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IS ASSISTED PROCREATION AN LGBT RIGHT?

MICHAEL BOUCAI*

A movement long identified with the notion that “love makes a family” today flirts dangerously with the dogma that “blood is thicker than water.” Biogeneticism, an ideology that favors biological modes of kinship and genetic conceptions of identity, informs many LGBT individuals’ choices about why and how to have children. In turn this ideology marks two troubling features of political efforts to facilitate LGBT parenthood: first, the markedly different understandings of equality—full versus formal, lived versus legal—that guide movement approaches to assisted procreation and adoption, respectively; and second, invocations of a fundamental “right to procreate” that valorize reproduction, idealize a biological model of parenthood, and threaten to entrench biogenetic bias in family law and constitutional doctrine.

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In memory of Eva Klein Boucai

INTRODUCTION

Is assisted procreation an LGBT right?

The question lends itself to multiple interpretations. A reader of law reviews might justifiably understand it to ask whether there is a right to use assisted reproductive technologies (ARTs) and whether that right extends to people who are lesbian, gay, bisexual, and transgender (LGBT). Taken literally, the question might also be construed to ask whether LGBT individuals have a special claim to this right—that is, whether access to ARTs is an entitlement that LGBT people possess precisely by virtue of their sexual orientation or gender identity.

This Article undertakes neither inquiry. It makes no normative arguments about the existence or content of the right to procreate, nor any suggestion that LGBT identity is a unique source of reproductive entitlements. Instead it interrogates assisted procreation's growing prominence in the politics of LGBT parenthood. When and why did access to ARTs become an LGBT-rights issue? Should it remain so? If yes, how can efforts to enable LGBT procreation be harmonized with longstanding movement ideals and distinctively “queer family values”?¹

These questions are not so much new as newly salient. For several decades, organizations and individuals identified with the LGBT movement have worked to rid the ART market of discrimination based on sexual orientation, gender identity, and marital status. At the same time, they have urged various sectors of society to permit, deregulate, and subsidize a range of reproductive technologies. Under the banner of LGBT rights, advocates and scholars have challenged an array of “barriers to access,”² from gaps in insurance coverage to prohibitions of anonymous sperm donation to bans on human cloning. Such “barriers” are condemned for infringing the fundamental right to procreate and for discriminating against LGBT people, who are disproportionately unable or unwilling to have kids “the old-fashioned way.”³

1. I borrow the expression from VALERIE LEHR, *QUEER FAMILY VALUES: DEBUNKING THE MYTH OF THE NUCLEAR FAMILY* (1999).

2. For uses of this phrase, see Valarie Blake, *It's an ART Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J.L. SCI. & TECH. 651, 654 (2011); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 22 (2008); Stu Marvel, *Polymorphous Reproductivity and the Critique of Futurity: Toward a Queer Legal Analytic for Fertility Law*, 4 JINDAL GLOBAL L. REV. 294, 309 (2013).

3. See *infra* note 64 and accompanying text (quoting gay rights pioneer Frank Kameny).

As several commentators observed in the wake of *Obergefell v. Hodges*,⁴ the triumph of “marriage equality” provides doctrinal and rhetorical fodder for claims that assisted procreation is indeed an LGBT right.⁵ In August 2016, when three lesbian couples challenged in federal court a New Jersey insurance law that defines infertility by reference to two years of regular heterosexual intercourse, their complaint led with the assertion, quoting *Obergefell*, that parenthood, “just like marriage,” “is essential to our most profound hopes and aspirations.”⁶ The plaintiffs went on to argue that *Obergefell*’s reasoning “compels states like New Jersey to treat heterosexual and same-sex couples equally” in regulating infertility treatment.⁷

Marriage equality’s impact also has been felt in the campaign to lift New York’s prohibition of remunerated surrogacy.⁸ In 2013, less than two years after New York granted same-sex couples the right to marry,⁹ and then again in 2015, the same year *Obergefell* extended that right nationwide,¹⁰ State Senator Brad Hoylman introduced legislation to permit “surrogate parenting contracts.”¹¹ The move was both “personal and political.”¹² Although Holyman and his partner (now

4. 135 S. Ct. 2584 (2015).

5. See, e.g., Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183, 249 (2015) (“[T]he marriage equality precedent . . . not only extends relational equality to same-sex couples, but also reproductive—and family formation—equality to them.”); Douglas NeJaime, *Griswold’s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J.F. 340, 342 (2015) (“[I]f same-sex marriage signifies [a] family-based equality . . . premised on the liberty interests at stake in . . . procreative and familial decision-making, then [it] casts serious doubt on attempts to restrict access to ART”); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) (counting ART-facilitated parenthood among “a new generation of issues emerging in marriage equality’s wake”). Opponents of same-sex marriage anticipated this logic long ago. See Brief for Appellee at 10–11, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973) (No. W-152-70) (warning that legalizing “uni-sexual marriages” would embolden efforts to create families “by either artificial insemination or adoption”).

6. Second Amended Complaint at 1, 18, *Krupa v. Porrino*, No. 16-cv-4637, (D.N.J. Oct. 13, 2016) (quoting *Obergefell*, 135 S. Ct. at 2594).

7. *Id.* at 2.

8. See *infra* note 11 and accompanying text.

9. N.Y. DOM. REL. LAW § 10-a (Consol. 2011).

10. See *Obergefell*, 135 S. Ct. at 2607.

11. N.Y. DOM. REL. LAW §§ 121–24 (Consol. 2016) (“Surrogate Parenting Contracts”); S.B. 2547, 2013 Leg., Reg. Sess. (N.Y. 2013) (“Eliminates the prohibition on surrogate parenting contracts”); S.B. 4617, 2013 Leg., Reg. Sess. (N.Y. 2013) (“Establishes the child-parent security act” dealing with assisted procreation more broadly).

