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ETHICAL, MORAL, ECONOMIC AND LEGAL BARRIERS TO ASSISTED REPRODUCTIVE TECHNOLOGIES EMPLOYED BY GAY MEN AND LESBIAN WOMEN

Catherine DeLair*

INTRODUCTION

Gay Rights groups estimate that there are approximately four million gay men and lesbian women raising between eight and ten million children.\(^1\) These figures primarily represent children born out of previously heterosexual relationships, not those born in households with two women or two men.\(^2\) However, facilitated by a host of assisted reproductive technologies, there are ever increasing numbers of gay men and lesbian women, as individuals, or in couples, who are choosing to bear and raise biologically related children.\(^3\) The 1980’s saw an increase in the number of children born to lesbians.\(^4\) In the 1990’s, these numbers extended to gay men.\(^5\) The media has coined


\(^1\)See Sue A. Pressley & Nancy Andrews, For Gay Couples, the Nursery Becomes the New Frontier, WASH. POST, Dec. 20, 1992, at A22 (basing the figures on the assumption that ten percent of the population is homosexual); see also Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 CHILD. DEV. 1025, 1026 (1992) (noting “Estimates of the number of lesbian mothers generally run about 1-5 million and those for gay fathers from 1 to 3 million”).

\(^2\)See Pressley & Andrews, supra note 1, at A22.

\(^3\)Precise data regarding the numbers of children being born and raised in homosexual households is not available.


\(^5\)See id.
the phenomenon a "gay baby boom," "lesbian baby boom," and the "gay-by boom."

Gays' and lesbians' motivations for wanting to bear and raise a biological child are similar to those of heterosexual couples. Many intend to have children in order to form a family unit. Some see having a child with a partner as a "common project" and a way of demonstrating love and commitment. Some may desire to fulfill a biological drive and to even experience pregnancy. Finally, the desire to have a child may be rooted in cultural and sociological expectations.

Because they do not engage in heterosexual relationships, gays and lesbians must turn to assisted reproductive technologies in order to produce genetically related children. While there are many kinds of assisted reproductive technologies, it is beyond the scope of this paper to discuss all of them. I will therefore, focus on the two forms of assisted reproductive technologies most commonly utilized by lesbians and gay men--artificial insemination and surrogacy. Despite available technology and increasing numbers of homosexuals who desire to have genetically related children, gays and lesbians still face significant barriers to assisted reproductive technology. This paper will examine those barriers and offer possible solutions. In addition, the social, moral and ethical barriers to reproductive technologies will be examined. These barriers include moral and religious convictions against reproductive technologies and moral and personal convictions against homosexuality. Monetary and legal barriers will also be examined. This paper also offers different challenges to these barriers.

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10For a discussions of other forms of reproductive technologies, see LORI B. ANDREWS, NEW CONCEPTIONS: A GUIDE TO THE NEWEST INFERTILITY TREATMENTS (1984).
11Surrogacy is the only form of assisted reproductive technology available to men. Assuming that lesbians are otherwise healthy and fertile, artificial insemination is the form of assisted reproductive technology most commonly used because it is the easiest, safest and cheapest. See JANE MATTES, SINGLE MOTHERS BY CHOICE 26-36 (1994).
Because of their biological ability to bear children, lesbians have been able to have children, often without medical insemination, through the process of artificial insemination. 12 Artificial insemination is the "introduction of semen in a women's vagina or uterus, other than by sexual intercourse." 13 Artificial insemination is a relatively safe, simple and cost effective procedure. 14 Semen can be obtained via a known donor, or it can be purchased from a sperm bank. 15 Women have the choice of being inseminated at a sperm bank, a physician's office, or in the privacy of their own home. 16

Because men cannot biologically bear a child, the only way a gay man can have a genetic child by involving a "surrogate mother." 17 A surrogate mother is "one who bears a child for a person or a couple unable to have children." 18 There are two varieties of surrogacy: traditional and gestational. 19 A traditional surrogate mother provides both the female gestational and genetic components of reproduction. 20 She is typically artificially inseminated with the sperm of the intended biological father. 21 In contrast, a gestational surrogate mother is one who provides only the gestational component of reproduction. 22 Gay men are likely to choose traditional surrogacy because gestational surrogates must undergo In Vitro fertilization (IVF), a costly procedure...
that increases the medical risk to the surrogate. Both forms of surrogacy are ordinarily agreed to via written contract, with the intention that the surrogate relinquishes all parental rights, giving the biological father full custody.

SOCIAL, MORAL AND ETHICAL BARRIERS

The most common and the most significant barrier that gays and lesbians face when trying to access reproductive technologies is physician discrimination and refusal to provide treatment. Physicians mediate all access to medical care, and they are, in a sense, "gatekeepers" deciding who receives treatment. The physician/patient relationship is considered a contractual one. The physician/patient relationship has traditionally been voluntary and personal, in which, for a variety of reasons, the physician may choose whether to enter. Absent an established patient/physician relationship, physicians are under no duty to treat a patient. Thus, physicians, especially those in private practice, wield a considerable amount of power regarding who is granted access to certain treatments. All physicians require some form of screening process prior to providing services for artificial insemination. The screening process typically includes one or more

23In Vitro Fertilization is a procedure whereby an oocyte and sperm are fertilized and transferred surgically or laproscopically into the surrogate. The benefit of using a gestational surrogate is that the biological father's semen can be fertilized with an egg from a member his partner's family, thereby creating a child that is genetically related to both partners.

24Ethics Commission, supra note 19, at 67S.

25See infra notes 26-60 and accompanying text.

26Patients typically seek out physicians for diagnosis and treatment of disease states. Based on the initial history and physical, physicians decide whether the patient will require medical follow-up and access to care.


28See BARRY R. FURROW ET AL., LIABILITY AND QUALITY ISSUES IN HEALTH CARE 428 (3d ed. 1997); see also American Medical Association, Council on Ethical and Judicial Affairs, Principles of Medical Ethics, in CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS (1996) ("A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which they provide medical services."). Under Emergency Medical Treatment and Active Labor Act (EMTALA), physicians are statutorily mandated to at least screen, and if warranted, provide treatment in situations of emergencies and active labor. See 42 U.S.C. 1395dd.

29See FURROW, supra note 28, at 428.

30See OTA SURVEY, supra note 13, at 9.
of the following: a fertility history, a personal medical history, a physical examination, a family history, and a personality assessment. A physician uses the information from the initial evaluation to determine whom he or she will treat. Only four out of five patients will be accepted for treatment.

Discrimination against gays and lesbians remains pervasive in society. Physicians may choose to deny treatment to homosexuals. Physicians who discriminate against gays' and lesbians' access to assisted reproductive technologies will do so for a variety of reasons. These reasons can be categorized as (A) moral and/or ethical objections to reproductive technologies, (B) religious objections to reproductive technologies or homosexuality, and (C) personal prejudices against homosexuality.

Moral and Ethical Objections to Assisted Reproductive Technologies

Physicians may refuse to provide services based on moral and/or ethical objections to assisted reproductive technologies in general. Additionally, even if a physician is willing to provide services for some assisted reproductive technologies, he or she may have objections specific to surrogacy.

Ethical objections to reproductive technologies are multifaceted. Some believe that reproductive technology is irresponsible because our
society is already overpopulated.\textsuperscript{38} Others argue that assisted reproduction is "unnatural."\textsuperscript{39} One theologian has stated that "the further the act of insemination, for instance, from the personal union and common life of the donor and recipient of the seed, the further from the human and therefore the more suspect morally the practice would be."\textsuperscript{40} Finally, others argue that assisted reproduction could lead to drastic, unacceptable changes in society.\textsuperscript{41} Because assisted reproductive technologies allow the parents to choose the egg and or sperm donor, they may be tempted to create "superkids" by choosing as a donor, only those with specific talents or traits.\textsuperscript{42}

Even physicians who accept conventional assisted reproductive technologies might object to surrogacy. The issues of surrogacy are politically charged, especially among feminists, and raises additional objections because it involves a third party.\textsuperscript{43} Reservations about surrogacy can be categorized in one of three ways. First, there are concerns surrounding the potential psychological effects on the surrogate, the child, and the intended couple.\textsuperscript{44} Second, some argue that surrogacy exploits women.\textsuperscript{45} Finally, some argue that children are commodified in surrogacy arrangements.\textsuperscript{46}

Studies have shown that some surrogates will experience a period of mourning and grief after relinquishing the child.\textsuperscript{47} This may be

\textsuperscript{38}See ANDREWS, supra note 10, at 12.
\textsuperscript{39}See id.
\textsuperscript{40}See id. quoting G.R. Dunsteen.
\textsuperscript{41}See id. at 13.
\textsuperscript{42}See id.
\textsuperscript{43}See generally Ethics Commission, supra note 19, at 73S-74S (discussing the political and moral objections to surrogacy).
\textsuperscript{44}See id. at 73S.
\textsuperscript{46}See Ethics Commission, supra note 19, at 1S, 74S.
\textsuperscript{47}See id. But see, Lori B. Andrews & Lisa Douglass, Symposium on Biomedical Technology and Health Care: Social and Conceptual Transformations: Technical Article: Alternative Reproduction, 65 S. cal. Rev. 623, 678 (1991). Studies have shown that 22% of surrogates state that giving up the child was the most emotionally challenging aspect of the arrangement, but 25% said losing contact with the intended parents was the most difficult aspect. The same study found that 75% of the women agreed that the most rewarding aspect of the arrangement was seeing the couples' happiness, giving the gift of life, etc. See id. at 676 citing Kathy Forest and David MacPhee, Surrogate Mothers' Grief Experiences and Social
inherent in the biological and emotional bond formed after nine months of carrying a child and giving birth.\textsuperscript{43} If the surrogate remains anonymous, the child may subsequently suffer psychological harm by trying to learn the biological mother’s identity.\textsuperscript{49} It is unclear if a child’s psychological development is affected if the surrogate is a relative or close friend of the intended couple.\textsuperscript{50} However, if the surrogate is a close friend or relative to the intended parent(s), the surrogate’s continued involvement may cause tension in the intended parent(s) household.\textsuperscript{51} Furthermore, the intended parent(s) may be psychologically stressed if the surrogate mother attempts to establish custodial or visitation rights.\textsuperscript{52}

