

GAY AND LESBIAN ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY

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ABSTRACT

Legal battles over same-sex marriage and technological developments in assisted reproduction have placed the question of the right of gays and lesbians to procreate on the public agenda. This article analyzes the extent to which rights of procreative liberty extend to the use of assisted reproductive techniques to have children and whether, if such rights exist, they can be denied to persons who are gay or lesbian. It shows that unproven concerns about the impact of gay and lesbian parenting on offspring are not relevant to situations in which children have already been born to gays and lesbians or will come into existence as a result of their reproduction. As a result, concerns about impact on offspring are not a valid ground for denying gays and lesbians same-sex marriage or access to assisted reproductive technologies. The article concludes by applying this framework to currently available reproductive techniques, such as artificial insemination, egg donation, and surrogate motherhood, and to futuristic ones, such as the ability to screen embryos for “gay genes,” reproductive cloning by gays and lesbians, and the fusion of embryos or gametes from same-sex partners.

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I. INTRODUCTION

Past struggles for gay and lesbian rights have confronted criminal bans on gay sexuality and discrimination in employment, the military, and other areas of public life. With *Lawrence v. Texas*¹ having struck down laws against sodomy, the front lines of the struggle for gay rights have moved to issues of same-sex marriage and child-rearing.²

The same-sex marriage debate has also placed gay and lesbian reproduction on the public agenda in a more direct way than has occurred in previous controversies over gay and lesbian rearing of children.³ The issue of same-sex marriage has reminded the country that gays and lesbians often have and rear offspring.⁴ Indeed, gay and lesbian parenting of children was a driving force in Massachusetts' landmark legal recognition of same-sex marriage.⁵ As more gays and lesbians enter into partnership arrangements, a growing number will seek to have children. To do so they will turn to assisted reproductive techniques (ARTs) to reproduce, thus raising questions about access to such techniques by heterosexuals and homosexuals alike.

Assisted reproduction is the use of non-coital technologies to conceive a child and initiate pregnancy. Most widely used is artificial insemination, but *in vitro* fertilization (IVF), egg donation, surrogacy, and genetic screening techniques are also available. In the more distant future, the prospect of genetic alteration of gametes or embryos looms as a way to select the traits of offspring. Heterosexual individuals and couples seek out ARTs when they are infertile, which occurs in 1 in 8 married couples.⁶ Homosexuals may also seek ARTs

¹ 539 U.S. 558 (2003).

² While *Lawrence* provides important protection to gays and lesbians, some commentators from the gay rights community have criticized the relational/marriage model of sexuality that it implies as overly domesticating gay sexuality, transforming sodomites and perverts into domesticated couples. Katherine M. Franke, *Commentary: The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1409 (2004) ("The price of the victory in *Lawrence* has been to trade sexuality for domesticity.").

³ Those issues arose in the context of child custody, adoption, and foster parenting. See *infra* at note 36.

⁴ In 1987 the estimate was that about 3 million gay men and lesbians in the United States were biological parents, and between 8 and 10 million children were raised in gay or lesbian households. LESBIANS, GAY MEN, AND THE LAW 475 (William B. Rubenstein ed. 1993).

⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Other grounds for recognition of such a right have been human dignity and freedom in intimate relations. See, e.g., *M. v. H.*, [1999] 2 S.C.R. 3 (ruling that discrimination against same-sex spouses in respect of spousal support is illegal); *Halpern v. City of Toronto*, [2003] 65 O.R. (3d) 161 (ruling that same-sex couples have right to marry).

⁶ See OFFICE OF TECH. ASSESSMENT, U.S. CONG., ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES, 49-57 (1987) (reporting results of 1987 survey studying physician and sperm bank practice).

for infertility, but more often they use them because they cannot reproduce with their partners or others of the same sex.

As more gays and lesbians seek to reproduce, conflict over gay access to assisted reproductive techniques is likely to increase. Just as some persons have questioned whether being raised by a gay parent is good for a child, some have questioned whether gays and lesbians should have children in the first place.⁷ Although many fertility clinics offer ART services to gays and lesbians, others do not or do so only for lesbians but not gay males. While Canada and Sweden have explicitly recognized the right of gay and lesbians to have access to ARTs, many countries forbid access altogether.⁸ Such restrictions limit or infringe the procreative liberty of gays and lesbians and raise the question of the extent to which gays and lesbians, like heterosexuals, have rights to procreate using ARTs.

This article analyzes the procreative liberty of gays and lesbians, their right to use ARTs to form families, and the implications of such rights for family law and access to ART services. It argues that all persons, regardless of sexual orientation or marital status, have the right to procreate and to use ARTs when necessary to achieve that goal. If so, the state cannot deny gays and lesbians access to ARTs to have children.⁹ Whether they will have access to a particular technique turns on whether access is granted to persons generally and on whether private clinics are free to discriminate against gays and lesbians in accepting patients. If homosexuality is not a valid basis for withholding care, as I argue below, then sexual orientation should be added to the conditions against which private providers cannot discriminate.¹⁰

⁷ See *Goodridge*, 798 N.E.2d at 983 (Mass. 2003) (Cordy, J. dissenting).

⁸ Assisted Human Reproduction Act, S.C., ch.2 (2004). BBC News, "Sweden to Allow IVF for Lesbians," March 3, 2005 available at <http://news.bbc.co.uk/2/hi/europe/4315145.stm>. Most countries that ban gay and lesbian access do so by limiting ARTs to married couples, which with a few exceptions necessarily excludes gays and lesbians. Bartha M. Knoppers and Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J. LAW & MED. 329 (1991). Italy recently passed a law having the same effect. Law 40/2004, February 19, 2004, Gazz. Uff. No. 45 (February 24, 2004). Even if there are no legislative or other "legal" prohibitions on unmarried individuals, gays or lesbians obtaining ART, as is the case in the United Kingdom, the statutory requirement that providers protect the "welfare of the child" is often interpreted to make sexual orientation and/or unmarried status a condition in practice for receiving services. The HFEA, however, does not condition licenses on not treating gays and lesbians or single persons. See Human Fertilisation and Embryology Authority, *Code of Practice*, 9, Jan. 2004, pp. 29-31, available at <http://www.hfea.gov.uk/HFEAPublications/CodeofPractice>.

⁹ Although most homosexuals may be sexually fertile, because of their homosexuality they may not be attracted to or be willing to mate with members of the opposite sex or may lack opportunities to do so. For them ARTs may be the only way to procreate.

¹⁰ There may still be, however, a few instances in which homosexual status itself is relevant in determining access in such futuristic techniques as reproductive cloning for fertile lesbi-

The article begins by analyzing the concept of procreative liberty and the extent to which it protects the right of infertile persons to use ARTs to form families. It then shows that gays and lesbians have the same interests in reproducing as do heterosexuals and should be accorded similar rights to reproduce, including similar access to ARTs as needed. In making that argument, it is necessary to address the argument raised in disputes over child custody, adoption, and same-sex marriage about whether gays and lesbians are desirable or adequate parents. Once it is shown that protecting children is not an adequate basis for denying gays and lesbians child rearing or reproductive opportunities, the case is strong for according to gays and lesbians the same rights to assisted reproduction that other persons have.

In the future, the willingness of persons to procreate may also be dependent on knowledge about the genetic make-up of expected offspring and the ability to choose, shape, or otherwise construct their genome. Although the availability of these techniques is still highly speculative, this article also addresses the issues that would arise if genetic tests for sexual orientation existed or genetic fusion of same-sex gametes were possible.

Analysis of these issues will show that a social preference to have children raised by married heterosexuals is not a sufficient basis to deny gays and lesbians the right to marry or to have offspring through the use of ARTs. The final sections of the article show how due respect for the procreative liberty of gays and lesbians protects access to currently available ARTs and to those that may be available in the future. It ends with a discussion of the use of ARTs to screen for a "gay gene," if such is ever discovered, to use reproductive cloning, and to use techniques combining genomes from two gay individuals.

II. PROCREATIVE LIBERTY AND ASSISTED REPRODUCTION

To assess rights to homosexual procreation we must first determine the status of reproductive choice generally. The Supreme Court's privacy and family jurisprudence has dealt for the most part only with a subset of reproductive issues, most notably liberty claims *to avoid reproduction* through birth control and abortion. With the 1992 reaffirmation in *Southeastern Pennsylvania Planned Parenthood v. Casey*¹¹ of the basic premises of *Roe v. Wade*,¹² those rights are now established as a probably stable part of the medical, legal,

ans or embryo fusion and gamete haploidization techniques for male homosexuals.

¹¹ 505 U.S. 833 (1992).

¹² 410 U.S. 113 (1973).

and social landscape. Recent battles over partial-birth abortion and fetal homicide and protection laws chip away at the edges but leave the basic right to terminate pregnancy intact.¹³ The appointment of new Supreme Court Justices, however, could quickly change the stability of this arrangement.

The United States Supreme Court has addressed the right to reproduce only in dicta.¹⁴ The 1942 case of *Skinner v. Oklahoma*¹⁵ is a much-cited precedent here. Although the *Skinner* Court invalidated the compulsory sterilization of certain repeat offenders on equal protection grounds, it added a stirring endorsement of the right to reproduce as “one of the basic civil rights of man.”¹⁶ Since then, however, the Court has rarely encountered specific claims of rights to reproduce, though it has seen fit many times in dicta to state that control over procreation and having children is protected.¹⁷ State courts, however, have held that conditioning probation for non-payment of child-support on avoiding reproduction does not necessarily violate the right to reproduce.¹⁸ Nor do prison officials violate prisoner reproductive rights when they refuse to allow incarcerated males to provide sperm for artificial insemination outside of prison.¹⁹ Neither the Supreme Court nor lower courts have directly addressed the existence of fundamental rights to use assisted reproduction and genetic screening technologies.

Although the Court has talked about the *right to reproduce* mainly in dicta, there is ample reason to think that that dicta would become

¹³ 18 U.S.C. § 1841 (2004) Unborn Victims of Violence Act of 2004; 18 U.S.C. § 1531 (2004) Partial Birth Abortion Ban Act of 2003; *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) (granting permanent injunction granted); *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004) (granting permanent injunction against Partial Birth-Abortion Act of 2003).

¹⁴ They have also involved the right to rear one’s biologic offspring. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁵ 316 U.S. 535, 541 (1942).

¹⁶ *Id.*

¹⁷ For a fuller analysis and relevant cites, see JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 2 (1994). In *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), the Court went so far as to state “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

¹⁸ *State v. Oakley*, 629 N.W.2d 2000 (Wis. 2002) (upholding an anti-procreation condition of probation for defendant convicted of non-payment of child-support); *State v. Taltey*, 814 N.E.2d 1201 (Ohio 2004) (striking down as overbroad an anti-procreation condition of probation for defendant convicted of non-payment).

¹⁹ *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) (en banc) (holding that a prison inmate has no right to provide sperm to his wife for artificial insemination outside the prison); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) (same). See ROBERTSON, *supra* note 17, 35-38 (discussing *Goodwin v. Turner*). See also, “Mobster’s Smuggled Sperm Counts for Extra 16 Months in Prison,” at <http://www.com/203/Law/08/21/smuggled.sperm.ap/index.html>.

holding if states attempted to limit coital reproduction, for example, by mandatory sterilization or contraception, limits on the number of children, or restrictions based on marital status and sexual orientation. If coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use noncoital means of reproduction to combine their gametes, such as artificial insemination (AI), *in vitro* fertilization (IVF), and related techniques. Infertile couples who use those techniques are trying to achieve the same goal of having and rearing offspring that fertile couples achieve through coitus. There is no good reason not to grant them the same presumptive freedom to achieve that goal which fertile persons have, subject to limitation, of course, if use of those techniques impaired important state interests.²⁰

A somewhat harder question arises when infertile couples use the services of a gamete donor or a surrogate to form a family. Here the move away from the nuclear family involves a third party replacing the genetic or gestational contribution of one of the partners. Is such “partial” reproduction so centrally important to individuals that it deserves the same protection? A closer look suggests that the most widely used third-party techniques—sperm and egg donation—do play an equally important role in the lives of persons who use them. The use of donor gametes allows one partner to transmit genes while the other rears only (donor sperm) or gestates and rears (egg donation). Embryo donation, which occurs less frequently, involves no gene transmission by either partner but does create gestational and rearing relations. Gestational surrogacy uses the gametes of each partner but depends on gestation by a woman engaged for that purpose.

If the state banned or placed substantial obstacles in the way of gamete donation, a plausible argument would exist that such measures infringed the procreative freedom of infertile individuals or their partners. Similar arguments could apply to embryo donation and gestational or even full surrogacy, though the argument for use of gestational surrogacy might be stronger than for the other techniques.²¹ If some uses of gamete donors or surrogates are constitutionally protected, then the state could not ban them unless it could show a compelling basis for doing so.²² Any such challenge, however, would

²⁰ In most instances, however, ARTs to have children do not cause the strong harm to others necessary to justify limitation of the right to reproduce. See note 75, *infra*.

²¹ Embryo donation and full surrogacy are the most distantly related to ordinary coital reproduction and may have less protection than gestational surrogacy, which uses the egg and sperm of the infertile couple.

²² Adoption also seeks to establish intimate association with a child but does not involve

embroil the Supreme Court in yet another controversy over the reach of substantive due process, with the same familiar arguments about the propriety of judges reading new rights into the Constitution instead of adhering closely to the content that open-ended clauses had when they were enacted. The outcome of such cases would depend on how closely the sought-for technique serves traditional reproductive interests and the type and strength of the interests that the state was trying to protect.²³

If the Supreme Court found that the liberty *right to reproduce* includes the use of ARTs when infertile, it is unlikely to limit such a right to persons who are married. Although a state might argue that only married persons should be aided in having children, it is also likely to find that a person's interest in reproduction exists independently of marriage. Some persons may be unwilling or unable to marry, yet strongly desire to be parents. As this article will explore, unmarried persons who have children would not necessarily be poor or inadequate childrearsers, nor are children invariably harmed by being born to single or unmarried parents.²⁴ Justice Brennan's statement in *Eisenstadt v. Baird*, "if the right to privacy means anything, it means the right of the *individual*, married or single, [to] deci[de] whether to bear or beget a child," suggests that state limits on reproduction by unmarried persons, such as barring access to the most common ARTs, are likely to be struck down on due process or equal protection grounds.²⁵

The right to select the genetic make-up of potential offspring has not yet received sustained attention from ART practitioners, legislatures, or the courts. One could argue that the right *to avoid reproduction* or *to reproduce* necessarily entails the right to obtain genetic

procreative rights because no biologic connection with the adopted child exists. No constitutional right to adopt has yet been recognized. See *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804 (11th Cir. 2004) (holding that adoption and foster care relationships do not involve liberty interests).

