

**Gay and Lesbian Rights to Procreate and 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 non-coital 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, while perhaps relevant in the adoption area 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.

The struggle for gay and lesbian rights has unfolded in many arenas, most notably in battles against discrimination in employment and the military and against the criminalization of gay sexuality. The frontlines of the struggle for gay rights have now moved to issues of same-sex marriage and the role that marriage plays as an institution for raising children.

The same-sex marriage debate has placed procreation by gays and lesbian on the public agenda in a new way. Despite past controversies over child custody, adoption, and foster parenting, little attention has focused directly on homosexual procreation. Yet gays and lesbians often have and rear offspring.¹ While many of these children result from heterosexual intercourse, gays and lesbians are increasingly turning to the use of assisted reproductive techniques (ARTs) to have children.

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, 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. Homosexuals may also seek ARTs for infertility, but more often they use them because they cannot reproduce with their partners or others.

As more gays and lesbians seek to reproduce, conflict over gay access to assisted reproductive techniques are 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

¹ In 1987 the estimate was that about 3 million gay men and lesbians in the United States were parents, and between 8 and 10 million children were raised in gay or lesbian households. p. 474 William Rubenstein editor, *Lesbian, Gay Men, and the Law* (1993) 474.

should have children in the first place.² Although many fertility clinics offer ART services to gays and lesbians, others do not. Some countries deny them access altogether.³ 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 and their right to use assisted reproductive technologies (ARTs) to form families. 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.⁴ Whether they will have access to a particular technique turns on whether access is granted to married or unmarried heterosexuals and whether private clinics are free to discriminate against gays and lesbians in accepting patients. If homosexuality is not a valid basis for withholding care, then sexual orientation should be added to the conditions against which private providers cannot discriminate.⁵

² See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E. 2d 941 (2003) especially Judge Cordy's dissent.

³ Several countries, for example, limit ARTs to married couples, which excludes gays and lesbians. This is the situation in Germany, Italy, and elsewhere. If gays are permitted to marry, they would have access to ART in those countries. There are no legislative or other "legal" prohibitions on unmarried individuals, gays or lesbians obtaining ART in the UK. The Human Fertilisation and Embryology Act 1990 is silent on the matter. There are, however, two practical limitations. First, many clinics have policies of not offering treatment in all/some of these cases. There has never been a legal challenge on discriminatory grounds and the prospects of success are not good.

Second, the clinics are required to have regard to the "welfare of the child" (s13(5) of the 1990 Act) and sometimes justify non-treatment because of the social circumstances of the would-be parents, including their sexual orientation and/or married status.

⁴ 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.

⁵ There may still, however, be a few instances in which homosexual status itself is relevant in determining access in such futuristic techniques as reproductive cloning for fertile lesbians or embryo fusion and gamete haploidization techniques for male homosexuals. See *infra* at

The article begins by describing 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 for that purpose. In making that argument, it is necessary to address questions of child-rearing by gays and lesbians that have arisen in disputes over child custody, adoption, and same-sex marriage.

Analysis of those issues will show that with the exception of adoption, 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 then 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 reproductive cloning, and to use of techniques of combining genomes from two gay individuals.

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*⁶ of the basic premises of *Roe v. Wade*,⁷ those rights are now established as an apparently stable part of the medical, legal, and social landscape. The battles that continue, such as those over partial-birth abortion and fetal homicide and protection

⁶ 505 U.S. 833 (1992).

⁷ 410 U.S. 113 (1973).

laws, chip at the edges but leave the basic right to terminate pregnancy intact.⁸ The appointment of new justices, however, could quickly change the stability of this arrangement.

The United Supreme Court has addressed the right to reproduce only in dicta.⁹ The 1942 case of *Skinner v. Oklahoma* 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.”¹⁰ Since then, however, the Court has rarely encountered specific claims of rights to reproduce, though it has seen fit to state many times in dicta that control over procreation and having children is protected.¹¹ Lower courts, however, have dealt with payment of outstanding child support as a condition for having more children and with suits by prison inmates seeking to transmit semen to a spouse for artificial insemination outside of the prison.¹² 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 holding if states attempted to limit coital reproduction, for example, by mandatory sterilization or contraception, limits on the number of

⁸ Juliet Eilpern, “Bill to Change Fetus’s Status Gain Support,” *Washington Post*, July 19, 2003, Page A02.

⁹ They have also involved the right to rear one’s biologic offspring. See *Stanley v. Illinois*, 405 U.S. 645 (1972),

¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹¹ Give cites. In *Eisenstadt v. Baird*, 405 U.S. 438 (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.” *Id.* at 453.

¹² Two federal appeals courts have found such actions unprotected in the prison context. See *Gerber v. Hickman*, 291 F.3d 617 (en banc, 9th Cir. 2002) (prison inmate has no right to provide sperm to his wife for artificial insemination outside the prison); see also *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990). John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994) pp. 35-38.

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.

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 does use 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 couples. 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.¹³ 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.¹⁴

A related question is whether the state could limit reproduction to married persons, for example, by prohibiting the provision of infertility services to unmarried persons in order to ensure that offspring will have two married rearing parents. A person's interest in reproduction exists independently of marriage, and some persons may have no feasible way to marry. Nor is there good reason to think that unmarried persons who have children would necessarily be poor or inadequate childrearers.¹⁵ Justice Brennan's statement in *Eisenstadt v. Baird* that "if the right to privacy means anything, it means the right of a person, married or single, to decide whether to bear or beget a child" suggests that state limits on reproduction by unmarried persons, such as barring access to ARTs, are likely to be struck down on due process of equal protection grounds.¹⁶

The Procreative Liberty of Homosexuals

Once it is recognized that unmarried persons have strong rights to reproduce, including the right to use different ART combinations when infertile or when necessary to ensure a healthy

¹³ 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.

¹⁴ Adoption also seeks to establish intimate association with a child but does not involve procreative rights because no biologic connection with the adopted child exists. No constitutional right to adopt has yet been recognized. See *Lofton v. Department of Children and Family Services*, --- F.3d ----, 17 Fla. L. Weekly Fed. C 201, 2004 WL 161275 (2004).