Physicians, particularly those who are feminist, may refuse to provide assistance and care in surrogacy arrangements because of political and/or philosophical beliefs.\textsuperscript{53} Some feminists view surrogacy as highly exploitative of women.\textsuperscript{54} Opponents argue that, because a fee is paid to surrogates, those most likely to offer their reproductive capabilities will be poor women in financial need.\textsuperscript{55} Thus, wealthier couples will take advantage of females in lower classes in order to meet their own reproductive means,\textsuperscript{56} thereby creating a class of reproductive “breeders.”\textsuperscript{57} Interestingly however, some research suggests that the

\textsuperscript{43}See Ethics Commission, supra note 19, at 73S.
\textsuperscript{49}See id. at 74S.
\textsuperscript{50}See id.
\textsuperscript{51}Id. at 73S.
\textsuperscript{52}See Andrews & Douglass, supra note 47, at 674 citing Hillary Hanafin, Surrogate Parenting: Reassessing Human Bonding (August 28, 1987) (unpublished paper presented at A.P.A. Convention, New York), “Recent studies on the outcomes of surrogacy arrangements show that all but a few cases of surrogate arrangements go smoothly, will all parties satisfied with their involvement.”
\textsuperscript{53}See generally Wikler, supra note 45 (discussing feminist perspectives regarding surrogacy); Katherine E. Lieber, Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?, 68 IND. L.J. 205 (1992) (discussing feminist perspectives regarding surrogacy.)
\textsuperscript{54}See id. Radical feminists argue that surrogacy is akin to prostitution. See Kerian, supra note 45, at 160, citing Rosemarie Tong, Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus, in REPRODUCTION ETHICS AND THE LAW 55, 68 (Joan C. Callahan ed., 1995). In both situations, the women must sell a “service” (in prostitution it is a sexual service, in surrogacy it is their reproductive service). See id
\textsuperscript{55}See Kerian, supra note 45, at 163 (1997), citing Tong, supra note 54, at 64-65.
\textsuperscript{56}Id.
economic gap between intended parent(s) and surrogate mother is not that great.\textsuperscript{58} Moreover, opponents argue that surrogacy equates with “baby-selling” because children are contracted for and a surrogate mother relinquishes rights to her biological child in exchange for monetary compensation.\textsuperscript{59} The children born out of such arrangements simply become “goods in a marketplace that demands product quality.”\textsuperscript{60} 

### Religious Objections to Assisted Reproductive Technologies and Homosexuality

Physicians may refuse to provide assisted reproductive technologies in general, or to gays and lesbians specifically, because of religious objections. Religious objections to homosexuality are presumably fueled by negative references to homosexuality in the Bible,\textsuperscript{61} as well as in religious teachings.\textsuperscript{62} The Catholic religion teaches that procreation should only occur in the sanctity of a marriage between a man and a woman.\textsuperscript{63} Thus, any form of artificial reproductive manipulation is considered morally wrong.\textsuperscript{64} Catholics condemn artificial insemination as “immoral purely and simply.”\textsuperscript{65} Masturbation, the most common method for obtaining semen, is also condemned.\textsuperscript{66} Moreover, it is...
immoral for a woman to receive semen from someone other than her husband. To do so represents adultery on the part of the wife and casts doubt on the legitimacy of the child. Catholics view surrogate motherhood as wrong on two grounds. First, it violates the spiritual and biological union of marriage and parental relationship. Second, it exploits women as "baby makers" and children as commodities.

The Jewish faith is more willing to accept some forms of assisted reproduction. Jewish leaders cite to three principles which, with certain restrictions, permit the use of some "fertility increasing manipulation" (i.e. In-vitro fertilization): (1) the commandment "be fruitful and multiply;" (2) the commandment of charity, in this case, using ones possessions or talents to ease the suffering of another (a childless couple); and (3) the principle of domestic peace and family integrity. Despite these principles, many Jewish authorities argue that artificial insemination from a donor is forbidden. Some view women who conceive by artificial insemination as adulterous and the children as illegitimate. There is also the concern about the possibility of incest when using anonymous donors because a woman may unknowingly use a relative's donated sperm. Artificial insemination of either a lesbian woman or a surrogate mother is also unethical under a Jewish belief system because masturbation is viewed as immoral. Orthodox Jews believe it sinful to "waste the seed." Many Jewish leaders disagree with surrogacy altogether because of surrogacy's

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67 See id. at 55.
68 See id. at 54-55.
69 See O'ROURKE & BOYLE, supra note 62, at 323.
70 See id.
73 See id. at 31.
75 See Fred Rosner, In Vitro Fertilization, Surrogate Motherhood, and Sex Organ Transplants, in SECOND INTERNATIONAL COLLOQUIUM ON MEDICINE, ETHICS AND JEWISH LAW, TAMUZ 5756-JULY 1996: COLLECTION OF ESSAYS 110 (Mordechai Halperin et al. eds., 1996).
76 See Feldman, supra note 74, at 180.
77 WILLFORD J. FEINGOLD, ARTIFICIAL INSEMINATION 83 (2d ed. 1976).
ethical and legal problems (exploitation and maternal identity).\textsuperscript{78} However, some Jewish leaders would find surrogacy permissible only in the absence of any other alternative "to save a marriage or to bring happiness to the depressed."\textsuperscript{79}

Some Protestants take a strict view of artificial insemination finding that it that the totality of marriage is ruined because artificial insemination ruins the "one-flesh unity of husband and wife."\textsuperscript{80} Other Protestant leaders would argue that artificial insemination is acceptable.\textsuperscript{81} These leaders see mutual consent between a husband a wife as a way of warding off accusations of "broken faith."\textsuperscript{82} Additionally, they view the act of a sterile husband sanctioning artificial insemination as a way of strengthening the marriage.\textsuperscript{83}

**Discrimination Based on Personal Prejudices Regarding Homosexuality or Homosexuals as Parents**

Physicians may discriminate and refuse to treat gays and lesbians because they find homosexuality personally offensive and/or because they feel that homosexual parenting is not in the best interest of the child.\textsuperscript{84} Many find homosexuality to be personally repugnant.\textsuperscript{85} Instead of viewing homosexuals as having similar emotions, attitudes, and values, some view homosexuals as strictly sexual beings,\textsuperscript{86} who are only concerned with sexual gratification.\textsuperscript{87}

\textsuperscript{78}See Feldman, supra note 74, at 179-81.
\textsuperscript{79}Rosner, supra note 75, at 114. Presumably two conditions would apply, one, the semen is not procured through masturbation (i.e. from a condom or coitus interruptus) and two, the surrogate is not paid for more than her expenses. See Feldman, supra note 74, at 178, 180 (Rabbi Levi Meier ed.).
\textsuperscript{81}See id.
\textsuperscript{83}See supra notes 25-35 and accompanying text.
\textsuperscript{84}I use the word "repugnant" because homosexuality is commonly believed to be "unnatural."
\textsuperscript{85}See Julie Shapiro, *Custody and Conduct: How the Law Fails Gay and Lesbian Parents and Their Children*, 71 IND. L.J. 623, 624 (1996) (noting that "many people, including many judges, perceive lesbians and gay men as exclusively sexual, while heterosexual parents are perceived as people, who along with many other activities in their lives, occasionally engage in sex"); "Since at least the nineteenth century, gay men have been known for their promiscuous
Physicians may also discriminate against gays and lesbians because they believe the homosexual environment is bad for the children. Some may find that homosexuality represents a threat to the concept and values of the "traditional family." They believe the homosexual environment is bad for the children.

Traditional family lacks a precise definition, but it is commonly defined as "two heterosexual, married adults and their biological or adoptive children." This traditional concept of family has existed for centuries. Two men or two women having children challenges this ancient notion of family, and some critics speculate that it sets a bad example for children reared in this environment.

Because gays and lesbians are not able to legally marry, many people harbor false perceptions that homosexuals are involved in short-term and unstable relationships. Since parental instability is regarded as dangerous to the psychological development of the children, some conclude that gays and lesbians make bad parents because they are more likely to be involved in unstable relationships. However, this conclusion is without merit since heterosexual relationships, just like homosexual relationships, can be equally stable or unstable. Several studies have indicated that gays and lesbians are often involved in long


See id. at 851.


See id.

See id.

See generally Wardle, supra note 87 (arguing that children of homosexuals are likely to psychologically and psychosexually harmed).


See id.

See id.

See id.

Id. at 353, citing Susan Golombok et al., Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal, 24 J. CHILD PSYCHOL & PSYCHIATRY 551, 553 (1983). The study stated, "it seems doubtful whether transience is any more characteristic of lesbian relationships than of women's heterosexual relationships." See id. Moreover, in today's society, divorce rates may be as high as 52%.
term relationships,\textsuperscript{97} and can therefore, provide stability in a home environment.

