Reproductive Ethics and Family: An Argument to Cover Access to ART for the LGBTQ Community

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ABSTRACT

Assisted Reproductive Technology can be a beneficial tool for couples unable to reproduce independently; however, it has historically discriminated against the LGBTQ+ community members. Given the evolution and acceptance of LGBTQ rights in recent years, discrimination and barriers to access reproductive technology and health care should be readdressed as they still exist within this community.

Keywords: LGBTQ+, ART, reproductive ethics, infertility, surrogacy, equality

INTRODUCTION

In recent years, the LGBTQ+ community has made great strides toward attaining equal rights. This fight dates back to 1970 when Michael Baker and McConnell applied for a marriage license in Minnesota.[1] After the county courthouse denied the couple's request, they appealed to the Minnesota Supreme Court. Baker and McConnell's dispute reached the US Supreme Court. *Baker v. Nelson*[2] was the first time a same-sex couple attempted to pursue marriage through higher courts in the US.[3] Because the couple lost the case, Baker changed his name to a gender-neutral one, and McConnell adopted Baker, allowing Baker and McConnell to have legal protections like the ability to receive certain inheritances. Baker and McConnell received a marriage license from an unsuspecting clerk from Blue Earth County, where they wed on September 3, 1971.[4]

BACKGROUND

The Supreme Court's decision left individual state legislatures the option to accommodate same-sex couples' rights constitutionally. As a result, some states banned same-sex marriage, while others offered alternative options such as domestic partnerships. With many obstacles, such as the Defense of Marriage Act (DOMA) and President Bush's efforts to limit marriage to heterosexual people, Massachusetts became the first state to legalize gay marriage in 2003.[5] Other states slowly followed. Finally, in 2015 the US

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Supreme Court made same-sex marriage legal in all 50 states in *Obergefell v. Hodges*,[6] marking an important milestone for the LGBTQ+ community's fight toward marriage equality. The *Obergefell v. Hodges* decision emphasized that members of the homosexual community are "not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions," thus granting them the right to "equal dignity in the eyes of the law."[7] This paper argues that in the aftermath of the wide acceptance of LGBTQ rights, discrimination and barriers to access reproductive technology and health care persist nationally.

Procreation also faces discrimination. Research supports that children's overall psychological and physical welfare with same-sex parents does not differ compared to children with heterosexual parents.[8] Some others worry about the children's developmental health and argue that same-sex male couples' inability to breastfeed their children may be harmful; however, such parents can obtain breast milk via surrogate donation.[9] Further concerns regarding confusion in gender identity in children raised by same-sex parents are not supported by research in the field indicating that there are "no negative developmental or psychological outcomes for a child, nor does it result in differing gender identity, gender role behavior or sexual partner preference compared to opposite-sex parents."[10]

ANALYSIS

I. Desire to Procreate

The American perception toward same-sex unions has evolved "from pathology to deviant lifestyle to identity."[11] In 2001, only 35 percent of Americans favored same-sex marriage, while 62 percent favored it in 2017.[12] The "Gay marriage generation"[13] has a positive attitude toward same-sex unions, arising from the "interaction among activists, celebrities, political and religious leaders, and ordinary people, who together reconfigured Americans' social imagination of homosexuality in a way that made gay marriage seem normal, logical, and good."[14] Same-sex couples' right to build a biological family and ability to do so using modern reproductive technology is unclear. The data generated by the LGBTQ Family Building Survey revealed "dramatic differences in expectations around family building between LGBTQ millennials (aged 18-35) and older generations of LGBTQ people,"[15] which may be in part attributable to recent federal rulings in favor of same-sex couples. Three important results from this survey are that 63 percent of LGBTQ millennials are considering expanding their families throughout parenthood, 48 percent of LGBTQ millennials are actively planning to grow their families, compared to 55 percent of non-LGBTQ millennials; and 63 percent of those LGBTQ people interested in building a family expect to use assisted reproductive technology (ART), foster care, or adoption to become parents.[16] There are 15.9 million Americans who identify as LGBTQ+ (6.1 million of whom are 18 to 35 years old); thus, an estimated "3.8 million LGBTQ+ millennials are considering expanding their families in the coming years, and 2.9 million are actively planning to do so."[17] Yet access and affordability to ART, especially in vitro fertilization (IVF) and surrogacy for same-sex couples, has not been consistent at a national level.

