interesting in illustrating the complexities in relation to what is seen to constitute parenthood. The following exchange quoted in the High Court hearing transcript is instructive in this regard. Mr Magill is quoted as saying,

I believed that I was the father of *all three of my children*.

When questioned on his reasons for this belief he states:

¹⁴ The High Court dismissed the Appeal

Well, I had no reason not to believe it, I watched all three of the children born. I was present at the hospital when all three children were born in Sea Lake and I had no reason to believe that *any of my children* weren't mine, sir (*Magill v Magill [2006] HCATrans 163 (7 April 2006)*, emphases added).

A tension can be seen in these statements with Mr Magill referring to the children as 'my children', yet in the same instance stating that the children were not his.

Similarly, in a report broadcast on the Australian ABC television *Lateline* program (Macdonald 2000), a man who was shown not to be the genetic father of the child he had supported and shared custody of for the last eleven years describes a conversation with his 'son', which is also worth repeating. He notes that when he asked the boy what he thought about the fact that he was not really his father the boy replied 'But you are really aren't you?' to which he replied 'Yeah of course I am, I'll always be your dad and you'll always be my son' (quoted in Macdonald 2000). Yet the report ends with the comment that the 'father' was 'now going back to the Family Court in a bid to get thousands of dollars in child support refunded. Parenthood in this instance then is constituted in two distinct ways. Genetic parenthood is seen to entail financial responsibility whereas social parenthood does not.

The cases of so-called 'paternity fraud' suggest that we are witnessing in public perceptions a shift toward the importance of genetic conceptions of parenthood that are seen to override a social parental role. In both of the above-mentioned cases a decade of parenting in the social and legal sense does not actually translate into being seen by the non-genetic parent actually to constitute 'parenthood' in the

‘proper’ sense of the term – because of the removal of the genetic connection. While it can of course be assumed that one of the major issues is seen to be deceit in the relationship, this does not diminish from the underpinning assumption in these cases that ‘proper’ parenting is measured in genetic connections and not years of care.

Importantly, the cases illustrate the growing role that DNA testing is now playing in disputes that come before the Family Court (O’Brien 2001),¹⁵ which has led to an increasing number of DNA testing laboratories offering testing to the general public – specifically men. At the time of the initial *Magill v Magill* court case, one Australian DNA testing lab was advertising on late-night television. Its voice-greeting message, heard when ringing the 1-900 number, stated ‘Hello and welcome to “Who is the father?” brought to you by Gene-E’ (Courtney 2001), reflecting and also reaffirming biological assumptions concerning fatherhood. Interestingly, the consultant attached to Gene-E at the time is quoted as saying ‘I had no idea that promiscuity among women was as high as the results appear to show’ (Edelsten 2001 quoted in Courtney 2001). Hence, women are constructed as they have been historically as though they cannot be trusted and as such they need to be governed and subjected to forms of surveillance such as paternity testing.

In the United Kingdom there have been a number of significant cases regarding paternity, which illustrate the difficulties faced by the courts. A useful summary of the general reactions of the courts is provided by O’Donovan (1998: 218). She notes that

¹⁵ The ABC television program, the *7:30 Report*, quotes one lawyer (David Lardner) as stating that he is seeking ‘DNA testing in one or two cases per year’. The program also noted a case in which a property settlement was significantly reduced after paternity tests proved that the husband was not the genetic father of the child. (Courtney 2001).

the presence or absence of another man willing to be the father is a crucial aspect. Where a third party believes himself to be a child's father, and wishes to displace a man who benefits from the presumption of paternity, or birth certificate evidence, the courts have shown reluctance to allow the challenge. Welfare is interpreted as security and continuity of a child who already has a father. Where the mother wishes to establish the paternity of her child for financial or other reasons, welfare is interpreted in terms of those reasons. Where a quasi-government agency charged with enforcement of child support wishes to attach financial liability to a man as the child's genetic father, it can be predicted that a court will order DNA testing to establish paternity if denied.

Hence, whose interests are furthered by paternity testing is an essential factor in the decision-making process. It is apparent still, then, at least in the legal setting, that 'scientific issues of genetic identity seem to be of lesser importance than social and material welfare' (O'Donovan 1998: 218). However, the increasing focus placed on the importance of genes in determining 'who' we are means that it is likely that this stance will be harder to maintain in the longer term policy context.

O'Donovan (1998: 218) identifies two key British cases where the courts have taken conflicting positions in regard to paternity claims. In the first instance, *Re F*, she notes that the courts created 'a dichotomy between welfare and scientific truth'.¹⁶ In this case a man believing himself to be the genetic father of a child applied for a paternity order, a claim which was opposed by the mother of the child. The child in question had a 'presumptive legal father to whom the woman was married' (O'Donovan 1998: 218). The 'court refused to order DNA testing on the basis that the welfare of the child required to non disturbance of the existing family', a decision which was upheld in the Court of Appeal. While the Court of Appeal addressed the issue of the importance of genetic heritage it balanced this concern against the perceived harm of the disruption of the family unit (O'Donovan 1998:

¹⁶ O'Donovan notes that this reasoning has been applied in several other cases.

219). The importance of the traditional nuclear family, which was in this case biologically 'imagined' rather than biologically 'ideal', was maintained and affirmed.

O'Donovan contrasts the position taken in *Re F* with that of *Re H*. In this case a child was born to a married woman and there was some circumstantial evidence that suggested that the child was that of the lover of the child's mother. The genetic father applied for and was given orders for DNA testing to prove this claim. The mother unsuccessfully appealed this decision. O'Donovan (1998: 220) notes that in this instance the 'Court of Appeal attempted to separate the issue of paternity from the issue of contact and parental responsibility, and stated that the paternity issue must be judged as a free-standing application'.

Hence, there is a lack of consistency in the application of the law. As O'Donovan (1998: 222) observes, 'in relation to the same child one man *can be* a genetic father for purposes of child support, another *appears* as a genetic father for purposes of a birth certificate' (emphases added). She argues that the reasons for this are partly historical given that, as has been noted earlier, traditionally 'where certainty of fatherhood was lacking, legal presumptions followed'.¹⁷ Significantly, in each of the above cases the court's action implicitly positions women as though they cannot be trusted to stipulate paternity. It is the role of the courts to make this decision.