¹⁵ From a heterosexual, married perspective the situation 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.

¹⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). 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 note 19 supra. Brooke Adams, Controversial surrogacy law fix proposed, *Salt Lake Tribune*, July 17, 2003, p. A1.

<http://www.sltrib.com/2003/jul/07172003/utah/76058.asp>

offspring, then there is no acceptable basis for denying that right to some persons because of their sexual orientation.¹⁷ Gay males and lesbians ordinarily are not sexually attracted to members of the opposite sex, but they have the same biologic and associational interests as heterosexuals do in having a child and the same general ability to be competent childrearers.

Such a position is not inconsistent with the biologic reality that gay men and lesbians are not ordinarily sexually attracted to members of the opposite sex and thus ordinarily lack the sexual desire for an opposite sex person necessary to reproduce.¹⁸ Even though they find members of the same sex to be sexually attractive, they may have also have desires to have or care for offspring. In addition, they will have been brought up in a society that invests having and rearing children as an important source of meaning and fulfillment, regardless of whether they are sexually attracted to persons with whom they could reproduce.

Yet concerns have arisen in disputes over adoption by gays and over same-sex marriage about the effects on children of being reared by gays and lesbians. Opponents of gay and lesbian reproduction criticize studies that claim to show that children reared by gays and lesbians do as well in all respects as other children by pointing out methodological flaws in the numbers involved, their non-random selection, and the politically driven agendas of many researchers. They also point to other studies that suggest that children in gay families do not do as well as other children.¹⁹

¹⁷ Any legal category defined in terms of sexual orientation faces the difficult problem of how one ascertains and establishes what that sexual orientation is. See *infra* at

¹⁸ Such a statement 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, others at different periods of their life, and still others never or only weakly so. For discussion of the vast range of homosexual/heterosexual desire and the difficulties in defining “homosexual” or “heterosexual,” see.

¹⁹ This argument assumes that gay parents are not appropriate for non-gay children because of the sexual identity issues posed, especially during adolescence. If that is correct, then gay parents may be ideal rearers for gay children. By extension, straight parents would not be the

A key question addressed in this article is whether this evidence has any relevance to the question of homosexual procreation and access to ARTs. As is argued below, these concerns at best might be relevant to state policies about adoption but they have no relevance to questions of gay marriage, custody of a gay person's existing children, or access to ARTs. 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 gay reproduction. 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.²⁰ As a result, protecting prospective children is not a valid ground for opposing same-sex marriages or gay and lesbian access to assisted reproductive techniques.²¹

Gay Rights to Rear Existing Children

While problems may exist in all families, let us assume that children of homosexuals have a different set of adjustment and living problems than children of married homosexual persons. Let us also assume that there may be a higher risk of special problems with gay families, or at least a theoretically possible chance that there is. This is not to say that children reared in homosexual 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

best rearing parents for a gay child. Yet if we allow straight parents to raise gay children, then why gay and lesbian parents who are likely to have a straight child should be treated any differently? (I am indebted to Les Green for this point).

²⁰ This is Derek Parfit's non-identity problem. See Derek Parfit, *Reason and Persons* (1984). For further discussion of the argument and the standard responses to it, see *infra* at. See also Parfit at, 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*, and note ____ *supra* at 22-257; and John A. Robertson, Harm to Offspring, Procreative Liberty, and Provider Autonomy in Assisted Reproduction (forthcoming).

complications in the personal journey to reach a mature, stable identity. To see what the policy implications of such a view of the evidence would be, we first examine its relevance to policies concerning gays raising their own existing children and policies for gay adoption.²² We then examine its relevance to situations in which children will be born to gay and lesbian parents.

Gay Rights to Rear Their Own Children

Many gay persons have married and had children or otherwise coitally reproduced. When such marriages have broken up, conflict between the couple over child custody and rearing has sometimes led one spouse to seek to deprive the gay spouse of custody or visitation rights because they are 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 many courts have found this fact to be relevant and deprived the gay parent of custody or limited visitation, especially if a gay partner had entered the scene.²³ More recently, courts with a few exceptions have found that sexual orientation is not per se a factor in assigning child rearing.²⁴ Instead, most states follow a “nexus” test, under which a parent’s

²¹ See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) especially Judge Cordy’s dissent.

²² 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*, 123 S.Ct. 2472 (2003), found that such bias did not provide a rational basis for governmental action.

²³ 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.

²⁴ In *Roe v. Roe* the Virginia Supreme Court found that living with a homosexual parent would without a doubt harm the child. 324 S.E.2d 691 (Va. 1985). Missouri allows such a presumption to be rebutted. *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. 1998). See also *Doe v. Doe*, 16 Mass. App.Ct. 499 (1983) (“The best interests of the child standard does not turn on a parent’s sexual orientation or marital status” at 503).

homosexuality is not a per se 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.²⁵

Courts that apply the nexus test focus on factors of the homosexual parent's behavior that might be harmful to the child. One 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.²⁶ 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*, 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 beyond mere friendship" which included kissing with her homosexual lover.²⁷ Other courts have ruled that it is not inappropriate for children to see the homosexual parent and the parent's lover kiss or hug. Decisions are not uncommon finding 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.²⁸ They may reflect a growing trend.

²⁵ The nexus test is used by some court explicitly, and is applied by many other courts. See for example *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 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. Ct. 1993).

²⁶ 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.

²⁷ 563 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).

²⁸ *In re Marriage of R.S. & S.S.*, 677 N.E.2d 1297 (Ill. App. Ct. 1996); *VanDriel v. VanDriel*, 525 N.W.2d 37 (S.D. 1994).

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.*, a Kentucky court of appeals reversed a trial court, ruling that the court had failed to consider possible troubles the child might have forming a normal heterosexual identity²⁹. The *Lundin* court also expressed concern about the formation of heterosexual identity.³⁰ However, an Illinois court of appeals found the fact that the child was confused because he had two mothers was not sufficient evidence to restrict visitation rights.³¹

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.³² 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.³³ 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 association with his or her offspring.