²³ Thus techniques that involve the gametes of a married couple (gestational surrogacy) are more likely to be granted protection than those that involve no genetic contribution at all (embryo donation). For an analysis of these issues see ROBERTSON, *supra* note 17; John A. Robertson, *Procreative Liberty in the Era of Genomics*, 30 AM. J. LAW & MED. 439 (2003).

²⁴ From a heterosexual, married perspective the situation of one parent or two parents of the same sex raising a child may appear to be less than ideal, but one cannot say that it is so likely that such children will be harmed as to justify denying single persons or unmarried couples the chance to reproduce.

²⁵ *Eisenstadt*, 405 U.S. at 453 (emphasis in original). If this principle is correct, then a law that limited assisted reproduction to married persons, such as that recently proposed in Utah for surrogacy, is likely to be struck down. See Brooke Adams, *Controversial Surrogacy Law Fix Proposed*, SALT LAKE TRIB., July 17, 2003, p. A1. available at <http://www.sltrib.com/2003/jul/07172003/utah/76058.asp>.

information about embryos and fetuses and to use that information in making decisions about embryo transfer or continuation of a pregnancy to term.²⁶ If so, a state could not ban the use of amniocentesis or preimplantation genetic screening or ban abortion or embryo transfer decisions based on those tests without showing compelling reasons for the ban. The strong version of such a claim would extend to decisions based on both medical and non-medical grounds, and posit a more general right of parents to choose the genome or other characteristics of prospective children. The weak version would recognize such a right only for medical indications. No courts, however, have yet addressed the constitutional grounding of such claims.

III. THE PROCREATIVE LIBERTY OF HOMOSEXUALS

Once it is recognized that both married and unmarried persons have a liberty right to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy offspring, there is no compelling reason for denying that right to persons because of their sexual orientation.²⁷ Gay males and lesbians ordinarily are not sexually attracted to members of the opposite sex, but they may nevertheless have strong desires to have or care for offspring.²⁸ They too have been brought up in families and in a society that identifies having and rearing children as an important source of meaning and fulfillment. They have, in short, the same biologic and associational interests as other persons do in having a child and the same general ability to be competent child-rearers.

Yet many persons seem to find gay and lesbian reproduction to be unnatural, an improper use of medical resources, or not in the "best interests" of offspring. Such objections could lead to state or provider restrictions on gay and lesbian access to assisted reproductive technologies.

²⁶ See John A. Robertson, *Prebirth Selection of Offspring Characteristics*, B. U. L. REV. 301 (1996); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AMER. J. L. & MED. 439 (2003).

²⁷ Any legal category defined in terms of sexual orientation faces the difficult problem of how one ascertains and establishes what that sexual orientation is. This difficulty is one more reason for the law to avoid making distinctions on this basis. See *infra* discussion accompanying note 59.

²⁸ Any statement about human sexual desire must be qualified by the wide range of variation in sexual attraction and its strength, with some persons sexually attracted to members of either sex, to same-sex others only at different periods of their life, and still others never or only weakly so. For a discussion of the vast range of homosexual/heterosexual desire and the difficulties in defining "homosexual" or "heterosexual," see EDWARD O. LAUMANN, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994) and TIMOTHY F. MURPHY, *GAY SCIENCE: THE ETHICS OF SEXUAL ORIENTATION RESEARCH*, ch. 1 (1999).

However, objections to gay and lesbian reproduction as “unnatural” or improper claim too much. The same charge can be levied against ART itself for infertile persons (or indeed, medical intervention for all illnesses). After all, if nature has not equipped people to reproduce, then we should not interfere with nature by assisting them to do so. If we reject that argument for the infertile (and its application to most other illnesses), then we should reject it here as well.

The key question in each case is whether the sought-for medical service, in this case ART for the infertile or for single persons and gay or lesbian couples, rationally serves an important human need. If it does for married couples, then it should for unmarried persons as well, regardless of their sexual orientation. If so, the label of “natural” or “medical” becomes a way to hide a normative judgment about the importance of reproduction to gay and lesbian persons that does not withstand close scrutiny.²⁹ The question then becomes whether unmarried persons, whatever their gender or sexual orientation, have an important human interest or need in reproducing. If they do, then they should not be excluded from ART services provided to others.

Usually, however, opponents rest their opposition to gay and lesbian reproduction on concerns about the welfare of offspring raised by gay or lesbian parents. In taking that position they assume, without actual evidence, that a gay or lesbian sexual orientation in parents is not good for children. State legislatures and courts have sometimes favored heterosexual over homosexual rearing parents in disputes over foster parenting, adoption, and child custody involving gays and lesbians. Similarly, opponents of same-sex marriage have argued that children are harmed by being reared by gay or lesbian parents, and that gay marriage would encourage the birth of such children.³⁰

A key question addressed in this article is whether such evidence, even if it validly shows that rearing by gay and lesbian parents is somewhat less favorable for children (which has not yet been reliably

²⁹ I am indebted to Gladys White for reminding me of the importance of this point, and to James Hughes for his succinct statement of the same issue: “I don’t see why it is any more medical to have a husband whose sperm are funky-shaped than to have a partner who doesn’t make sperm at all.”

³⁰ Although much of the social and psychological literature shows that parenting by gay men and lesbians presents no insuperable problems, opponents argue that this literature has severe methodological flaws, is not a representative sample, and reflects a non-neutral agenda. In support of the claim that children do equally well, see Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1060, 1064-65 (2000) (reporting no significant differences). For the opposite view, see Kirk Cameron & Paul Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757, 770-74 (1996) (stating that children raised by homosexual parents suffer from disproportionately high incidence of emotional disturbance and sexual victimization).

established), has relevance to the question of homosexual procreation and access to ARTs. As is argued below, if outcomes turn out to be less desirable for children reared by gay and lesbian parents—a highly questionable conclusion, this argument at most might be relevant to state policies about adopting existing children. But it would have no relevance to questions of same-sex marriage, custody of a gay person's existing children, access to ARTs, or other situations in which a new child is brought into the world. Adoption focuses on the best interests of already existing children and the state's goal of finding optimal placements for them. Opposition to gay marriage and access to ARTs, on the other hand, is based on protecting children who come into being only as a result of reproduction by gays and lesbians.³¹ Harm to offspring should not be a material factor in making such an assessment because the child sought to be protected would not otherwise have existed.³² As a result, protecting prospective children is not a valid ground for opposing same-sex marriages or gay and lesbian access to the assisted reproductive techniques available to others.³³

IV. GAY AND LESBIAN RIGHTS TO REAR CHILDREN

Because much of the debate over same-sex marriage and adoption and reproduction by gays and lesbians has focused on the welfare of children, this article first addresses existing law about the right of gays and lesbians to raise children. Although many studies have shown that gays and lesbians are equally competent parents and that their children are as well-adjusted as other children, let us assume for the sake of argument that some reliable social and psychological studies show that children of homosexuals have a different set of adjustment and living problems than children of married heterosexual persons.³⁴ Let us also assume that there may be a higher risk of special problems in gay families, or at least a theoretically possible chance that such is the case.³⁵ This is not to say that children reared in homo-

³¹ I recognize that not encouraging gay reproduction is only one argument of opponents of same sex marriage. More central has been the claim that gay marriage will diminish the meaning of marriage for all persons or that recognition of same sex marriage will signal the acceptability of same sex behavior, and lead younger persons into gay and lesbian sexual activities.

³² This is Derek Parfit's non-identity problem. DEREK PARFIT, *REASON AND PERSONS* (1984). For further discussion of the argument and the standard responses to it, see *infra* note 63. See also Dan Brock, *The Non-Identity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 *BIOETHICS* 269 (1995); BUCHANAN ET AL., *FROM CHANCE TO CHOICE* (2000).

³³ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (especially Judge Cordy's dissent).

³⁴ See *supra* note 30.

³⁵ One report suggests that children of lesbian parents might be more likely to experiment with their sexuality and life-styles before settling in on a specific sexual orientation. Susan

sexual settings are inescapably scarred or cannot have happy lives, only that they may be on average somewhat less happy or somewhat more likely to have additional complications in the personal journey each child makes to reach a mature, stable identity. To see what the policy implications of such evidence would be, we first examine its relevance to policies concerning gays raising their own existing children and policies for gay adoption.³⁶ We then examine its relevance to situations in which children will be born to gay and lesbian parents.

A. Rearing Existing Children

An important distinction in the analysis of the reproductive rights of gays and lesbians is that between claims to rear existing children and claims to bring children into the world who will be reared by gay and lesbian parents. As we will see, if the child already exists, a biologic parent who is gay or lesbian will have the same right to rear that child as would a heterosexual parent. By contrast, although the psychological and social data does not strongly support such a conclusion, states may be free to deny gays and lesbians the right to be foster or adoptive parents (though few do).

In situations in which gays and lesbians seek to bring a child into the world, claims that children are best raised in a heterosexual married family have no logical relevance to protecting the child's welfare, because the child in question would not otherwise have existed. As will be discussed below, the non-identity problem in preventing harm to future offspring strongly supports the notion that the sexual orientation of parents should have no relevance to the right of gays and lesbians to have access to assisted reproduction and to rear resulting children.

1. Gay and Lesbian Rights to Rear Their Biologic Children

Many gays and lesbians have married opposite sex partners and had children or otherwise coitally reproduced. When such marriages have broken up, conflict between the couple over child custody and

Dominus, *Growing Up with Mom & Mom*, N.Y. TIMES Mag., Oct. 24, 2004, 69.

³⁶ I am bracketing out the question of whether those differences or risks are substantially different than the many other less than ideal circumstances in which heterosexual reproduction occurs. Much heterosexual reproduction exposes children to poverty, strife, unfavorable genomes, and many other less than ideal rearing situations, yet few efforts are made to prevent or stop such reproduction. That fact suggests that public policy attempts to limit homosexual reproduction on grounds of protecting offspring are in fact masking bias or antipathy toward gays and lesbians. *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003) found that such bias did not provide a rational basis for governmental action.

rearing has sometimes led one spouse to seek to deprive the gay spouse of custody or visitation rights because that person is gay. That partner has argued that exposure to a gay life-style is harmful to the child, particularly if they live with or demonstrate affection with gay partners.

In years past some courts have found this fact to be a determinative factor and deprived the gay parent of custody or limited visitation, especially if a new gay partner has entered the scene.³⁷ More recently, with few exceptions, courts have found that sexual orientation is not a per se factor in assigning child rearing.³⁸ Instead, most states follow a "nexus" test, under which a parent's homosexuality is not an automatic reason for limiting custody or visitation, but could be relevant if the other party can show that the parent's homosexual behavior has a harmful effect on the child.³⁹

Courts that apply the nexus test focus on aspects of the homosexual parent's behavior that might be harmful to the child. One appellate court, for example, found that a trial court had improperly granted a mother unsupervised visits with her children when the children had witnessed sexual acts between the mother and her lesbian lover.⁴⁰ Such rulings, however, are not in themselves evidence of a bias against homosexuals, since almost any court would not award custody to heterosexual parents who openly engage in sex in front of their children.

Courts differ on the effect of more innocent displays of affection such as kissing and embracing by homosexual parents. In *Lundin v. Lundin*,⁴¹ a Louisiana court of appeals held that the trial court should have awarded a greater amount of custodial time to the father when the children witnessed the mother in "indiscreet displays of affection

³⁷ Such an approach would now most likely be unconstitutional under *Stanley v. Illinois*, 405 U.S. 645 (1972) unless a direct connection between the gay or lesbian parent's sexual orientation and harmful impact on the child could be shown.

³⁸ In *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) the Virginia Supreme Court found that living with a homosexual parent would without a doubt harm the child. Missouri allows such a presumption to be rebutted. *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. 1998). *But see Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. 1983) ("[T]he court has stressed that a parent's life-style, standing alone, is insufficient ground for severing the natural bond between a parent and a child.").

³⁹ The nexus test is used by some courts explicitly, and is applied by many other courts. *See e.g.*, *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Supp. 1986); *Boswell v. Boswell*, 721 A.2d 662 (Md. 1998). *Charpentier v. Charpentier*, 536 A.2d 948 (Conn. 1988); *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. 7d. 1993).

⁴⁰ *See Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992). The court cited a case denying custody to a father who had a live in girlfriend, suggesting it might have been the sexual misconduct in the presence of the children that influenced the court, and not the fact that the mother was a homosexual.

⁴¹ 563 So.2d 1273 (La. Ct. App. 1990). *See also M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).

beyond mere friendship” which included kissing with her homosexual lover. Other courts have ruled that it is not inappropriate for children to see the homosexual parent and the parent’s lover kiss or hug. These decisions commonly find that discreet displays of affection, including a mother kissing her lesbian lover in front of the children, do not harm children who are otherwise doing well.⁴² They may reflect a growing trend.

A possible explanation for the heightened scrutiny that courts give to homosexual parents seems to be concern for the child’s development of a normal gender identity. For example, in *L. v. D.*,⁴³ a Kentucky court of appeals reversed a trial court that had failed to consider possible troubles the child might have forming a normal heterosexual identity. The *Lundin* court also expressed concern about the formation of heterosexual identity.⁴⁴ However, an Illinois court of appeals found no evidence that a child was confused because he had two mothers, and thus refused to restrict visitation rights.⁴⁵

An important factor in custody or visitation decisions with regard to a gay person’s own child is constitutional recognition of a biologic parent’s right to rear his or her own child.⁴⁶ That right cannot be infringed unless there is clear and convincing evidence that the parent is neglecting the child, not merely whether its best interests would be served by another rearing arrangement.⁴⁷ Although disputes between spouses will turn on what is best for the child, a parent could not be denied visitation unless there was a strong basis for finding harm to the child. Displays of affection alone between same-sex persons should not in themselves satisfy the demanding standard that must be met to deprive a parent of her constitutional right of association with her offspring.