12. Alexandra Sifferlin, *Battle Over Paid Surrogacy Opens New Front*, TIME (Jan. 28, 2015), <http://time.com/3666606/battle-over-paid-surrogacy-opens-new-front/> [<https://perma.cc/KRU4-J2WK>].

husband) managed to circumvent their own jurisdiction's law by taking their business to California, the birth of their daughter in 2011 was, according to *The New York Times*, tarnished by “a frisson of the illicit that seem[ed] to them . . . archaic and unfair in the post-marriage-equality world.”¹³ A spokesperson for the Empire State Pride Agenda explained: “[Y]ou know how the phrase goes—first comes love, then comes marriage, then comes the baby and the baby carriage.”¹⁴

Senator Hoylman's story attests to the intensely private desires that invigorate LGBT efforts to reform the ART market. Many LGBT people want to become parents, and ARTs promise to fulfill that wish—sometimes with fewer bureaucratic hurdles and less expense than adoption,¹⁵ the most obvious alternative.¹⁶ But these technologies do not merely produce children; they furnish offspring. In this crucial respect, ARTs appeal to American society's pervasive *biogeneticism*, its deep-seated faith in the priority and superiority of biogenetic forms of

13. Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. TIMES (Feb. 19, 2014), <http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html> [https://perma.cc/WC34-L9YG]. See also *Wedding Announcement for Brad Hoylman and David Sigal*, N.Y. TIMES (Feb. 24, 2013), <http://www.nytimes.com/2013/02/24/fashion/weddings/brad-hoylman-david-sigal-weddings.html> [https://perma.cc/Y7XK-B75S].

14. Hartocollis, *supra* note 13. For other LGBT-rights framings of the repeal effort in New York, see Glenn Blain, *Gay Rights Advocates Fight to Lift Ban on Paying Surrogate Moms*, N.Y. DAILY NEWS (Jan. 15, 2014), <http://www.nydailynews.com/news/politics/push-nys-ban-paying-surrogate-moms-article-1.1581165> [https://perma.cc/3UVR-BZD2]; Frank Lowe, *The Surrogacy Roadblock*, ADVOCATE (Feb. 24, 2014), <http://www.advocate.com/parenting/2014/02/24/surrogacy-roadblock> [https://perma.cc/J79F-L82T] (arguing that, “[w]ith the growing number of gay couples looking to have children,” New York's ban “will have to change sooner rather than later”); Paul Schindler, *When Gay Men Want to Be Biological Dads*, GAY CITY NEWS (Oct. 30, 2014), <http://gaycitynews.nyc/gay-men-want-biological-dads/> [https://perma.cc/84HX-5GJ5] (contrasting New York's “respectable sixth place in terms of giving [same-sex] couples the right to marry” with its foreclosure of gay men's “primary route” to becoming a “biological father”); *Issues*, BRAD HOYLMAN FOR SENATE, <http://bradhoylman.com/issues/#lgbt> [https://perma.cc/WSL6-WPRP] (last visited Oct. 26, 2016) (listing surrogacy legalization among priorities for achieving “full LGBT equality at the state level”).

15. See, e.g., MAUREEN SULLIVAN, *THE FAMILY OF WOMAN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER* 43–45 (2004) (stating that most of the lesbian mothers in Sullivan's study “said that they decided not to adopt because it was their impression that getting pregnant was easier”).

16. Adoption and assisted procreation are not mutually exclusive. Many second-parent adoptions, for example, involve one woman who, by virtue of a biological relationship, is a legal parent from birth and another who assumes parental status alongside the first. In such an arrangement, both ART and adoption perform their characteristic functions: the former creates a biological link between an adult and a child, while the latter endows legal parenthood upon someone other than a biological parent. These contrasting relationships to biogenetic parenthood are, for present purposes, the defining features of ART and adoption, respectively.

relationship and identity.¹⁷ As scholars across a range of disciplines have perceived, ARTs reinforce some very conventional kinship norms, even as they enable the creation of undeniably “modern” families.¹⁸ The queer households enabled by ART may well “rebut the presumption that [a] biological mother and a biological father must always lie at the heart of the reproductive family,”¹⁹ but in other ways they continue to locate biology, conjugality, and reproduction at the heart of kinship.

Queer people are hardly impervious to the allure of biogenetic parenthood. Many LGBT ART users frankly admit their preference for a biological child,²⁰ and some say “they would rather remain childless if they cannot have . . . [offspring] of their own.”²¹ Others more subtly reveal their biogenetic investments: lesbian couples who divide between them genetic and gestational motherhood; cisgender same-sex partners who search for gamete donors with physical characteristics that match those of the non-genetic parent; and individuals—again, usually in

17. “In [the] American cultural conception, kinship is defined as biogenetic,” an “objective fact of nature” that entails “a relationship of . . . common identity, expressed as ‘being of the same flesh and blood.’” DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 23–24 (2d ed. 1980). *See also Introduction to FAMILIES BY LAW: AN ADOPTION READER* 1, 4 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) (discussing “[b]iogeneticism and the companion . . . attitude that adoption is at best a risky ‘last resort’”).