The two primary problems accessing ART for the LGBTQ community are the lack of federal law and cost. A federal law that guaranteed coverage would address both problems.

II. ART for Same-Sex Couples

All same-sex male (SSM) couples and same-sex female (SSF) couples must involve third parties, including surrogates or egg or sperm donors.[18] ART involves the legal status of "up to two women (surrogate and egg donor)," the intended parents, and the child for SSM couples.[19] While sometimes necessary for

heterosexual couples using ART, an egg or sperm from someone other than the intended parents or a surrogate will always be necessary for the LGBTQ people seeking ART.

ART, in particular IVF, is essential for infertile couples unable to conceive on their own. Unlike other industrialized countries (such as Canada, the United Kingdom, Sweden, Germany, and Australia), the US does not heavily oversee this multibillion-dollar industry.[20] The American Society for Reproductive Medicine does provide lengthy guidelines to fertility clinics and sperm banks; however, state lawmakers have been less active as they seem to avoid the controversy surrounding controversial topics like embryo creation and abortion.[21] As a result, states "do not regulate how many children may be conceived from one donor, what types of medical information or updates must be supplied by donors, what genetic tests may be performed on embryos, how many fertilized eggs may be placed in a woman or how old a donor can be."[22]

III. A Flawed Definition of Infertility

The WHO defines the medical definition of infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after twelve months or more of regular unprotected sexual intercourse."[23] This antiquated definition must be updated to include social infertility to integrate same-sex couples' rights.[24] In the US, single individuals and LGBTQ couples interested in building a family by biological means are considered "socially infertile."[25] If insurance coverage is allotted only to those with physical infertility, then it is exclusive to the heterosexual community. Although some states, such as New York, discussed below, have directly addressed this inequality by extending the definition of infertility and coverage of infertility treatments to include all residents regardless of sexual orientation, this is not yet the norm everywhere else. The outdated definition of infertility is one of the main issues affecting same-sex couples' access to ART, as medical insurance companies hold on to the formal definition of infertility to deny coverage.

IV. Insurance Coverage for IVF

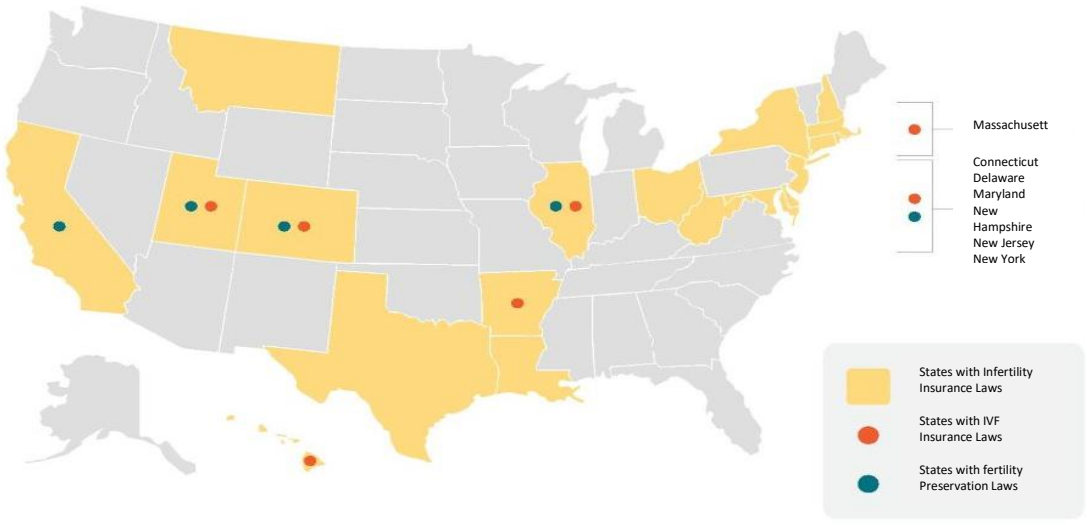

Figure 1: Infertility Coverage per State. Retrieved and adapted from https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/