2. Adoption by Gays and Lesbians

Adoption presents a different situation because a would-be adoptive parent is not seeking custody of his or her own biologic child but

⁴² See *In re Marriage of R.S. & S.S.*, 677 N.E.2d 1297 (Ill. App. Ct. 1996) (holding that mother’s relationship with live-in lesbian partner does not justify modification of the custody agreement in favor of the father); *VanDriel v. VanDriel*, 525 N.W.2d 37 (S.D. 1994) (determining that the trial court did not abuse discretion by awarding primary custody to mother, even though she was maintaining a lesbian relationship).

⁴³ 608 S.W.2d 64 (Ky. Ct. App. 1980).

⁴⁴ *Lundin*, 563 So.2d at 1277.

⁴⁵ *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993).

⁴⁶ *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that unmarried father was entitled to a hearing on his fitness as a parent before his biological child can be adopted without his consent).

⁴⁷ *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring that the clear and convincing standard be met before a parent may be deprived of parental rights).

that of someone else's already existing child.⁴⁸ In that situation, the best interest of the child is legitimately a paramount concern. No recognized reproductive or other right of family liberty comes into play, even for persons who have been acting as foster parents for a child.⁴⁹ This means that states generally have wide leeway with setting the conditions for adoption. However, they are not immune from respecting the due process and equal protection rights of gays and lesbians in setting those conditions.

With a few exceptions, however, the question of gay and lesbian adoption is largely moot. All states allow gay individuals to serve as foster parents or legal guardians, and almost all permit them to adopt as well.⁵⁰ Several state appellate courts, for example, have ruled that a potential adoptive parent's homosexuality is not a per se bar under state law to adoption.⁵¹ The more relevant question is whether adoption in any given case would serve the best interests of the child. Because there is no reason that gays and lesbians cannot be caring and responsible parents, eligibility for adoption should depend upon the parenting resources and abilities of individuals seeking to adopt, and not on sexual orientation per se.

Florida and a few other states take a different view.⁵² Although Florida gays and lesbians may be legal guardians and foster parents,

⁴⁸ Adoption of one gay partner by another to provide the same legal protections as marriage is a different use of adoption not here discussed. See LESBIANS, GAY MEN, AND THE LAW, *supra* note 4, at 431-42.

⁴⁹ The Supreme Court has held, for example, that foster parents are not entitled to due process before termination of foster parenting because they have no liberty or property interest in that relationship. See *Smith v. Organization of Foster Families for Reform*, 431 U.S. 816 (1977).

⁵⁰ See, e.g., *Sharon S. v. Superior Court*, 73 P.3d 554 (2003) (permitting ex-partner to complete an independent second-parent adoption of child bore by former partner through artificial insemination); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (holding that unmarried, same-sex couple was permitted to adopt a child, notwithstanding one partner's previous adoption of a child); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (holding that same sex cohabitants are not precluded from jointly adopting a child); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993) (permitting lesbian to adopt her partner's biological child); *Adoptions of B.L.V.B.*, 6287 A.2d 1271 (Vt. 1993) (holding that biological mother and her lesbian partner could adopt the children of the mother); *In re Evan*, 583 N.Y.S.2d 997 (Sur. 1992) (holding that adoption by biological mother and her lesbian partner was in the best interests of the child).

⁵¹ *Adoption of Anonymous*, 622 N.Y.S.2d 160 (1994) (stating that homosexuality is not a bar where there is no evidence showing adoption not in the child's best interests); *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990); *In re Adoption of M.J.S.*, 44 S.W.3d 41 (Tenn. Ct. App. 2001); *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981).

⁵² See, e.g., FLA. STAT. ANN. § 63.042 (West 1997); ALA. CODE § 26-10A-6 (1992); MISS. CODE ANN. § 93-17-3 (1999) (prohibiting adoption by couples of the same gender); UTAH CODE ANN. 378-3-1(3) (Supp. 2001) (barring adoption by unmarried cohabitants, which includes gays).

they are barred by statute from adopting.⁵³ This law was the fruit of a virulent anti-gay 1977 referendum campaign led by the entertainer Anita Bryant. While that statute had survived previous court challenges, the conclusion in *Lawrence v. Texas* that moral disapproval of homosexual sodomy did not constitute a rational basis for governmental action, couched as it was in language strongly protecting the dignity and respect owed to homosexuals, appeared to have doomed the Florida ban.⁵⁴

The 11th Circuit Court of Appeals, however, upheld the Florida law by applying a highly deferential version of rational basis review that ignored the values protected in *Lawrence*.⁵⁵ The appeals panel justified its holding as a case of appropriate deference to a legislative judgment about what best protected the interests of adopted children. Because there is no right to adopt as such, even for foster parents who have long lived with a child, the court was highly deferential to the state's claims. The state's policy to "create adoptive homes that resemble the nuclear family as closely as possible" was rational because Florida has "a legitimate interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children."⁵⁶ The court found no reason to question Florida's claim about the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."⁵⁷ Disallowing adoption into homosexual households, which are necessarily motherless or fatherless and "lack the stability that comes with marriage," was thus a rational means of furthering Florida's interest in promoting adoption by marital families.⁵⁸

In reaching these conclusions, the court cast a cold eye on the plaintiffs' claim that social science research showed that homosexuals performed well as adoptive parents and that children raised by them suffered no adverse outcomes. The court found that the evidence was not so clear and overwhelming that it would be irrational for the legislature to take a different view of the desirability of heterosexual rear-

⁵³ FLA. STAT. ANN. § 63.042(d)(3) (West 1997 & Supp. 2005) ("No person is eligible to adopt under this statute if that person is a homosexual."). Administrative regulations define "homosexual" as one who engages in homosexual practices, and thus does not bar non-practicing homosexuals from adopting.

⁵⁴ 339 U.S. 558 (2003).

⁵⁵ *Lofton vs. Sec'y of Dept. of Children & Fam. Health Servs.*, 358 F.3d 804 (2004).

⁵⁶ *Id.* at 819.

⁵⁷ *Id.* at 804.

⁵⁸ *Id.* Citing the long history of families as the ideal site for child rearing, the court concluded that "it is in the best interests of adoptive children, many of whom come from troubled and unstable backgrounds, to be placed in a home anchored by both a father and a mother." *Id.* at 820.

ing parents. The legislature could properly find that those studies were not definitive because of their questionable methodologies, small self-selected samples, political bias in how they were interpreted, and an over-inclusion of affluent, educated parents.⁵⁹ It cited other studies that showed that children raised in homosexual households fared worse on a number of measures.⁶⁰ In any event, the state might rationally “proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries.”⁶¹

The weakness in the court’s analysis is its acceptance of the many inconsistencies and exceptions in the state’s purported policy of achieving a stable rearing environment akin to that of a married couple. The Florida statute was in fact riddled with exceptions that resulted in a high degree of both over and under-inclusivity in pursuing its stated goal. Yet in each instance the court found “some conceivable basis” to rationalize the law’s very loose fit with its purported concerns. For example, despite its claim of the importance of a stable, nuclear rearing arrangement, the law did not limit adoption to married couples. It allowed adoption by single persons as long as they were not practicing homosexuals. Yet the court found that this provision was “rational” because the state “might have thought” that single heterosexuals were more likely to marry in the future than were gays.⁶² Also, since most adopted children are likely to be heterosexual, the court found that heterosexual couples are “better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.”⁶³

⁵⁹ *Id.* at 825, (citing, *e.g.*, Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCHOL. 130 (1995) (reviewing various studies and questioning them on “theoretical and empirical grounds”).

⁶⁰ *Id.* at 825, (citing, *e.g.*, Kirk Cameron & Paul Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757, 770-74 (1996) (claiming that children raised by homosexual parents suffer from disproportionately high incidence of emotional disturbance and sexual victimization)).

⁶¹ *Lofton*, 358 F.3d at 826.

⁶² As Justice Barkett points out, it is much more likely that single individuals with adopted children are even less likely to marry. *Lofton v. Sec’y of the Dept. of Children & Fam. Servs.*, 377 F.3d 1275, 1297-1298 (2004) (Barkett, J., dissenting from denial of Petition for Rehearing En Banc).

⁶³ *Lofton*, 358 F.3d at 822. Judge Barkett found that this over-idealized the need for similar experiences to provide parenting and counseling, and that in any event, a policy of promoting heterosexuality in offspring was not an acceptable one. *Lofton*, 377 F.3d at 1300 (Barkett, J., dissenting from denial of Petition for Rehearing En Banc).

Also damaging to the claim of rationality was the effect of the state's policy on the children whom gays and lesbians sought to adopt. Many of the children in question were foster children being raised by gay or lesbian foster parents. Although Lofton and other plaintiffs had been foster parents for many years, they could not adopt those children, even if it would delay or make it unlikely that those children were ever adopted. Yet the court found that the state might rationally conclude that such delay was worth it in order to increase the chance of finding an "optimal" placement for such children with single or married heterosexuals.⁶⁴ Nor did the state's acceptance of homosexuals as foster parents and legal guardians show that a ban on adoption was irrational because those arrangements do not have the permanence or legal and cultural significance of adoptive parenting.

The court could not reach these conclusions without a very grudging reading of *Lawrence v. Texas*.⁶⁵ For the court, that case was about homosexual sodomy only, not about sexual autonomy generally or the duty to treat homosexuals with equal respect in areas beyond sodomy. As Justice Rosemary Barkett shows in her vigorous dissent from the denial of the petition for rehearing en banc, the court's reading of *Lawrence* and other equal protection cases is very difficult to justify.⁶⁶ As Judge Barkett shows, equal protection cases from *Eisenstadt v. Baird* through *City of Cleburne v. Cleburne Living Center, Inc.*, and *Romer v. Evans*, make clear that a law that treats a disfavored group differently and is so full of exceptions that it is ill-suited to reach its goals, may be taken to be based on animus toward the disfavored group.⁶⁷ In such cases the Court has subjected the state's rationale to a more searching scrutiny than the "any conceivable basis" rationale used in the commercial and economic area. As she persuasively shows, the many exceptions in the law for heterosexuals and even homosexuals who do not engage in homosexual acts make it difficult to credit the notion that the law is designed to promote a stable nuclear rearing situation.

The panel's stingy reading of *Lawrence* is also evident in its unwillingness to find that Florida's ban violates the right of sexual autonomy recognized in *Lawrence*. The appeals court argued that since the *Lawrence* majority used rational basis language and never

⁶⁴ Id at 819. It also noted that if delay alone mattered, than any other requirement that delayed adoption, such as appropriate income, residence, in-state residency and other criteria, would also be irrational.

⁶⁵ 339 U.S. 558 (2003).

⁶⁶ *Lofton*, 358 F.3d at 804.

⁶⁷ *Lofton v. Sec'y of the Dept. of Children & Fam. Servs.*, 377 F.3d 1275, 1292-1301 (11th Cir. 2004) (Barkett, J., dissenting from denial of Petition for Rehearing En Banc).

mentioned a fundamental right, no more general right of sexual autonomy or homosexual status was established. As Judge Barkett shows, however, this directly contradicts the heightened scrutiny that *Lawrence* accorded to sexual intimacy. Although the opinion did not use the language of fundamental rights, it is clear that it was applying the heightened scrutiny that fundamental interests receive. If sexual autonomy was not a protected liberty interest or fundamental right, then the state's traditional concern with morality would have provided a rational basis for the statute. Yet it is such moral judgment that the Court found irrational when applied to homosexual sodomy.⁶⁸

If so, then a law that prohibits persons who engage in protected sexual activity from adoption operates as a burden on the exercise of that protected right. Although there is no right to adopt as such, once the state authorizes adoption, it cannot condition eligibility on waiving constitutional rights of sexual intimacy or other protected liberty interests without showing that they are substantially related to advancing the best interests of children. Although it is not irrational to think that there might be some advantages to adopted children if adopted by a married couple, the Florida law is not so limited. Its many exceptions and willingness to tolerate the plight of foster children whose adoption is delayed or never occurs makes it very difficult to view it as anything other than a product of animus against homosexuals (as its origins in the Anita Bryant campaign of 1977 suggests).⁶⁹

The reluctance of the 11th Circuit panel to strike down the Florida ban on homosexual adoption despite *Lawrence* suggests that gays and lesbians may have to continue to struggle for equal rights and status in many areas. Although many courts might view the import of *Lawrence* more broadly than did the *Lofton* panel, other courts have also given *Lawrence* a narrow reading.⁷⁰ But even parsimonious interpretations of *Lawrence* will not change the invalidity of attempts to limit reproduction by gays and lesbians. As we will see below, concerns

⁶⁸ See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). Judge Barkett is especially derisive of the panel's claim that *Lawrence* is limited by *Washington v. Glucksberg*, 521 U.S. 702 (1997), claiming that Judge Birch has invented the notion that *Glucksberg* required that only rights that have been affirmatively protected by history and tradition are recognizable under substantive due process. *Lofton*, 377 F.3d at 1304-1306 (Barkett, J., dissenting from denial of Petition for Rehearing En Banc).

⁶⁹ *Lofton*, 377 F.3d at 1301-1303.

⁷⁰ See, e.g., *State v. Limon*, 83 P.3d 229 (Kans. App. 2004) (reduced sentences for statutory rape not applicable to same-sex situations); *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004) (finding that *Lawrence* does not create a right of sexual autonomy that invalidates state ban on sale of sexual devices). *But cf.* *Martin v. Zihler*, 607 S.E.2d 367 (Va. 2005) (ruling that a state ban on fornication was invalid after *Lawrence*).

about the well-being of children cannot serve as a rational, much less a compelling, basis for restricting gay and lesbian reproduction because the children in question come into existence only as a result of that reproduction.

B. Rearing Children Who Would Not Otherwise Have Existed

Debates about same-sex marriage and access to ARTs also turn on the welfare of children, but here the situation is very different from that of child custody or homosexual adoption.⁷¹ Disputes about raising one's own children or adopting the children of others involve children who already exist. Gay and lesbian procreation involve children who will come into existence through the use of ARTs, the frequency of which is likely to increase with legal recognition of domestic partnerships or same-sex marriages. Opponents who argue that gay parents are not optimal rearers cannot prevail in this context, as the *Loften* court have allowed them to do in the adoption setting, because the children they seek to protect would not exist if their policies were adopted.