18. *See, e.g.*, NAOMI R. CAHN, *THE NEW KINSHIP: CONSTRUING DONOR-CONCEIVED FAMILIES* 4 (2013) (observing how “people [who] choose to use donor sperm or eggs” both “challeng[e]” and “assimilat[e] . . . into the nuclear family model made up of those with genetic bonds”); Rachel Epstein, *Introduction to WHO’S YOUR DADDY? AND OTHER WRITINGS ON QUEER PARENTING* 13, 22 (Rachel Epstein ed., 2009) (suggesting that ART-enabled families both “challenge[] and . . . recreate . . . traditional notions of family, biology, blood, and kinship”); SARAH FRANKLIN, *BIOLOGICAL RELATIVES: IVF, STEM CELLS, AND THE FUTURE OF KINSHIP* 6–7 (2013) (noting that ARTs lend “a degree of flexibility to the reproduction of reproduction, while largely keeping the structure of bilateral, biological kinship norms intact”); Marilyn Strathern, *Introduction to the First Edition of JEANETTE EDWARDS ET AL., TECHNOLOGIES OF PROCREATION: KINSHIP IN THE AGE OF ASSISTED CONCEPTION* 9, 25 (2d ed., Routledge 1999) (1993) (“[T]he emphasis Euro-Americans give to personal and kin identity via the facts of biology . . . is simultaneously reinforced and bypassed by the new reproductive technologies.”); CHARIS THOMPSON, *MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES* 177 (2005) (arguing that ARTs are at once “innovative ways of breaking free of bondage to old cultural categories of affiliation . . . [and are] part of a hegemonic reification of . . . stultifying ways of classifying and valuing human beings”).

19. Marvel, *supra* note 2, at 311.

20. *See* LESNIK-OBERSTEIN, *infra* note 107 and accompanying text.

21. Timothy F. Murphy, *Assisted Gestation and Transgender Women*, 29 *BIOETHICS* 389, 393 (2015).

pairs—who await the advent of technologies that will allow them to create a child in no one’s image but their own.²²

Because the “biological bias”²³ that affects LGBT ART use is so consistent with mainstream values, much of what this Article has to say will be relevant to *non*-LGBT procreation and *unassisted* reproduction. Its queer focus is justified, however, by the uptake of assisted procreation as an LGBT-rights issue—and, critically, by the ethic of “kinetic kinship” long associated with LGBT culture.²⁴ Where biogeneticism holds that “blood is thicker than water,”²⁵ queer politics, thought, and social life have reliably countered that love, not blood, makes a family.²⁶ Championing a social and functionalist—as opposed to a biological and essentialist—conception of familial relationships, LGBT communities and their advocates have challenged the “bionormativity” of treating parenthood as a pre-social, “extra-legal” fact and the “repronormativity” of treating procreation as an “inevitable and natural” drive.²⁷

Will the LGBT movement abandon these insights now that the law allows gay marriage and science enables “queer reproduction?”²⁸ In significant but not irreversible ways, it already has. In addition to

22. See *infra* Part II. Unless otherwise indicated, allusions to “same-sex couples” refer to relationships between two cisgender partners—i.e., two individuals whose gender identities conform to the sex assigned to each at birth.

23. Carolyn McLeod & Andrew Botterell, “*Not for the Faint of Heart*”: *Assessing the Status Quo on Adoption and Parental Licensing*, in *FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES* 151, 166 (Françoise Baylis & Carolyn McLeod eds., 2014) (using the term “biological bias” to describe “the belief that biological families are superior to . . . adoptive families”).

24. Elizabeth Freeman, *Queer Belongings: Kinship Theory and Queer Theory*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* 295, 305 (relating anthropologist Corrine Hayden’s juxtaposition of genetic and kinetic kinship to David Schneider’s “statement that kinship consists of ‘doing’ rather than ‘being’”) (citing Corrine Hayden, *Gender, Genetics, and Generation: Reformulating Biology in Lesbian Kinship*, 10 *CULTURAL ANTHROPOLOGY* (1995) and SCHNEIDER, *supra* note 17).

25. SCHNEIDER, *supra* note 17, at 49.

26. See, e.g., GIGI KAESER, *LOVE MAKES A FAMILY: PORTRAITS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PARENTS AND THEIR FAMILIES* 3 (1999); Clare Riley, *American Kinship: A Lesbian Account*, 8 *FEMINIST ISSUES* 75, 84 (1998) (recalling that “Love Is What Makes a Family” was a popular slogan at the Second National March on Washington for Lesbian and Gay Rights in 1987); Judith Stacey, *The Families of Man*, 30 *SIGNS* 1911, 1912 (2005) (referring to gay men’s and lesbians’ insistence that “love makes a family”) (quoting KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 107 (1991)).

27. I borrow these terms from Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 *GA. L. REV.* 649, 653–54 (2008) and Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181, 185 (2001).

28. See Marvel, *supra* note 2, at 297, 300 (contrasting “natural” with “queer reproduction” and introducing the term “queer reproductivity”).

giving expression and encouragement to the biogeneticist yearnings of many movement constituents, efforts to support LGBT family-building projects evince at least two troubling tendencies. First, there is a systematic double standard when it comes to adoption, a path to parenthood that, however strewn with obstacles, is nonetheless spared the claims of disparate-impact discrimination regularly asserted against barriers to ART. This double standard amounts to a transformative approach to assisted procreation and an acquiescent stance toward the current state of adoption policy and practice. Second, in their frequent reliance on the constitutional right to procreate, LGBT access-to-ART claims often reify biological parenthood's inordinate prestige, much as same-sex couples' invocations of the fundamental right to marry entrenched, nowhere more clearly than in *Obergefell*,²⁹ a morally saturated and politically regressive vision of marriage.

To be clear, this Article does not reject biogenetic parenthood *per se*. It rejects biogeneticism—the social and moral priority attaching to biogenetic ties and to notions of selfhood grounded in those ties. Exposing and opposing this ideology elsewhere has been a prominent feature of critical legal thought on the LGBT movement. For over a century, individuals with same-sex attractions have pled for civil rights and social tolerance on the ground that sexual orientation is “immutable,”³⁰ a plea often understood, not least by many gay men and lesbians, to mean that homosexuality is “innate”—metaphorically in one's blood and perhaps literally in one's genes.³¹ But where “the immutability excuse” for gay equality has been subject to sharp criticism within and beyond the academy,³² biogeneticism in the politics of LGBT parenthood has been largely overlooked. Why?