Adoption by Gays and Lesbians

The case is different when a gay person seeks to adopt the child of another.³⁴ Here the person is not seeking custody of his own child but that of an already existing child. In those situations, the best interest of the child is a paramount concern and no reproductive or other right

²⁹ 608 S.W.2d 64 (Ky. Ct. App. 1980); *Lundin* at 1277

³⁰ *Lundin* at 1277.

³¹ *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993).

³² *Stanley v. Illinois*, 405 U.S. 645 (1972) (unmarried father cannot have his biologic child adopted without his consent).

³³ *Santosky v. Kramer*, 455 U.S. 745 (1982) (clear and convincing standard must be met to deprive a parent of parental rights).

of family liberty comes into play. This is true even if the would-be adoptive parent has been a foster parent of the child for several years, or otherwise been in a rearing or custodial relationship with the child.

All states allow gay individuals to serve as foster parents or legal guardians, and most permit them to adopt as well.³⁵ Courts in New York, Ohio, Tennessee, Virginia and Massachusetts have ruled that the fact that a potential adoptive parent is homosexual is not a per se bar to adoption.³⁶ The question, instead, is whether adoption of the child by a gay or lesbian parent would be in the child's best interest, which depends upon the facts of specific cases and not simply the would-be adoptive parent's sexual orientation.

A few states, however, prohibit adoption by gays, even though they allow gay individuals to be foster parents.³⁷ A 1977 referendum campaign in Florida to ban gay adoption led by the entertainer Anita Bryant received national attention and a majority vote.³⁸ The statute has been challenged constitutionally but upheld both at the state and federal level.

In the latest ruling involving the Florida statute a federal court of appeals rejected a constitutional challenge to the Florida law that makes homosexuals ineligible to adopt, leaving

³⁴ Adoption of one gay partner by another to provide the same legal protections as marriage is a different use of adoption. See William Rubenstein at 439.

³⁵ In New York, Ohio, Tennessee, Virginia, and Massachusetts, *Adoption of Tammy*, 416 Mass. 205 (1993), courts have ruled that the fact that an adoptive parent is a homosexual is not a per se bar to adoption. Some of factor showing that the adoption is not in the child's best interests would have to be shown.

³⁶ *Adoption of Anonymous*, 622 N.Y.S.2d 160 (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.*, 522 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).

³⁷ Fla. Stat. Ann. Sec. 63.042; Miss. Code Ann. Sec. 93-17-3 (prohibiting adoption by couples of the same gender); Ala. Code Sec. 26-10A-6; Utah Code 378-3-1(3)(Supp. 2001). (barring adoption by unmarried cohabitants, which includes gays).

³⁸ "No person is eligible to adopt under this statute if that person is a homosexual." Fla. Stat. Ann. Sec. 63.042.

the matter to the discretion of state policymakers.³⁹ No fundamental rights or suspect classifications were involved, so a rational basis test applied. The state claimed that its policy was designed to “create adoptive homes that resemble the nuclear family as closely as possible” in order to “provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization.”⁴⁰ In particular, Florida emphasized the “vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling.”⁴¹ 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 adopting by marital families.

In siding with the state, the court of appeals found that Florida has “a legitimate interest in encouraging a stable and nurturing rearing environment for the education and socialization of its adopted children.”⁴² The state “has a legitimate interest in encouraging this optimal family structure by seeking to place adoptive children in homes that have both a mother and father... which is based on the premise that the marital family structure is more stable than other household arrangements and that children benefit from the presence of both a father and mother in the home.”⁴³ 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.”⁴⁴

³⁹ *Lofton v. Department of Children and Family Services*.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 9.

⁴³ *Id.*

⁴⁴ *Id.*

The highly deferential approach of the court to the state's claims is further reflected in how it responded to the statute's over and underinclusivity. Because the state need have only "some conceivable basis" for its distinctions, the court could easily find plausible grounds for each instance of loose fit. For example, the court found that the state might have allowed unmarried heterosexual persons to adopt because they were more likely to marry in the future than were gays. Also, since most adopted children are likely to be heterosexual, 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."⁴⁵ Nor does the fact of delay in finding placements for foster children show that the policy is irrational. The point isn't simply to find a placement, but to find the optimal ones. If delay alone mattered, than any other requirement that delayed adoption, such as income, residence, in-state residency and other criteria, would also be irrational. Finally, the fact that homosexuals might be foster parents and legal guardians also does not show that the law is irrational because those arrangements do not have the permanence or legal and cultural significance of adoptive parenting.

In reaching these conclusions, the court cast a cold eye on the claim of the gay plaintiffs that recent 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. Many of those studies had questionable methodologies, small self-selected samples, political bias in how they were interpreted, and an overinclusion of affluent educated parents. The court noted that other studies have shown that children raised in homosexual households fare worse on a number of measures. In any event, the experience with same sex

⁴⁵ Id at 10.

couples rearing children is still too new to justify a court finding that a legislature wishing to take a more cautious approach was acting irrationally.⁴⁶

Although many states find that homosexual adoption also serves the best interests of adopted children, the appeals court decision is defensible in light of prevailing constitutional doctrines. The opportunity to rear an unrelated child has never been recognized as a fundamental right, even for foster parents seeking to adopt the child whom they have been rearing. Because of the mixed state of the social science data, a state might choose to proceed cautiously here, at least when it purports to be acting to protect the well-being of the child. Although proponents might argue that states that deny adoption to gays are really expressing moral disapproval of gay and lesbian sexual orientation, a state may plausibly counter that it wanted to “proceed with deliberate caution before placing adoptive children in an alternative, but unproven family structure that has not yet been conclusively proven to be equivalent to the marital family structure that has established a proven track record spanning centuries.”⁴⁷ As the next section will show, however, the state’s right to seek an optimal outcome for children placed for adoption does not apply to situations in which children will not exist unless gay marriage and reproduction is recognized.

Children Who Would Not Otherwise Exist

⁴⁶ Id at 12. It also cited approvingly Judge Cordy’s dissent in *Goodridge v. Department of Public Health*, which expressed similar doubts.