Persons who cite protection of offspring to oppose same-sex marriage or gay and lesbian access to ARTs have overlooked "the non-identity problem" famously identified by Derek Parfit.⁷² Even if we allow for the sake of argument that it would be preferable for all children to be reared in a heterosexual married setting, children born with the high likelihood of being raised outside that setting are not harmed by that fact alone. Because the children in question would not exist unless they were brought into the world by the gay or lesbian individuals or couples who rear them, they are not harmed simply because they have been born into what some have claimed to be less than optimal circumstances.⁷³ Indeed, tort law has long recognized this point in its refusal to grant children damages for "wrongful life" for being born in disadvantaged or diminished states of well-being when there was no alternative way for them to have been born.⁷⁴ Pro-

⁷¹ The debate about same-sex marriage is not only about the welfare of children, but the importance of marriage for raising children is a central part of the debate.

⁷² See PARFIT, *supra* note 32.

⁷³ This is particularly true in a case where parents are competent and committed to the best interests of the child, but would also be true in less ideal rearing circumstances.

⁷⁴ The California, New Jersey, and Washington Supreme Courts have allowed children to recover special but not general damages on a claim of wrongful life in situations in which their parents were able to recover both special and general damages for the child's birth. See *Turpin v. Sortini*, 31 Cal.3d 220 (1982); *Procanik v. Cillo*, 470 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis*, 656 P.2d 483 (Wash. 1983). While these cases are defensible as a means to assure that the tortfeasor internalizes the full cost of the tort, the opinions overlook the inconsistency that exists when they allow the recovery of special but not general damages. If the child has been wronged by being born, then such damages also should be awarded.

protecting those children by denying them existence altogether would thus not provide rational grounds for denying gays and lesbians the right to marry or to procreate with ARTs.

The standard response to the non-identity problem has been to move away from a person-based concept of harm to an evaluation of the resulting state of affairs, regardless of whether harm to the interests of any particular individual has occurred. Derek Parfit and Dan Brock have argued that an obligation to act to produce the best overall state of affairs may exist when another child without those deficits could be substituted without undue burdens to the parents.⁷⁵ But those conditions are not easily met in the case of gay and lesbian procreation (or in most other situations of assisted reproduction).⁷⁶ If homosexual rearing carried a high risk of diminished offspring welfare, then one could question the desirability of any gay and lesbian reproduction or child rearing. Restrictions to limit reproduction, however, impose substantial burdens on gays and lesbians seeking to procreate. Nor would denying them the right to reproduce lead to a married heterosexual couple having another child in the place of children not born in gay and lesbian families. Thus any restrictive measure fails to satisfy the stringent requirements of the same-numbers, duty-to-substitute alternative to the non-identity problem.⁷⁷

To understand how the non-identity problem and procreative liberty play out in the two main arenas in which concerns about the welfare of offspring have strongly figured, the next sections address same-sex marriage and gay and lesbian access to ARTs. Because concerns about the welfare of offspring have been most directly articulated in the debates over same-sex marriage, I begin there.

1. *Same-Sex Marriage and Harm to Offspring*

The current debate over same-sex marriage involves a complex array of issues, but many of them turn on marriage as the culturally embedded site for procreation and child-rearing, and the harms that are alleged to arise for children if same-sex marriage is recognized.⁷⁸

⁷⁵ DEREK PARFIT, *supra* note 32 at 371-77; Dan Brock, *The Non-Identity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 *BIOETHICS* 269 (1995). See also Buchanan, *supra* note 32, at 22 (detailing the ethical and technical complexities in determining the boundaries of reproductive freedom and the transmission of harmful conditions); John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 *AMER. J.L.&MED.* 7-40 (2004).

⁷⁶ Robertson, *supra* note 75.

⁷⁷ For a more extended discussion of the non-identity problem and various responses to it, see Robertson, *supra* note 75.

⁷⁸ As Les Green has reminded me, “same-sex” marriage rather than “gay” or “homosexual” marriage is the more accurate term because there are no legal barriers to gays or lesbians

One aspect of the debate is the claim of opponents that marriage is quintessentially about reproduction and since same-sex couples by definition do not reproduce with each other, marriage should be foreclosed to them. The second aspect of the debate is that since opposite-sex marriage is the most likely and appropriate site for rearing and nurturing children, everything should be done to preserve its viability. Same-sex marriage might dilute its importance and thus lead to children being born outside the allegedly supportive structure of married male and female rearing parents.⁷⁹

Procreation and the Essence of Marriage. It is true that society has channelled reproduction to marriage but it has also tolerated and permitted much reproduction to occur outside marriage. With over half of children in the United States now born outside of marriage, legitimacy is no longer an important social category.⁸⁰ Nor, as we have seen, do most states award child custody or restrict adoption on the basis of marital status or sexual orientation.⁸¹ Most importantly, fertility and intention to reproduce are not prerequisites to marriage; failure to consummate the marriage or infertility are not grounds for divorce or invalidation of a marriage. As the Massachusetts Supreme Judicial Court noted in its landmark upholding of the right of same-sex marriage, even “people who cannot stir from their deathbed may marry.”⁸² The court found that the essence of marriage is permanent commitment to a personal relationship, not procreation. Although many married persons do have children, “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”⁸³

marrying persons of the opposite sex.

⁷⁹ The procreation argument against same-sex marriage was nicely summarized in a letter to the editor of the New York Times commenting on a Massachusetts court decision in favor of same-sex marriage:

The key reason for giving special consideration to marriage is its unique role in the procreation and education of children, which is impossible with “gay unions”. . . . Drug abuse, crime, poverty and educational difficulties are reduced when children are raised by a mother and a father. Traditional marriage is in enough trouble today without further adding the absurdity and degradation of 'gay unions' to its problems.

Frank J. Russo, Jr., *Letters*, N. Y. TIMES, Feb. 6, 2004, at A24 (the writer is identified as the state director of the American Family Association of New York).

⁸⁰ NATIONAL CENTER FOR HEALTH STATISTICS, 52 NATIONAL VITAL STATISTICS REPORTS 8-9 (2003) (reporting that 34% of all births in the United States in 2002 were to unmarried women, a figure which has slowly increased in recent years).

⁸¹ See *supra* note 50.

⁸² *Goodridge v. Dept. of Pub. Health*, 789 N.E.2d 941, 961 (Mass. 2003).

⁸³ *Id.* at 961.

Protection of Offspring. The second way in which procreation figures in the same-sex marriage debate is over claims about the welfare of future children. Opponents claim that same-sex marriage will end up hurting children by leading to more of them being born in same-sex households or to non-married heterosexuals. The first will result from the encouragement which marriage will give to gays and lesbians to have offspring. The second from the dilution of the attractiveness of the married state to heterosexuals, leading to more children born to heterosexuals outside of marriage.

This claim has both an empirical and a conceptual basis. Empirically, the question is whether children reared in same-sex marriages would fare as well as children who are reared in opposite-sex marital settings. The argument that they would not fare as well is based on the long history and social importance of the institution, the lack of clear studies to the contrary, and an innate conservative opposition to change in such a fundamental social institution. However, even if there are advantages to children of having opposite-sex parents, it is unclear how great the disadvantages of gay or same-sex rearing would be. Given the importance of marriage to the individuals seeking it, a higher threshold of difference should be required to justify withholding marriage because of a fear that children may not be reared as effectively in same-sex or non-marital opposite-sex families.⁸⁴

But even if clear rearing advantages could be shown, it does not follow that resulting children are so harmed that the state is justified in stopping gays and lesbians from reproducing or from marrying a same-sex partner because of the risk to the welfare of offspring. Because the children would not otherwise have been born, they are not harmed by being born to same-sex married persons or to unmarried heterosexuals. Nor is the degree of disadvantage so great that it raises questions about the procreative rationality or good faith of an individual or couple interested in the welfare of their children.⁸⁵ Thus protecting the children who would otherwise not be born is not a compelling or even rational basis for banning same-sex marriage.

Indeed, the irrationality of denying gays and lesbians the right to marry their partners to protect offspring is heightened by the impact of a same-sex marriage ban on children who will be born to gays and lesbians regardless of whether they are married. Although same-sex

⁸⁴ The *Goodridge* majority did not reach the question of fundamental rights, while the dissents found there was no fundamental right to marry that extended to same sex-marriage. A commitment view of marriage, however, would argue for finding that it is a fundamental right, or alternatively, that a ban on same sex-marriage reflected bias and served no rational basis.

⁸⁵ See Robertson, *supra* note 75, at 21.

marriage might encourage more gays and lesbians to have children, gays and lesbians will have offspring regardless of whether same-sex marriage is recognized. In denying same-sex marriages the state would also be denying the children of gay and lesbian partnerships the permanency of commitment, stability, and federal and state financial and other benefits that come with marriage.

The impact on children born to gay couples was a major reason for the court's finding in *Goodridge v. Department of Public Health* that the state's ban on same-sex marriage was not rationally related to its legitimate goal of protecting the interest of children. The majority found:

Excluding same-sex couples from civil marriage will not make children of opposite sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized."

* * * *

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.⁸⁶

The dissents, on the other hand, most notably that of Judge Cordy, vigorously argued that same-sex marriage was more likely to harm rather than help children because it would lead to more children being born and reared in less desirable circumstances by same-sex couples and unmarried heterosexuals. According to him, the state's interest in protecting the welfare of future children thus met the rational basis standard that legislation banning same-sex marriage had to meet.

But even if Judge Cordy is correct that married heterosexual rearing has advantages over alternatives, there are two conceptual mistakes in his reasoning. The first is his claim that banning same-sex marriage will protect the children who would have been born if same-sex marriage were permitted. This position ignores the non-identity

⁸⁶ *Id.*

problem. As we have seen, it protects those children by preventing them from being born at all, which is hardly a benefit from their perspective once they are born.⁸⁷ Even if being reared by married heterosexual parents may have certain advantages, it is not possible for those children to be born to opposite-sex married parents.⁸⁸ Because they have no other way to exist, they are neither harmed nor wronged by being born and reared by same-sex parents.⁸⁹ A policy that would protect those children by preventing their birth altogether is no protection for them at all.⁹⁰

The second mistake is Judge Cordy's ignoring the reality that same-sex partners will have children regardless of whether same-sex marriage is permitted. If the legislature is truly concerned for those children, it should extend to them the same substantial benefits that the children of opposite-sex married couples receive. No rational basis exists for not treating the children of same-sex couples the same as the children of opposite-sex couples.⁹¹ To treat those children similarly, it should extend to them the same rights and privileges that children of opposite-sex marriage receive, and permit their parents to marry.

Some opponents of same-sex marriage might argue that permitting gays and lesbians to enter into "civil unions" that accord many of the same benefits as marriage would adequately protect children, and thus allow "marriage" to be retained for opposite-sex unions only. Whether state recognition of "civil unions" would accord full equality to the children of same-sex partners would depend on whether federal social security law also recognized that status. If it did, then whether the label of "civil union" or "marriage" were used would be less im-

⁸⁷ The question of harm must be asked from the perspective of persons once they are born because until they are born, there is no person in existence with rights or interests to be protected. See Robertson, *supra* note 75.

⁸⁸ Transferring custody of them after birth for rearing by heterosexual married couples would not in most cases be feasible. Even if it were, it would exact a substantial burden from the parents, and one that under *Stanley v. Illinois* would almost certainly be unconstitutional. 405 U.S. 645 (1972) (declaring the right of a father to have custody of his illegitimate children).

⁸⁹ Indeed, even if rearing by same-sex couples is not optimal, those children will still have rich and rewarding lives, and will generally be raised by loving parents who provide excellent care, as Judge Cordy's dissent repeatedly recognizes. *Goodridge*, 748 N.E.2d at 1003 (Cordy, J., dissenting). He also rejects sexual orientation as a basis for child custody or adoption decisions based on the best interests of the child.

⁹⁰ Nor is it possible to easily substitute married heterosexual parents for those children, because they would not otherwise be born, thus foreclosing a same-numbers substitution approach to the non-identity problem. See Robertson, *supra* note 75.

⁹¹ See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that illegal alien children cannot be barred from public education because of the illegal acts of their parents). Denying the children of gay parents the benefits of marriage in effect punishes them for the "sins" of their parents.

portant to the interests of the child than to the equal status of gays and lesbians who seek to marry their partners.⁹²

2. *Gay and Lesbian Procreation and Harm to Offspring*

Reproduction by gays and lesbians raises directly the issue of harm to offspring that arises indirectly in the same-sex marriage context. Opponents of gay and lesbian procreation would argue that if rearing by same-sex or homosexual parents is not optimal, then facilitating gay and lesbian procreation will lead to more children being born and reared in less than optimal settings. Although the difference in welfare between the two settings might not justify direct limitations on coital reproduction by gays and lesbians, it does provide a sufficient basis for barring access to the ARTs needed to procreate.⁹³

The flaw in this position, however, is the non-identity problem—that the children sought to be protected by banning gay and lesbian access to ARTs will not then be born. Because a life with a gay or lesbian parent is still a meaningful life, those children are hardly protected by preventing their birth altogether.⁹⁴ Protecting the welfare of children born to gay parents would thus not satisfy a rational basis, much less a compelling interest, test for interfering with the procreative liberty of gay and lesbian persons who wish to reproduce. As a result, the state could not legitimately pass laws that prohibit or substantially burden gay and lesbian reproduction, regardless of whether it occurs coitally or as the result of assisted reproduction.

As with other fundamental rights, however, the state is not obligated to fund those procedures nor to prohibit private actors from refusing to treat or offer ART services to gay and lesbians because of their personal objection to such life-styles or their unwillingness to facilitate a rearing situation that they perceive as sub-optimal or undesirable. State and federal civil rights laws prohibit discrimination in private medical services because of the race, religion, ethnicity, or disability of the patient. In most cases, however, the ban on impermissible discrimination does not include sexual orientation, leaving private providers free to deny ART services on the basis of discrimi-

⁹² See Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass.) (ruling that a civil union with all the same benefits and privileges as civil marriage is unconstitutional because it denigrates gays and treats them differently without a rational basis for the difference).

⁹³ Many nations prohibit the provision of ART services to persons who are not married, thus implicitly barring services to gays and lesbians. See Lynn D Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 7 n.8 (1996) (listing Scandinavian countries that forbid adoption of ARTs by homosexual domestic partners).

⁹⁴ As noted earlier, the claim that policy should be based on overall, not individual, welfare overlooks the difficulty of meeting the duty-to-substitute alternative to the non-identity problem.

natory criteria that the state could not act on. An important policy issue is whether IVF providers should retain the freedom to discriminate against such patients. A more complete discussion of these issues follows.