O'Donovan (1998: 212) argues in the English context that the legal notion of paternity remains in the present day quite complex, despite the continued social acceptance of children born outside of marriage. With regard to cases in which

¹⁷ Significantly, in the British system, 'statutory fatherhood for purposes of child support has no necessary effect elsewhere in the law'. O'Donovan (1998: 213) draws attention to a case in which the genetic father was given a support order but the former husband's name remained on the birth certificate.

unmarried women have given birth and registered the name of the father on the birth certificate no *automatic* parental responsibility is granted to the registered father. In this case then ‘paternity and parental responsibility are not necessarily co-terminous’ (O’Donovan 1998: 212). Hence, as O’Donovan goes on to observe, in this context while the birth certificate gives legal status to the registered father it does not necessarily give or entail parental responsibility. For O’Donovan (1998: 220), clarification of the relevant issues in specific cases can be obtained through an ‘analytical separation’ of paternity and the rights of parentage. In her words, ‘[T]he “certainty” of genetic inheritance offered by science does not inevitably draw legal consequences in its train. In social terms we have a choice about the meaning we wish to give genes’.

Whereas the legal situation and the presumption of paternity have traditionally ignored the ‘truth’ of genetic relationships, the use of paternity testing in divorce and financial support cases places a focus on the genetic relationship necessitating in many cases the ignoring of the social parental role as a legitimate parenting role. Here the state finds itself in a double bind, on the one hand supporting the importance of genetic paternity in instances where financial responsibility for a child has not been undertaken by the genetic father, while on the other hand willing to overlook the lack of genetic paternity in cases where the legal father is not the genetic father and prepared to legitimise the creation of a biologically ‘imagined’ family.

Challenging Adoption Orders – men’s ‘right’ to their genetic children

A series of United States adoption cases, identified by Shanley (1995), in which genetic fathers have challenged adoption orders, illustrate the difficulties that courts

have had with the issue of genetic material and genetic 'ownership' of children and it is worthwhile reviewing these cases. In each of these cases the primary question for the courts is seen to be what should be the grounding of parental rights – should it rest on the genetic relationship between the child and the 'father', or should it be determined by evidence of a parental relationship (Shanley 1995: 220)?

In the case of *Baby Girl Clausen* (Michigan Court of Appeals, No. 161102, March 29, 1993), a dispute arose between the genetic parents and the adoptive parents. In this case the genetic birth mother had given consent to the adoption process, as did the man she named as the father on the birth certificate; however, the child's actual genetic father had no knowledge of the child's birth. After changing her mind about the adoption, the birth mother contacted the genetic father who sought paternity testing and also sought to overturn the adoption. Importantly, this was within four weeks of the child's birth. The genetic father contended that 'a biological father has a right to custody of his child unless it is shown that he is unfit to be a parent' (quoted in Shanley 1995: 219). In this instance the genetic father was successful. Significantly, as Shanley (1995: 220) notes, while the birth mother was in agreement with the genetic father, and could be said to have in effect initiated the proceedings, it was actually the rights of the genetic father that were upheld. Her rights had already been terminated.

In the case of *Quillion v Walcott* (434 U.S. 246 [1978]) a different verdict was found. In this case Quillion sought to oppose the adoption of his genetic child by Walcott who was married to the child's genetic birth mother. The court held that as Quillion had only had sporadic contact and had, hence, not developed a parental relationship with the child he was not able to oppose the adoption by Walcott

(Shanley 1995: 225).¹⁸ In the case of *Caban v Mohammed* (441 U.S. 380 [1979]) the court used the same approach; however, in this instance Caban's contact with his genetic child enabled him to prevent the child's adoption by the new husband.

In the matter of *Robert O v Russell K* (80 N.Y.2d 252 [1992]) Robert O sought to overturn an adoption order as soon as he found out that he was the genetic father of the said child on the grounds that he had a constitutional right to be informed of the birth of *his* child (Shanley 1995: 240). However, despite the fact that Robert O acted as soon as he found out, this action was after a period of ten months after the adoption had taken place and consequently the court denied Robert O's motion to overturn the order. The child in question was by this time firmly ensconced in a traditional nuclear family. The court noted that 'promptness is measured in terms of the child's life, not by the onset of the father's awareness' (at 262, quoted in Shanley 1995: 240).¹⁹

As Shanley (1995: 227) notes, the exception to the rule of contact establishing a parental relationship seems to be the case of *Michael H v Gerald D* (491 U.S. 110 [1989]). In this case Michael H had had an affair with the child's genetic birth mother (Carole) who was married to Gerald at the time and this affair produced a daughter. Michael H had provided care for the child during the years and she and her mother had lived intermittently with Michael, Gerald and another man. After

¹⁸ Similarly, in *Lehr v Robertson* (463 U.S. [1983]) it was found that Lehr had had almost no contact with his biological daughter though there was some disagreement as to whether Lehr had ignored the child or had in fact been impeded by the biological mother in his attempts to see her. Nevertheless, the majority of the court held that since there had been insufficient attempts by Lehr to establish a relationship with the child a parental relationship did not exist and thus his motion was denied (Shanley 1995: 226).

¹⁹ It is only since the mid-twentieth century that courts have looked at the best interests of the child rather than the focus on the rights of the parents (Mahoney 1995: 36). In looking at the best interests of the child the question of which family structure provides the best environment for the child is of paramount importance. It needs to be noted that as adopting parents are often of a higher class than those who give up their children for adoption that class may in fact be an underlying issue in the decision-making process.

reconciling with Gerald the birth mother sought to suspend contact between Michael and the girl. The majority of the court held that under common law the child was presumed to be a child of the marriage and, hence, the claim of Michael H was denied (Shanley 1995: 227). Significantly, the court produced five opinions illustrating the difficulty faced in such a decision. While this case contradicts the implications of the parental relationship as established by care-giving, it affirms the historical notion of the presumption of paternity.

While these cases have not relied on genetic relationships to establish parenthood they are significant in that, as with disputes in surrogacy cases, it is the genetic or biological relationship between the 'father' and the 'child' that forms the basis of the claim. Also significant is the importance placed on the maintenance of the traditional nuclear family and the reluctance by the courts to undermine this family type. Where third parties have been present throughout the relationship the courts are generally unwilling to allow adoption proceedings to go ahead. However, where there has been sporadic or no contact between the genetic father and the child the courts seem unwilling to introduce a third body into the nuclear family. As can be seen in the case of Robert O the time that a child has been with an adopting family is also considered important.

It is interesting to reflect on this notion of the perceived importance and length of the relationship with the child in the decision-making process of adoption cases in the light of decisions that have been made in surrogacy cases. Here, the relationship between the birth mother and the fetus during the pregnancy is not considered to be an actual relationship by the courts. This is despite the fact that it is of nine months duration. In surrogacy cases the role of the body of the birth mother in producing

the child is minimised, and in some cases legally erased, in order to establish a relationship between the social parents and the child. Courts then can be seen to make contradictory rulings, which are in part dependent on the interests of the parties involved but importantly also balanced against issues of social order.