The question surely admits of multiple answers: the possibility that previously piecemeal and decentralized activism has only recently become visible as a movement-within-a-movement; the likelihood that marriage, so long as it dominated LGBT politics, has been for many

29. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015).

30. See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument From Bisexuality*, 49 SAN DIEGO L. REV. 415, 468–70 (2012) (discussing the deployment of immutability arguments from the late nineteenth century to the early twenty-first century).

31. See JANET R. JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE* 76–77 (2003) (describing many LGBT people's “sincerely held view” that “their identities [are] inborn”).

32. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567 (1994); Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 597–600 (2014); Frank Bruni, *Genetic or Not, Gay Won't Go Away*, N.Y. TIMES (Jan. 29, 2012), <http://www.nytimes.com/2012/01/29/opinion/sunday/bruni-gay-wont-go-away-genetic-or-not.html> [https://perma.cc/7QJL-PB52].

observers a more urgent object of critical attention; and the fact that feminists, historically the surest skeptics of anything resembling pronatalism, are today more apt to frame reproduction as a choice that should be socially supported than one that is culturally coerced.³³ Perhaps most importantly, biological parenthood is widely understood as an unimpeachable prerogative,³⁴ and in many progressive circles one finds a reluctance to so much as appear to “intru[de] [into] matters so fundamentally affecting a person as the decision . . . to bear or beget a child”³⁵—a child who, once begotten, is the rightful object of protective impulses.³⁶

Respect for individual sensitivities and deference to the integrity of existing families should affect the tenor, not the possibility, of forthright discussion about whether, when, and how to claim an LGBT right to assisted procreation. As family law scholar Nancy Polikoff insisted in an early reflection on the lesbian “baby boom” of the 1980s,³⁷ “there is a difference between doing political analysis and making judgments.”³⁸ More than a decade later, law professor Dorothy Roberts made a similar point in her trenchant account of the ART market’s racial dynamics. The purpose of that inquiry, she explained, was “not to judge individuals’ motivations, but to scrutinize the legal and political context which helps to both create and give meaning to

33. By the time law professor Katherine Franke wrote that one “risk[s] being labeled unfeminist” for critiquing “the complex ways in which reproduction is incentivized,” the view that motherhood is inherently limiting of women’s potential had largely given way to arguments for work-family balance and egalitarian parenthood. See Franke, *supra* note 27, at 184; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); see also THOMPSON, *supra* note 18, at 67 (describing “a whole genre of feminist writing [that has] valorized womanhood itself and often equated it with motherhood or expressed it using maternalist metaphors”).

34. CHRISTINE OVERALL, WHY HAVE CHILDREN? THE ETHICAL DEBATE 4 (2012) (challenging the assumption that the desire for a biological child “is either immune to or incapable of analysis and . . . ethical assessment”).

35. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

36. Sociologist Suzanna Danuta Walters, herself “a lesbian mother and a single parent,” has observed that political dialogue about LGBT parenting “gets personal pretty quickly.” SUZANNA DANUTA WALTERS, THE TOLERANCE TRAP 209 (2014).

37. The word “boom” emphasized the phenomenon’s popularity, not its novelty. Lesbians had been having children by means of assisted insemination since the early 1970s. See AMY AGIGIAN, BABY STEPS: HOW LESBIAN ALTERNATIVE INSEMINATION IS CHANGING THE WORLD 12 (2004) (noting a 1975 conference at Harvard Medical School that included a workshop on lesbians and at-home insemination).

38. Nancy D. Polikoff, *Lesbians Choosing Children*, in POLITICS OF THE HEART: A LESBIAN ANTHOLOGY 48 (Sandra Pollack & Jeanne Vaughn eds., 1987). For a powerful illustration of political critique undertaken in a respectful and indeed loving register, see generally Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010).

[those] . . . motivations.”³⁹ Maintaining this distinction—between personal criticism and political critique—seems especially important when charting the future of a movement that, in Polikoff’s words, was “built on the premise that the personal *is* political.”⁴⁰

This Article proceeds as follows. Part I surveys the contexts and rhetorics in which proponents of LGBT equality have fought to expand access to ARTs. Part II documents the biogeneticism that informs why and how many LGBT people deploy reproductive technologies. Part III traces a rich tradition of anti-biogeneticism over a half-century of LGBT politics, thought, and culture. It provides the historical and normative warrant for Part IV, which lodges a critique of the rights-based claims—claims of equality and of procreative liberty—that permeate LGBT arguments about assisted reproduction. Finally, the Article’s Conclusion suggests what LGBT ART users themselves have to gain from a movement that takes biological and adoptive parenthood equally seriously and that tempers its reliance on the fundamental right to procreate.

I. THE POLITICS OF LGBT PROCREATION

For roughly a dozen years before the Supreme Court settled the matter in *Obergefell*, the most prominent legal justification for gay marriage bans was the so-called “responsible procreation” defense.⁴¹ Different-sex couples, it was argued, need marriage to impose order and seriousness of purpose on their all-too-often accidental reproduction, whereas same-sex couples do not need marriage because they come by children deliberately, through adoption or with the help of ARTs.⁴² Aside from the backhanded compliment it paid to gay and lesbian parents,⁴³ the argument was ironic in that many same-sex marriage opponents condemn the *techniques* of responsible procreation,

39. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 287 (1997).

40. Polikoff, *supra* note 38, at 48 (emphasis added).

41. This argument appears to have entered the legal debate in *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999), the case that ultimately brought civil unions to Vermont, but Justice Cordy of Massachusetts was the first judge to credit it. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (“[T]he institution of marriage has systematically provided for the regulation of heterosexual behavior [and] brought order to the resulting procreation . . .”).

42. In fact, most children currently being raised by same-sex couples “were conceived in . . . different-sex relationships.” ABBIE E. GOLDBERG ET AL., WILLIAMS INST., RESEARCH REPORT ON LGB-PARENT FAMILIES 1 (2014).