There are those who claim that children raised by homosexuals are likely to be harmed.\textsuperscript{98} For example, Professor Wardle, author of \textit{The Potential Impact of Homosexual Parenting on Children}, along with others, expresses concern that the psychosexual and psychological development of the children will be negatively affected.\textsuperscript{99} Wardle, not surprisingly, argues for the adoption of a legal presumption that homosexual parenting is not in the best interest of a child.\textsuperscript{100}

One concern regarding the children's psychosexual development is that they will not be exposed to dual gender role models and will, therefore, suffer from gender identity and will fail to develop appropriate sex-typed behavior.\textsuperscript{101} Some question whether boys and girls will develop interests and participate in activities that are appropriately masculine and feminine,\textsuperscript{102} or if boys will begin acting effeminate and girls will begin acting masculine.\textsuperscript{103} Another concern is that children raised in homosexual environments will have a higher predisposition to be being homosexual themselves.\textsuperscript{104}

There are those who also believe that a homosexual environment is detrimental to a child's psychological development.\textsuperscript{105} Assumptions are made that the child's moral, emotional, behavioral, and intellectual development will be compromised.\textsuperscript{106} Specifically, there is fear that children will be subjected to ridicule; will develop low self-esteem; will

\textsuperscript{97}See \textit{id.} at 352-53 (discussing and citing several studies).
\textsuperscript{98}See \textit{generally} Wardle, \textit{supra} note 87 (discussing how children will be harmed by homosexuals).
\textsuperscript{99}See Wardle, \textit{supra} note 87, at 833; Charlotte J. Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective 2 DUKE J. GENDER L. & POL'Y 191 (, 198-201 (1995); Harlow, \textit{supra} note 9, at 98-201 (1996); Flaks, \textit{supra} note 72, at 345, 355-72.
\textsuperscript{100}See Wardle, \textit{supra} note 87, at 893-94.
\textsuperscript{101}See Flaks, \textit{supra} note 93, at 364-68; Harlow, \textit{supra} note 9, at 199; Patterson, \textit{supra} note 99, at 198; Wardle, \textit{supra} note 87, at 858, 866.
\textsuperscript{102}See Flaks, \textit{supra} note 93, at 366.
\textsuperscript{103}See Patterson, \textit{supra} note 99, at 198.
\textsuperscript{104}See Flaks, \textit{supra} note 93, at 368-71, 386 (noting that legislators and judges use this assumption to deny homosexual parents custody or visitation rights); Patterson, \textit{supra} note 99, at 198; Wardle, \textit{supra} note 87, at 832.
\textsuperscript{105}See \textit{generally} Flaks, \textit{supra} note 93 and Patterson, \textit{supra} note 99 (discussing the perceived psychological harm of children exposed to homosexual parents).
\textsuperscript{106}See Flaks, \textit{supra} note 93, at 355.
be less socially popular; will have lower intellectual capabilities; and will develop behavioral problems.\(^{107}\)

However, several recent studies have refuted these claims,\(^{106}\) and overall, none of the existing research supports any of the above concerns.\(^{109}\) For example, several studies found no difference between a child raised in a heterosexual home and a child raised in a homosexual home in terms of a child’s gender identity.\(^{110}\) The studies also demonstrated that children raised in homosexual families developed appropriate and traditional sex-typed behaviors\(^{111}\) and none of the children raised by lesbians\(^{112}\) or gay men\(^{113}\) were any more likely

\(^{107}\)See Patterson, supra note 99, at 197-200; Flaks, supra note 793 at 356-57.


\(^{108}\)See generally Patterson, supra note 108, at 1025 (analyzing and discussing several studies that look at the intellectual, psychological and psychosexual impact of children raised by homosexuals).

\(^{109}\)See Flaks, supra note 93, at 364-65, citing Golombok et al., supra note 105, at 554; see Green et al., supra note 108, at 179-80; Kirkpatrick et al., supra note 108, at 543.

\(^{110}\)See id. at 365-68.

\(^{111}\)See id. at 369-70, citing Golombok et al., supra note 103, at 564; Green, supra note 108, at 693.
to be homosexual. Similarly, research had shown that there is no difference in the mental health, self-esteem, peer relationships, moral development, or intellectual abilities between children raised in homosexual homes versus those raised in heterosexual homes.

Economic Barriers
Gays and lesbians face two economic barriers when attempting to utilize assisted reproductive technologies. First, assisted reproductive technology can be expensive, especially for gay men who must use surrogacy. Second, because of prejudice against homosexuals, gays and lesbians are likely to be denied any insurance reimbursement.

Artificial insemination is inexpensive compared to surrogacy because it only requires access to sperm. Sperm can be free if it is procured from a willing donor, or it can be bought through a sperm bank or a physician’s office for an average cost of $85-$130. Sperm can be introduced into the woman with a physician’s help, or else one can self inseminate, reducing physician fees. However, insemination may take several attempts before conception occurs. Thus, repeated attempts at insemination may end up costing thousands of dollars.

Surrogacy is much more expensive because the process involves a third party and requires more technology. A surrogate mother will rarely provide services for free and her fees alone may cost at least $10,000. In her book, The Lesbian and Gay Parenting Handbook, April Martin argues that surrogates deserve payment because the process requires “many months of negotiations, screenings and inseminations; 24 hour-a-day child care over the course of nine months; countless hours at medical appointments; time lost from work; and health risks, emotional upheaval, and possible permanent bodily

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113 See id. at 370, citing Bozett supra note 108, at 47; Miller, supra note 108, at 547.
114 See id. Flaks, supra note 93, at 370.
115 See id. at 355-58, citing Golombok et.al., supra note 108, at 565; Gottman, supra note 108, at 188-89.
116 See infra notes and accompanying text.
117 Even if an insurance company were to pay for infertility services, it is likely that the policy would only pay if the person was married and diagnosed by a physician as infertile.
119 See MARTIN, supra note 16, at 58.
120 See id.
121 See Kerian, supra note 45, at 165.
changes." After medical and legal bills are calculated, the entire final cost of a surrogacy arrangement may be $20,000-$30,000 or more. Therefore, in reality, surrogacy is only available to wealthier gay men.

Gays and lesbians are unlikely to receive monetary assistance in their quest to access assisted reproductive technologies. First, approximately thirty percent of all private insurance companies refuse to cover assisted reproductive technology. Second, even if a gay or lesbian had an insurance policy covering assisted reproductive technologies, they would most likely not receive benefits because they are not medically infertile, and, therefore, the procedure is not "medically necessary." Insurance companies, like other businesses, are motivated to control costs and maximize profits. One way of controlling costs is to place restrictive definitions of what treatment they will cover. A medically necessary clause is a common restriction found in health insurance contracts. But for their sexual orientation, homosexuals are presumably otherwise fertile.

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122 See MARTIN, supra note 16, at 108. A demographic study involving 39 surrogate women showed that the typical surrogate mother is married with two children, twenty-eight years old, had thirteen years of formal education and was employed full-time. She Andrews, supra note 32, at 674, citing Hillary Hanafin, Surrogate Parenting Reassessing Human Bonding 2 (August 28, 1987) (unpublished paper presented at APA Convention, New York). They had positive pregnancies and enjoyed being pregnant. See id. None of the women stated that money was the deciding factor in considering whether to become involved in the arrangement. See id.

123 See MARTIN, supra note 16, at 112.

124 See D'Andrea Millisap, Sex, Lies, and Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA, 22 AM. J. L. & MED. 51, 57 (1996). However, at least nine states (California, Connecticut, Arkansas, Hawaii, Illinois, Maryland, Massachusetts, Rhode Island, and Texas) statutorily mandate some coverage for assisted reproductive technologies. See id. at 59.

125 Medical infertility is defined as the inability to conceive after one year of intercourse without contraception. See NEW YORK TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES 10 (1998).

126 See generally Mark Hall, Health Insurers' Assessment of Medical Necessity, 140 U. PA. L. REV. 1637 (1992) (discussing the appropriateness of a decreased role of the courts in the assessment of "medical necessity").

127 See Angela R. Holder, Funding Innovative Medical Treatment, 57 AM. L. REV. 795, 796 (1994).

128 See id.


130 I am presuming that if a homosexual were to engage in sexual relationships with a member of the opposite sex, he or she would prove to be fertile over time.
Legal Barriers

Increasingly, courts have had to address the legal issues surrounding the use of assisted reproductive technologies. Most often they have dealt with custodial and parental challenges. However, in surrogacy cases, courts have additionally had to consider the legality and enforceability of surrogate compensation and of the contractual arrangement itself. In response, the federal, as well as several state governments, have enacted statutes in an attempt to more clearly define the rights and responsibilities of those using assisted reproductive technologies. Case law continues to define rights and responsibilities where statutory enactment is lacking or incomplete. Both statutory and case law create real and “constructive” legal barriers to assisted reproductive technologies. Real barriers are created when statutes criminalize the reproductive technology or an aspect of the technology. Such barriers are common to both homosexuals and heterosexuals alike. “Constructive” barriers are created when statutory and case law produce significant disincentives to accessing reproductive technologies because homosexuals will not have equal legal standing in defending a parental or custodial challenge. Gay men are particularly vulnerable to legal barriers because they must deal with statutory and case law involving both artificial insemination and

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131 As assisted reproductive technology becomes more utilized, courts will invariably need to address the myriad of legal issues.
134 See infra notes 141-220 and accompanying text.
135 Many states have not enacted any statutes dealing with assisted reproductive technologies. In those states, or where statutes fail to address a particular legal issue, courts must rely on common law application of legal issues. See discussion and footnotes, infra notes 141-220.
136 See discussion and footnotes, infra notes 205-220.
137 See discussion and footnotes, infra 141-220. For example, a real barrier exists if a statute makes it criminal to participate in a surrogacy arrangement.
138 For example, a lesbian may choose to avoid artificial insemination if the state's statutory scheme would not provide her with protection against a parental challenge.
139 See infra notes 205-220 and accompanying text.
surrogacy, whereas lesbians must only deal with laws involving artificial insemination.\footnote{Because surrogacy arrangements typically involve artificial insemination of the surrogate mother, gay men will be subject to laws affecting both surrogacy and artificial insemination.}

**Statutory and Case Law as Barriers to Artificial Insemination**

At least thirty-one states have enacted statutes addressing some aspect of artificial insemination.\footnote{See ALA. CODE § 26-17-21 (Michie 1992); ALASKA STAT. § 25.20045 (1998); ARK. CODE § 9-10-201-202 (West 1991); CAL. FAM. CODE § 7613 (West 1999); COLO. REV. STAT. § 19-4-106 (West 1997); CONN. GEN. STAT. ANN. § 45a-771 to 45a-779 (West 1993); FLA. STAT. ANN. § 742.11 (West 1997); GA. CODE ANN. § 19-7-21, 43-34-42 (1991); IDAHO CODE § 39-5401 to 5408 (Michie1998); ILL. COMP. STAT. ANN. § 750 § 40/1 (Smith-Hurd 1999); KAN. STAT. ANN. §§ 23-128 to 23-130 (1995); MASS. GEN. LAWS ch. 46, 4B (West 1994); Mich. Comp. Laws Ann. § 700.111 (West 1995); MICH. STAT. ANN. § 257.56 (West 1996); MONT. CODE ANN. § 40-6-106 (1997); NEV. REV. STAT. § 126.061 (Michie1993); N.H. STAT. ANN. § 168-B:1-32 (1994); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN § 257.56 (West 1998); N.Y. COMP. LAWS ANN. §§ 700.111 (West 1995); OR. REV. STAT. §§ 109.239 to 109.247, 677.360, 677.365 (Butterworth 1990); TENN. CODE ANN. § 68-3-306 (1996); TEX. FAM. CODE ANN. § 151.101 (West 1996); VA. CODE ANN. §§ 20-156 to 165 (Michie1995); WASH. REV. CODE ANN. § 26.26050 (West 1997); WIS. STAT. ANN. § 891.40 (West 1997); WYO. STAT. § 14-2-103 (1999).}