Insurance coverage varies per state and relies on the flawed definition of infertility. As of August 2020, 19 states have passed laws requiring insurance coverage for infertility, 13 of which include IVF coverage, as seen in *Figure 1*. Also, most states do not offer IVF coverage to low-income people through Medicaid.[26] In states that mandate IVF insurance coverage, the utilization rate was "277% of the rate when there was no coverage,"[27] which supports the likelihood that in other states, the cost is a primary barrier to access. When insurance does not cover ART, ART is reserved for wealthy individuals. One cycle of ART could cost, on average, "between $10,000 and $15,000."[28] In addition, multiple cycles are often required as one IVF cycle only has "about a 25% to 30%" live birth success rate.[29] Altogether, the total cost of successful childbirth was estimated from $44,000 to $211,940 in 1992.[30]

On February 11, 2021, New York Governor Andrew M. Cuomo "directed the Department of Financial Services to ensure that insurers begin covering fertility services immediately for same-sex couples who wish to start a family."[31] New York had recently passed an IVF insurance law that required "large group insurance policies and contracts that provide medical, major medical, or similar comprehensive-type coverage and are delivered or issued for delivery in New York to cover three cycles of IVF used in the treatment of infertility."[32] But the law fell short for same-sex couples, which were still required to "pay 6 or 12 months of out-of-pocket expenses for fertility treatments such as testing and therapeutic donor insemination procedures before qualifying for coverage."[33] Cuomo's subsequent order made up for gaps in the law, which defined infertility as "the inability to conceive after a certain period of unprotected intercourse or donor insemination."[34] Cuomo's order and the law combine to make New York an example other states can follow to broaden access to ART.

V. Surrogacy

Access to surrogacy also presents its own set of problems, although not exclusive to the LGBTQ community.

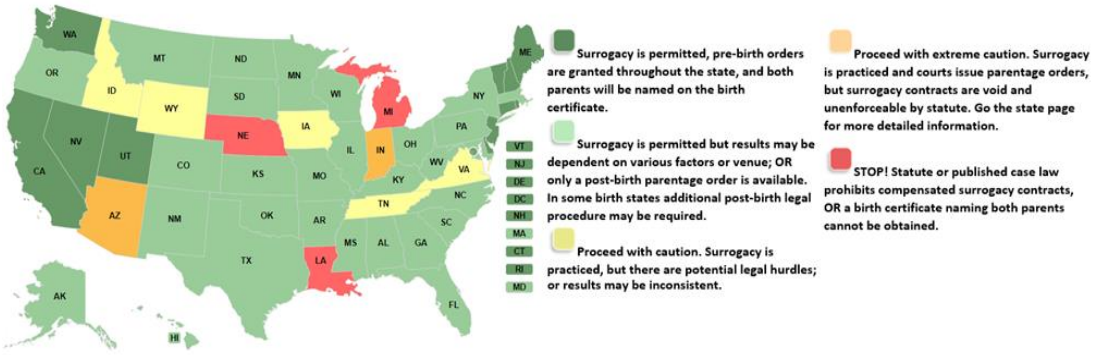

Figure 2: US Surrogacy Map. Retrieved and adapted from https://www.creativefamilyconnections.com/us-surrogacy-law-map/