43. “Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.” *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014).

regardless of who uses them.⁴⁴ The same “conjugal model” that posits marriage as a “union . . . intrinsically ordered to producing new life”⁴⁵ understands parenthood as “a natural relation following from biological reproduction by one man and one woman”⁴⁶ Proponents of this model mistrust ARTs because of the cleavages these technologies “introduce[] between biology and parenthood[,] and, often, between marriage and parenthood.”⁴⁷ They charge that ARTs violate a human right “to a natural biological heritage,” as well as a child’s right “to know and be raised by” two individuals who both combine “the biological, social, and legal dimensions of parenthood”⁴⁸ and bring the distinctive qualities of men and women to the gendered roles of father and mother.⁴⁹

The same aspects of assisted procreation that trouble adherents of the conjugal model make it palatable or even attractive to those who favor a “diversity model.” This model “focus[es] on family *function* rather than family *form*,” “acknowledges various pathways to parenthood,” and “often includes a normative judgment that . . . [variety in family life] has value” in itself.⁵⁰ Insofar as ARTs facilitate

44. Certain commenters do appear to reject ARTs only to the extent that they enable childbearing and childrearing by LGBT people. Patrick Steptoe, for example, “the ‘father’ of *in vitro* fertilization itself, [considered it] . . . ‘unthinkable to willingly create a child to be born into an unnatural situation such as a gay or lesbian relationship.’” Sarah Franklin, *Essentialism, Which Essentialism?*, 24 J. HOMOSEXUALITY 27, 31 (1993).

45. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

46. Linda McClain & Daniel Cere, *Introduction to WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY* 1, 2 (2013).

47. *Id.* at 3.

48. See David Blankenhorn, Address at the Danish Institute for Human Rights: The Rights of Children and the Redefinition of Parenthood 2, 7 (June 2, 2005), <http://americanvalues.org/catalog/pdfs/family-humanrights.pdf> [<https://perma.cc/MLX3-R377>]. Some commentators claim that “intentionally,” “deliberately,” raising children apart from even one of their biological parents is a “selfish and harmful” act that brings into the world “half-orphaned” individuals “stripped of part of [their] heritage.” See Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 453 (2006); Camille S. Williams, *Planned Parent-Deprivation*, 4 WHITTIER CHILD & FAM. ADVOC. 375, 376 (2004). For a sophisticated analysis of the “flattened, misleading image of identity formation” underlying arguments that “individuals have a right to know their genetic origins,” let alone a right to be brought up by their genetic parents, see Robert Leckey, *Identity, Law, and the Right to a Dream?*, 38 DALHOUSI L.J. 525, 526–27 (2016).

49. See, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 857 (“[M]en and women contribute different (gender-connected) strengths and attributes to their children’s development.”).

50. McClain & Cere, *supra* note 46, 2–3. This model “reflects a traditional, and still common, understanding of parenthood as a natural relation following from biological reproduction by one man and one woman within marriage” *Id.* at 2.

the conception and gestation of well-loved children by individuals who have no intention of raising them (i.e., donors and surrogates), they testify to the severability of biological and social parenthood. Insofar as reproductive technologies enable single and LGBT people to become parents, they subvert some of the same “hegemonic family forms” whose appeal, paradoxically, drives the fertility industry.⁵¹ And insofar as ARTs empower queer individuals to engineer non-coital meetings of sperm and egg, they impinge on a primary source of heterosexuality’s mystique and claim to moral superiority: its “exclusive monopoly” over the creation of new life.⁵² Moreover, by facilitating what is, in a sense, “same-sex procreation,” ARTs undermine a binary gender system premised largely on reproductive function.⁵³

Given reproductive technologies’ capacity to disrupt linked norms of gender, sexuality, and parenthood, it seems only fitting that proponents of LGBT equality would be at the forefront of efforts to facilitate access to them. Movement engagement with the issue began no later than the “gayby boom” of the 1980s,⁵⁴ a phenomenon that itself had several political dimensions. First, the “boom” was spurred primarily by community efforts to circulate information about assisted (or “artificial”) insemination and to establish lesbian reproductive health clinics.⁵⁵ These efforts were widely understood as end-runs around a medical establishment that was hesitant to provide fertility counseling and treatment to unmarried women, especially lesbians.⁵⁶ Second, intentional lesbian motherhood provoked significant intra-community debate: was this a triumph of female reproductive autonomy or a capitulation to natalism and gender stereotypes?⁵⁷ Third, the lesbian baby boom thrust movement lawyers into custody and visitation disputes involving women with donor-conceived children. Advocates’ consistent position in these cases, described at greater length below, was to defend the rights of nonbiological parents.⁵⁸

51. CHARIS THOMPSON, *MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES* 274 (2005).

52. SUSAN MARTHA KAHN, *REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 102–03* (2000) (paraphrasing SARAH FRANKLIN, *EMBODIED PROGRESS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION* 165–66 (1997)).

53. SULLIVAN, *supra* note 15, at 9–10.

54. By 1988, the lesbian “baby boom” was an “observable fact.” Stephanie Weissman, *Lesbians Considering Parenthood 2* (May 1988) (Ph.D dissertation, Massachusetts School of Professional Psychology).

55. See, e.g., Renate Duelli Klein, *Doing It Ourselves: Self-insemination, in TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD?* 382 (Rita Arditti et al. eds., 1984).