Five of those states have statutory language criminalizing artificial insemination if a licensed physician does not perform it.\footnote{See Ark. CODE § 9-10-201-202 (West 1991); Conn. GEN. STAT. ANN. § 45a-771 to 45a-779 (West 1993); Ga. CODE ANN. § 19-7-21, 43-34-42 (1991); Idaho Code § 39-5401 to 5408 (Michie1998); Or. REV. STAT. § 109.239 to 109.247, 677.360, 677.365 (Butterworth 1990).}

For example, Georgia’s statute provides, in relevant part: “Physicians and surgeons licensed to practice medicine...shall be the only persons authorized to administer or perform artificial insemination. ... Any other person or persons... shall be guilty of a felony...”\footnote{See Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 288-89 (1993).} This creates a real barrier for gays and lesbians, as well as heterosexuals, wishing to utilize artificial insemination. Many prefer to self-inseminate in the privacy of their own home,\footnote{See MARTIN, supra note 16, at 49.} thus avoiding medical professionals with perceived or real discriminatory practices.\footnote{See Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285, 288-89 (1993).} Requiring the involvement of a physician...
may also create a financial barrier to those who cannot afford the additional medical costs.\textsuperscript{146}

Artificial insemination statutes also create constructive barriers for gays and lesbians because parentage and custodial issues can be challenged.\textsuperscript{147} In 1973, the federal government promulgated the Uniform Parentage Act (UPA).\textsuperscript{148} The purpose of the Act was to establish a legal relationship between child and parent.\textsuperscript{149} Thirteen states have modeled their insemination statutes after the UPA.\textsuperscript{150} The UPA provides, in relevant part:

\begin{itemize}
  \item[a)] If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband’s consent must be in writing and signed by him and his wife...
  
  \item[b)] The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.\textsuperscript{151}
\end{itemize}

A clear reading of this statute suggests that a sperm donor may assert parental rights in two ways. First, the donor could argue that the woman is not afforded statutory protection if the sperm he provides is not given to a physician for use in the insemination. Case law supports

\begin{itemize}
  \item[\textsuperscript{146}] See MARTIN, supra note 16, at 49.
  \item[\textsuperscript{147}] See infra notes 205-220 and accompanying text.
  \item[\textsuperscript{148}] Unif. Parentage Act § 5, 9B U.L.A. 287 (1987)[hereinafter UPA].
  \item[\textsuperscript{149}] See id.
  \item[\textsuperscript{150}] See ALA. CODE § 26-17-21 (Michie 1992); CAL. FAM. CODE § 7613 (West 1999); COLO. REV. STAT. § 19-4-106 (West 1997); ILL. COMP. STAT. ANN. § 750 s 40/1 (Smith-Hurd 1999); MINN. STAT. ANN § 257.56 (West 1998); MONT. CODE ANN. § 40-6-106 (1997); NEV. Rev. Stat. § 126.061 (Michie 1998); N.J. STAT. ANN. § 9:17-44 West 1993; N.M. STAT. ANN. § 40-11-6 (Michie 1989); OHIO REV. CODE ANN. § 3111.30 to 3111.38 (Anderson 1996); WASH. REV. CODE ANN. § 26.26.050 (West 1997); WIS. STAT. ANN. § 891.40 (West 1997); WYO. STAT. § 14-2-103 (1999).
  \item[\textsuperscript{151}] UPA, supra note 148 (emphasis added).
\end{itemize}
this argument. In *Jhordan C. v. Mary K.*, the California Court of Appeals found that the donor of a child conceived by insemination was the legal father because the woman did not utilize the services of a physician, and was therefore, not afforded the protection of the statute. Almost all states, even those not entirely modeled after the UPA, have language which similarly suggest that statutory protection will only be granted if the parties utilize the services of a physician.

The second way a sperm donor may assert parental rights is to challenge the statute by arguing that only legally married couples, not unmarried women, are granted presumptive parental rights. All states' statutes presume that if a woman's husband consents to artificial insemination, he is deemed the legal, natural father. Courts will interpret the statute "in such a way as to facilitate a finding of one mother and one father." The Supreme Court supports this strong presumption of legitimacy and the recognition one mother and one father.

In *Michael H v. Gerald D.*, Michael H. conceived a child while having an affair with a woman married to Gerald D. Even though Michael H had an opportunity to establish a relationship with the child because he lived with the child's mother for some time while she remained married to Gerald D., the Court upheld the California state law which presumed that the child born to a woman living with her husband was the legal child of the husband. The Court noted that when a child is "born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage. . . ." Thus in custodial and parental cases in jurisdictions with statutory language similar to California's, courts are likely to interpret both statutory and case law in

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152 *Jhordan*, 244 Cal. Rptr. at 530.
153 See id. at 533-35 (Ct.App. 1986).
154 See *FLA. STAT. ANN. § 742.11 (West 1997); N.H. STAT. ANN. § 168-B 1-32 (1994); N.C. GEN. STAT. § 49A-1 (Michie 1984 & Supp. 1992); TENN. CODE ANN. § 66-3-301 (1991); TEX. FAM. CODE ANN. § 151.101 (West 1996) (states that do not have language requiring the services of a physician.).
155 See supra note 150.
156 Henry, supra note 145, at 23.
158 Id. at 113.
159 See id. at 115.
160 Id. at 129.
a way that grants parental rights to a single male sperm. Consequently, a lesbian's legal standing against a donor is significantly diminished because she cannot legally marry.

Interestingly, eight states that have adopted the UPA have removed the word "married" in front of woman in part "b." For example, part "b" of California's artificial insemination statute states: "the donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of the child thereby conceived." Thus, in those states, unmarried and married women are seemingly granted similar statutory protection. However, even in those states, the statute still contains part "b" that presumes that a married woman's husband is the child's natural father.

Gay men using artificial insemination in surrogacy arrangements face similar "constructive" barriers because their paternity can be challenged. As noted above, statutory and case law favors a presumption of paternal rights for men married to women who conceive by artificial insemination. Thus, a gay man who inseminates a married woman, has significantly less legal standing should a custody or visitation battle ensue.

Statutory and Case Law as Barriers to Surrogacy Arrangements
Gay men face additional real and constructive barriers when using surrogacy arrangements. Real barriers are created when statutes criminalize the surrogacy arrangement itself or criminalize the

161 In *Michael H.*, 491 U.S. at 2128, the Supreme Court indicated that, providing that he demonstrate a willingness to take on the responsibilities of parenthood, an unwed father's constitutional rights changed if the mother was not married.


166 See *supra* notes 141-165 and accompanying text.

payment of a surrogate.\textsuperscript{168} Constructive barriers are created when the contracts are found to be null and void.\textsuperscript{169} If a surrogate mother challenges custody and the contract is found to be void, family law and the “best interest” of the child will determine the placement of the child.\textsuperscript{170} Courts will exercise discretion in determining the factors and how much weight to give each one.\textsuperscript{171} Given the prevalence of prejudice against homosexuals, it is likely that if custody were challenged, a judge would not find in favor of a gay man or gay couple.\textsuperscript{172}

Sixteen states have enacted statues addressing some aspect of surrogacy.\textsuperscript{173} States take one of four positions regarding surrogacy. First, some states have made surrogacy arrangements prohibited and punishable.\textsuperscript{174} Second, some states permit surrogacy arrangements, but compensation to a surrogate is illegal and punishable.\textsuperscript{175} Other states do not specifically make surrogacy contracts illegal, but recognize them


\textsuperscript{169}\textit{See} IND. CODE ANN. § 21-20-1-1 to 20-3 (Burns 1997); LA. REV. STAT. ANN. § 2713 (West 1991); NEB. REV. STAT. § 25-21, 200 (1995); N.D. CENT. CODE § 14-16-01 to 14-16-07 (Michie 1997).

\textsuperscript{170}\textit{See generally} Andrea Charlow, \textit{Awarding Custody: The Best Interests of the Child and Other Fictions}, 5 YALE L. & POL’Y REV. 267 (1987) (discussing and analyzing the legal theory of “the best interest of the child”).

\textsuperscript{171}\textit{See id. at} 268.

\textsuperscript{172}\textit{See supra} notes 131-140 and accompanying text.


\textsuperscript{174}\textit{See} ARIZ. REV. STAT. ANN. § 25-218; D.C CODE ANN. § 16-401-02.

as void and unenforceable.\textsuperscript{176} Finally, some states find that surrogacy contracts are enforceable provided certain regulatory measures are met.\textsuperscript{177} The following paragraphs will discuss each of these variations.

Arizona and Washington D.C. prohibit surrogacy contracts.\textsuperscript{178} Kentucky, Michigan, New York, Utah, and Washington prohibit and make it illegal to compensate a surrogate.\textsuperscript{179} States that expressly prohibit surrogacy arrangements create patent legal barriers. Those states that prohibit remuneration suggest that surrogacy arrangements are permissible as long as the surrogate is not compensated.\textsuperscript{180} However, in reality those statutes may create just as significant a barrier. Few women are unwilling or unable to perform surrogacy services without compensation.\textsuperscript{181} Thus, criminalizing payment to a surrogate often renders surrogacy untenable.

Several statutes, while not criminalizing surrogacy arrangements, find the contract to be void and unenforceable.\textsuperscript{182} The result is that in those states, gay men will not have statutory protection in defending themselves should the surrogate challenge parental custody.

\textsuperscript{176}See IND. CODE ANN. § 21-20-1-1 to 20-3 (Burns 1997); LA. REV. STAT. ANN. § 2713 (West 1991); NEB. REV. STAT. § 25-21, 200 (1995); N.D. CENT. CODE § 14-18-01 to 14-18-07 (Michie 1997).