Among states, there are differences in how and when parental rights are established. States in dark green in *Figure 2* allow pre-birth orders, while the states in light green allow post-birth parentage orders. Pre-birth orders "are obtained prior to the child's birth, and they order that the intended parent(s) will be recognized as the child's only legal parent(s) and will be placed on the child's birth certificate," while post-birth parentage orders have the same intent but are obtained after the child's birth.[35] For instance, states can require genetic testing post-birth, possibly causing a delay in establishing parentage.[36] Although preventable through the execution of a health care power of attorney, a surrogate mother could be the legal, medical decision-maker for the baby before the intended parents are legally recognized. On February 15, 2021, gestational surrogacy – the most popular type of surrogacy in which the surrogate has no

biological link to the baby – was legalized in New York,[37] but it remains illegal in some states such as Nebraska, Louisiana, and Michigan.[38]

In addition, the costs of surrogacy are rising, and it can cost $100,000 in the US.[39] Medicaid does not cover surrogacy costs,[40] and some health insurance policies provide supplemental surrogacy insurance with premiums of approximately $10,000 and deductibles starting at $15,000.[41] Thus, "surrogacy is really only available to those gay and lesbian couples who are upper class,"[42] leaving non-affluent couples out of options to start a family through biological means.

VI. A Right to Equality and Procreation

Some argue that same-sex couples should have the right to procreate (or reproductive rights). Based on arguments stemming from equal rights and non-discrimination, same-sex couples who need to use ART to procreate should have access to it. The need to merge social infertility into the currently incomplete definition of fertility could help same-sex couples achieve access through insurance coverage.

The human right of equality and non-discrimination guarantees "equal and effective protection against discrimination on any ground."[43] The United Nations later clarified that "sexual orientation is a concept which is undoubtedly covered" [44] by this protection. The right to procreate is not overtly mentioned in the US Constitution; however, the Equal Protection Clause states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States… without due process of law."[45] In fact, some states have abridged the reproductive privileges of some US citizens by upholding prohibitive and intricate mechanisms that deter same-sex couples from enjoying the privileges other citizens have. The Supreme Court acknowledged procreation as a "fundamental"[46] personal right, in *Skinner v. Oklahoma*, mandating that the reproductive rights of individuals be upheld as the right to procreate is "one of the basic civil rights of man"[47] because "procreation [is] fundamental to the very existence and survival of the race."[48] In *Eisenstadt v. Baird*, the courts also supported that "the decision whether to bear or beget a child" fundamentally affects a person.[49] I argue that this protection extends to same-sex couples seeking to procreate. Finally, *Obergefell v. Hodges* held that the Due Process and Equal Protection clauses ensure same-sex couples the right to marriage, as marriage "safeguards children and families, draw[ing] meaning from related rights of childrearing, procreation, and education."[50] By implicit or explicit means, these cases align with the freedom to procreate that should not be unequally applied to different social or economic groups.

Yet, the cases do not apply to accessing expensive tools to procreate. As heterosexual and the LGBTQ community face trouble accessing expensive ART for vastly different reasons, especially IVF and surrogacy, the equal rights or discrimination argument is not as helpful. For now, it is relevant to adoption cases where religious groups can discriminate.[51] The insurance coverage level may be the best approach. While the social norms adapt and become more inclusive, the elimination of the infertility requirement or changing the definition of infertility could work.

Several arguments could address the insurance coverage deficit. Under one argument, a biological or physical inability to conceive exists in the homosexual couple trying to achieve a pregnancy. Depending on the wording or a social definition, a caselaw could be developed arguing the medical definition of infertility applies to the LGBTQ community as those trying to procreate are physically unable to conceive *as a couple planning to become parents*. One counterargument to that approach is that it can be offensive to label people infertile (or disabled) only because of their status as part of a homosexual couple.[52]

CONCLUSION

In the last 50 years, there has been a notable shift in the social acceptance of homosexuality.[53] Marriage equality has opened the door for further social and legal equality, as evidenced by the increased number of same-sex couples seeking parenthood "via co-parenting, fostering, adoption or surrogacy" – colloquially referred to as the 'Gayby Boom'.[54] However, some prejudice and disdain toward LGBTQ+ parenting remain.

Equitable access to ART for all people may be attainable as new technology drives costs down, legislators face societal pressure to require broader insurance coverage, and social norms become more inclusive.

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