56. See *id.* at 383.

57. See generally Polikoff, *supra* note 38.

58. See *infra* notes 360–364 and accompanying text.

Then came the uproar over cloning, sparked by the birth of Dolly the sheep in 1996.⁵⁹ Gay activists participated vigorously in public discussion of this groundbreaking but fearsome achievement.⁶⁰ Some claimed that lesbians and gay men have a “special interest,” a unique “stake in the advancement of cloning technology.”⁶¹ When President Bill Clinton issued an executive order prohibiting the use of federal funds for human cloning research, Randy Wicker, a leading figure in the early gay liberation movement, founded the Clone Rights Action Network, which led a protest outside the Stonewall Inn in New York City.⁶² In an interview with *Gay Today*, Frank Kameny, the “‘father’ of gay activist militancy,”⁶³ explained: “Because many gay men and women wish to have children of their own, and doing it ‘the old-fashioned way’ is not to our liking, cloning . . . offer[s us] possibilities of particular interest and unique value”⁶⁴

Kameny’s statement on cloning neatly captures the logic that underlies many LGBT-equality arguments for expanding access to reproductive technologies. These arguments begin with the proposition that LGBT people are more likely than the general population to require procreative assistance because they suffer special forms of infertility: the medical infertility that many transgender people experience due to hormonal and/or anatomical interventions,⁶⁵ and the “dysfertility”⁶⁶—

59. See generally Gina Kolata, *Scientist Reports First Cloning Ever of Adult Mammal*, N.Y. TIMES (Feb. 23, 1997), <http://www.nytimes.com/1997/02/23/us/scientist-reports-first-cloning-ever-of-adult-mammal.html> [https://perma.cc/8593-PL7J].

60. See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 365 (2004) (noting that “persons in the gay and lesbian community were among the first proponents of cloning”). For a surprisingly early discussion of cloning among “potential future methods of female reproduction without men,” see Mary O’Donnell, *Lesbian Health Care: Issues and Literature*, 10 SCI. FOR PEOPLE 8, 14 (1978).

61. Chris Bull, *Send in the Clones*, ADVOCATE, Apr. 15, 1997, at 37.

62. Jack Nichols, *First Cloning Rights Group Led by Gay Pioneer*, GAY TODAY (Feb. 27, 1997), <http://gaytoday.badpuppy.com/garchive/events/022897ev.htm> [https://perma.cc/KG4J-E6GG] (quoting Randy Wicker, “Cloning is a Gay and Feminist Issue!”).

63. Jack Nichols, *A Conversation with the Father of Gay Activist Militancy: Franklin Kameny*, GAY TODAY (April 28, 1997), <http://gaytoday.com/garchive/interview/042897in.htm> [https://perma.cc/Z4TC-GTBG].

64. *One Take on Cloning: It Makes Men Irrelevant*, ASSOCIATED PRESS (April 7, 1997), <http://lubbockonline.com/news/040797/columnis.htm> [https://perma.cc/T2VM-STJZ]. For a thorough elaboration of the LGBT claim to a right to clone, see generally Erez Aloni, *Cloning and the LGBTI Family*, 35 N.Y.U. REV. L. & SOC. CHANGE 1 (2011).

65. Katrien Wierckx et al., *Reproductive Wish in Transsexual Men*, 27 HUM. REPROD. 483, 483 (2011) (noting that hormone treatments and sex reassignment surgery can “lead to an irreversible loss of . . . reproductive potential”).

also known as the “structural,”⁶⁷ “relational,”⁶⁸ or “constructive”⁶⁹ infertility—of lesbians and gay men and of bisexuals in same-sex relationships. Given these conditions, the argument goes, barriers to ART have a “disparate”—a “concentrated” or “lopsided”—impact on LGBT people,⁷⁰ impeding full LGBT equality in parenthood. Therefore they are discriminatory.

Relying on this logic, advocates have alleged that a wide variety of policies, practices, and proposals discriminate (or, if adopted, would discriminate) against the disproportionately “dysfertile” LGBT population. Activists, politicians, and academics seeking to enable LGBT parenthood have:

- called for repeal of bans on surrogacy⁷¹ and opposed candidates who support those laws;⁷²

66. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1033 (1996) (coining the term “dysfertile” to describe “those rendered childless by their failure to fit the definition of infertile, because they are unmarried and/or lesbian or gay”).

67. Daar, *supra* note 2, at 24 (discussing “structural” infertility).

68. Julien S. Murphy, *Should Lesbians Count as Infertile Couples? Antilebian Discrimination in Assisted Reproduction*, in QUEER FAMILIES, QUEER POLITICS 182, 182–83 (Mary Bernstein & Renate Reimann eds., 2001) (discussing “relational infertility”).

69. Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147 (2000) (calling gays and lesbians “constructively infertile”).

70. For uses of these terms, see, in turn, Richard F. Storrow, *Marital Status and Sexual Orientation Discrimination in Infertility Care*, 3 L.J. SOC. JUST. 99, 108 (2012); Stu Marvel, “Tony Danza Is My Sperm Donor?”: *Queer Kinship and the Impact of Canadian Regulation Around Sperm Donation*, 25 CAN. J. WOMEN & L. 221, 238–39 (2013); Kimberly M. Mutcherson, *The New Kinship is the Old Kinship* (Dec. 11, 2014) (unpublished manuscript) (on file with author).

71. See *supra* notes 8–14 and accompanying text (discussing efforts to repeal New York’s surrogacy ban); see also Kimberly M. Mutcherson, *How Parents Are Made: A Response to Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1207, 1212–13 (2013) (“[T]he case for the unconstitutionality of marriage based restrictions on access to surrogacy . . . might be strengthened by noting that such [restrictions] work a particular violence on . . . same-sex couples, especially gay men.”); Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1238 (2014) (characterizing Washington’s criminal ban on surrogacy contracts as anomalous given the state’s “otherwise favorable legal atmosphere for same-sex couples”); Lou Chibbaro, *Catania Introduces Surrogacy Bill*, WASH. BLADE (Jan. 16, 2013), <http://www.washingtonblade.com/2013/01/16/catania-introduces-surrogacy-bill/> [<https://perma.cc/9WVG-N46Q>] (noting the Gay and Lesbian Activists Alliance’s endorsement and other LGBT activists’ “praise” of a bill introduced by “[g]ay D.C. Council member David Catania” to legalize surrogacy in the District of Columbia).