\textsuperscript{178}See ARIZ. REV. STAT. ANN. § 25-218; D.C CODE ANN. § 16-401-02.

\textsuperscript{179}See KY. REV. STAT. ANN. § 199.590 (Michie 1999) (no one may be party to a contract that would pay a woman for her being artificially inseminated and later agreeing to terminate her parental rights in the child); Mich. Comp. Laws Ann. §§ 722.851, 722.857, 722859 (West 1997) ($10,000 fine and/or one year imprisonment for a party to the arrangement and $50, 000 and/or five years imprisonment for one who assists in the contract); N.Y. DOM. REL. LAW § 122, 123 (McKinney 1998, Supp. 1999) (provides a civil penalty of $500.00 for a party to a contract and a $10,000 fine for those who arrange the contract); UTAH CODE ANN. § 76-7-204 (Michie 1995) (no person... may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination... and subsequently terminate her parental rights to a child born as a result); WASH. REV. CODE ANN. §§ 26.26.210 to 26.26.260 (West 1997) (compensation for arranging or participating in a surrogacy arrangement is prohibited and considered a gross misdemeanor).


\textsuperscript{181}See supra notes 121-23 and accompanying text.

\textsuperscript{182}See IND. CODE ANN. § 21-20-1-1 to 20-3 (Burns 1997); LA. REV. STAT. ANN. § 2713 (West 1991); NEB. REV. STAT. § 25-21, 200 (1995); N.D. CENT. CODE § 14-18-01 to 14-18-07 (Michie 1997).
Four states have statutes that will enforce a surrogacy contract if certain conditions are met. These states have modeled their statutes in part, after the Uniform Status of Children Assisted Conception Act (USCACA). The purpose of the USCACA was to protect the well-being of children born as a result of assisted conception. Alternative A offers the states "a framework under which such agreements are given effect under limited and prescribed circumstance." Sections six through nine define the requisite circumstances. Alternative A states in relevant part, "A surrogate, her husband, if she is married, and the intended parents may enter into a written agreement...." The USCACA defines intended parents as "a man and a women married to each other, who enter into an agreement under this (Act)...." Virginia has officially adopted the USCACA. The other states have similar statutory language. In these states gay men are likely to be denied statutory protection because they are unable to legally marry.

Only two states have statutes that do not affirm statutory protection based on the status of marriage. Washington's statute suggests that an unmarried man could enter into a surrogacy contract enforceable only if the surrogate is at least 18 years old and the commissioning couple is at least 18 years old and legally married; NEV. REV. STAT. ANN. § 126.045 (Michie 1998); N. H. REV. STAT. ANN. § 168-B: 1 to B:32 (1994 & Supp 1998). VA CODE ANN. § 20-156 to 165 (1995).
arrangement if the surrogate relinquishes her parental rights. However, Washington is one of the states that prohibits and punish payment to a surrogate. Thus while a gay man in Washington may have some legal protection because the statute does not require legal marriage, he still faces a barrier by not being able to compensate a surrogate. Arkansas’s extremely liberal statute is the only one that specifically acknowledges that an unmarried man may contract with a woman to bear his child. It states that the child born as a result of a surrogacy agreement is “the child of (1) the biological father and the woman intended to be the mother if the man is married; or (2) the biological father only if he is unmarried. . . .”

In states lacking surrogacy statutes, courts will be forced to individually address the issues raised. Courts will create law by taking one of the four positions described above. Given the controversial nature of surrogacy, many courts are likely to follow the New Jersey Supreme Court’s decision in the Baby M case and hold that surrogacy arrangements are void and unenforceable. In Baby M, the New Jersey Supreme Court held surrogacy contracts void and unenforceable on two grounds: (1) surrogacy contracts violated the state’s adoption laws because it was akin to baby selling; and (2) surrogacy contracts violated public policy. It is the public policy issues that may provide support for other jurisdictions to reject surrogacy contracts. The Supreme Court Baby M addressed four public policy issues. First, it found that the exchange of money was contrary to the child’s best interest because “the child is sold without regard for whether the purchasers will be suitable parents.” Second, the court suggested that surrogacy is a form of baby selling, resulting in the “exploitation of

194 See id. at 26.26.250 (compensation for arranging or participating in a surrogacy contract is prohibited).
196 See id.
198 See id. at 1240-42.
199 See id. at 1246-50.
200 See id. at 1227, 1241-42.
201 See id. at 1241.
all parties involved." Third, the court noted that surrogacy contracts violated public policy by providing permanent separation of a child from his mother. Finally, the court found that surrogacy arrangements were potentially placing a child without regard to the interest of the natural mother of the child. Given the current status of statutory law, gay men are likely to be "constructively" barred from surrogacy arrangements because their actions will either be prohibited or unenforceable against a surrogate mother challenging her parental rights. Deciding to enter into a surrogacy arrangement is costly and requires a sufficient amount of emotional energy. As a result, many gay men may not be willing to enter into surrogate arrangements without legal protection.

Second Parent Adoption Law as a "Constructive" Barrier
One reason that gay and lesbian couples seek assisted reproductive technologies is to create a nuclear family. Because gays and lesbians can not legally marry, their family units are not recognized as legal entities. Therefore, in order to establish legal parental rights, the non-biological parent must petition the court to adopt the child through a co-parent or second parent adoption. Unfortunately, many homosexuals will face additional legal barriers when trying to do so. Like physicians, many judges and legislators hold prejudices against homosexuals. Statutory and case law often reflects these prejudices. For example, Florida and New Hampshire's statutes

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202 See In re Baby M, 537 A.2d at 1241-42 ("the negative consequence of baby buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interests of the child or the natural mother")

203 See id. at 1241-1242; see also id. at 1246-1247 (Public policy dictates that a child be raised by both his natural parents.)

204 See id. at 1242.

205 Pressley & Andrews, supra note 1, at A22.

206 While no state currently recognize gay and lesbian marriages, Hawaii, Alaska and Vermont have challenged the issue on constitutional grounds. See Bahr v. Leavitt 852 P.2d 441 (1993).


208 See Flaks, supra note 93 at 368-71; Patterson supra note 49 at 193.

209 See FLA. STAT. ANN. § 630.42 (West 1997); N.H. REV. STAT. ANN. § 170-B 4 (1994); see also In re Angel Lace, 516 N.W.2d 678 (Wis. 1994); Alison D. v. Virginia M., 572 N.E.2d
specifically deny homosexuals the right to adopt. Additionally, Connecticut’s statute allows the state to consider the sexual orientation of the adoptive parents when granting custody. By jurisdiction, courts have historically denied second parent adoptions and custodial and visitation rights to the non-biological co-parent. Some courts have refused to grant custodial or visitation rights to the non-biological co-parent solely because they were homosexual.

The effect is to leave the non-biological parent with no legal standing to assert parenting privileges. Thus, if the relationship erodes, the non-biological parent is left to the caprice of the biological parent in terms of custodial or visitation rights. Similarly, if the biological parent dies or otherwise become incapacitated, the child would legally be without a parent.

Fortunately, several jurisdictions have begun to grant second parent adoptions. Some courts will liberally interpret the state’s adoption laws. For example, the lesbian co-parent in B.L.V.B. was able to successfully adopt her partner’s biological child. Vermont’s adoption statute said “A person or husband or wife. . .may adopt any

27 (1991) (holding woman who has live-in relationship with child’s mother not a parent under the New York statute).


See In re Angel Lace, 516 N.W.2d at 682-83.

See Alison D. v. Virginia M., 572 N.E.2d 27 (1991). In this case, the parents of the children were lesbians who had been in long term relationships that ended. The non-biological parent attempted to assert custodial or visitation rights. In it’s holding, the New York Supreme Court denied such rights to the non-biological parent.

See G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1988) (affirming the trial court’s decision to grant the father custody because his former wife was involved in a lesbian relationship who showed affection to her lover in front of her child. The court found that this created a “unhealthy environment” for the child.); Jacobson v. Jacobson, 314 N.W,2d 78, 81-2 (1981) (the court of appeals denying custody to the mother because homosexual relationships were not legally recognized and the child may suffer social disapproval).

See In re B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993); In re Tammy, 619 N.E.2d 315, 319 (Mass. 1993); In re Adoption of Evan, 583 N.Y.S.2d 997, 1001 (N.Y. Sup. Ct. 1992); see also Patterson, supra note 99, at 196 (1996) (listing and citing to cases in additional jurisdictions-Alaska, District of Columbia, Pennsylvania and New Jersey-where second parent adoptions have been granted).


In re B.L.V.B., 628 A.2d 1271, 1275(Vt. 1993).
other person as his or their heir. . . ."218 The court found that as a single person, the lesbian co-parent was allowed to legally adopt.219

Despite advances in co-parent adoptions, many jurisdictions still deny custodial or visitation rights to non-biological co-parents.220 Moreover, many jurisdiction have yet to decide these issues, and it is reasonable to assume that some of those jurisdictions are likely to find against a non-biological parent's rights. Thus, the inability to successfully adopt their non-biological child creates an additional "constructive" barrier.

CHALLENGING THE BARRIERS

Gays and lesbians wishing to fight these barriers to reproductive technologies face an uphill battle. However, there are both constitutional and common-law grounds for challenging current laws. The arguments will need to be creative and persuasive. Another remedy to reproductive barriers is legislative reform. The following subsections will address a series of barriers and possible remedies.

Social, Moral and Ethical Barriers

A physician's religious or personal beliefs constitute the single most pervasive reason that gays and lesbians are denied access to assisted reproductive technologies.221 While these discriminatory practices based on personal beliefs are beyond the reach of constitutional challenges, a gay or lesbian might bring a common law claim based on violations of contract law.222

Challenges Based on Contract Law

Gays and lesbians may be able to bring a breach of contract claim if a physician refuses to provide treatment because they are homosexual.223

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218 VT. STAT. tit. 15 § 431-454 (repealed). The statute was later repealed and replaced with even more liberal, more specific language regarding the rights of non-biological parents to adopt. See VT. STAT. ANN. tit. 15A, § 1-101 (Supp. 1998).