⁴⁷ Lofton at 12. In reaching this result, the Lofton court gave a very narrow reading to *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), reading that case as an application of the rational basis test and not as creating a new fundamental right. A more expansive reading of *Lawrence*, however, would not necessarily have led to a different result because a fundamental right to make intimate sexual choices would not be relevant to adoption.

Debates about same-sex marriage and access to ARTs also turn on the welfare of children, but here the situation is very different than child custody or homosexual adoption.⁴⁸ Disputes about raising one's own children or adopting the children of others involve children who already exist. Same-sex marriage and gay and lesbian procreation involve children who will come into existence because of the marriage or use of ARTs in question. Opponents who argue that gay parents are not optimal rearers cannot prevail in this context as they can in the adoption setting because the children they seek to protect would not exist if their policies were adopted. To protect those children they would deny them existence altogether.

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.⁴⁹ Even if it would be preferable for all children to be reared in a heterosexual married setting, those children are not necessarily harmed if they are raised in a non-marital setting if they would not have otherwise existed and been reared by a married opposite-sex couple. 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 cannot have been harmed by being born to such parents.⁵⁰ 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.⁵¹ Protection of

⁴⁸ 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. See discussion *infra*.

⁴⁹ Derek Parfit, *Reason and Persons* (1984).

⁵⁰ 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.

⁵¹ The California, Washington, and New Jersey 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, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis*, 98 Wash. 2d 460, 656P.2d 483 (1983).

offspring should not then be an acceptable basis 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.⁵² But those conditions are not easily met in the case of gay and lesbian procreation (or in most other situations of assisted reproduction). Avoiding the diminution of welfare alleged to flow from homosexual rearing would require that gays and lesbians relinquish custody of their children at birth or not reproduce at all. Either alternative would 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 their place. Thus either alternative fails to satisfy the stringent requirements of the same-numbers, duty-to-substitute alternative to the non-identity problem.⁵³

Physicians ordinarily have wide discretion over who they accept as patients and what services they will provide, and thus may have more leeway in making those decisions than do state actors. Unless a jurisdiction had made sexual orientation an impermissible ground for

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.

⁵² Derek Parfit note supra at ____; 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*, and note ___ supra at ____ 22-257; and John A. Robertson, "Procreative Liberty and Harm to Offspring in Assisted Reproduction," (forthcoming, 2004).

discrimination in public accommodations, doctors would be free not to provide ARTs to gays even if the state could not ban them from doing so.

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.

⁵³ For a more extended discussion of the non-identity problem and various responses to it, see John A. Robertson, "Procreative Liberty and Harm to Offspring in Assisted Reproduction," (forthcoming, 2004).

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 children if same-sex marriage is recognized.⁵⁴ 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 supportive structure of married male and female rearing parents.⁵⁵

Procreation and the Essence of Marriage. It is true that society has channeled 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.⁵⁶ Nor, as we have seen, do most states

⁵⁴ 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 marrying persons of the opposite sex.

⁵⁵ 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, New York Times, Feb. 6, 2004, A24 (the writer is identified as the state director of the American Family Association of New York).

⁵⁶ 34% of all births in the United States in 2002 have been to unmarried women. The number and percentage has been slowly increasing. While many persons decry the high number of unmarried births, it has become an inescapable part of national life. Centers for Disease Control, 52 National Vital Statistics Reports 8-9 (2003).

award child custody or restrict adoption on the basis of marital status or sexual orientation.⁵⁷

Most importantly, fertility and intention to reproduce are not prerequisites to marriage; failure to consummate the marriage or infertility is not grounds for divorce. 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 are permitted (to) marry.”⁵⁸ The court found that the essence of marriage is permanent commitment, 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 marriage.”⁵⁹

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

⁵⁷ See supra at.

⁵⁸ *Goodridge v. Department of Public Health* at

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.⁶⁰

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.⁶¹ Thus protecting the children who would otherwise 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 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.

⁵⁹ *Goodridge* at 13.

⁶⁰ 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.

⁶¹ See Robertson, note 51 *supra*.

The impact on children born to gay couples was a major reason for the court in *Goodridge* finding 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.’”⁶²

....
“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.”⁶³

The dissent, 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 otherwise have been born. This position ignores the non-identity problem, protecting those children by preventing them from being born at all, which is hardly a benefit from their perspective once they are born.⁶⁴ Even if being reared by married heterosexual parents is preferable, it is not possible for those children to

⁶² *Goodridge* at 14.

⁶³ *Id.*

⁶⁴ The question is asked from their perspective once they are born because until they are born, there is no person in existence with rights or interests to be protected. See Robertson, note *supra* at.

be born to opposite-sex married parents.⁶⁵ Because they have no other way to exist, they are neither harmed nor wronged by being born and reared by same-sex parents. 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.⁶⁶ A policy that would protect those children by preventing their birth altogether is no protection for them at all.⁶⁷

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.⁶⁸ 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

⁶⁵ 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) (right of father to custody of his illegitimate children).

⁶⁶ The dissent repeatedly recognizes that same-sex couples may provide excellent care and rearing. It also rejects sexual orientation as a basis for child custody or adoption decisions based on the best interests of the child.

⁶⁷ 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 John A. Robertson, "Harm to Offspring, Procreative Liberty, and Assisted Reproduction," (forthcoming).

⁶⁸ See *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal alien children cannot be barred from public education because of 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' father.

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 important to the interests of the child than to the equal status of gays and lesbians who seek to marry their partners.⁶⁹

Gay and Lesbian Procreation and Harm to Offspring

The question of harm to offspring from gay and lesbian procreation follows a similar analysis. Homosexual procreation 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 allowing gay and lesbian procreation to occur 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.⁷⁰

The problem again, 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 rich and rewarding life, those children are hardly protected by preventing their birth altogether.⁷¹ Protecting the welfare of children born to gay parents would

⁶⁹ *Opinion of the Justices to the Senate*, 2004 WL 202184 (Mass.), ruled 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.

⁷⁰ Many nations prohibit the provision of ART services to persons who are not married, thus implicitly barring services to gays and lesbians. See Wardle’s *Constitutional Claims*, 1996 *BYU L. Rev.* note 2, at 7 listing Scandinavian countries that forbid adoption or ART by gays. See also note *supra*, where gay and lesbian access to ARTs in Germany, Italy, and the United Kingdom are discussed.