72. See, e.g., *Chris Christie: Opposes Nationwide Marriage Equality, Transgender Rights*, HUMAN RIGHTS CAMPAIGN,

- demanded public funding of ART research;⁷³
- fought anti-abortion measures that encompass practices, such as “selective reduction,”⁷⁴ that sometimes attend certain ARTs;⁷⁵
- charged that curtailing access to anonymously donated sperm reinforces “reproductive hierarchies” that disadvantage lesbian parenthood;⁷⁶
- protested the “dramatic impact” that bans on self-insemination have on lesbians and single women;⁷⁷
- decried the “disproportionate effect” on LGBT people of regulations that permit gametes to be donated but not sold;⁷⁸
- called for legislation to compel insurance companies to cover procreative technologies;⁷⁹
- urged university administrators to qualify the costs of assisted procreation (as well as adoption) for “dependent care adjustments” of student loan debt;⁸⁰

<http://www.hrc.org/2016RepublicanFacts/chris-christie> [https://perma.cc/RM6Z-TSFD] (last visited Oct. 16, 2016).

73. Aloni, *supra* note 64, at 62–76 (arguing that the federal ban on cloning research discriminates against LGBT and intersex people and violates equal protection).

74. “Selective reduction, also known as multifetal pregnancy reduction[,] . . . is the practice of terminating one or more fetuses to reduce a multiple pregnancy” Radhika Rao, *Selective Reduction: “A Soft Cover for Hard Choices” or Another Name for Abortion?*, 43 J.L. MED. ETHICS 196, 196 (2015).

75. See, e.g., *Colorado and Mississippi—“Personhood” Amendments on November Ballots*, PROUD PARENTING (Apr. 29, 2010), <http://www.proudparenting.com/category/legal-financial/page/23/> [https://perma.cc/7WZS-W29C]; J.C. O’Connell, *GLBT Issues Quiet but Powerful in Presidential Campaign*, COLO. INDEP. (Sept. 26, 2008), <http://www.coloradoindependent.com/9014/glb-issues-quiet-but-powerful-in-presidential-campaign> [https://perma.cc/J4UQ-7AJC] (noting Equal Rights Colorado’s opposition to a proposed “Egg as a Person” Amendment due to its “impact on the use of [ARTs]”).

76. Mutcherson, *supra* note 70, at 13. See also Angela Cameron et al., *De-anonymising Sperm Donors in Canada*, 26 CANADIAN J. FAM. L. 95, 116–30 (2010).

77. Storrow, *supra* note 70, at 110 (internal quotation omitted) (footnote omitted).

78. Marvel, *supra* note 70, at 229.

79. See Blake, *supra* note 2, at 701. See also Murphy, *supra* note 68, at 184–85 (counting the high cost of fertility services as an instance of “antilesbian discrimination”).

80. E-mail from Sarah Gersten, Co-President, Harvard Law Sch. Lambda, to author (March 25, 2015, 7:49 AM) (on file with author) (describing an effort initiated by Harvard Law School’s LGBTQ group to “allow . . . LGBTQ and other couples who wish to adopt or utilize ART to be able to do so while pursuing a public interest career”).

- counted employers' willingness to subsidize assisted procreation (but not adoption) as an indicator of solicitude toward LGBT employees;⁸¹
- claimed that judicial non-enforcement of parenting contracts "takes a particular toll" on same-sex couples, who "must rely" on assisted procreation to have children;⁸²
- suggested that "centering the queer reproductive family" in legal and political debates about ART could furnish grounds to "demand access to state-led subsidies;"⁸³ and
- argued that "facially neutral" restrictions on fertility tourism,⁸⁴ along with "immigration policies that restrict recognition of children born of surrogacy," unfairly obstruct "the creation of families headed by gay and lesbian or single parents."⁸⁵

To be sure, not all LGBT-equality claims about assisted procreation relate to disparate impacts. Some involve relatively straightforward cases of disparate treatment. A number of foreign countries permit only married or heterosexual couples to access ARTs.⁸⁶ In the United States, disparate-treatment discrimination against LGBT people takes multiple forms: outright refusals of medical treatment (an increasingly rare problem in a profit-driven industry whose ethical guidelines prohibit discrimination based on marital status and sexual orientation);⁸⁷ LGBT marginalization in the information and treatment offered by otherwise nondiscriminatory ART providers;⁸⁸

81. See NAT'L LGBT BAR ASS'N, 2015 LAVENDER LAW CONFERENCE & CAREER FAIR 40–45 (2015) (Conference Program).

82. Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 165 (2013) (emphasis added).

83. Marvel, *supra* note 2, at 301–02, 310.

84. Fertility tourism is a sub-species of medical tourism, which is defined as "the travel of patients from the 'home country' to the 'destination country' for medical treatment" I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1311 (2013). Legal restrictions and international price disparities "have prompted significant amounts of [fertility] tourism." *Id.* at 1323.

85. Storrow, *supra* note 70, at 108.

86. *Id.* at 101.

87. See Am. Coll. of Obstetricians & Gynecologists Comm., *Opinion No. 385: The Limits of Conscientious Refusal in Reproductive Medicine*, 110 OBSTETRICS & GYNECOLOGY 1203, 1206 (2007) (condemning discrimination based on sexual orientation); The Ethics Comm. of the Am. Soc'y for Reprod. Med., *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 100 FERTILITY & STERILITY 1524, 1526 (2013) (condemning discrimination against "single persons and gay and lesbian couples").