In line with the paternity dispute cases, discussed above, the United States adoption cases indicate the difficulties that courts face when attempting to balance claims of a genetic relationship (or lack thereof) against the traditional family structure. Often the genetic father's claim rests on the genetic connection alone, due to a lack of a social relationship with his genetic child – either because he has had no knowledge of the child or in some instances as a result of his lack of interest in the child (Shanley 1995: 231). In these cases the claims of men to 'their' children have been mitigated by other circumstances, which the courts have taken into account when making their decisions. Not all men, then, are considered to have a right to their genetic offspring. Importantly, however, these cases illustrate that genetic material is considered by the genetic father to be their 'property' even when it is placed in someone else (such as a genetic child) constituting genetic material as separate but yet belonging to the man's body.

Embryo Donation – new methods of adoption

In general, IVF and related procedures necessitate harvesting an excess number of oocytes, or eggs, from women undergoing the treatment. The eggs are then fertilised for implantation and the embryos not required for the initial implantation are frozen for future use, for example, in cases where pregnancy does not result or for attempts at a second or third pregnancy. This practice reduces not only the cost of treatments but also the need for further and, as discussed in Chapter 4, often painful harvesting

attempts. In countries such as Australia, the United States and the United Kingdom there are in the main three options to deal with embryos which are 'left over' after treatment has been completed – 'to donate them for research, to donate them to another couple or to... leave them to perish' (Souter 1999: 27). Increasingly there is a focus on donating the embryos rather than letting them perish.

While there has been a decrease in the number of 'live babies' put up for adoption in Australia, 'left over' embryos from IVF now enable other forms of 'adoption'. According to reports, embryo adoption provides a cheaper option than progressing through the complete IVF process (Souter 1999: 29).²⁰ It is also a less invasive procedure for women's bodies as there is no need to harvest eggs and, hence, no need for the rounds of fertility drugs.²¹ As such embryo adoption allows older women a further chance of conceiving children when they are unable to produce viable eggs (Souter 1999: 29). As I noted in Chapter 5, the use of IVF technologies by 'older' women in order to 'extend' their reproductive years is seen to be highly problematic.

Embryo adoption is commonly seen to avoid many of the pitfalls that can occur in more traditional adoption cases (Souter 1999: 27).²² The gamete donors, for example, have no recourse to claim back their embryos or the resulting children. Embryo adoption enables the creating of biologically 'imagined' families and consequently the child is legally considered to be the child of the birth mother and her husband or de facto husband. It is their names that appear on the birth certificate

²⁰ There have been some reports of embryos being deliberately created for adoption though it is not thought that this is happening in Australia at the moment (Souter 1999: 27).

²¹ Though it can be assumed that for many people using this option they have already undergone IVF rounds and that this is a last option.

²² However, as the article notes, questions arise out of the differences in screening processes for potential adopters of embryos when compared with actual children (Souter 1999: 29)

and the child is created in law as though an adoption has not taken place. However, the increasing importance placed on the right to know your genetic origins is also having an impact on families created through this practice. Australian NHMRC (2004: 23) *Ethical Guidelines*, for instance, state explicitly that '[A]s for adopted people, persons born from reproductive procedures using donated embryos are entitled to know their genetic parents and of the existence of any genetically related siblings'. Hence, other bodies are inserted metaphorically into the nuclear family.

Of interest is a comment from one of the women interviewed in a report on the issue. The woman in question had seven left over embryos that could be donated. She noted that while she would consider 'adopting' an embryo she could not see herself allowing the adoption of her embryos: 'I couldn't bear to know my child was out there walking around. It's not just an egg or a sperm. To me, this is the child already. Given the opportunity to grow, it becomes what my children are' (quoted in Souter 1999: 27). Significantly, her comments reflect dominant notions of biological heredity while also reaffirming the notion of genetic material as property.

A British report also reflects the theme of the importance of genetic heredity. In this case a British man was attempting to donate the embryos created before the death of his wife from illness. The woman had undergone treatment to remove the eggs while awaiting a heart and lung transplant. Attempts to find a suitable surrogate birth mother to enable him to 'have' the children failed and the embryos were due to be destroyed under government regulations unless they were used within four months. The report states that the man in question is driven 'by a desperate urge to save the last vestiges of his wife's life' It goes on to report that the 'widower has agonised over how he can keep the memory of his wife alive through the birth of

their children' (Rogers 2000, emphasis added). Hence, genetic relatedness is equated with ownership of the genetic material. Despite the fact that the embryos will be born to someone else, and will be considered to be the legal and social child of that person, they are considered by the widower to be his and his wife's offspring. A member of the Human Fertilisation and Embryology Authority noted at the time that 'An embryo may just be a bag of eight cells, but it raises fundamental questions about identity, ownership and genetics' (quoted in Souter 1999: 29).²³ Hence, genetic material is considered to be important in describing and identifying who we are.

Embryos and the Ownership of Genetic Property

Since the 'orphan embryo' case in Australia where the death of a United States couple sparked an intense debate concerning what should happen to the embryos stored in Australia, with one of the questions being whether the embryos would in fact be eligible to inherit the couple's fortune, Australian regulators have moved to ensure the status of embryos in the event of the death of gamete providers.

According to the NHMRC *Ethical Guidelines* (2004: 28):

If both members of a couple for whom an embryo is stored die, any reasonable, clearly expressed and witnessed directive from them should be followed. If there is no such directive, or it cannot be followed, clinics should arrange for disposal of the embryo.

Hence, genetic material is seen to be different to other body parts.

Issues are also raised by the question of who 'owns' created embryos in cases where there are disputes between couples, for example, in relation to divorce. The 1988

²³ The report not only questions what happens when a child grows up not knowing their biological heritage but also raises the much discussed and thought about question of whether it is possible that a child may in fact end up marrying a biological sibling (Souter 27/799: 27).

United States case of *Davis v Davis*²⁴ is useful for consideration in this context as it raises many of the debates that commonly surround arguments about reproductive technologies. Moreover, the case received a great deal of publicity. The *Davis v Davis* case and others rest on the notion that embryos and, hence, genetic material are property.