219 See In re B.L.V.B., 628 A.2d at 1273.

220 New York is an example of a jurisdiction that refuses to grant visitation rights to a non-biological parent. See Alison D., 572 N.E.2d at 29.

221 See supra notes 25-60 and accompanying text.


223 See id.
The establishment of a physician/patient relationship creates a duty on the part of the physician to continue care. Absent such relationship, physicians are under no duty to provide care. With assisted reproductive technologies, physicians determine whom they treat based on information obtained in the screening/initial evaluation. Thus, it is only after a physician affirmatively agrees to provide treatment that a physician/patient relationship exists. However, it is arguable that an contractual relationship exists even at the time of the initial evaluation/screening.

Since express written contracts are rarely a part of a physician/patient interaction, an implied contract provides the basis for the patient/physician relationships. When a patient comes to a physician’s office, he or she is impliedly offering to enter into a contract with a physician. When the physician examines the patient, he or she accepts the offer and a contract is created. The Supreme Court of Virginia held that a physician/patient relationship was formed when the physician “had granted an appointment at a designated time and place for the performance of a specific medical service, one within the defendant’s professional competence.”

A gay or lesbian can argue that a physician/patient relationship existed both at the time the appointment was made and at the time of the initial evaluation. Therefore, absent a valid medical justification for denying treatment, an arbitrary decision not to treat based on homosexuality constitutes a breach of contract.

Cost Barriers
Absence sweeping legislative reform, there is little that gays and lesbians can do regarding the cost of assisted reproductive technologies. Gays and lesbians will receive financial assistance for services related to assisted reproductive technology only if four conditions are met. First, state or federal governments must mandate that all insurance companies provide for treatments related to assisted reproductive technology.

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224 See Furrow, supra note 23, at 284.
225 See id.
226 See OTA Survey, supra note 13, at 9.
227 See Furrow, supra note 28, at 284-85.
228 See id.
229 See id.
230 Lyons, 239 S.E.2d at 105 (Va. 1977).
Second, statutes must exclude the language of "medically necessary" as well as exclude or broaden the definition of infertility. Third, statutes must exclude language that suggests or specifies that only married couples will receive benefits. Finally, legislation must mandate same sex partnership health benefits.

Approximately 70% percent of insurance companies provide for some form of assisted reproductive technology. Moreover, at least nine states have passed legislation requiring coverage for treatment related to infertility. However, most insurance companies and all nine states, provide benefits for assisted reproductive technology, only for "medically necessary" treatments related to the diagnosis of "infertility." For example, Connecticut’s statute requires insurance companies to offer insurance providing "medically necessary expenses for the diagnosis or treatment of infertility." Infertility is defined as the inability to conceive after one year of intercourse without contraception. Treatment that is medically necessary is typically defined as treatments that require a physicians order, are recognized as the appropriate treatment for the illness, and are not experimental in nature. By definition, gays and lesbians are not medically infertile, rather, they are constructively infertile because they do not have sexual intercourse with members of the opposite sex. Therefore, assisted reproductive technologies would not be considered medically necessary


233 See Mark A. Hall & Gerald F. Anderson, Models of Rationing Health Insurer’s Assessment of Medical Necessity, 140 U. Pa. L. Rev. 1637, 1644-1662 (1992) (discussing the rationale for including these clauses in insurance contracts). See also supra note 223.


235 See Task Force, supra note 125, at 10.


237 By constructively infertile, I mean that gays and lesbians are infertile only because their sexual orientation prevents them from procreating via heterosexual intercourse. Of course, it is possible that some gays or lesbians who attempt to conceive by engaging in heterosexual relations, may eventually be diagnosed as medically infertile.
for a homosexual who could "technically" reproduce by lesser intrusive means. Thus, it is unlikely that the inability to procreate secondary to homosexuality will be recognized as an illness requiring "appropriate treatment."

In order to provide the most liberal of coverage for gays and lesbians, statutes must also exclude language that suggests or states that only married couples will receive benefits, and they must require that all governmental and private employers extend health benefits to same sex partners. Several states currently limit coverage to married couples. Since homosexuals are unable to legally marry, they would clearly be denied benefits. Extending insurance coverage to same sex partners would ensure that even if the biological parent undergoing treatment with assisted reproductive technology did not have health insurance, he or she would be able to receive benefits under their partner's policy.

Unfortunately, it is highly unlikely that in the next few years all four, let alone one, of the above conditions will be met. Insurance companies, like any other business, search for ways to maximize profits and contain costs. For example, insurance companies already deny coverage for experimental, but life saving treatments for forms of cancer. Since basic medical costs increase each year, neither the government nor private insurance companies are unlikely to expand already existing coverage. There are especially unlikely to expand coverage to include individuals who could, but for their homosexuality, otherwise have children. Thus gays and lesbians are left to individually finance the costs of assisted reproductive technologies. This will be particularly difficult for gay men given the phenomenally high cost of surrogacy.

Legal Barriers

There are three potential remedial actions for real and constructive legal barriers. One remedy is to challenge the barriers as a violation of one's due process and equal protection rights. Gay men have an additional remedy in common law when challenging legal barriers to

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238 Hawaii, Maryland, Rhode Island, and Texas. See supra note 232.
239 See generally Angela R. Holder, Funding Innovative Medical Treatment, 57 ALB. L. REV. 795 (1994) (discussing the denial of experimental treatment by insurance companies).
240 See infra notes 242-285 and accompanying text.
surrogacy.\textsuperscript{241} The final remedy is to propose and urge legislative reform that will challenge all the legal barriers that gays and lesbians encounter.

\textbf{Constitutional Challenges}

Currently, there are no statutes that specifically ban access to artificial insemination by gays and lesbians. However, in 1995, three states introduced legislation which would have prohibited or made burdensome, access by single women.\textsuperscript{242} Fortunately these propositions were never passed.\textsuperscript{243} Two states currently prohibit and criminalize surrogacy\textsuperscript{244} and five states criminalize artificial insemination if a physician does not perform it.\textsuperscript{245} While it is less clear whether strong constitutional arguments can be made for constructive barriers, arguments may be made for those laws that provide for patent bans under the auspices of substantive due process and equal due protection and equal protection.\textsuperscript{246}

\textbf{Substantive Due Process Arguments}

The United States Supreme Court has not yet addressed whether there is a constitutional right of access to assisted reproductive technology. However, it has considered cases addressing related issues of procreation such as state ordered sterilization, contraception and abortion.\textsuperscript{247} In \textit{Skinner v. Oklahoma}, the Supreme Court invalidated a

\textsuperscript{241}See id.
\textsuperscript{242}Harlow, supra note 9, at 175 n.8, citing S. Cong. Res. 75, 18th State Leg (Hawaii 1995) (requesting that the Department of Health consider whether sperm banks should be prohibited from selling sperm to single women and be limited to allowing artificial insemination only for infertile couples); S. File No. 1785, 79th Leg Sess. (Minn. 1995) (barring single women from using artificial insemination unless a male provider fills affidavit to the inseminator before insemination stating that he will sign documents establishing his paternity); H.B. No. 2303, 68th Leg. (Or. 1995) (prohibiting physicians from performing artificial insemination on single women).
\textsuperscript{243}See id.
\textsuperscript{244}See ARIZ. REV. STAT. ANN. § 25-218 (West 1991); D.C. CODE ANN. § 16-101-02 (Michie 1997).
\textsuperscript{245}See ARK. CODE § 9-10-201-202 (West 1991); CONN. GEN. STAT. ANN. §§ 45a-771 to 45a-779 (West 1993); GA. CODE ANN. § 19-7-21, 43-34-42 (1991); IDAHO CODE §§ 39-5401 to 5408 (Michie1998); OR. REV. STAT. § 109.239 to 109.247, 677.360, 677 365
\textsuperscript{246}See infra notes 247-285 and accompanying text.
\textsuperscript{247}See generally Skinner v. Oklahoma, 316 U.S. 535 (1942) (addressing the constitutionality of mandatory sterilization); Griswold v. Connecticut, 381 U.S. 479 (1965) (addressing the constitutionality of prohibiting contraceptive use by married couples).
statute that would have allowed the state to sterilize a repeat felon.\textsuperscript{248} Justice Douglas noted that the right to reproduce was "... a right which is basic to the perpetuation of a race. ..."\textsuperscript{249} In \textit{Griswold v. Connecticut}, the Supreme Court invalidated the state's ban on the use of contraceptives for married couples.\textsuperscript{250} In \textit{Eisenstadt v. Baird}, the Court extended its holding from \textit{Griswold} to include those who were unmarried.\textsuperscript{251} Justice Brennan noted, "if the right of privacy means anything, it is the right of the individual, married or single to be free of unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\textsuperscript{252} Finally, in \textit{Roe v. Wade}, the Supreme Court held that a woman had the right to terminate a pregnancy.\textsuperscript{253}

Taken as a whole, it can be inferred that these decisions stand for a constitutional right to procreate regardless of marital status. If the Supreme Court were to adopt a broad interpretation of the right to procreate to include a right to procreate using assisted reproductive technologies, states would have the burden of justifying any restriction on access to assisted reproductive technology.\textsuperscript{254} For example, if the Supreme Court adopted a broad interruption, a state would have the burden of justifying a statutory scheme that legally recognized artificial insemination only with married couples.

However, it has been argued that the negative right to terminate or prevent pregnancy does not imply a positive right to procreate.\textsuperscript{255} A negative right is the "right of forbearance, entitling an obligation upon others to leave the claimant alone."\textsuperscript{256} With assisted reproductive technologies, the individual is entitled to be left alone without

\begin{thebibliography}{99}
\item \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972) (plurality opinion) (extending Griswold's rationale to unmarried couples); \textit{Roe v. Wade}, 410 U.S. 113 (1973) (addressing the constitutionality of prohibiting access to abortions).
\item See 316 U.S. at 538.
\item \textit{id.} at 536.
\item See 381 U.S. 479, 485-86 (1965).
\item See 405 U.S. 438, 446 (1972) (plurality opinion).
\item \textit{id.} at 453.
\item See 410 U.S. 113, 154 (1973).
\item \textit{Reproductive Technology and the Procreation rights of the Unmarried}, 98 \textit{Harv. L. Rev.} 669, 677 (1985) [hereinafter \textit{Reproductive Technology}].
\item See \textit{id.}
\end{thebibliography}
interference from the United States Government in matters regarding individual autonomy and bodily integrity. A positive right is a claim "of assistance or positive support which entails an obligation on someone else to provide the goods or services required for the person to exercise the right."257 Claiming a right to assisted reproduction becomes positive because the parties require assistance in attempting to realize their right to procreate.258 Two Supreme Court cases demonstrate the Court's reluctance to extend the right to procreate.259 In both *Maher v Roe*260 and *Harris v. McRae*,261 the Court noted that although women had a right to an abortion, they did not a positive right to the financial assistance in order to procure one.262 The government could argue that the same reasoning applies in this case—the government does not have to provide the financial means to the services, nor does have it have to statutorily mandate that assisted reproductive technologies be available to all who seek the services.