V. ACCESS TO ARTS

We have seen that all persons have the liberty right to procreate and presumably to use ARTs to do so, including the use of donor gametes and gestational surrogacy, and possibly preconception and prenatal screening techniques as well. Harm to future offspring from the nature of the technique or the non-marital status or sexual orientation of the parents is not a sufficient basis for state action denying persons the right to reproduce either coitally or with medical assistance.

With this background, we now examine the different settings and situations in which gays and lesbians seek ART services to procreate. The legal questions and conflicts that arise in that arena depend on the technique at issue and whether it is sought by homosexual men or women. One set of issues is the legal availability of the techniques that serve the reproductive needs of gays and lesbians. A second set concerns the scope of physician autonomy in selecting patients. A third set involves the rearing rights and duties of gay and lesbian individuals and partners in those arrangements. As we will see, the main obstacles to gay and lesbian reproduction are not legal bars as such, but rather rights of fertility doctors to choose their patients, uncertainties about rearing rights and duties, and the lack of resources needed to pursue ART options.

A. *Legal Availability of ART Techniques*

Gay and lesbians seeking to have offspring could benefit from a variety of ART techniques, including AI or IVF with donor sperm, donor sperm and egg donation, embryo donation, and surrogacy.⁹⁵ Although no state directly bars gay and lesbian access to such techniques, it is nonetheless informative to address the constitutional status of access to such techniques if legal bars were enacted.

⁹⁵ I exclude from discussion arrangements in which another woman has agreed to produce a child, whether through intercourse or with an ART, that will be relinquished at birth to the person hiring her. Persons who commission the birth of a child in this way are not exercising their own procreative liberty, and no right to acquire a child by adoption has been recognized as part of family autonomy. See *In re Marriage of Buzzanca*, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998); ROBERTSON, *supra* note 17, at 142-144 (1994) (liberty to use donors and surrogates does not require recognition of a right to arrange an adoption prior to birth).

1. Artificial Insemination of Gay Single Women or Couples

Perhaps the most common instance of non-coital gay procreation involves single women or coupled gay women who request artificial insemination (AI) to have a child. While some gay women prefer to self-inseminate with sperm obtained from donor friends or purchased from sperm banks, others seek the services of physicians. Precise numbers do not exist, but it is widely assumed that several thousand children are born each year from physician insemination of single women and lesbian couples.

No laws prohibit artificial insemination of single women, whether lesbian or straight, to enable them to have a child. If they did, they would be vulnerable to constitutional attack as interference with an unmarried woman's right to procreate by preventing her from conceiving non-coitally.⁹⁶ Protecting prospective children would not count as a compelling justification for infringing procreative liberty because the children sought to be protected would not otherwise be born, and at worst would suffer a sub-optimal, not directly harmful, rearing situation.⁹⁷

Whether ART clinics may deny services to single women or lesbian couples turns on whether the clinic is a state or private actor.⁹⁸ If the clinic is a state entity, for example, a state medical school or hospital, it will be bound by the requirements of Fourteenth Amendment due process and equal protection. Although the state is not obligated to provide ART services, if it does, it would need a rational basis for denying some persons access to those services while granting them to others. For example, if a state university medical center provided AI with donor sperm or egg donation to married couples, it arguably could not refuse to provide those services to unmarried individuals, regardless of their sexual orientation. Disapproval of single parenthood or homosexuality would not provide such a justification.⁹⁹ Nor, under the analysis of this article, would protection of children who would not otherwise have been born be a sufficient basis for the unequal treatment of persons seeking those procedures.¹⁰⁰

⁹⁶ If the state could not prohibit a single woman from engaging in sexual intercourse in order to conceive, then a ban on AI for that purpose should also be unconstitutional.

⁹⁷ Strictly speaking, the non-identity problem applies whether the resulting situation is merely "sub-optimal" or "directly harmful" because the child sought to be protected would not exist if the event causing the directly harmful condition did not occur. For further discussion of this point, see Robertson, *supra* note 75.

⁹⁸ It also turns on whether state or federal legislation prevents discrimination in public accommodations on that basis.

⁹⁹ See *Romer v. Evans*, 517 U.S. 620 (1996). *Lawrence v. Texas*, 539 U.S. 558 (2003), could also be interpreted to add some support to such a claim. *But see Lofton, supra* at note 20.

¹⁰⁰ Several instances of refusal to treat gay women have been reported, but none has led to

2. *AI and Egg Donation to a Lesbian Couple*

Some single women or lesbian couples wish to combine egg donation with AI from a donor. This may be necessary because of the infertility of the gestating partner. In other cases it is a way for both partners to have a biologic relationship with the child, with one providing the egg and the other the gestation, thus making them both biologic parents. In the future if cytoplasmic transplants prove to be safe and effective, the one providing only gestation may also be able to provide cytoplasm to her partner's egg as a way to gain some additional shared genetic connection.¹⁰¹

As is the case with AI and other ARTs, no laws prohibit egg donation to single or lesbian women or regulate the fees that can be paid to donors. Such prohibitions would most likely be unconstitutional, as would be the refusal by state entities that provide egg donation to married women to provide them to single or gay women. While regulation of egg donation to ensure the health and safety of donors would be permissible, limits on the fees that can be paid to egg donors would raise constitutional issues if they prevented infertile women from obtaining the gametes they needed to reproduce.¹⁰²

3. *Surrogacy for Gay Males*

Some gay males now want to have their own child either as a single parent or with a same-sex partner. Brokering agencies in California, Boston, Washington, D.C., and Florida have assisted gay males to have offspring.¹⁰³ To do so, they will have to find women who will bear the child for them. In some cases the surrogate will also provide the egg (full surrogacy). In other cases one woman will donate the egg which is fertilized with the sperm of one of the gay male partners and another woman will gestate the child (gestational surrogacy).

Because a surrogate mother is essential for gay male reproduction to occur, some persons might suggest that the law ban such arrange-

litigation. Some staff members at the University of Washington Hospital were "uncomfortable" treating lesbian women, and refused. As a state institution, the University determined that it could not discriminate on the basis of marital status or sexual orientation and declared a policy of equal access. The staff who objected had to comply or seek other employment.

¹⁰¹ See John A. Robertson, *Reconstituting Eggs: The Ethics of Cytoplasm Donation*, 71 FERTILITY & STERILITY 219, 221 (1999) (discussing the ethics of cytoplasm donation).

¹⁰² This argument assumes that a person's right to procreate includes the right to engage the assistance of a donor or surrogate when necessary for them to have a genetically or gestationally related child. If such a right exists, then some bans on payment might infringe that right without sufficient justification.

¹⁰³ Sandra G. Broodman, *Fatherhood by a New Formula*, WASHINGTON POST, January 18, 2005, F1.

ments. But if surrogacy in either form is available to married persons, then it should be available to unmarried persons as well. The strongest case for a constitutional right to use a gestational surrogate to reproduce would arise if a married couple is able to produce gametes but the wife is unable to gestate the embryo and thus needs the services of a surrogate gestator to have genetically related offspring. The argument is weaker when the wife can provide neither an egg or gestation because she has no genetic or physical link with the resulting child. Such an arrangement, however, is necessary for her husband to reproduce. Thus he may have the right to engage a full surrogate, even if his infertile wife does not.

If a right of a married couple to use a surrogate to reproduce were recognized, then such a right should exist as well for a single person, regardless of that individual's gender or sexual orientation. If single persons have a right to reproduce coitally with a willing partner, then they should also have the right to use an ART (including surrogacy) to procreate, regardless of their sexual orientation.¹⁰⁴ A law banning such uses would interfere with their procreative liberty. Protection of offspring would not provide a rational justification because the children in question would not otherwise have been born, and in any event, will have a meaningful and rewarding life even if reared by their father alone or with a gay partner. If disapproval of homosexuality itself is not a valid basis for governmental action, then a state clinic would not be free to offer surrogacy or ART services to heterosexual persons but not homosexuals.¹⁰⁵

No state makes either full or gestational surrogacy itself a crime, but 15 states limit payments to surrogates for their services.¹⁰⁶ In some cases state prohibitions on paying fees to relinquish a child for adoption could limit surrogacy payments. If these laws substantially burdened the ability to obtain the gametes or gestational services needed to have a biologically related offspring, they could in theory

¹⁰⁴ A single woman might need a gestational surrogate if she can produce an egg. Similarly, a man with viable sperm would need the services of a full surrogate or those of an egg donor and a gestational surrogate to have offspring. Note that the claim of a single person to reproduce would not exist if they are providing neither genes or gestation to the arrangement.

¹⁰⁵ If the clinic bars all unmarried persons, it may be a different matter. The question there is whether preferring that the child have married parents provides a substantial justification for denying unmarried persons access.

¹⁰⁶ ARIZ. REV. STAT. ANN. 25-218 (West 2000); D.C. CODE ANN. 16-402 (2001); FLA. STAT. ANN. 742.15 (1997); IND. CODE ANN. 31-20-1-2 (1999); KY. REV. STAT. ANN. 199.590(4) (West 2001); LA. REV. STAT. ANN. 9:2713 (West 1991); MICH. COMP. LAWS 722.859 (2002); NEB. REV. STAT. 25-21,200 (1995); N.H. REV. STAT. ANN. 168-B:16 (2001); N.Y. DOM. REL. LAW § 123 (McKinney 1999); N.D. CENT. CODE 14-18-05 (2004); UTAH CODE ANN. 76-7-204 (2003); VA. CODE ANN. 20-162 (Michie 2004); WASH. REV. CODE ANN. 26.26.240 (West 1997).

be viewed as infringing a gay male (or infertile couples's) right to procreate.¹⁰⁷ With little precedent yet on this issue, it is unclear, however, whether such a challenge would succeed.

A more important factor than sexual orientation in providing ART services to enable single men to reproduce is whether the man is situated to provide the nurturing and support needed by the child.¹⁰⁸ The same question about child-rearing capabilities can be raised about single or coupled gay women and, indeed, about married couples as well. Yet the willingness to be more concerned about that issue with single males or gay male couples suggests the influence of stereotypes about the different child-rearing abilities of males and females. Gender stereotypes have long viewed women as child-rearers and men as providers. With those stereotypes no longer sufficient to justify depriving women of opportunities available to men, they should not be used to justify depriving men of opportunities available to women.¹⁰⁹

Fertility centers are generally free to refuse to provide ART services to individuals or couples whom they think will not make responsible parents.¹¹⁰ But they should have good reason for doing so beyond sex-based stereotypes about males as child-rearers. Just as most single women who seek to have children are likely to be nurturing and caring child-rearers, single men who seek to reproduce with a surrogate are likely to be as well. It is reasonable for ART programs to inquire into the rearing capabilities in all their patients, and choose not to provide ART services to single males or females, whatever their sexual orientation, if they have grounds for thinking that the person will not be a suitable parent. In that case they would deny ART services on grounds of ability to rear, not on grounds of sexual orientation.¹¹¹ To be consistent, they should apply the same criteria to single women and to married couples.¹¹²

¹⁰⁷ That argument would turn on whether bans on payment prevent persons from reproducing and whether payment threatened interests in preventing coercion and exploitation. See John A. Robertson, *Surrogate Motherhood and the Ethics of Collaborative Reproduction* HASTINGS CENTER REPORT, 13:13-17 (1983).

¹⁰⁸ What if the program offers the service to single women and not single men? Is there any reason to think that women are more naturally inclined to be good child-rearers?

¹⁰⁹ See *Craig v. Boren*, 429 U.S. 190 (1976); *United States v. Virginia*, 518 U.S. 515 (1996).

¹¹⁰ THE ETHICS COMMITTEE FOR THE AMERICAN SOCIETY OF REPRODUCTIVE MEDICINE, *Child-rearing Ability and the Provision of Fertility Services*, 82 FERTILITY & STERILITY 564, 567 (2004).

¹¹¹ Strictly speaking, because of the non-identity problem children born to persons who are inadequate rearing parents but who will retain custody will not have been harmed by that birth. But private providers may not wish to facilitate such an arrangement. See Robertson, *supra* note 75.

¹¹² To ensure that patients have not underestimated the burdens of raising a child as a sin-

In making these assessments some programs might prefer to provide services to couples rather than individuals. Such programs might be more likely to find that child-rearing will be more ably done by a gay male or female couple rather than a single male or female. Here there are two people to share the challenges and demands of child-rearing. If they have joined in a civil union, a marriage, or a permanent partnership, they are also likely to have a stable relationship that is conducive to a rich and rewarding life for their child.

It is also likely that some fertility programs do not offer ART services to gay males because of the added complications which involving a surrogate carrier entail.¹¹³ Not all fertility programs will participate in surrogacy arrangements, even if they do provide IVF, AI, and egg and embryo donation services. Many of such programs may be willing to treat lesbians, but then draw the line at gay males because of the program's desire to avoid the complications of surrogacy.

B. Professional Autonomy in Selecting Patients as a Barrier

With few state laws directly limiting access to assisted reproduction, a more important factor in regulating gay and lesbian reproduction is the willingness of physicians and ART clinics to treat them. Currently, about 80% of ART clinics in the United States provide AI and related services to single women and lesbian couples, while only about 20% provide services to male individuals or couples. While most gay males and lesbians who have sought ART services probably have been able to receive them, some have not, and others have had more difficulty in doing so than married couples or single women and lesbian couples.

Any effort to restrict physician autonomy in this area must confront the wide discretion that physicians have traditionally had over whom they treat. Ordinarily, physicians are free or not to accept a person as a patient. However, once having accepted a person as a patient, the physician has a duty not to abandon the patient. The duty of non-abandonment means that the physicians must use reasonable care in treating patients and must give patients whom they no longer wish to treat adequate opportunity to find another physician.

gle parent, counseling prior to conception would be helpful. In one instance an ART program inseminated a surrogate mother hired by a young single male who would rear the child on his own. The man grossly underestimated the challenges of a new baby, could not tolerate the crying of a colicky baby, and murdered the child a month after its birth.

¹¹³ Communication with Dr. Paula Amato, Baylor College of Medicine, Houston, Tx. (January 7, 2005).

There are two legal limitations on the right of physicians not to accept a person as a patient—one constitutional and one statutory. If the physician is a state employee or providing services in a state facility, he or she would be bound by constitutional duties of due process and equal protection, and most likely, after *Lawrence v. Texas* and *Romer v. Evans*, would not be free to deny services to persons because of their sexual orientation or marital status.¹¹⁴ A claim that they were doing so to protect potential children from being reared by same-sex or single parents would not pass constitutional muster.