⁷¹ 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. See *supra* at.

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.

A slightly different question is whether ART providers in the private sector may nevertheless refuse 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. This question concerns the limits of professional autonomy in deciding which parents to take and treat. 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. If not, providers would be free to deny ART services on the basis of discriminatory criteria that the state could not act on.

Access to ARTs

We have seen that all persons have the right to procreate and to use ARTs to do so, including the use of donor gametes, surrogacy, and preconception and prenatal screening techniques. 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 denying persons the right to reproduce either coitally or with medical assistance, though private physicians may have the freedom to decline to treat some patients.

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 very much on the precise technique at issue and whether it is sought by homosexual men or women.

Artificial Insemination of Gay Single Women or Couples

Perhaps the most common instance of non-coital gay procreation involves single gay women or gay women with partners who request 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.

Laws against artificial insemination of single or gay women do not exist. If they did, they would be vulnerable to constitutional attack as interference with an unmarried woman's right to procreate. 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 would at worst suffer an unavoidably sub-optimal, not directly harmful, rearing situation.⁷²

The question of whether ART clinics on their own may decide not to provide services to single women or lesbian couples turns on whether the clinic is a state or private actor. 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. Because individuals have no right to receive services from the state, the question would turn on whether the state had a rational basis for denying them services. Disapproval of homosexuality would not provide such a justification.⁷³ Nor, under the analysis of this article, would protection of children be a sufficient basis. Private providers, however, would be free to withhold such services as long as

⁷² 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.

⁷³ See *Romer v. Evans*, 517 U.S. 620 (1996). *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) could also be interpreted to add some support to such a claim. But see Lofton, *supra* at.

state or federal discrimination laws do not include sexual orientation or marital status as an impermissible ground of discrimination.

Several instances of refusal to treat gay women have been reported, but none has led to litigation. Some staff members at the University of Washington Hospital were “uncomfortable” treating lesbian women, and refused.⁷⁴ 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. It is unclear whether a state-authorized conscience clause for those who object to treating them would be constitutional.⁷⁵

In practice the more important legal issues for gay women using AI to have children is obtaining certainty that the donor will not have rearing rights. Over 35 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 where the husband consents to the donation.⁷⁶ Most of these statutes do not directly address the rearing rights and duties of donors in non-marital situations. However, strong arguments for excluding the donor based on the reliance of the parties will exist if the parties have agreed in writing at the time of donation that the donor is relinquishing all rearing rights and duties in resulting offspring.

To ensure that those rights are extinguished, single women should obtain sperm through a sperm bank and have it administered by a physician.⁷⁷ 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

⁷⁴ University of Washington case.

⁷⁵ To do so is to recognize the validity of their prejudice. Since another person is directly involved, it harms them, at least if no other providers are available. Conscience clauses in the abortion context might be treated differently.

⁷⁶ AI laws.

later claim parenthood. A written donation agreement is essential, but could be overridden if practices show otherwise. Several painful cases have arisen over misunderstandings of what each party envisaged.⁷⁸ 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.

The other significant legal issue growing out of AI of lesbian women is the rearing rights and duties of the non-gestational partner. 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 many states regards only the gestating partner as a parent with rearing rights and duties, and accords the non-gestating partner no parental status at all.⁷⁹ Sometimes the non-gestating partner may become a parent through adopting the child, often through a step-parent adoption.⁸⁰ One of the benefits to offspring of same-sex marriage mentioned in *Goodridge v. Department of Public Health* was 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 be legally recognized as a parent.

The lack of clear parenting rights for children born to single women or lesbian couples through AI complicates such transactions, but is probably not itself a significant barrier to

⁷⁷ A few states recognize termination of donor rights only when the insemination is done by a physician. Use of a physician may also increase efficacy.

⁷⁸ See *Jhordan C. v. Mary K.*, No. A0278210 (Ca. Ct. of App. Apr. 25, 1986); *C.C. v C.M.*, App. Div. N. J..

⁷⁹ See *In re Pamela P.*, 443 N.Y.S.2d 343 (1981).

⁸⁰ *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*

lesbian women using this technique to reproduce.⁸¹ Legislation that clearly designated rearing rights and duties as the donors and recipients intended would be desirable for persons using these techniques and their offspring. Some persons, however, would oppose such legislation because they would view it as encouraging homosexual reproduction. Although failure to enact such legislation would not itself infringe procreative liberty, providing certainty to the parties and offspring has much to recommend it on policy grounds.⁸² As with same-sex marriage, official legal recognition of parenting rights is more likely than its absence to provide certainty and stability for children and their parents.

AI and Egg Donation to a Lesbian Couple

Sometimes 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 the one providing only gestation may be able to provide cytoplasm through nuclear transfer of gamete nucleus as a way to gain some additional shared genetic connection.⁸³

Laws prohibiting egg donation to gay women 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. The more salient legal question in such arrangements is legal

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. See note *supra*.

⁸¹ But see Catherine DeLair, "Ethical, Moral, Economic, and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women," 4 *DePaul J. Health Care L.* 147, 162-173 (2000); Audra Elisabeth Laabs, "Lesbian ART," 19 *Law & Ineq. J.* 65 (2001).

⁸² John A. Robertson, "Assisted Reproductive Technology and the Family," 47 *Hastings Law Journal* 911, 927-933 (1996).

recognition of the intended joint parenting rights of both parties. The few egg donation statutes on the books contemplate severing the rearing rights and duties of the egg donor genetic mother and the recipient gestational mother.⁸⁴ The arrangement intended, however, when one partner provides the egg and the other gestates seeks to maintain them. Although no case law yet exists on the subject, the courts are likely to give great weight to the predonation and preimplantation reliance and understanding of the parties.⁸⁵ If the parties have agreed that the donor will retain some rearing rights as well as the gestator, then that should control. Further doubts could be eliminated by a step-parent adoption by the egg donor.

AI and Egg Donation to a Single Woman.