The facts of the case are this. Mary Sue Davis had had nine ova removed, which had been fertilised with the sperm of her then husband, Junior Davis. Two were implanted but did not result in pregnancy while the other seven were cryopreserved. After the couple divorced Mary Sue Davis sought a court order so that she could have the embryos implanted in her. Junior Davis, who also opposed the anonymous donation of the embryos, contested this order.

In his opposition to his former wife's motion, Junior Davis stated that he 'did not want to be "raped of his reproductive rights"' (*Davis v Davis v King* E144 96, p21 quoted in Overall 1995: 181). In addition, he argued that his lack of consent to the procedure would have the impact of forcing parenthood upon him (Overall 1995: 181). It is worth noting that Mary Sue Davis was willing to take on the economic and social responsibilities of parenthood; hence, the concern for Junior Davis 'would have to be founded upon a concern for the significance of genetic parenthood, and biological, not emotional or social, attachment to one's offspring' (Overall 1995: 183).

²⁴ Though disputes over embryos that arise after couples divorce are not common, the *Davis v Davis* case is not an isolated incident. In 1998 the New York State of Appeals Court ruled that a couple were bound to donate their left-over embryos to science as per the stipulation that they had made concerning the status of left-over embryos made when they were still married. In 1999 a similar court case was brought about in Illinois where a preliminary injunction was granted that prevented the impregnating of two embryos in a woman undergoing divorce proceedings until the status of those embryos has been ascertained (Peres 1999).

The Tennessee Circuit Court gave temporary 'custody' of the embryos to Mary Sue Davis. The judge found that the embryos were 'human beings' and, hence, their best interests were served by being born.²⁵ Junior Davis appealed this decision. In his appeal Junior claimed again 'that the earlier decision "was tantamount to the court's decision that Junior may be required to become a parent against his will, thus denying him the right to control reproduction"' (Davis v Davis wl 13087 (Tenn. App), Franks, Judge (1990:2), quoted in Overall 1995: 181). As Overall (1995: 181) notes, Davis' statements appealed to feminist concerns such as the right not to engage in non-consensual sex and the right to control one's own reproduction.

In the appeal decision Judge Franks stated that Junior Davis had a constitutional right not to have children where no pregnancy had taken place (Overall 1995: 183).²⁶ Interestingly, the decision in *Davis v Davis* relied in part on an interpretation of the United States abortion case, *Roe v Wade*, which included the finding that it was 'the right of a man to avoid procreation' (Colker 1996: 1065). As Colker (1996: 1066) argues, this interpretation was incorrect, as the case did not involve 'the physical interests of a pregnant women'. Moreover, Colker (1996: 1070) notes, *Roe V Wade*,

does not reflect a constitutional preference for termination of life over sustaining of life. In fact, if anything, Roe strikes the opposite balance by recognizing that the life that is terminated in an abortion is entitled to some state protection, although the woman's interest in terminating her pregnancy outweighs that interest until viability.

In the end the court

²⁵ See Overall (1995) for a discussion of the problems with the conception of embryos as human beings.

²⁶ I noted in the last chapter that in a case involving surrogacy (*Munoz v Haro*) in the United States there was held to be a constitutional right to procreate.

concluded that, where no prior agreement exists the court should award the embryos to the party wishing to avoid procreation, “assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the preembryos in question” (842 S.W.2d 588, 604 (Tenn 1992), in Colker 1996: 1064).

By the time of the appeal, Mary Sue Davis had remarried and no longer wanted the embryos to be implanted in her, wanting instead to put them up for donation. As such, the ‘reasonable possibility’ exception set out by the courts did not apply, as she did not intend to use the embryos herself (Colker 1996: 1065). Yet as Colker (1996: 1065) notes, it is likely that even if she had intended to use them ‘the court would have ruled in favour of Mr Davis, concluding that Ms Davis had a reasonable possibility of becoming a biological parent’.²⁷

The decision in *Davis v Davis* discounts the ‘enormous discomfort’ that women can face in pregnancy thereby constituting women’s reproductive bodies as little more than fetal containers (Colker 1996: 1071). The courts also disregarded the ‘disproportionate contribution’ made by women, including Ms Davis, in IVF procedures (Colker 1996: 1073). As outlined in Chapter 4, women undergo invasive egg harvesting procedures. Thus, in the Davis case, and in line with other debates surrounding the issues of reproductive technologies, women’s bodies and their role in reproduction, and the impact of reproductive technologies on women’s bodies, were largely ignored.²⁸

²⁷ This is despite the fact that Mary Sue Davis had reportedly had five tubal pregnancies and undergone six previous IVF attempts (Colker 1996: 1072). Interestingly, Junior Davis also argued against the prospect of single-parent families citing his own experience as a child of a single-parent family as evidence of the detrimental effects of being raised in such a family (Overall 1995: 195). In making this contention Junior Davis appealed to traditional arguments about the foundation of ‘proper’ families.

²⁸ It has been argued that women are averagely economically poorer than men after divorce and due to the decline in the supply of eggs they are also often reproductively poorer and thus in cases dealing with the custody of frozen embryos custody is often more important to the woman (Colker 1996: 1063).

As Christine Overall (1995: 195) has noted, a subtext of the case seems to be the fear of sperm theft. This panic is augmented by the location of birth control as a woman's issue. The fear that men have about having their sperm stolen can be seen in other areas. In the more recent United States case of 'the stolen sperm', *Wallis v Smith*, Peter Wallis sued his former partner, Smith, for fraud claiming she stole his sperm, requesting damages equal to the amount of child support he would have to pay. Wallis is quoted as saying 'It was a role I did not ask for or seek. I was conned into it – a situation millions of men face each day'. The case was dismissed at the district level with Judge Scott quoted as saying '[B]irth control issues should be left to consenting adults rather than the courts' (Graham 1999: 38).

Colker (1996: 1069) notes that the case of frozen embryos is analogous with other cases of pregnancies. She states that even

[I]f a man and woman have intercourse, and the woman deceives the man into thinking that she is using birth control, we do not allow the man to exercise a veto over her desire to carry a pregnancy to term. In fact we even impose child support on him, despite the possible fraud.

With regard to frozen embryos Colker argues that the intention in donating gametes for use in IVF and other related technologies 'is for a very clear purpose – to become parents'. Consequently, '[B]ecause that initial consent existed, there is no good reason to give presumptive value to the person who has changed his or her mind' (Colker 1996: 1069). While the construction of women as tricking men into pregnancy is problematic, in particular considering that this is a continued theme in debates surrounding unwanted paternity, Colker's point is clear – consent has been given.