Opponents might also argue that even if there were a right to procreation by assisted reproductive technologies, that right does not extend to homosexuals. In *Bowers v. Hardwick*,263 the Court upheld a statute that criminalized homosexual sodomy acts.264 The Court distinguished this case from the other cases establishing a procreative right by stating that there was "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."265 The court rationalized its proscription based on ancient history and tradition.266 Specifically, Justice White noted that "sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights."267 He further noted that "until 1961,
all fifty states outlawed sodomy..." In concluding, Justice White stated that the Court was unwilling to take a more expansive view of its authority and discover new fundamental rights. Thus, it may be inferred that in its holding, the Court excluded homosexuals from constitutional protection in the areas of right to privacy, family and procreation.

One commentator has argued, however, that Hardwick has no bearing on a homosexual’s right to procreate. Marla Hollandsworth notes that assisted reproductive technology “does not involve any sexual act with another person, and certainly does not invoke any sodomy proscriptions." Any sexual activity that is involved in assisted reproductive technology is done solely for the purpose of procreation, bringing it within the protection afforded all with regard to reproductive autonomy. Although Ms. Hollandsworth argues specifically from a gay man’s perspective, her reasoning applies with equal force to lesbians because any sexual activity related to artificial insemination is done solely for the purpose of procreation.

**Equal Protection Argument**

Statutes that discriminate between married and unmarried individuals and between men and women’s reproductive rights may also violate the Equal Protection Clause. The Equal Protection Clause requires equal treatment for individuals who are similarly situated. A gay man or a lesbian’s equal protection rights may be violated because many states provide statutory protection of assisted reproductive technologies only to married individuals. Thus, unmarried persons become a class who are otherwise similarly situated but treated differently. Unmarried persons are similarly situated because they could procreate (like married persons) with the help of assisted reproductive technologies. However, they are treated unequally because many statutes will only grant legal access to assisted reproductive technologies to married persons. A gay man’s equal protection rights may be additionally

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268 See Bowers, 478 U.S. at 193.
269 See id. at 194.
270 See Hollandsworth, supra note 12, at 224.
271 See id.
272 Id.
273 See id.
274 See Kerian, supra note 45, at 122.
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violated because states that prohibit surrogacy leave men as the only class of persons deprived of the right to procreate. Therefore, gay men become a class who are otherwise similarly situated because they could procreate, like heterosexuals, with the help of assisted reproductive technologies. However, they are treated unequally because many statutes criminalize and prohibit surrogacy arrangements.

The Supreme Court has determined that the right to procreate was fundamental, and any ban on that right is subject to strict scrutiny. With strict scrutiny, a state must show that it had a compelling interest in creating its ban, and that the statute was narrowly drawn. With assisted reproductive technology, a state would have to allege differences between unmarried and married individuals, or between men and woman, sufficient to demonstrate a compelling interest in denying unmarried individuals, or men, statutory protection with assisted reproductive technologies. The second step would require a state to demonstrate that the ban was neither over nor under-inclusive.

Under either equal protection arguments, the government would likely raise two arguments for constituting compelling interests. First, the state would argue that it has a compelling interest in safeguarding the emotional and psychological well being of a child created by assisted reproductive technologies. The state would argue that a child born to an unmarried individual by assisted reproduction would be psychologically harmed. The argument assumes that a child would be psychologically harmed by having only one parent and it assumes that children would be harmed if they knew they were conceived by “alternative means.” The government would then have to demonstrate that the ban was neither under nor over-inclusive. A barrier to reproductive technologies by unmarried individuals is arguably under inclusive because the assumption that learning about

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275 See CONSTITUTIONAL LAW, HORNBOOK SERIES, FIFTH EDITION 601-03 (John E. Nowak & Ronald D. Rotunda eds., 1995).
276 Id.
277 Similarly, in the case of surrogacy, the state would have to allege differences between men and women sufficient enough to demonstrate a compelling state interest in banning surrogacy.
278 See Nowak & Rotunda, supra note 275 at 602.
279 See Reproductive Technology, supra note 254, at 683.
280 Id.
alternative conception harms a child would also apply to children born to married couples.\(^{281}\)

The second argument that a state could make is that it has a compelling interest in safeguarding public morals. The state would argue that the notions of "traditional family" are threatened when unmarried persons procreate. In a society where the composition of those in traditional families is dramatically decreasing, that argument is without merit.\(^{282}\) Even if it were a meritorious argument, any statute that sought to protect notions of traditional family by barring access to assisted reproductive technology would be over-inclusive.\(^{283}\)

If a state were challenged on a ban to surrogacy, it would likely argue that it has a compelling interest in safeguarding the psychological health of all parties involved. A surrogacy arrangement can psychologically harm the surrogate mother who must relinquish a child she gestated and gave birth to. The intended parent(s) could suffer psychologically if a surrogate were to challenge custody. A child could be harmed if he knew he was conceived by artificial means and then given up by his mother.\(^{284}\) Even if the state’s argument was sound, a ban against surrogacy is under-inclusive because it fails to consider other practices that would have a similar emotional impact on all parties.\(^{285}\)

As demonstrated, constitutional challenges are viable options for gays and lesbians who are subjected to patent bans in accessing assisted reproductive technologies. However, it will take more persuasive and creative arguing to bring a constitutional challenge based on a "constructive" barrier.

**Common Law Arguments for Upholding Surrogacy Agreements**

Gay men have an additional remedy to a surrogate mother challenging her maternal rights in a surrogacy agreement. The landmark decision in the California case *Johnson v. Calvert* set a precedent for a

\(^{281}\)See id.

\(^{282}\)See *Only One U.S. Family in Four is "Traditional,"* *N.Y. Times*, Jan. 30, 1991, at 19 (noting that, according to the 1990 census, only 26% of the nation’s households consist of two parents of the opposite sex living together with their children).

\(^{283}\)See *Reproductive Technology*, *supra* note 254, at 682.

\(^{284}\)See *supra* notes 53-60 and accompanying text.

\(^{285}\)For example, adoption is similarly emotionally entangled.
contractual analysis of surrogacy arrangements. In Johnson, the surrogate mother threatened to not relinquish the child due to strained relations. The plaintiffs petitioned the court to be recognized as the genetic and legal parents of the child. In addition to finding the plaintiffs to be the genetic parents, the trial court also held the surrogacy arrangement was enforceable. The California Supreme Court upheld the surrogacy agreement by looking to the parties’ intent. It determined that the plaintiffs intended to become parents while the defendant agreed only to facilitate the procreation. The court cited the writings of two scholars in providing a rationale for their decision. Citing a legal scholar, the court noted, that the recent developments in reproductive technology “dramatically extended affirmative intentionally.” The court further noted “within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained for ought presumptively to determine legal parenthood.” Citing another legal scholar, the court noted that “the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context.”

The Court recognized that parties entering into to a surrogacy agreement do so willingly, voluntarily and based on an informed decision. While not precedential outside of California, a gay man can make a strong argument against a surrogate attempting to assert parental rights by citing Johnson v. Calvert.

297 See id.
298 See id.
299 See id.
300 See id. at 782.
301 Johnson, 851 P.2d at 783.
302 See id.
304 Id.
305 Id., citing Schultz, supra note 277, at 323.
Arguments for Comprehensive Legislative Reform

Current statutes addressing assisted reproductive technologies and adoption by non-biological partners fail to reflect the reality that there is an increasing number of non-traditional families being created.\(^{296}\) For example, a survey conducted in 1987 demonstrated that of 80,000 women using donor semen for artificial insemination, approximately 8,600 were unmarried and 1,700 of the 8,600 were lesbians.\(^{299}\) It is likely that these numbers have significantly increased over the last thirteen years. Moreover, it is likely the percentage of single heterosexual women and lesbians utilizing artificial insemination was underreported in 1987 because those groups are the ones most likely to avoid involving a physician because of perceived or real discrimination.\(^{300}\) While there is currently no data on the numbers of gay men using surrogacy to create a family, it is likely that these numbers are also increasing.\(^{301}\) The language in most states' statutes fails to provide adequate statutory protection for those of non-traditional families who want to access assisted reproductive technology. Thus, the federal government is urged to promulgate a comprehensive statute that will define the rights and responsibilities of all the parties involved in the assisted reproduction. This article proposes a statute that will provide equal and uniform protection to married heterosexuals, unmarried heterosexuals, and homosexuals alike. Likewise, states are urged to adopt statutes in order to create uniformity in the law. Uniformity provides for predictable and consistent application.

Prior to providing a legislative model, it is important to discuss those elements, currently in statutory schemes, which must be altered or removed. First, statutory protection should not be predicated on the involvement of a physician in the artificial insemination process. Such a requirement is not legally sound because there is nothing about artificial insemination that requires the skill or guidance of a physician.\(^{302}\) The procedure poses very little risk to the woman,\(^{303}\) and

\(^{296}\)By non-traditional, I mean single heterosexual men and women as well as homosexual individuals and couples.

\(^{299}\)See OTA SURVEY, supra note 11, at 8.

\(^{300}\)See Henry, supra note 93 at 289.

\(^{301}\)See introduction and accompanying footnotes.

\(^{302}\)See JANE MATTES, SINGLE MOTHERS BY CHOICE 26-36 (1994).