A single woman wishing to reproduce may find that she is not able to conceive through AI because of her age or other problems with functioning eggs. She may then want an egg donation. If she is permitted to be a single parent when inseminated, the use of an egg donor should not change matters. As the gestator, she will be regarded as the legal mother in most states, as long as the egg donor has knowingly relinquished her rights in the child.

In effect, the single woman in this arrangement will become a gestational surrogate for an embryo created with the egg and sperm of separate donors for the purpose of having a child for herself, not for another couple. Ordinarily the lack of biologic connection and her single status might raise questions about the stability of the resulting relationship to the child. But since she is gestating and will rear, there is very likely to be a strong bond with the child.

⁸³ See John A. Robertson, "Reconstituting Eggs and the Ethics of Cytoplasm Donation," 71 *Fertil. & Steril.* 219-221 (1999).

⁸⁴ See Fla. Stat. ch. 742.14 (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).

⁸⁵ John A. Robertson, "Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation," 39 *Case Western Law Review* 1-38 (1988-89).

This situation is to be distinguished from the much more questionable situation in *Buzzanca* case, in which a couple obtained separate egg and sperm donations and hired a surrogate to gestate the embryo, and then refused to accept the resulting child.⁸⁶ The courts, quite properly, held that they were nevertheless legally responsible for the resulting child, who was born through the arrangement they created. A law banning such arrangements would not infringe procreative liberty because that couple was not procreating, but rather arranging for a child to be created for them. But procreative liberty is not the same as a right to rear unrelated children. Just as there is no fundamental right to adopt a child who has already been born, there is no fundamental right to arrange for such a child to be created in the first place.⁸⁷

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. To do so, they will have to find a surrogate mother who will bear the child for them. In some cases the surrogate will also provide the egg. 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.

Because the use of a surrogate mother is essential for gay male reproduction to occur, some persons might suggest that the law ban such arrangements. But if single persons have a right to reproduce coitally with a willing partner, then they should also have the right to use an ART to procreate, regardless of their sexual orientation. A law banning such uses would interfere with their procreative liberty. Such a law would be difficult to justify on grounds of

⁸⁶ *In re Marriage of Buzzanca* 72 Cal. Rptr.2d 280 (Cal. App. 1998).

⁸⁷ See *Lofton*, supra. Such a ban, however, would be based on the lack of biologic connection and not on sexual orientation. The case of the single woman who acts as her own gestational surrogate for the created embryo is distinguishable because of her biologic connection through gestation with the child. Although gestation *tout court* is not itself procreation, it is sufficiently close to it that courts are likely to treat it similarly.

protecting offspring because the children in question would not otherwise have been born, and in any event, can have a rich and rewarding life even 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 ART services to heterosexual persons but not homosexuals.⁸⁸

A more important factor than sexual orientation in providing ART services to enable single men to procreate is whether the man is equipped and able to provide competent child-rearing to the child. While some single men will have these capacities, no doubt with the aid of others in rearing, other men may underestimate the demands and challenges of being a single parent. 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 and ended up murdering the child.⁸⁹ This does not necessarily mean that all single gay males should be barred from using ARTs to procreate, but it would be reasonable for ART programs to demand proof of adequate rearing capabilities in their patients. An ART program might validly choose not to provide ART services to single males, whatever their sexual orientation, if they have grounds for thinking that the patient 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.⁹⁰

⁸⁸ If the clinic bars all unmarried persons, it may be a different matter. Here the question is whether preferring that the child have married parents is arbitrary.

⁸⁹ A case reported from Pennsylvania involved a single male who became a parent in this way who then murdered the child because it cried so much.

⁹⁰ 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 _____.

The case for providing AI and surrogacy services is much stronger if gay male couples that are committed to each other seek to have a child. 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 the child that they raise. Provider concerns about their child-rearing capacity should accordingly lessen.

The partners in such a procreative enterprise would face the same issues of parenting rights that gay women have faced. The partner providing the sperm would be the legal father, but in most states the non-biologic partner would have no parental rights until he adopted the child. 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.

A gay male couple (whether married or unmarried) who choose to reproduce will face the question of which one will be the genetic father. They could alternate if they are planning to have more than one child. At some point in the mid-distant future, it might become possible to have each partner contribute genetic material to the child that they parent. This could occur if embryos created with the sperm of each could be fused, creating a human chimera that will have genes of each and be related to each. Further discussion of this technique occurs below.

“Gay Genes” and Prenatal Selection for Sexual Orientation

In addition to making procreation feasible, ARTs are increasingly being used for genetic screening of prospective offspring before birth. Most of this 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.

One potential candidate for such non-medical screening is genes that predispose toward or associate an individual with a homosexual orientation. If such genes exist, they are likely to

be mutations or variations that affect testosterone production at three critical points in the life-span of an individual--in the fetus, in early infancy, and at puberty.⁹¹ 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 research has not panned out.⁹² 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 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 still instructive to consider to what extent a person's reproductive rights would entitle a person to use genetic selection or alteration techniques to choose the sexual orientation of their offspring.

A popular play several years ago portrayed the conflict confronting a father whose wife is pregnant with a male fetus with the genetic marker that he will be homosexual.⁹³ The drama concerned the protagonist's struggles over whether to abort or not. 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, it is likely to be of primary interest to those with some family history of that orientation, rather than to the population at large. Gays or lesbians might seek it out 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. More likely, some heterosexual couples with family

⁹¹ See Daniel D. Freedman, "Three Facets of Sexual Differentiation," 350 *New Eng. J. Med.* 4 (2004).

⁹² Dean Hammer et al, "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation," 261 *Science* 321 (1993); George Rice, Carol Anderson, Neil Risch, & George Ebbers, "Male Homosexuality: Absence of Linkage to Microsatellite to Markers at Xq28," 284 *Science* 665 (1995).

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 was for the parental project of successful gene transmission to the next generation.⁹⁴ 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 orientation, 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.⁹⁵ Similarly, some gays who reproduce might assert that they would do so 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 freedom of association permits persons in the private sphere to

⁹³ Jonathan Tolin, *Twilight of the Golds*.