Posthumous Reproduction

In cases of posthumous reproduction – that is, conception after the death of one partner – we see that in many cases the state acts on ‘behalf’ of deceased men. The state’s actions in these instances essentially can be seen to protect men’s right to decision-making over their genetic material. In a much-publicised case, a United Kingdom woman, Dianne Blood, who on December 11th 1998 gave birth to a baby boy as a result of posthumous reproduction, fought a protracted three-year legal battle to gain access to the stored gamete material of her deceased husband, Stephen.²⁹ In 1995 Stephen contracted meningitis, which resulted in him falling into a coma from which he later died. Prior to his death, however, while in the coma, two sperm samples were removed and were placed in the custody of the Infertility Research Trust. After the death of Stephen Blood the Human Fertilisation and Embryology Authority refused access to the samples on the basis that Mr Blood had not given written consent to the procedure and in addition they also prohibited the samples to be taken abroad for fertilisation procedures.³⁰ The action by the Authority constituted genetic material as different to other bodily material, which could be removed with the consent of the family. In 1997 the Court of Appeal overturned this decision stating that ‘the authority was wrong not to take proper account of European Law, which gives every EU citizen the right to receive medical services in a member state unless there are overriding public policy reasons against it’ (Leyne 1998). Dianne Blood was consequently allowed access to the sperm samples and has since given birth to two children.

²⁹ This case caused much public outcry and sparked intense debate both in Britain and internationally. In Australia, in particular, the case received a considerable amount of media attention.

³⁰ Dianne Blood claimed that they had discussed the issue previously and that her husband would have consented to the procedure.

Australia has also had a series of cases involving posthumous reproduction. In 1998, for example, a woman was awarded ‘the right to have sperm removed from her late husband’s body’ after his sudden death ‘as a result of a road accident’ (Bennet 1999). However, Australian courts have not always given orders to enable the removal of the gamete material. Similar to debates concerning access to IVF for single women and lesbian couples, discussed in Chapter 5, a key issue in regard to posthumous reproduction is the status of alternative family forms, specifically female single-parent headed families. In the matter of *Gray* [2000] QSC 390 (12 October 2000, at 23c), one of the reasons given in the refusal to allow the removal of sperm in this case was that the Judge ‘could not see how it could be said that the interests of such a child will be advanced by inevitable fatherlessness’. Hence, the importance of fatherhood and fathers in the traditional family model is affirmed.

Reflecting the importance placed on consent of the husband in policies regulating other reproductive technologies, such as IVF, consent is seen to be a key issue in regard to posthumous reproduction. The NHMRC (2004: 22) *Ethical Guidelines* state that with regard to use of gamete material ‘from persons in a postcoma unresponsive state’:

Clinics must not facilitate use of gametes in such circumstances unless all of the following conditions are met:

- deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes; or

a person in a postcoma unresponsive state (‘vegetative state’) prepared clearly expressed and witnessed directions, before he or she entered the coma, consenting to the use of his or her gametes; or

a dying person prepares clearly expressed and witnessed directions consenting to the use, after death, of his or her gametes; and

- the prospective parent received counselling about the consequences of such use; and
- the use does not diminish the fulfilment of the right of any child who may be born to knowledge of his or her biological parents.

As the third dot point indicates, the Guidelines also uphold the right for children to know their genetic origins.

In posthumous reproduction the potentially conflicting issues of men's right to, or not to, procreate, bodily integrity, and the importance of passing on biological, or genetic, heredity converge. As in other policy areas discussed in the chapter, gamete material is seen to be both separate and as part of the body.³¹ As an issue, posthumous reproduction highlights the fact that genes are considered to be more than mere body organs. Where a family can consent to the harvesting of other organs for transplant use this is not the case with regard to gamete material. Perhaps this is because genetic material is utilized to 'form' life rather than 'maintain' life. Hence, when men are unable to make the decision for themselves a surrogate in the form of the state is appointed to take their place and decide the reproductive fate of their genes. I argue that implicit in these arguments are questions surrounding the importance of the role of men in family formation.

Abortion

I want to end the chapter by briefly discussing the issue of abortion, as it seems on face value to contradict the arguments that have been made here. As such, I want to note how this issue can be distinguished from the other policy areas and also how some similarities can be elucidated. Where men have not had claim to 'their'

³¹ Interestingly, in the matter of Gray [2000] QSC 390 (12 October 2000) the question of property in a dead person was discussed at length.

genetic material as yet is in the area of abortion. No case so far has allowed a man to prevent the abortion of 'his fetus'. Significantly, however, the presence of, or claim to, male genetic material has allowed actions in the courts to be made. In Canada, for instance, a legal battle was fought out between a woman and her former fiancé over her right to a termination. The former fiancé sought an injunction preventing the termination (Wallace 1989). Despite a series of Quebec courts ruling to block the abortion, the Supreme Court of Canada eventually ruled in favour of the termination (D'Arcy 1990).³² Importantly, the Supreme Court noted that there is 'no special right to intervene in a woman's decision to seek an abortion' (Van Dusen 1989). In this area (to date) men have been dissociated from their genetic inheritance and constituted in some ways as mere 'sperm donors'.

The significance for abortion so far has been the location of the embryo in the woman's body and its dependence on the woman's body for sustainability (Overall 1995: 191). However, we can assume that as the viability of fetuses outside of the womb increases that more claims by men will be made. We can further postulate that the increasing importance placed on genetics will lead to increased claims by men for *their* genetic material. In addition, if we reduce reproduction 'to the contribution of genetic material, further credibility is given to the "rights" of men in the decision to terminate a pregnancy...' (Stabile 1994: 91). Moreover, the more embryos, and genetic property, are regarded as separate from the body the more they will be seen as purchasable and, hence, the more they will be seen as property (Overall 1995: 190). Bordo (1993: 92) draws attention to one case in which the husband argued that the wife's right to abort is in fact a right to abort a part of him.

A claim is made on the basis of genetic heredity and a constitution of male genetic

³² Though by this time the woman in question had terminated her pregnancy at 22 weeks in Boston (D'Arcy 1990).

material as belonging to the man. Bordo (1993: 92) emphasises that her point is not to 'dehumanise' men but rather it is to illustrate the price in terms of subjectivity that women pay with these claims.

Conclusion

This chapter has demonstrated that our understandings of, and assumptions about, genetic material factor in a range of policies that deal with reproduction in which men have had claims on their genetic material. It has also shown that tensions are heightened by historical concepts of family formation and parental rights. These tensions are evident in the often-contradictory ways in which these issues are treated in the courts. For instance, not all claims based on genes are upheld. Hence, not all men have a claim to their genetic material. It is important then to note that 'Genetic paternity does not necessarily entail legal or social fatherhood' (O'Donovan 1998: 222). Underlying these issues and arguably in issues of IVF and surrogacy is the role, both legal and social, of the father in the traditional family structure and his control over his reproduction.