\(^{303}\)See id.
as previously noted, it can be easily and safely accomplished in the home setting. Some individuals may prefer to undertake the procedure in the privacy of their own home. Moreover, as previously mentioned, gays and lesbians are often denied access to such procedures and are thus forced to self-inseminate.

Legislators should also remove any language that grants greater statutory protection to married couples. As currently written, the UPA grants superior statutory protection to a married woman by preventing a sperm donor from asserting parental rights. Under part “a,” the husband of a married women undergoing artificial insemination is the presumed legal father. Under part “b”, the donor’s rights are automatically terminated if his semen is provided to a physician and used with a married woman. As currently written, an unmarried woman (including a lesbian) does not receive statutory protection. Also, a gay man’s paternal rights are automatically terminated if he is using artificial insemination as part of a surrogacy arrangement with a married woman. With regard to surrogacy, all states that validate the agreement have language which suggest the contract will only be enforced if the intended parents are a married couple.

A Model for Comprehensive Legislation Related to Issues of Assisted Reproduction and Non-Biological Co-Parent Adoption

The following is a proposed model statute that would assist in accomplishing the goal of securing access for gay men and lesbian women to assisted reproduction. It is beyond the scope of this paper to create a model legislative statue encompassing all forms of assisted reproduction. However, to be truly comprehensive, such and act would include those elements.

304 See id.
305 See supra notes 25-60 and accompanying text.
307 See id.
308 See id.
309 See id.
§1. **Definitions:**

1. **Assisted Reproduction:** pregnancy resulting from the fertilization of a donor's sperm and a recipient's egg through the process of artificial insemination.

2. **Artificial Insemination:** the introduction of semen into a women's vagina or uterus, other than by sexual intercourse.

3. **Donor:** an adult man, other than the recipient's husband if she is married, who donates his sperm for the purpose of artificial insemination.

4. **Donee:** an adult female who receives a donor's sperm for use in artificial insemination.

5. **Gestational Mother:** a woman over the age of 18 who enters into a written agreement to bear a child conceived through artificial insemination for intended parent(s).

6. **Intended Parent(s):** A single adult man, a single adult woman, or an adult couple, regardless of gender, who agree, in writing, to be the legal parents of the child conceived by assisted reproduction.

7. **Adoptive Co-Parent:** any person, of either gender, who enters into a written agreement to be a legal parent of a child conceived in part by the biological parent.

**COMMENT**

The word "adult" was purposefully added as a modifier. This legislative body intends to include only those persons over the age of eighteen. First, it is our belief that persons over eighteen can more readily appreciate the rights, responsibilities and ramifications of assisted reproduction. Second, only persons over eighteen can enter into binding contractual agreements.

The definition of "intended parent(s)" was changed to accommodate single men and women as well as married and unmarried couples. Under this definition, the gender of the intended parents becomes irrelevant to establishing intent to parent.

"Gestational Mother" replaces the notion of surrogate mother. "Surrogate" is politically charged would that often has negative connotations attached to it. The definition of "adoptive co-parent" was
included to accommodate a non-biological adult, of either gender, who intends to co-parent the child conceived in part by the biological parent.

§ 2 ARTIFICIAL INSEMINATION: MATERNAL RIGHTS OF THE DONEE

Unless modified by sections 4 and 5, a woman who gives birth to a child is the child’s legal mother.

COMMENT

The purpose of this section is to establish maternity as envisioned by the technologies discussed here. This provision can be amended or modified should there be a growth in the use of technology enabling a woman to give birth to a child not genetically related.

§ 3 ARTIFICIAL INSEMINATION: PATERNITY RIGHTS OF THE DONOR

(1) Married Woman:
   (a) Absent any written agreement to the contrary, if a woman is married and her husband consents to the insemination, he is the presumed natural father of the child thereby created.
   (b) A donor may assert his intent to paternal rights if:
       (1) A written agreement is signed by all parties at least thirty days prior to the insemination.
       (2) An uninvolved person witness the agreement.
       (3) The agreement must be registered with the State Department of Health, or similar regulatory body, where it will remain as evidence of the agreement.

(2) Unmarried Woman:
   (a) Absent any written agreement to the contrary, a donor of semen for use in the artificial insemination of a woman other than his wife, is treated in law as if he were not the natural father.
   (b) A donor may assert his intent for paternal rights if:
       (1) A written agreement is signed by all parties at least thirty days prior to the insemination.
       (2) An uninvolved person witness the agreement.
       (3) The agreement must be registered with the State Department of Health, or similar regulatory body, where it will remain as evidence of the agreement.
COMMENT
The primary purpose of this section is to define the rights and responsibilities of a donor. It recognizes and honors contractual agreements made between the parties regarding paternity. The language of this section provides the best statutory protection for all possible parties. The child is protected in two ways. One, if the woman is married and her husband consents to the procedure, he is the presumed legal father of the child. Second, a donor can contract at the outset for paternity rights.

All women are equally protected because the statute does not require the involvement of a physician. Unmarried women receive statutory protection from donors asserting paternal rights because the donor’s rights are automatically terminated unless a written and registered agreement is made at least thirty days prior to the insemination. Finally, gay men will be able to assert paternity rights in surrogate contracts by signing a written and registered agreement.

§ 4 Surrogacy Agreement
(1) The gestational mother, her husband if she is married, and the intended parent(s) may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted reproduction, and the intended parents may become the parents of the child pursuant to the following:

(a) The gestational mother is at least eighteen years old and has borne at least one child.
(b) The intended parent(s) and the gestational mother are represented by separate counsel. The intended parent(s) may pay for the gestational mother’s legal expenses.
(c) The intended parent(s) and the gestational mother submit to psychological testing prior to entering into the contract. The practitioner must submit to the State Board of Health, his or her determination of a party’s psychological fitness for fulfilling a surrogacy contract. Both parties must be deemed psychologically fit prior to entering into the written agreement.
(d) Compensation to the gestational mother should not exceed $15,000.
(e) The surrogacy arrangement must be accomplished through the State Board of Health or similar regulatory body, who will review and qualify the parties based on compliance with sections 4(1)(a)-(d). A written agreement, signed by all parties plus a witness, must be submitted to the agency. The agreement will provide evidence of the parties' intent to enter into a surrogacy agreement. Once filed, the agreement will be deemed a binding legal contract. As a contract, both parties will have the right to specific performance.

(f) Prior to pregnancy, either the gestational mother or the intended parent(s) may terminate the contract by filing a written notice with the State Board of Health. The notice will be honored as evidence of the party's intent to terminate the contract.

(g) The gestational mother has full constitutional rights to terminate her pregnancy at anytime. If an abortion is medically indicated (for her or the fetus's health) the gestational mother will be compensated pro rata, per the original agreement, for the amount of time she was pregnant. If the decision is unilateral, the gestational mother forfeits all claims to compensation.

2. Paternity is to be determined pursuant to section 3.

3. Co-parenting may be modified pursuant to section 5.

COMMENT

The purpose of this section is to define the procedures as well as the rights and responsibilities of all the parties involved in a surrogacy arrangement. The language of the statute honors the right to contract by informed adults while reflecting an appreciation for the concerns raised regarding the appropriateness of a woman agreeing to bear a child on behalf of another. We believe that fully informed adults would not enter into surrogacy agreements unless both believe that they will derive some benefit.\(^{310}\) The requirements of sections 1(b) and (c) ensure that all parties are truly informed prior to entering into the

agreement. Requiring both parties to undergo and pass a psychological test, provides the best assurance that both parties are mentally and emotionally able to fulfill the terms of the contract. Requiring separate legal counsel ensures that both parties are fully apprised of the terms of the contract.

Subsection (e) describes the procedural requirements. Subsection (f) and (g) describe the situations in which the agreement may be terminated. Subsection (g) recognizes the gestational mother’s constitutional rights to an abortion. However, we also honor the basic tenants of contract law. Therefore, if the gestational mother chooses to exercise her constitutional right and terminate the pregnancy, we feel that she is untitled to any compensation that might have been contracted for.

§5 Adoption by Adoptive Co-Parent

(1) A non-biological co-parent may claim parental pursuant to subsections (a) and/or (b):

(a) An adult person, unrelated to the biological parent, may, with the biological parent’s written permission, legally adopt the child created through assisted reproduction. The non-biological co-parent then has full parental rights responsibilities and claims including, but not limited to custodial or visitation claims. The written agreement must be submitted to regulatory agency mentioned in §§ 3, 4 and 5.

(b) A non-biological co-parent, if he or she has not legally adopted pursuant to §5(1)(a), may petition the court for a determination of parental rights in suit for custody or visitation if:

(1) he or she can prove that they functioned as a co-parent since the child(ren)’s birth.

(2) he or she can demonstrate that it is in the best interest of the child(ren).

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COMMENT

The purpose of this section is to acknowledge and determine the parental rights of a non-biological co-parent. The language of the statute accommodates co-parents regardless of gender or sexual orientation. This section protects the interests of the non-biological co-parent as well as the child in the event that the biological mother dies or attempts to end contact between the child and the non-biological parent.\(^{312}\)

CONCLUSION

An increasing number of gays and lesbians want to bear and raise genetically related children. In accessing assisted reproductive technologies, gays and lesbians face barriers that are often unique to them based solely on their sexual orientation. These include moral ethical, financial and legal barriers. With the advent of such a "gay-by boom," courts will be forced to address these issues. In order to provide equal access to reproductive technologies, courts must become willing to more liberally apply or expand current statutory and case law.

A comprehensive and uniform legislative reform offers gays and lesbians the opportunity to equalize access to assisted reproductive technologies. Given the increasing numbers and the changing demographics of those accessing the technology, it is not too far removed for states to consider statutes similar to the one proposed. Because the number of people being discriminated against might be very high and underreported, successful lobbying efforts need to be instituted by activist groups who are interested in seeking changes.\(^{313}\)

\(^{312}\)See id. at 310.

\(^{313}\)Holly Harlow suggests that major gay and lesbian rights groups would not be willing to lobby because they do not want to draw attention to the issue and risk all out bans against gays and lesbians. See Harlow, supra note 9, at 210-11 (citing information obtained in an interview with Kate Kendall, Executive Director of the National Lesbian Rights Organization (Oct. 16, 1995)).