If the physician is a not a government employee or not otherwise considered a state actor, he or she would retain discretion to choose among patients as long as he or she does not discriminate on grounds deemed impermissible in state or federal civil rights laws.¹¹⁵ These laws typically restrict discretion in providing medical services and other public accommodations on grounds of race, religion, sex, ethnicity, and disability, though 15 states include sexual orientation as an impermissible ground.¹¹⁶ Accordingly, private ART providers not in those jurisdictions would retain discretion over whether to provide services to single persons and couples regardless of their sexual orientation. Even if this discretion has not prevented many gays and lesbians from obtaining ART services, it has made it more costly or difficult in some circumstances, and may lead to additional barriers in the future.

Given the key role that physicians play as gatekeepers to the use of ARTs, some persons have argued that both professional ethics and public policy should prohibit physicians from denying services based on marital status or sexual orientation. According to this argument, this ground for discrimination is not rationally related to a legitimate non-discriminatory purpose and the sought-for services are of great importance to the individual denied them. ART programs would still have some flexibility in what services they offer, but if they provide donor gametes or gestational surrogacy to married couples or heterosexuals, then they cannot justifiably deny it to single persons or gay and lesbian couples.¹¹⁷

¹¹⁴ 539 U.S. 558 (2003); 517 U.S. 620 (1996).

¹¹⁵ This is true under federal law and the law of most states.

¹¹⁶ CAL. CIV. CODE 51 (West Supp. 2005); CONN. GEN. STAT. 46a-81d (2004); D.C. CODE ANN. 2.1402.31 (Supp. 2004); HAW. REV. STAT. 368-1 (Michie 1993); Illinois SB3186, sent to Governor on 1/19/05; MD. CODE ANN. 49B, § 5 (2004); MASS. ANN. LAWS ch. 272, § 98 (West 2000); MINN. STAT. 363A.02 (2004); N.H. REV. STAT. ANN. 354-A:1 (Supp. 2004); N.J. STAT. ANN. 10:5-4 (West 2002); N.M. STAT. ANN. 28-1-7 (Michie Supp. 2003); N.Y. EXEC. LAW § 296 (McKinney 2003); R.I. GEN. LAWS 11-24-2 (2002); VT. STAT. ANN. tit. 9 § 4502 (1993 & Supp. 2004); WIS. STAT. § 66.0125 (2003).

¹¹⁷ The claim that treating gay males is more complicated because an egg donor and/or sur-

The counterargument draws both on the importance of professional choice, the nature of the services sought, and the developing but still unformed clear consensus about the rights and status of unmarried persons and gays and lesbians with regard to reproduction. Opponents of a physician's duty to provide ARTs regardless of marital status or sexual orientation would argue that just as state conscience clause laws protect a health-care provider's right not to participate in abortion, so physicians with moral objections should not have to assist gays and lesbians in conceiving and having children.¹¹⁸ Unlike refusing treatment to persons with HIV or an acute illness, ARTs are not essential for the patient's life or health and other willing providers are usually available.¹¹⁹ Nor does imposition of such a duty recognize the importance of a professional's sense of his or her own role or purpose in practicing medicine.¹²⁰ Given the strength of these competing arguments, it is likely that private physicians in many states will retain professional discretion to refuse to provide ART services to gays or lesbians.

C. Rearing Rights and Duties in Children After Assisted Reproduction

More important than direct state bans or professional barriers to gays and lesbians using ARTs to reproduce are uncertainties about their rearing rights and duties in children resulting from these arrangements. Because society has not yet fully resolved family and parenting relationships from the use of gamete donors and surrogates,

rogate is involved and thus need not be provided is not necessarily persuasive. See *infra* note 120.

¹¹⁸ All states but Alabama, Mississippi, New Hampshire, and Connecticut have laws protecting health care workers who object to providing or assisting in abortions. See, e.g., CAL. HEALTH & SAFETY CODE § 123420 (West 2004); FLA. STAT. ANN. § 390.0111(8) (West 2004); OHIO REV. CODE ANN. § 4731.91 (Anderson 2004). See also the developing right of pharmacists to refuse to fill prescriptions for emergency contraception or birth-control pills. Julie Cantor and Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008 (2004); Charisse Jones, *Druggists Refuse to Give Out Pill. Say Their Religion Forbids the Use of Contraceptives*, USA TODAY, Nov. 9, 2004, p. 3A.

¹¹⁹ This is especially true given that providers willing to offer the service are usually available, though lesbians seeking ARTs will have more options than gay males for alternative providers.

¹²⁰ A physician who is willing to use an egg donor and surrogate for a gay or single woman but not for a gay or single man describes the difference as helping the woman "replace something that she should have had the opportunity to do on her own, but for whatever biological reason (ovarian failure or hysterectomy) cannot. A male, on the other hand, can never produce eggs or carry a child, so there is nothing 'malfunctioning' for him. This may not hold water, but it makes sense for me." Interview with Anonymous Physician, May 16, 2004.

this uncertainty applies to the use of ARTs by married persons as well. I focus here, however, on issues of rearing rights and duties as they directly affect gays and lesbians.

1. Donor Sperm

With single women and lesbian couples using artificial insemination with donor sperm more frequently than other techniques, the laws governing rearing rights and duties after the use of donor sperm are directly relevant to lesbian reproduction.¹²¹ More developed than the law for other forms of gamete donation and surrogacy, the law of sperm donation has been written for the most part from the perspective of a married couple with severe male infertility. Most states have statutes or court decisions upholding the exclusion of the donor from any rearing rights and duties in the resulting child in the context of donation to a married couple when the husband provides written consent to the donation.¹²² Most of these statutes do not directly address the rearing rights and duties of donors in non-marital situations, though a few do so if a physician performs the insemination.¹²³

In the absence of statutory resolution of rearing questions, a strong argument exists for an intention-based solution to disputes over rearing rights and duties. An agreement to exclude the donor from rearing rights is most likely to be given effect. Indeed, if a donor has not asserted a claim to rearing shortly after birth, he may be estopped from asserting a claim for paternity at a later time. If he does assert such a claim and can establish paternity, a written agreement relinquishing parental rights could well be given effect. However, if there is no such agreement or if the parties have not used a physician for the insemination, a sperm provider may retain paternal rights over offspring.¹²⁴

¹²¹ They are also relevant to gay male reproduction, but in those cases there is no intention to donate sperm to the woman who provide the eggs and/or gestates. Rather, it is to use her services to have a child.

¹²² See, e.g., ALA. CODE § 26-17-21(2004); CAL. FAM. CODE § 7613 (West 2004); COLO. REV. STAT. § 19-4-106 (West 2004); DEL. CODE ANN. Tit. 13 § 8-703 (2004); 750 ILL. COMP. STAT. ANN. 40/2 (West 2004); KAN. STAT. ANN. § 38-1114 (2000); MINN. STAT. ANN. § 257.56 (West 2003); MO. ANN. STAT. § 210.824 (West 2004); MONT. CODE ANN. § 40-6-106 (2004); NEV. REV. STAT. ANN. § 126.061 (Michie 2004); N.J. STAT. ANN. § 9:17-44 (West 2004); N.M. STAT. ANN. § 40-11-6 (Michie 2004); N.D. CENT. CODE § 14-18-02.1, 14-17-04 (2004); OHIO REV. CODE § 3111.95 (Anderson 2004); WASH. ADMIN. CODE § 26.26.710 (2004); WYO. STAT. ANN. § 14-2-903 (Michie 2004).

¹²³ See, e.g., CAL. FAM. CODE § 7613 (West 2004).

¹²⁴ To ensure that those rights are extinguished, single women should obtain sperm through a sperm bank and have it administered by a physician. If the donor is not obtained from a sperm bank but is a known individual, it is essential to formalize the arrangement so that he may not later claim parenthood. A written donation agreement is essential, but may not guarantee the intended result. Several painful cases have arisen over misunderstandings of what each party

The most litigated issue arising from lesbian use of donor sperm concerns the rearing rights and duties of a non-gestational partner who has jointly undertaken with the mother to have and rear a child. In many instances of lesbian procreation both partners agree to share parenting equally but only one is inseminated and gestates. If the partners later separate, the law in most states regards only the woman who gives birth as a parent with rearing rights and duties, and accords the non-gestating partner no parental status at all.¹²⁵ While this disposition has most frequently barred the non-reproducing partner from having visitation or custodial rights, it has also been used to prevent the imposition of support duties on the non-reproducing partner.¹²⁶

In most states, however, the non-gestating partner may become a parent through a step-parent adoption.¹²⁷ Both New York and Massachusetts, for example, deny rights to the non-gestating partner from the parties' agreement, but allow that partner to become a parent through a step-parent adoption.¹²⁸ One of the benefits to offspring of same-sex marriage mentioned in *Goodridge v. Department of Public Health* is the added stability that comes from defining parenthood at birth and eliminating the need for such cumbersome alternatives as adoption to create the needed stability. Until that adoption occurs, however, the non-gestating partner may have no certainty that she will or will not be legally recognized as a parent with rearing rights and duties, whatever agreements the two women have made concerning rearing rights and duties in the child.¹²⁹

Two cases have recently recognized the non-biologic partner as a parent in cases in which joint rearing was intended. In one a California appellate court has read the requirement in its Uniform Parentage Act to apply "as far as practicable the provisions that are applicable to establishing a father and child relationship . . . to determine the existence of a mother-child relationship" as establishing the non-gestating

envisaged. See *Jhordan C. v. Mary K.*, No. A0278210 (Cal. Ct. App. Apr. 25, 1986); *C.M. v C.C.*, 377 A.2d 821 (N.J. Super Ct. App. Div. 1977). To avoid them it is essential that the arrangement be formalized by a notarized document or even by a formal termination of parental rights by the donor. Although not all states officially recognize single person adoption, state courts in later disputes are more likely to follow the donation model followed with heterosexuals and married couples.

¹²⁵ See *In re Pamela P.*, 443 N.Y.S.2d 343 (N.Y. Fam. Ct. 1981).

¹²⁶ *T.F. v. B.L.*, 813 N.E. 2d 1244 (Mass. 2004) (stating that in the absence of legislation, parenthood by contract is not recognized).

¹²⁷ *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *Adoption of Tammy*, 619 N.E. 2d 320 (Mass. 1994); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. 1995). However, states that bar adoption by homosexuals or by unmarried persons would bar adoption in those cases.

¹²⁸ Cf. *In re Pamela P.*, 443 N.Y.S. 2d 343; see cases cited *supra* note 127.

¹²⁹ See *T.F. v. B.L.*, 2004 WL 1879513 (Mass. 2004)

partner as a parent without a step-parent adoption.¹³⁰ In the second case an Indiana appellate court held that because the couple had agreed to bear and raise a child together by insemination of one of the partners with donor sperm, both women are legal parents of the resulting child.¹³¹ If these decisions survive appeals, they will show an increased state willingness to rely on the intention of the parties in determining rearing rights and duties in ART offspring.

2. *Egg and Embryo Donation*

Little legislation exists concerning the rearing rights and duties of participants in other situations involving gamete donors and surrogates. Five states have passed legislation to specify rearing rights and duties in egg donation, and two in embryo donation.¹³² Paralleling the treatment of sperm donation to a married couple, the few egg and embryo donation statutes on the books sever the egg donor's rearing rights and duties in resulting children when she has relinquished those rights at the time of donation, making the recipient gestational mother the sole legal mother. A few courts have given effect to such intentions in non-statutory states. As similar disputes arise in other states, the courts are increasingly likely to follow an intention-based, contractual approach that intends to have the gestational mother the sole legal mother. Presumably such agreements would also protect the egg donor from attempts to impose on her child support or other rearing duties.

These rules would also apply to situations in which one of the lesbian partners provides the egg and the other the gestation to produce a child with donor sperm. Although no case law yet exists on the subject, the courts are likely to give great weight to the reliance and understanding of the parties at the time of the donation.¹³³ If the parties have agreed that the donor will retain some rearing rights as well as the gestator that result is likely to control. Any doubts could be alleviated by a step-parent adoption by the egg donor.

The importance of the intentions of the parties at the time of providing the egg is highlighted in a California case that barred an egg donor who had relinquished rearing rights to her partner but then jointly reared the child for several years from recognition as a legal

¹³⁰ *Kristine H. v. Lisa R.*, 2004 WL 1465100 (Cal. Ct. App.).

¹³¹ *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. Dec. 14, 2004).

¹³² See, e.g., FLA. STAT. ANN. § 742.14 (West 1995); N.D. CENT. CODE § 14-18-04 (1995); OKLA. STAT. ANN. tit.10, § 555 (West Supp. 1996); TEX. FAM. CODE ANN. § 151.102 (West Supp. 1996); VA. CODE ANN. § 20-156 (Michie 1995).

¹³³ John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 39 CASE W. RES. L. REV. 1, 18 (1988-89).

parent of the child.¹³⁴ Two women in a long-term relationship decided to have a child. After several attempts at artificial insemination of one of them, the treating physician suggested that they use the non-inseminated partner as an egg donor. The egg provider signed a consent form provided by the fertility program that said that she relinquished all rearing rights and duties in any resulting children to her partner. After rearing the resulting child together for two years, the parties separated. When the biologic mother denied the rearing partner further access to the child, that partner sued. Despite her claim that she did not intend to waive her rearing rights in providing the egg, the court held that her agreement together with other evidence about the intention of the parties showed that she had relinquished those rights and denied her legal parenthood.¹³⁵

3. *Gay Males and Surrogacy*

Although single women and lesbian couples may on occasion engage a surrogate to enable them to have a genetically related child, single males or gay male couples have no way to reproduce unless a woman, who is usually paid for her services, agrees to be inseminated or have an embryo created with the male's sperm and an egg provided by an egg donor transferred to her uterus. The intent in such arrangements ordinarily is to have the woman who bore the child have no role in rearing it.

One set of legal issues concerns whether the surrogate retains any rearing rights and duties in such cases, even if she agreed to relinquish her parental rights at birth. In the famous case of *Baby M.*, which involved a full surrogate, the New Jersey Supreme Court refused to enforce such an agreement, reasoning that agreements to relinquish children for adoption violated public policy.¹³⁶ The California Supreme Court, on the other hand, found that such agreements were enforceable in cases involving a gestational surrogate.¹³⁷ While several states have statutes that appear to apply the New Jersey solution, they do not usually distinguish between full and gestational surrogacy. In other states authority exists for listing the genetic parents in gestational surrogacy arrangements on the birth certificate.¹³⁸ In

¹³⁴ *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 2004).