In this section of the thesis I have teased out how assumptions about biology have impacted on policy. In particular I made an argument that historically women and men's bodily reproductive functions have been characterised differently. Moreover, they have been depicted along traditional stereotypical gender lines. Women are constituted as though they are controlled by their reproductive functions. Furthermore, I have argued that these factors have had particular policy consequences. Significantly, the three chapters in this section have affirmed that biological notions of heredity remain dominant despite legal attempts to shroud

them. Where paternity and in some cases maternity is in question the state deals with this through the creation of biologically 'imagined' families.

Conclusion

Giving Weight to Biological Bodies: material effects and implications for future technologies

The field of policy analysis is dominated by commentary and critique rather than by research. Abstract accounts tend toward tidy generalities and often fail to capture the messy realities of influence, pressure, dogma, expediency, conflict, compromise, intransigence, resistance, error, opposition and pragmatism in the policy process. It is easy to be simple, neat, and superficial and to gloss over these awkward realities. It is difficult to retain messiness and complexity and still be penetrating (Ball 1990: 9).

What I would like to suggest then is that the seemingly abstract code of medical science in fact tells a very concrete story, rooted in our particular form of social hierarchy and control. Usually we do not hear the story, we only hear the “facts”, and this is part of what makes science so powerful. But women – whose bodily experience is denigrated and demolished by models implying failed production, waste, decay, and breakdown – have it literally within them to confront the story science tells with another story, based on their own experience (Martin 1987: 197).

I framed Chapter 1 with the above quote by Ball (1990: 9) and I have again chosen it to frame the Conclusion to this thesis. Ball, as noted in the first chapter, emphasises the messy realities of policy. As I indicated then, and have demonstrated throughout, nowhere is this more apparent than in policies dealing with reproductive technologies and family formation. Within the policy considerations around these areas we see tensions, conflicts and contradictions. One of the primary reasons that policy is ‘messy’ is that policy is social. By this I mean that policy is a social creation, reflecting social developments and shifts in social attitudes. In regard to the policy areas covered in this thesis, a key factor in the tensions and contradictions that I have highlighted is the heightened emphasis currently placed on the importance of genes and genetic theories.

Western assumptions about genetic heritage shape social policy around reproductive technologies and related issues of family formation. These assumptions connect with social attitudes regarding women's bodies and notions of the 'proper' family. Policies regulating these areas are underpinned by long-held beliefs regarding the shape and nature of the 'proper' or traditional family. Significantly, not only do the policies reflect assumptions about the proper shape of the family as a two-parent heterosexual unit with 'biological' children, but they also produce this family type as the norm. As I have argued, this family type has not necessitated that children actually be biological, only that they appear to be.

Where (heterosexual) families are created through reproductive technologies, and with the use of donated gamete material, policy overcomes the 'lack' of genetic connection through the creation of a biologically 'imagined' family. This family is then treated for all intents and purposes, both politically and socially, as though it conforms to the biologically 'ideal' 'norm'. Indeed, with the exception that the children are not genetically related to one or in some cases to both parents, 'imagined' families conform in all other senses to the traditional family type. In the creation of biologically 'imagined' families it has been necessary to ignore the other bodies involved in the process, including gamete donors and surrogate reproductive bodies. Hence, for example, in surrogacy the role of the birth mother's body in production of the child is minimised socially and, as we have seen increasingly, also legally. Assumptions regarding the value of women's bodies in reproduction are implicated in this practice.

The political and social creation of biologically 'imagined' families is not a recent phenomenon. Current policy approaches in the area of reproductive technologies

reflect historical practices relating to the presumption of paternity and the conceptualisation of children as a 'product of marriage'. In addition, policies regulating adoption have also historically 'overlooked' a lack of genetic relatedness to create a family which reflects the traditional 'norm'. Thus the state has always been involved in the production of biologically 'imagined' families. The maintenance of the role of the patriarchal head, I argue, has been central to the policy production of 'imagined' families.

However, the traditional family, and hence the policy production of 'imagined' families, is under threat from a range of factors including a rise in divorce rates; increases in the ages of first-time mothers, which is leading to a greater need for reproductive technologies due to 'problems' associated with biological fertility; and the ability of reproductive technologies to facilitate the creation of alternative families such as same-sex families and single-parent families. Moreover, the increasing focus on genetic determinist ideas and the consequent importance placed on the role of genes in determining 'who' we 'are', along with developments in reproductive technologies such as DNA testing, are creating tensions and contradictions in the policy production of 'imagined' families.

In some cases, such as gestational surrogacy, genetic relationships are being used to strengthen the connection, both social and legal, between the children born from such arrangements and their social parents. In other cases, such as IVF, where children are born from donor gamete material, the focus on the importance of knowing your genetic identity, and the resultant policy trend toward providing access for these children to their genetic donors, is challenging the construct of 'imagined' families as a heterosexual two-parent unit with 'biological' children. In

areas such as child support, paternity testing is having uneven consequences. In some instances paternity testing is being used by the state to enforce child support orders where paternity has been denied while, in other instances, paternity testing is being used by non-genetic parents to disprove paternity and, hence, challenge child support orders.

In simple terms this thesis has had as its focus the challenges to the shape of the traditional family which are being brought about by developments in reproductive technologies. As I noted in the first chapter, there were three primary goals in regard to the analysis: first, to reveal the frameworks within which we understand issues related to reproductive technologies and related policies of family formation and the ways in which debates are shaped and limited through these frameworks; second, to identify the ways in which policy ‘shapes us’ as subjects and the consequences of this shaping; and, finally, to draw attention to the ways in which material bodies are constituted in policies and the impact of this constitution on material bodies. A key aim in this context has been to elucidate the role of policy in the forming, shaping and regulation of bodies. As we have seen throughout this thesis the ways in which bodies, particularly women’s bodies, are conceptualised in policies regulating reproductive technologies and related issues of family formation is highly problematic.