⁹⁴ See John A. Robertson, "Procreative Liberty in the Era of Genomics," 29 *Amer. J. Law & Med.* 439-487 (2003).

⁹⁵ The choice of gay parents to have gay children is not inconsistent with a reproductive agenda of gene transmission, because those gay offspring might also reproduce, just as their 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 gene transmission and parenting in the next generation.

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.⁹⁶

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 surrogate. For lesbian couples, ARTs will allow one to provide the egg and the other the gestation, but sperm is still needed from a donor.

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 them as ways around the discrimination that gays and lesbians face. Although such techniques are highly

⁹⁶ 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. The child would still be free to be his own person other regards.

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.

Reproductive Cloning

Reproductive cloning has occurred in a number of mammalian species, but is 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. As a result, any discussion of reproductive cloning for humans--whether heterosexual or homosexual--is highly speculative.

As with other techniques, whether reproductive cloning would be available to gays and lesbians would depend first on whether it was available to non-gay persons. That is, if heterosexuals do not have a right to use a particular technique to reproduce, then a fortiori it would seem that neither would gays. On the other hand, if the right of heterosexuals to use a technique is protected, there is a strong argument that gays and lesbians should have that right as well.

These principles are directly applicable to the question of whether gays and lesbians would be entitled to use reproductive cloning if it were otherwise shown to be safe and effective. One must first determine whether heterosexuals would have a right to engage in reproductive cloning. That analysis would depend on whether it served core reproductive interests without harming others. As I have shown elsewhere, a plausible argument in favor of reproductive cloning could be made in the case of persons who are gametically infertile and have no other way to have and rear genetically related offspring.⁹⁷ Such a rationale would not apply to persons who are sexually fertile and seek to clone. Until a more general right to select offspring

⁹⁷ John A. Robertson, "Two Models of Human Cloning," 27 Hofstra L. Rev. 609, 633-637 (1999).

characteristics in all circumstances is recognized, only cloning when infertile should be permitted.

The distinction between reproductive cloning for the infertile but not the fertile also illuminates questions of gay and lesbian cloning. Gays and lesbians have a special interest in reproductive cloning because of the discrimination which they have experienced in their efforts to have and rear children.⁹⁸ Indeed, homosexual groups 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 mtDNA and cytoplasm, 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.

Lesbian Cloning

As argued 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.⁹⁹ Lesbian cloning poses the question of whether that right exists even if lesbians have the same access to men or sperm banks that married heterosexual couples do. If they do have access to sperm, a single lesbian or lesbian couple who is fertile could each contribute biologically to the birth of a child via sexual reproduction.¹⁰⁰ If the woman is single, she could have artificial insemination with donor sperm,

⁹⁸ William Eskridge and Edward Stein, "Queer Cloning," in Martha Nussbaum and Cass Sunstein, Editors, *Clones and Clones* 95 (1998).

⁹⁹ Gay males also have the same rights to reproduce and rear that heterosexual males have.

¹⁰⁰ If she is infertile due to uterine or health factors, she would need someone else to gestate to produce a genetically-related child. If she were gametically infertile, she could receive an egg

and then gestate and rear her child, with or without involvement of the genetic father. If she has a lesbian partner, one of them could be inseminated and then gestate, with both sharing rearing. In some states the nonbiologic rearing partner could adopt the child and thus legally establish rearing rights and duties.¹⁰¹ If both partners wanted a biologic connection, they could undergo IVF, with one partner providing the egg and the other gestation. In that case presumably each would be considered the legal mother if that were there clear preconception agreement for that arrangement.¹⁰²

Although fertile lesbians have no physical impediment to sexual reproduction and increasingly no social impediment either, it might be a mistake always to view a fertile lesbian's decision to engage in reproductive cloning as a case of cloning when fertile rather than cloning as a last resort to overcome gametic infertility. In the case hypothesized, the decision to clone is not so much to have a child with 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 mtDNA, with either of them gestating).¹⁰³ If the

donation and then gestate. Only in that latter case would she need to clone herself in order to have a genetic connection with offspring.

¹⁰¹*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).

¹⁰² There would be no reason to prefer the gestational over the genetic mother when there was an agreement for both to rearing mothers. See *Calvert v. Johnson*, 851 P.2d 776, 787 (Cal. 1993) (holding that a gestational surrogate who carries an implanted embryo containing none of her genetic material to term is not the "natural mother" of the resulting child under California law).

¹⁰³ 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, note 56 supra at 96-97; Lee Silver, *Remaking Eden: Cloning and Beyond in a Brave New World* 178 (New York: Avon Books, 1997). See discussion infra at.

woman were single, she could reproduce by herself by providing the egg in which the nucleus of one of her somatic cells is placed, and then bear the resulting embryo to term.¹⁰⁴

The normative question presented by a lesbian's choice to clone rather than reproduce sexually is whether her desire to reproduce without male involvement should be respected as much as any desire to have and rear genetically-related children. If a woman's wish to have children without male gametes is valued as an essential part of her procreation, then the need to clone herself, whether she is alone or with a partner, can plausibly be viewed as a case of reproductive failure. She cannot reproduce without a man sexually, and thus must resort to cloning, just as a gametically infertile heterosexual couple who wish to have genetic children to rear might choose cloning of the husband over anonymous sperm donation. In neither case would sexual reproduction enable them to produce a genetically-related child to rear.

The case of a single lesbian deserves similar treatment. A gay 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, she would be in the same position as an infertile heterosexual couple who decide to clone instead of using an anonymous sperm donor.¹⁰⁵

¹⁰⁴ Similarly, a single fertile heterosexual woman who wishes to reproduce without donor sperm might choose to clone herself in order to procreate.

¹⁰⁵ 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.

In these cases the choice to clone is to establish a genetic connection between the child and rearing parent without male involvement, not to have a child with a particular genome as such. If the choice to eschew male involvement deserves respect, then the situation is very much like that of an infertile heterosexual couple who clone the husband to provide him with a genetic connection with the child whom he rears, and not because of a desire *per se* to replicate another individual. Lesbian cloning to avoid male involvement might then be perceived as an instance of reproductive cloning equivalent to reproductive failure because sexual reproduction is not feasible.