¹³⁵ Peggy Orenstein, *The Other Mother*, N.Y. TIMES MAG., July 25, 2004, at 24 (highlighting the Appeals Court's decision).

¹³⁶ *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988).

¹³⁷ *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993).

¹³⁸ See, e.g., 750 ILL. COMP. STAT. 45/6 amended by ILL. LAWS 93-921 (West 2004); FLA. STAT. ch. 742.16 (West 2004); VA. CODE ANN. § 20-160 to 162 (Michie 2004); WIS. STAT. § 69.14 (1) (h) (2003-2004); *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass.

any event, participants and practitioners in states without established law have assumed that gestational surrogacy would be given effect,¹³⁹ or they have taken the chance that the surrogate will renege on her agreement and proceeded anyway.

A second set of issues issue for gay couples who reproduce using a surrogate is the allocation of rearing rights and duties between the male partners. There is a direct parallel here to the issues that gay women have faced when one partner has provided neither gametes nor gestation. The partner providing the sperm would be the legal father, but in most states the non-biologic partner would have no parental rights or duties until he adopted the child. As a result, gay male couples who use surrogate mothers to reproduce will have to choose which one will provide the sperm.¹⁴⁰ If they have more than one child, they could alternate genetic parentage. One incident of same-sex marriage and perhaps of civil unions is that the non-biologic spouse would automatically become a parent if the child is born during their marriage or union. Such would also be the case if an intention-based approach to rearing rights and duties were applied.¹⁴¹

D. Summary

In sum, there are few direct legal barriers on gay and lesbian access to assisted reproduction. Indeed, state laws that prohibited access to ARTs by single persons or gays and lesbians would most likely be constitutionally invalid. Instead of legal barriers, gays and

2001) (holding that genetic parents of twins carried by surrogate gestational carrier pursuant to contract could be identified as their parents in birth certificate information supplied by hospital); *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. 2000) (permitting petitioner's biological parents' names to be placed on the birth certificate); *Arredondo ex rel. Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 182 (Sup. Ct. 1994) (ordering issuance of birth certificate with biological mother's name); *Belsito v. Clark*, 644 N.E.2d 760, 767 (C.P. Ohio 1994) (holding that where the genetic parents did not relinquish their rights, parentage was determined by genetic imprint rather than birth).

¹³⁹ A single male or gay couple engaging a surrogate might also obtain an egg donor to make the arrangement one of gestational surrogacy, so that the surrogate will have fewer rights to change her mind at birth.

¹⁴⁰ Some gay males couples have requested that embryos formed with the sperm of each be placed in the surrogate's uterus, so that each partner will not know for sure without further testing which partner is the father. While this practice may enable each partner to view himself as the father, such arrangements will not eliminate the need for genetic testing to determine parentage if divorce or separation occurs except in those few states that recognize the parties' intention as determining parentage. See text accompanying *supra* notes 121 and 122. One might also speculate that at some point in the mid-distant future, it might become possible to have each partner contribute genetic material to the child through embryo fusion or haploidization techniques. See discussion below at pp 45-49.

¹⁴¹ The intention-based approach would not apply to such cases because the rules for determining male parentage do not extend to such situations, as they do in the case of women.

lesbians couples and single persons may face private discrimination from providers unwilling to provide them with some or all of the services which they need to reproduce. Most state civil right laws do not bar discrimination on the basis of sexual orientation, and thus permit such private discrimination to occur. The lack of certainty about rearing rights and duties in resulting offspring is curable by careful planning and step-parent adoption. In the end, the lack of resources to pay for ART procedures may be a greater barrier for gays and lesbians seeking medical assistance to reproduce than is the law.

VI. "GAY GENES" AND PRENATAL SELECTION FOR SEXUAL ORIENTATION

In addition to making procreation feasible, ARTs are increasingly being used for genetically screening of prospective offspring before birth. Most screening has focused on preventing severe genetic disease or susceptibility conditions in offspring, but eventually some non-medical traits may also be identifiable before birth. Plausible arguments exist that a person's procreative liberty includes to some degree the right to obtain genetic information about gametes, embryos, or fetuses prior to birth and to use that information to have or avoid having a particular child.¹⁴² We have had, however, too little experience with genetic selection and its many ramifications to resolve definitively the scope of such a right.

If such a right exists and genetic tests for particular traits are available, one potential candidate for preconception genetic screening and selection would be genes that predispose toward or associate an individual with a homosexual orientation. If such genes exist, they are likely to be mutations or genetic variations that affect testosterone production at three critical points in the life-span of an individual—in the fetus, in early infancy, or at puberty.¹⁴³ Identifying such genes will not be easy. A few years ago studies showed that genes associated with homosexuality existed on the X chromosome, but the finding have not been confirmed.¹⁴⁴ Other areas of genomic origin are being studied, but there is no guarantee that a specific genetic basis for sexual orientation will ever be found. If such genes are discovered, the question of whether homosexual or heterosexual persons

¹⁴² John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U.L. REV. 421, 424-429 (1996).

¹⁴³ See Daniel D. Freedman, *Three Facets of Sexual Differentiation*, 350 NEW ENG. J. MED. 4 (2004).

¹⁴⁴ Dean Hamer et al., A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, 261 SCIENCE 321, 326 (1993); George Rice et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, 284 SCIENCE 665, 667 (1999).

would be able to use ARTs or other techniques to choose sexual orientation of prospective offspring would become a major social issue. Although hypothetical, it is instructive to consider to what extent a person's reproductive rights might entitle a person to use genetic selection or alteration techniques to choose the sexual orientation of their offspring.¹⁴⁵

A popular play several years ago portrayed the conflict confronting a father whose wife is pregnant with a male fetus with the genetic marker for homosexuality.¹⁴⁶ The drama concerned the protagonist's struggles over whether to abort his would-be gay son. If pre-birth tests for sexual orientation became available, we would face the question of whether parents would be free to abort fetuses, or more likely, select embryos, that have a particular sexual orientation.

Because such a gene is likely to be manifested in families, such tasks are likely to be of primary interest to those with some family history of homosexuality, rather than to the population at large. Gays or lesbians might seek it in order to have a child who also will be homosexual. They may feel that they are more likely to understand and bond with such a child, and can better prepare it for the challenges of life.¹⁴⁷ More likely, some heterosexual couples with family members who are homosexual may care deeply enough about it to prefer not to have a child with the genes for homosexuality. The partner of such a person, for example, might want screening to minimize the chance that their offspring will have that sexual orientation.

In either case a couple or individual could claim that they should be free to choose their child's sexual orientation if it would strongly and plausibly affect their willingness to reproduce. In assessing that claim, a key issue would be how important such selection would be for the parental project of successful gene transmission to the next generation.¹⁴⁸ For some parents the idea of raising a gay child poses a number of problems, including the reduced likelihood that such a child would have progeny that would continue the parents' genes. Although few people might seek to screen on grounds of sexual orien-

¹⁴⁵ See also Timothy F. Murphy, *Controlling the Sexual Orientation of Children*, in TIMOTHY F. MURPHY, *GAY SCIENCE: THE ETHICS OF SEXUAL ORIENTATION RESEARCH* 103-136 (1999); Edward Stein, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 305 (1999); Edgar Dahl, *Ethical Issues in New Uses of Preimplantation Genetic Diagnosis: Should Parents Be Allowed to Use Preimplantation Genetic Diagnosis to Choose the Sexual Orientation of Their Children?*, 18 *HUMAN REPRODUCTION* 1368 (2003).

¹⁴⁶ JONATHAN TOLINS, *THE TWILIGHT OF THE GOLDS: A PLAY IN TWO ACTS* (1994).

¹⁴⁷ As my colleague Tony Reese points out, they may also find it desirable to counteract those straight couples who are selecting against gay offspring.

¹⁴⁸ See John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 *AM. J.L. & MED.* 439, 449-450 (2003) (examining the reasons for genetic selection).

tation, particularly if the screening were costly or physically intrusive, it would be difficult to argue that parents would not be exercising procreative liberty in seeking to screen and exclude on that basis.¹⁴⁹ Similarly, some gays might argue that they would reproduce only if they could use techniques that would increase the chance of having a gay child. Because such a child would not be born unless genetic selection occurred, and being gay is not inconsistent with having a rich and rewarding life, protecting the welfare of the child would not be a compelling reason to ban such selection.

In the case of selection against homosexuality, the couples making that choice might be acting out of bias or prejudice against homosexuality (or against heterosexuality by homosexuals who seek a gay child), but reproductive and associational freedom permits persons in the private sphere to discriminate as they choose. One could strongly support equal rights for gays and lesbians in all public and institutional spheres, yet still find that this choice is within their procreative discretion. Nor could one easily show that allowing such choices would be a continued public demeaning of homosexuals, who are still publicly discriminated against in many ways, because it occurs in private. We may hope that the genetics of sexual orientation never lends itself to simple tests to screen children for sexual orientation. But if that knowledge develops, it may be hard to show that it does not fit within the rights of parents to decide about the characteristics of offspring.¹⁵⁰

VII. FUTURISTIC TECHNIQUES: CLONING AND CHIMERIZATION

The ARTs discussed above (with the exception of screening for a “gay” gene) all concern alternatives to coital reproduction for gays and lesbians to have offspring. If they are single, the requested technique substitutes the egg and uterus or sperm that is ordinarily provided in heterosexual intercourse with that provided by a gamete donor or gestational surrogate. For lesbian couples, ARTs will allow one partner to provide the egg and the other the gestation, but sperm is still needed from a donor.

¹⁴⁹ The choice of gay parents to have gay children, who might themselves face obstacles to their own reproduction, is not inconsistent with a reproductive agenda of gene transmission to subsequent generations, because those gay offspring might also then use assisted reproductive techniques to reproduce, just as their own gay parents did. In any event, in selecting for a child with gay genes, gay parents are engaged in the culturally defined project of reproduction as having genetic progeny and parenting them in the next generation.

¹⁵⁰ Nor would a child chosen in part to have a particular sexual orientation be a product or commodity of manufacture anymore than a child chosen for gender might be. One has no particular design for the child beyond being healthy and having the sexual orientation chosen.

Some persons have speculated that in the future techniques might become available that will by-pass the need to have an egg or sperm donor, allowing individuals to reproduce themselves through cloning, or allowing two same-sex individuals to produce an embryo and child that has the genes of both of them. Many in the gay community have hailed such techniques as ways around the discrimination that gays and lesbians face. Although such techniques are highly speculative and may never become available, they are discussed here as a way to show the outer limits or future possibilities of using technology to enable gays and lesbians to procreate and choose their genetic characteristics in the process. As the discussion will show, there is no easy technological fix for the desire of gays and lesbians—or indeed, anyone—to have extensive control over the genetic make-up of offspring.

A. *Reproductive Cloning*

Although reproductive cloning has occurred in a number of mammalian species, it remains difficult, has low success rates, and often bad effects on offspring. It is nowhere close to being safe and effective for humans, and may never be.¹⁵¹ As a result, any discussion of reproductive cloning for humans—whether heterosexual or homosexual—is highly speculative. Discussion, however, of whether an individual would have a right to produce progeny by reproductive cloning may nonetheless shed light on the scope of reproductive rights of persons. Despite the many obstacles to successful reproductive cloning, the following discussion asks whether anyone, including gays and lesbians, would have a right to use reproductive cloning if that technique has been shown to be as safe and effective as other reproductive procedures.

As with other techniques, whether reproductive cloning would be available to gays and lesbians would depend first on whether it is generally available at all. If there is no right generally to engage in reproductive cloning, then no one, including gays and lesbians, would have a right to engage in that practice. On the other hand, if the right to use the technique were generally recognized, then it would be difficult to justifiably deny its use by gay men and lesbians.

Analysis of the question of whether persons generally have a right to engage in reproductive cloning would turn on whether it served core reproductive interests without harming others. A plausible argument in favor of reproductive cloning would be strongest in the case of persons who are gametically infertile and have no other way

¹⁵¹ Rudolph Jaenisch, "The Science and Ethics of Nuclear Transplantation, 351 NEW ENG. J. MED. 2787 (2004).

to have and rear genetically related offspring.¹⁵² It would not follow, however, that all persons have a right to clone, including those who are sexually fertile. Because they could reproduce sexually, sexually fertile persons who assert a right to clone are in fact asserting a right to select the genome of offspring, not a right to reproduce as such. Until a more general right to select offspring characteristics is recognized, one could plausibly argue that reproductive cloning, if safe and effective, should be available only to those persons who could not have progeny without it.

The distinction between reproductive cloning for the infertile but not the fertile has relevance to the question of gay and lesbian access to reproductive cloning. Gays and lesbians have expressed a special interest in reproductive cloning because of the discrimination which they have experienced in their efforts to have and rear children.¹⁵³ Indeed, persons in the gay and lesbian community were among the first proponents of cloning, perceiving cloning as a way to control their reproduction free of discrimination in their efforts to procreate. For lesbians it offered the unique advantage of reproduction without the need of a male, which is an important goal for some lesbians. It also allowed a woman to reproduce alone, for she herself could provide the oocyte, nuclear DNA from a somatic cell, and gestation needed to produce a child. The appeal of cloning to gay males is less clear. It may be based less on grounds of feasibility as in the case of lesbians, and more on the wish to select the genome of the child.

1. Lesbian Cloning

As shown above, lesbians have the same right to reproduce that other women, single or married, have, i.e., the right to have genetically-related children to rear.¹⁵⁴ Lesbian cloning poses the question of whether sexually fertile lesbians who may reproduce with a male partner or with sperm from a donor or commercial sperm bank nevertheless have a right to choose this method of having a child.

Because fertile lesbians have no physical or social impediment to assisted sexual reproduction, it might seem that their claim to engage

¹⁵² See John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 633-637 (1998-1999); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J. L. & MED. 439, 468-473 (2003). While recognizing that other grounds for reproductive cloning plausibly exist, I limit my analysis to those who are otherwise gametically infertile rather than those who are capable of having progeny through intercourse or assisted reproduction.

¹⁵³ William Eskridge & Edward Stein, *Queer Cloning*, in CLONES AND CLONES 95 (Martha Nussbaum & Cass Sunstein, Eds., 1998).