Through primarily a concentration on discourses, this thesis has examined a range of policy texts, including legislation, bioethical reports and judicial decisions, which deal with reproductive technologies and related issues of family formation. It has focussed on the ways in which the language in these texts creates the frameworks within which we debate and understand issues relating to reproductive technologies

and other policies of family formation. In addition, I employed what I term a body-focussed approach to policy in order to elucidate the conceptualisation of women's bodies in policies regulating reproductive technologies and related issues of family formation. As previously noted, this approach draws on a range of theories including poststructuralism and feminist body theory. In brief, it requires analysis of the ways in which material bodies are constituted within policies. Such analysis highlights the role played by social assumptions about body parts and processes in making policy. It also opens up the opportunity to examine the ways in other factors such as gender, class and race mark material bodies. Recognising the ways in which women's bodies are conceptualised in the policy considerations around the areas covered in my thesis opens spaces to challenge conceptualisations which I argue have negative implications for women's bodies.

A key element to policy analysis is the importance of identifying the wider environment in which policy is made and operates. To repeat the point made throughout this thesis, policy occurs neither in a vacuum nor in isolation. The first section of the thesis drew on the Foucauldian concept of genealogy and other deconstructive approaches to discuss three key areas which are essential to understanding policy considerations around the areas of reproductive technologies and related policies of family formation: the current importance placed on genetic explanations; the concern over the birth rate decline; and the historical conception of reproductive bodies in law and policy.

The importance placed on genes in determining 'who' we 'are' is increasingly difficult to ignore both politically and, importantly, socially. Genes are not only molecular structures but they are also invested with strong codes of cultural

meaning (Nelkin and Lindee 1995), cultural codes which intersect with issues of gender, race, and class. The focus on the importance of genetics is having significant implications for the policy production of 'imagined' families. While policies, such as those dealing with the regulation of the passing down of property, have long been underpinned by assumptions regarding heredity and blood and hence by implication genetic ties, the discovery of the 'gene' enabled a shift from a more abstract theoretical conception of biological difference to a scientific model.

In part the appeal of biological determinism can be seen in its claim to be scientific (Rose *et al.* 1984: 29). In Western industrialised societies sciences, such as biology, are dominant discourses due to their claim to rationality or objective truth. Thus they are weighted more heavily than other discourses such as sociology. While there are claims that science is both rational and neutral in its application, in actuality science is a process, impacted on by the politics and values of the time (Latour 1987). Simply put, social thought impacts on scientific debates. It is people who give genes and body processes their meaning. In this context scientists and medical practitioners have become key players in ascribing meanings, through language, both to genes and to other bodily, including reproductive, processes. However, this role is often ignored.

Debates about reproductive technologies need to be seen in the context of the social conceptualisation of the decline in the birth rate in many Western countries, including Australia. Historically, the family has served a variety of political, economic and social functions, including the (re)production of economically productive citizens (O'Brien 1981: 11); hence, the concerns regarding the decline in the birth rate. Significant similarities can be seen between current debates

surrounding the birth rate decline in Australia and those at the turn of the twentieth century. In both instances women have been held accountable for the decline and women, and their 'choices', have been constituted as the 'problem' in policies which address the issue. In these circumstances infertility is not seen as a desirable 'condition' for heterosexual women. Thus there is an increased impetus for (heterosexual) women to undertake technological intervention in order to address fertility 'problems'. It needs to be emphasised that infertility is not constituted as a 'problem' for some people such as lesbian women.

Connections can also be seen between the birth rate debate and eugenic thought, with concerns focussing on the production of particular populations. Reproductive technologies provide clear means of shaping the kind of population which will be produced. Not only do they (reproductive technologies) provide the means of creating families which 'pass' as biological and, hence, reflect and reaffirm the traditional family norm, but they also, through technologies such as genetic screening, 'assist' in producing citizens who can fulfil an economic requirement, that is, citizens who are not 'disabled'.

Western understandings of the body are dominated by biomedical conceptions of bodies, which conceptualise bodies in terms of their parts and processes. Hence, it is biomedical practitioners who have been given the authority to speak about women's bodies. As I noted in Chapter 4, however, women's experiences of practices such as oocyte, or egg, removal in IVF often differ from the medical discourses surrounding the procedures. The experience of egg removal appears to be much more challenging physically than medical accounts suggest. Still, these medical discourses remain dominant.

Around the area of reproduction, assumptions about women's bodies have produced women as less autonomous than men (Bacchi and Beasley 2002). For example, within the field of bioethics, traditionally the field which deals with issues relating to reproductive technologies, women have been conceptualised problematically as lacking autonomy and as ruled by their bodies. This constitution is seen to justify paternalistic treatment (Diprose 1995; Bacchi and Beasley 2002). In addition, a series of legal decisions have constituted women's pregnant bodies as little more than containers for the safe production of the fetus. Hence, the intrinsic role of the pregnant body in reproduction and the interdependent relationship between the pregnant body and the fetus is overlooked (Stabile 1994: 80). The increased prevalence of technologies, such as ultrasound, also contribute to the erasing of the role of the birth mother's body in reproduction as they construct the fetus as separate from the pregnant body, thereby increasing the status of the fetus as a 'subject' in its own right. Moreover, the increased importance placed on the well-being of the fetus produces women's bodies as sites of and for surveillance.

Each of the three chapters in the first section illustrated that women's bodies have been, and continue to be, primary targets for policy intervention around the areas of reproduction and family formation. Women's bodies, for example, have been targeted in eugenic policies of sterilisation and continue to be targeted in genetic screening procedures. Women's bodies have also been, and continue to be, targeted in policies dealing with concerns over declining birth rates. And, women's pregnant bodies continue to be targeted for surveillance in government policies such as the South Australian Government 'Pregnancy and Alcohol Don't Mix' Campaign (Government of South Australia 2005). I argue that women internalise the messages about their bodies with a consequent impact on their subjectivities.

The second section applied the body-focussed approach to policy to a series of policy areas related to reproductive technologies and family formation with the primary aim of highlighting the contradictions and contestations around the various policy areas. In this section I looked in detail at two case studies – IVF and surrogacy – as well as at a series of other closely-related policy areas. A key goal in this section has been to highlight the ‘messiness’, identified by Ball (1990), of policy. In each of the areas the role of policy in the forming, and privileging, of traditional families is significant.

Around the area of IVF we see that policies have had as a central concern the producing, and thereby maintaining, of the heterosexual family as the norm. In this context, the attempts by the Australian Federal Government to amend the *Sex Discrimination Act 1984* in order to ensure that States which placed restrictions on access to IVF technologies to lesbian and single women would not be in breach of the Act can be seen as being concerned with maintaining the heterosexual family and a patriarchal role for men in that family. Policies regulating the use of IVF technologies have historically protected ‘traditional’ families, created with the use of donor gamete material, through the production of an ‘imagined’ family. However, as I have noted throughout, the increased focus on the importance of genes in determining ‘who’ we ‘are’ has problematised this practice.