Gay Male Cloning

It is much harder to view gay male cloning as an instance of last resort because sexual reproduction is not physically or socially available, as might plausibly be argued in some cases of lesbian cloning. Instead, it appears to be a case of individuals choosing to clone in order to obtain or select a child with a particular genome and relationship to the rearing parent. No man, whether gay or straight, can reproduce sexually or by cloning without the assistance of women to provide an egg and gestate.¹⁰⁶ 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.¹⁰⁷ 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. If so, he cannot claim that cloning is necessary for him to have and rear genetically-related children

¹⁰⁶ The use of bovine eggs to receive nuclear transfer as has been suggested for therapeutic cloning is unlikely to work here, and faces social and other objections, such as mixing animal and human. See John A. Robertson, "Reconstituting Eggs and the Ethics of Cytoplasm Donation," 71 *Fertil. & Steril.* 219-221 (1999).

because sexual reproduction also requires that help. Nor can he justify the choice to clone as the lesbian can on the grounds of aversion to reproduction with the opposite sex. If he is to reproduce at all, he will need the assistance of women to provide eggs and gestate.

The use of cloning by gay males would thus seem to be a case of seeking to have a child with a particular genome rather than having a child who is genetically connected at all.¹⁰⁸ In most instances one could hypothesize that the DNA chosen would be that of the individual himself, perhaps in part to increase the chances that the child will be gay and thus perpetuate gay culture.¹⁰⁹ If so, it would raise the question of the right to choose children's genome regardless of the ability to reproduce sexually. 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 would have a greater right to clone. In neither case is cloning necessary for their reproduction to occur. Of course, if heterosexuals are permitted to clone when there is no reproductive failure, then homosexuals should be free to do so as well.

Chimerization and Haploidization

Other speculative techniques that have been discussed in connection with gay and lesbian procreation is 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 or may not pose much greater physical risks

¹⁰⁷ 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 .

¹⁰⁸ 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.

to offspring. A very strong showing of safety in animals and with early human embryo studies would have to occur before actually attempting to have a child with shared gametes. Indeed, the barriers are so great that such a procedure may never be feasible. A discussion, however, of the issues that it raises are useful for exploring the outer limits of genetic selection and alteration in the context of gay and lesbian procreation.

Chimerization. Creating chimeras from two embryos has more potential than haploidization to produce viable offspring. Scientists have since 1961 been able to create chimeric mice by combining cells from different mouse embryos. Each cell retains its identity--no fusion of cells occurs. But as the embryo develops, the cells derived from different embryos mix together and communicate as if they were from the same origin. When the animal is born, every tissue within the body is a mixture of cells from the original two embryos.¹¹⁰ 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 can 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.¹¹¹ If embryos of different sexes combine, there is a risk of an intersexed person, with both male and female chromosomes. However, unless the

¹⁰⁹ The genetic or inherited component of homosexuality is unclear, though some studies show that it may be responsible for 20-38% of homosexuality. See Eskridge and Stein, note 62 *supra* at 104.

¹¹⁰ For a description of how this might occur, see Lee Silver, *Remaking Eden*, 180-187.

¹¹¹ Neng Yu et al, "Disputed Maternity Leading to Identification of Tetragametic Chimerism," 346 *New Eng. J. Med.* 1545.

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.¹¹²

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. Each member of the same-sex pair would provide gametes to create an IVF embryo, males using donated eggs and females donated sperm. At the 8 cell stage each embryo would have one cell removed to determine the sex of the embryo so that only embryos of the same sex would be combined. Those embryos would then be moved together, activated with a slight electrical charge, and given a reconstructed zona pellucida to protect them.¹¹³ 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. If a female couple has used this technique, then either or both of them could gestate fused embryos. The resulting child would have two genetic mothers and, if the same sperm donor is used, one genetic father.

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 “dignity of human procreation.”¹¹⁴ 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

¹¹²Silver, *supra* at.

¹¹³ *Id.*

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 truly engaged in procreation. A key factor in moral and legal evaluations of such actions, in addition to the physical effects on offspring, would be whether the same-sex couple creating the chimera is committed to loving and nurturing the child for itself. If so, it may be very hard to deny that parents are seeking healthy, genetically-related offspring to nurture and rear in the most feasible way for them to do so, thus exercising procreative liberty.

It is less clear that 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 procreate. 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 liberty that they should have the discretion to proceed. The judgments 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 needs of gays and lesbians to procreate that few would seek such an exotic method of reproduction. In any event, a much

¹¹⁴ President's Bioethics Council, 2004.

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. If one of the haploid pronuclei is removed before it combines in the fertilized egg 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 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.¹¹⁵

No offspring, however, have been successfully born in mice from such procedures, so use in humans is much further off than either reproductive cloning or chimerization. Only after the procedure was well-established in mammals could one ethically try in humans. At that point their use in humans would raise the same array of issues that operate with creation of chimeras as a way to have genetically related offspring. Although the child strictly speaking would not have been harmed because not otherwise born, there would still be a question of whether a parent interested in the welfare and well-being of their child would bear and rear such a child. 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 they would understandably undertake such an action. The

¹¹⁵ See Lee Silver, note supra at 177-178. For a use of haploidization to create gametes in the first place, see Antonio Regalado, "Could a Skin Cell Someday Replace Sperm or Egg?" Wall Street Journal, Oct. 17, 2002, B1; Zsolt 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 and Sterility (Suppl.) S1 (2002).

easy availability of other alternatives for gay and lesbian reproduction would directly affect that judgment.¹¹⁶

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 gays and lesbians are increasingly integrated into society, 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 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 equally capable of providing a rich and rewarding rearing environment, there is no basis for claiming that they are harmed by being born to gay 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.

Once the right of gays and lesbians to ARTs are recognized, their access to them will depend on what ART techniques are generally available to persons seeking to reproduce. ART

¹¹⁶ 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

programs now offer a wide range of reproductive and genetic services. Gays and lesbians should then have access to AI, 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 gays and straights should have access to such screening once the right of couples to select non-medical traits of offspring prior to birth is recognized. 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.

different child?