¹⁵⁴ Gay males also have the same rights to reproduce and rear that heterosexual males have.

in reproductive cloning is more a claim of a right to select the genome of offspring than a right to reproduce as such. Some lesbian couples, however, might argue that the decision to clone is not impelled so much by the desire to select a particular genome as it is to have a child free of sperm or gametes outside the lesbian relationship. In addition, reproductive cloning would enable each partner to contribute genetically to the child whom they would both rear (one providing the nuclear DNA and the other cytoplasm and mitochondrial DNA, with either of them gestating).¹⁵⁵

In such a case the normative question presented by a lesbian couple's choice to clone rather than reproduce sexually is whether their desire to reproduce without male involvement should be respected as much as the desire of infertile persons to use reproductive cloning to have genetic progeny. If a lesbian couple's wish to have children without male gametes is valued as an essential part of meaningful procreation for them, then the need to clone herself or her partner could plausibly be viewed as a case of reproductive failure due to *normative infertility*.¹⁵⁶ If so, they should be allowed to use reproductive cloning to the same extent as would a gametically infertile heterosexual couple that chose cloning of the husband over anonymous sperm donation.

The case of a single lesbian requesting reproductive cloning warrants a similar analysis. A single woman would have no need to clone in order to have genetically-related children because through artificial insemination or coitus she could conceive and then gestate a child. A single woman who did not want a male source of sperm, even anonymous donor sperm from a commercial sperm bank, might elect to clone herself. If her choice to eschew male gametes is respected as an essential part of her person, she too would suffer from *normative infertility*, and be in the same position as an infertile heterosexual couple who decide to clone instead of using an anonymous sperm donor.¹⁵⁷

¹⁵⁵ The possibility of sharing mtDNA and nuclear DNA may limit the desire to create a chimera made from clones of each, if that procedure were ever safe and legal, in order to produce a child sharing the genes of each partner. See Eskridge and Stein, *supra* note 153 at 96-97; LEE SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 178 (1997).

¹⁵⁶ Although the term is novel, it seems to accurately describe the position of the couple who would reproduce only if they could avoid male gametes.

¹⁵⁷ If a single lesbian has the right to clone herself, it may be difficult to bar single heterosexual fertile woman from doing so as well. One issue would be whether the preference to procreate by cloning oneself rather than use donor sperm carries more weight when it derives from a lesbian ideology or belief system than when it springs from the convenience of not having to risk having a child with a genetic father who might later claim rearing rights. Of course, the clone source's own father would be the genetic father of the clone of the woman, though his social role, if any, would be that of grandfather rather than father.

2. Gay Male Cloning

It is much harder to view gay males who are sexually fertile as suffering from *normative infertility* in asserting a right to clone, as might plausibly be argued in some cases of lesbian cloning. No man, whether gay or straight, can reproduce sexually or by cloning without the assistance of women to provide an egg and gestate. Nor is it possible for each male partner to contribute biologically to the child in the way that each lesbian partner could, with one partner providing mtDNA and cytoplasm and gestating and the other providing nuclear DNA.¹⁵⁸ If a woman's cooperation must in any case be obtained to provide an egg and gestation, cloning alone will not enable a man to produce a child who has no alternative feasible way to have a genetic child to rear.

The claim of a right by gay males to employ reproductive cloning to have a child would thus seem more accurately described as the claim of a right to choose the genome of offspring rather than the right to have a child at all.¹⁵⁹ If single or married heterosexuals do not have the right to clone themselves or others when they can reproduce sexually, it is hard to see why gay males should have a greater right to clone. Of course, if heterosexuals are permitted to clone when there is no reproductive failure, then homosexuals should be free to do so as well.

B. Chimerization and Haploidization

Other speculative techniques occasionally discussed in connection with gay and lesbian procreation are the possibility of creating human chimeric or haploidized embryos as a way to enable two persons of the same sex to procreate using the gametes of each. Such techniques are much further off than reproductive cloning and may pose even greater physical risks for offspring.¹⁶⁰ A very strong showing of

¹⁵⁸ A chimera created with the genes of two different males would make each a genetic father of the child, but such a procedure is too distant in the future to be a practical option. In any event, an egg and gestation provided by a female would still be necessary. See discussion *infra* at pp. 404-05.

¹⁵⁹ The case of a gay infertile male would be different. He could argue that he needs to clone in order to have a genetically-related child to rear. If single infertile heterosexual males have the right to clone themselves, then it homosexual males should as well, for one cannot meaningfully distinguish their interest in having genetically-related children for rearing or their ability to rear based on their sexual orientation.

¹⁶⁰ I do not discuss parthenogenesis (birth from an oocyte), which occurs in some reptiles and invertebrates. Although the birth of an apparently healthy mouse from the combination of two eggs has been reported, few laboratories would be capable of duplicating that technique and it appears to have no useful human applications. Gretchen Vogel, "Japanese Scientists Create Fatherless Mouse," 304 *Science* 501 (2004). Nor do I discuss the possibility of deriving gam-

safety in primates and early human embryonic development would have to occur the use of such techniques could ethically be offered. Indeed, the barriers are so great that such a procedure may never be feasible. Discussion is nevertheless useful for exploring the outer limits of genetic selection and alteration in the context of gay and lesbian procreation.

Chimerization. Although Greek mythology refers to a chimera as a mixture of two species, in reproductive biology the term refers to the combination cells from two separate individuals. Since 1961 scientists have been able to create chimeric mice by combining cells from different mouse embryos. Each cell retains its identity. But as the embryo develops, the cells derived from different embryos mix together and communicate as if they had the same origin. When the animal is born, every tissue within the body is a mixture of cells from the original two embryos.¹⁶¹ With mice, unless two strains with different coat colors have been combined, there is no way to tell that they are chimeric. However, if a female embryo is joined with a male embryo, then intersex problems may arise.

The mammalian data and reports in the literature of over 100 human chimeras that have fused naturally (reversing the process of natural twinning) suggest that creating human chimeras might also be feasible. Most cases of naturally-occurring human chimeras appear to be healthy and have no major physical problems.¹⁶² If embryos of different sexes combine, there would be the risk of an intersexed person, with both male and female chromosomes. However, unless the intersexuality drastically affects the gonads or external genitalia of the person, their chimeric status may go undetected and may not even prevent them from reproducing.¹⁶³

The idea of creating chimeric offspring as a way to procreate might appeal to same-sex couples who wish to have a child with genetic contributions from each instead of the half that would be present if sperm or egg from another were used to conceive a child. Chimerization might occur as follows. Each member of the same-sex pair

etes from embryonic stem cells. While there may be potential medical applications from gametes derived in this way, the ability to derive female gametes from male embryonic stem cells and vice versa is an additional hurdle that would have to be overcome to make this technique relevant to gays and lesbians. The topic is too speculative to merit further discussion here. Giuseppe Testa & John Harris, *Ethical Aspects of Embryonic-Stem Cell Derived Gametes*, 305 SCIENCE 1719 (2004).

¹⁶¹ For a description of how this might occur, see SILVER, *supra* note 155 at 180-87.

¹⁶² Neng Yu et al., *Disputed Maternity Leading to Identification of Tetragametic Chimerism*, 346 NEW ENG. J. MED. 1545 (2002).

¹⁶³ SILVER, *supra* note 155 at 181.

would provide gametes to create an IVF embryo (the male couple using donated eggs and the female couple donated sperm). At the 8 cell stage each embryo would have one cell removed to determine its sex, so that only embryos of the same sex would be combined (each couple could produce either males or females). Those embryos would then be moved together, activated with a slight electrical charge, and given a reconstructed cell coating (zona pellucida) to protect them.¹⁶⁴ Those fused embryos that continue to cleave and appear healthy would, in the case of a male couple, then be transferred to the uterus of a gestational surrogate mother. The resulting child would have two genetic male parents and one female genetic parent (two if different egg donors were used). If a female couple has used this technique, then either or both of them could gestate the fused embryos. The resulting child would have two genetic mothers and, if the same sperm donor is used, one genetic father.

If chimerization had been shown to be safe and effective for its intended purpose (which may be very difficult to show), should gays and lesbians be free to use such procedures to have offspring with the genomes of each? Some persons would object to creating chimeric children for same-sex couples on the ground that it offends the “humanity of human procreation.”¹⁶⁵ Others would find a greater objection to be the risk of harm to resulting offspring. However, extensive mouse data and the reports of naturally-occurring human chimeras suggests that their health, vitality, and life-spans would be comparable to that of non-chimeric children. Perhaps the greatest risk is that this could lead to children with a patchy complexion or hair color, just as occurs if mice with different strains of fur are combined. It is unclear, however, how frequently such cases would occur, and when they did, what their psycho-social effects on children would be.

Strictly speaking, chimeric children would not have been harmed by being born because they have no other way to be born but as chimeras. Yet many people would question whether couples who choose novel procedures that have a high risk of producing children with severe deficits are seeking the usual goods of human procreation, particularly when they are sexually fertile. In addition to the physical effect on offspring, a key factor in moral and legal evaluations of chimerization is whether the same-sex couple creating the chimeric child is committed to loving and nurturing the child for itself. If so, it may be hard to deny that parents are exercising procreative liberty.

¹⁶⁴ *Id.* at 177-78.

¹⁶⁵ PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 5 (2004).

It is less clear that the logic of constitutional doctrines of procreative liberty would extend that far. Because each of the partners could have a genetically-related child by non-chimeric methods, it may be difficult for them to argue that chimerization is essential for them to reproduce. At that point they could claim that it is the only way that they could biologically procreate with their same-sex partner. The question then would be whether same-sex joint genetic reproduction is so important a reproductive interest that they should have the freedom to proceed. The judgment required here is similar to the judgment required when a lesbian individual or couple claims that reproductive cloning is essential because it is the only way that they may reproduce without a male.

As the discussion has shown, the prospect of chimerization is highly speculative and may never need to be faced in practice. A growing acceptance of same-sex marriage and gay and lesbian reproduction with other ARTs might sufficiently satisfy the desire of gays and lesbians that few persons to procreate would seek to use such an exotic method. In any event, a much greater recognition than now exists of the right of individuals to choose the genomes of their offspring would be necessary for chimerization, if physically safe, ever to be accepted.

Haploidization. Another speculative way to combine the genes of each same-sex partner would be through a process called haploidization. Haploidization techniques build on the recognition that the process of fertilization first produces a pronuclei consisting of the haploid genome provided by each gamete before they integrate with each other some 20 hours after fertilization at syngamy. If one of the haploid pronuclei is removed before it combines with the other, it could be joined with the haploid pronuclei of the partner produced in another fertilization. Two female haploid pronuclei could then be combined in one enucleated egg, as could two male haploid pronuclei, to form a diploid individual half of whose chromosomes come from one partner and the other half from the other.¹⁶⁶

Haploidization shares the same problems of faulty imprinting of genes and other epigenetic problems as do reproductive cloning, and has had even less success in mice and other mammals. Only after the procedure was well-established in primates could one ethically try it in humans. At that point its use in humans would raise the same array

¹⁶⁶ See SILVER, *supra* note 155 at 177-178. For a use of haploidization to create gametes, see Antonio Regalado, *Could a Skin Cell Someday Replace Sperm or Egg?* WALL ST. J., Oct. 17, 2002, at B1; Zsolt Peter Nagy et al., *Development of an Efficient Method to Obtain Artificially Produced Haploid Mammalian Oocytes by Transfer of G2/M Phase Somatic Cells to GV Ooplasts*, 78 FERTILITY & STERILITY S1 (Supp. 2002).

of issues that operate with creation of chimeras and reproductive cloning when fertile as a way to have genetically related offspring. Although the child born as a result would not, strictly speaking, have been harmed by its birth because it had no other way to have been born, there is still the question of whether a sexually fertile individual or couple interested in the welfare and well-being of their child would have a child in this way.¹⁶⁷ That in turn would turn on whether the need of a person to have their haploid genome passed on to another is so important to them that should have the freedom to undertake such an action. The easy availability of other alternatives for gay and lesbian reproduction suggests skepticism about the importance of that need.¹⁶⁸

VIII. CONCLUSION

The long march toward equal rights for gays and lesbians took a great leap forward in 2003 with court decisions striking down laws against homosexual sodomy and marriage. As society continues to examine the rights of gays and lesbians, attention will focus on their desires to have and raise families through the use of assisted reproductive technologies. Although gays and lesbians appear to be as capable of being good parents as are heterosexuals, some jurisdictions and some clinics may deny them access to ARTs and other services or arrangements that they need to procreate.

This article has shown that concerns about the welfare of resulting children are not persuasive grounds for denying gays and lesbians access to ARTs or to same-sex marriage. The children born to same-sex married couples or to single or unmarried gays and lesbians through ARTs would not have existed if procreation by their gay and lesbian partners had not occurred. Given that gay and lesbian parents are as equally capable of providing a caring and meaningful rearing environment as are other persons, there is no basis for claiming that offspring are harmed by being born to gay and lesbian parents. Even if states have the right to prefer heterosexual persons in placing children for adoption, they have no right to deny gays and lesbians the right to procreate by denying them equal access to the ARTs needed for that purpose. Whether private actors should be permitted to make those judgments will remain controversial.

¹⁶⁷ See Robertson, *supra* note 75, at 21.

¹⁶⁸ For example, if a gay male couple wishes to use this technique, wouldn't it be better for them to alternate providing donor sperm to a surrogate, so that each would be the genetic father of a different child?

Once legal rights are clarified, gay and lesbian access to assisted reproduction will depend on what ART techniques are generally available to persons seeking to reproduce. Fertility programs now offer a wide range of reproductive and genetic services. Gays and lesbians should then have access to IVF, gamete donation, and surrogacy to have families just as heterosexuals do. If it becomes feasible to screen embryos or gametes for genes predisposing toward sexual orientation, then both gay and straight individuals should have access to such screening once the right of couples to select non-medical traits of offspring prior to birth is recognized. Reproductive cloning and the use of chimerization and haploidization techniques to combine the genes of same-sex persons is highly speculative, and would not, under current conceptions of procreative liberty, likely be available.

Opponents of same-sex marriage have argued strenuously that recognition of the right of gays and lesbians to marry will dilute the meaning of marriage, diminish the importance of the institution, harm the welfare of children, and even threaten long-term social stability. Analogous charges have or might be leveled at policies and practices that ensure gay men and lesbians access to ARTs in order to procreate. I have argued that harm to future offspring is not a sufficient basis for denying to gays and lesbians the means to reproduce that are available to heterosexuals. Rather than undermine families or harm offspring, access to ARTs for gays and lesbians will promote parenting and family values, just as it does for heterosexuals.