In contrast to the way in which the increased focus on the importance of genetics in IVF produces challenges to the ‘imagined’ family, with regard to surrogacy we see genetic connections used by social parents to *strengthen* their claims on ‘their’ genetic children – thus strengthening ‘imagined’ families. Moreover, in many instances we see that the genetic material of the social father, and in some instances

the social mother, forms a basis through which other issues such as class and race are played out in judicial disputes. Increasingly, the social parent's genetic contribution is privileged in policy decisions over the birth mother's body. This constitution of genetic material as separate from the 'reproductive body' results, I argue, in the fragmentation of the birth mother's pregnant body. Judicial and policy decisions which enable social (genetic) parents to place their names on the birth certificate – thereby creating a biologically 'imagined' family – effectively erase the role of the pregnant body in the reproductive process. The body of the birth mother is, hence, constituted in surrogacy arrangements as little more than a fetal container – something to be managed during the pregnancy and discarded after the event.

While the primary interest in this thesis is on elucidating the assumptions about women's bodies in reproductive processes, in Chapter 7 this focus was extended to encompass men's bodies. For men, it is their genetic contribution, and the social weight given to this contribution, that allows them to claim 'ownership' over 'their' children in cases where they challenge adoption orders or paternity. Genetic material is increasingly conceptualised in these cases as property. However, as noted, not all men's bodies or (their) genetic contribution are given equal weight. At issue for the courts have often been questions regarding the type of family to be formed and the 'best interests' of the child or children, which are assessed within social parameters of ideal family relationships. Consequently, in many cases the courts are prepared to ignore a genetic connection between a man and 'his' child because of other social concerns, such as the sanctity of the traditional family type.

Each policy area discussed in this thesis is ultimately concerned with families, whether this be creating families, such as in IVF, surrogacy and adoption, or

limiting families, such as in abortion. Paternity testing can be used for both purposes. Reproductive technologies enable the creation of both biologically 'ideal' and biologically 'imagined' families but it is the identity of 'imagined' families that is most at stake in the increased focus placed on the importance of genetics. Hence we are seeing a greater technological focus being placed on increasing the chances of producing genetically related children. As with IVF, while surrogacy arrangements facilitate the creation of alternative family types, such as male same-sex headed families, assumptions in other policies regarding the constitution of a proper family undermine the legitimacy granted to these families.

As this analysis has illustrated, social assumptions about the value of women's bodies underpin the policy considerations around these areas. This thesis has highlighted that around the area of reproduction there is a tendency to denigrate or ignore women's bodies. Women's bodies are constituted problematically. They are fragmented, constructed in terms of their relevant parts or reproductive material – that is, as eggs, womb and blood (McBride Stetson 1996: 219). Moreover, women's bodies are conceptualised as passive bodies in the reproductive process – waiting, for example, for the embryo to implant and significantly constituted as subject to the authority of medical knowledge. In essence, women's bodies are 'subjected rather than subject' in the medical management of pregnancy and reproduction (Shildrick 1998: 189). It is this conceptualisation of women's bodies which denies women the right to speak about their bodies and enables others to make decisions on their behalf. By contrast, men's bodies are constituted as active participants.

It is clear that feminist policy theorists must challenge these conceptualisations. The assumption that around the area of reproduction women's bodies make them a

particular type of citizen – a citizen who lacks ‘autonomy’ – is deeply problematic (Bacchi and Beasley 2002). A body-focussed approach to policy analysis, as advanced in this thesis, opens up a space to challenge this assumption. It draws attention to the unsatisfactory ways in which women’s bodies have been conceptualised historically in policy considerations around the areas of reproductive technologies and related issues of family formation. It highlights the effects of this conceptualisation on women’s subjectivities. In addition, it insists on recognition of bodies as marked by other factors such as race.

The need to pay attention to women’s material bodies is becoming increasingly important. For example, the birth of a child from a surrogacy arrangement to a Federal Australian Labor party senator has sparked a new impetus for national consistency in surrogacy legislation (Stafford 2006: 11). It seems unlikely in light of the current constitution of women’s bodies around the area of reproduction that new laws will constitute birth mothers as anything more than ‘incubators’ for the fetus. The case also signals the place of class and political influence in policy development which, as we have seen, is a social product.

We are also seeing related developments around the area of cloning. The need for reproductive bodies, whether to supply eggs for therapeutic cloning or to gestate fetuses for other forms of cloning, is missing from the debates regarding cloning. It is the very constitution of women’s bodies in terms of their bodily parts, and stripped of their bodily context, which allows debates about cloning to ignore the absolutely essential role of women’s bodies in these processes. Here it needs to be emphasised that I am not implying judgement on the merits, or otherwise, of therapeutic cloning. Rather, I am insisting that, due to these developments, it is

increasingly imperative that the essential role of women's material bodies in birthing processes be identified and acknowledged. Public policy needs to be developed with due regard to the ways in which, historically, women's bodies have been rendered invisible.

The thesis therefore makes a case for giving weight, in policy development, to women's material bodies. With Martin (1987: 197), I argue that the 'story of science' needs to be confronted 'with another story', based on women's experience. The claim here is not an essentialist claim, simply to 'put bodies back in'. Rather, by noting and tracking the processes by which women's bodies have been rendered invisible, it is an assertion that this social 'invisibilization' needs to be reversed.

Prior to starting this thesis, I followed through newspaper reports the Australian surrogacy case *Re Evelyn*, which I discussed in Chapter 6. At the time I did not know how this case should be decided and who should be awarded custody of 'Evelyn'. In part, my current interest in policies regulating reproductive technologies stemmed from this case. And to some extent this thesis was undertaken to provide some answers to the questions this case had raised for me. At its completion, I am no closer to finding the answers to the question of whether birth mothers or social parents should retain custody of children born from surrogacy arrangements. Still, I have a greater understanding of the reasons why this question is so difficult, particularly for feminists such as myself. Indeed, Ball (1990: 9) is correct – policy is 'messy'. A key factor in this messiness is the social nature of policy, the way it is underpinned by a complex mix of long-held assumptions and changes due to, among other things, technological developments, such as the

'discovery' of the 'the gene' and the development of new reproductive technologies. This complex mix ensures that there are no easy answers. Mapping the social developments that influence policy reveals that some factors, for example the formation of normative families, are privileged over other factors, in this instance women's material bodies. Such mapping also therefore provides the grounds for insisting that a rebalancing is in order. To this end the thesis makes a case for recognising the physiological presence of women in reproduction.

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