88. Lori E. Ross et al., *Sexual and Gender Minority Peoples' Recommendations for Assisted Human Reproduction Services*, 36 J. OBSTETRICS & GYNECOLOGY CAN. 146, 148, 150 (2014) (describing comments, questions, forms,

insurance policies and statutory insurance mandates that employ a “narrow and heterocentric definition of infertility;”⁸⁹ and refusals to apply the marital paternity presumption to nonbiological mothers in same-sex unions.⁹⁰

Finally, proponents of LGBT parenthood contend that barriers to ART infringe the right to procreate,⁹¹ the “right to found a family,”⁹² in violation of constitutional and international law.⁹³ Such claims are regularly yoked to equality arguments, the idea being that LGBT people’s unequal access to biological parenthood (or to a particular route to biological parenthood) discriminates against them in their exercise of a fundamental right.⁹⁴ These claims target disparate treatments, like the hypothetical Preservation of Family Values Act (PFVA) that President (then-Professor) Barack Obama asked students to analyze in a 1996 law-school exam;⁹⁵ and they target disparate impacts,

brochures, and websites that “presume heterosexuality, cisgender identities, or particular family configurations”).

89. Storrow, *supra* note 70, at 100; *see also* Second Amended Complaint, *supra* note 6, at 3, 18 (alleging that a state insurance mandate defining infertility by reference two years of unprotected heterosexual intercourse violates the Equal Protection Clause).

90. *See Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335 (2013) (holding that the Iowa Constitution’s equal protection guarantee requires the marital presumption’s application to same-sex couples).

91. *See, e.g., S.J. Barrett, For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?*, 73 BROOK. L. REV. 695, 714 (2008) (arguing that “homosexual parents” are entitled under the right to procreate “to give birth [sic] via artificial insemination or otherwise”).

92. Matthew Vella, *IVF Law ‘Inherently Homophobic’ – Gay Rights Movement*, MALTATODAY (July 31, 2012), <http://www.maltatoday.com.mt/news/national/19981/ivf-law-inherently-homophobic-gay-rights-movement-20120731#.V-vN7dz897K> [<https://perma.cc/6LSS-C8TC>] (describing a Maltese advocate’s reaction to a regulation that would restrict IVF to different-sex couples). *See also* Diane S. Hinson, *Ask the Expert*, 38 FAM. ADVOC. 42, 42 (2016) (arguing that *Obergefell* bolsters same-sex couples’ “right to build their families”).

93. *See infra* note 317 and accompanying text.

94. *See* NeJaime, *supra* note 5, at 347 (“ART, as an acceptable and available mode of family formation, is essential to sexual orientation equality and to same-sex couples’ procreative liberty.”).

95. The hypothetical Act prohibited “health care professional[s] . . . from providing infertility services to any unmarried person” and further provided that, if found unconstitutional, the prohibition would “apply only to . . . homosexual couples.” Barack Obama, *Constitutional Law III Final Examination*, at 1–2 (Dec. 12, 1996), <http://lawprofessors.typepad.com/files/conlaw3.obama.1996.fall.pdf> [<https://perma.cc/2VNH-YW3Q>]. According to Obama’s answer key, “[a]t first blush, the [Act] seems clearly to implicate . . . the right to procreate first announced in *Skinner v. Oklahoma*.” Barack Obama, *Re: The Exam*, at 2 [hereinafter *Exam Key*], <http://lawprofessors.typepad.com/files/conlaw3.obama.1996.fall.memo.pdf> [<https://perma.cc/8XGL-97VJ>]; *see also* Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES (July 30, 2008),

like bans on compensated surrogacy and “[l]aws that . . . deny . . . recognition to intended parents”⁹⁶

As Professor Obama observed in his own constitutional assessment of the PFVA, “the status and scope of the ‘procreation right’” are “unsettled.”⁹⁷ Expert opinion is divided even as to whether the right extends from “natural” to assisted procreation.⁹⁸ Still, “rights talk” about reproductive technologies furnishes enviable rhetorical opportunities. Claims in this vein range from the broad assertion that, without access to ARTs, “no gay person would be able to exercise biological kinship or reproducti[ve] rights,”⁹⁹ to the arresting suggestion that, “[f]rom the standpoint of a couple whose only hope of procreating is through the assistance of a surrogate, a law that criminalizes that assistance is no different than [a] law providing for the sterilization of convicted felons”¹⁰⁰

<http://www.nytimes.com/2008/07/30/us/politics/30law.html> [<https://perma.cc/YRZ5-7XTS>].

96. NeJaime, *supra* note 5, at 347; *see also* Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 930 (2012) (suggesting that “refusal to allow the use of ART or to enforce [a] gestational agreement could implicate” married couples’ right to procreate and arguing that this right should extend to married same-sex couples).

97. Obama, *Exam Key*, *supra* note 95, at 3. For a fuller discussion of the right to procreate in American jurisprudence, *see infra* Part IV.B.

98. For a range of opinions on the question, *see* JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994) (arguing that the right to procreate includes a right to use ARTs); I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1195, n.244 (expressing doubts as to *Skinner v. Oklahoma ex rel. Williamson*’s relevance to restrictions on ART); Garrison, *infra* note 285, at 859 (suggesting that the “murky” “boundaries of procreative liberty . . . [render] ‘rights talk’ . . . [about ART unhelpful in] fashioning a workable legal regime”); Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 22 (2015) (claiming that the right to procreate not only includes an entitlement to use ARTs but may also impose on states “positive obligations to provide some people with access to [ARTs]”); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008) (concluding that “there is no general right to use ARTs as a matter of reproductive *autonomy*, but there may be a limited right to use ARTs as a matter of reproductive *equality*”); Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 989–92 (2002) (asserting that it is constitutional to ban any and all ARTs).

99. SULLIVAN, *supra* note 15, at 11.

100. Nicolas, *supra* note 71, at 1281. The reference here is to *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 537–38 (1942), where the Supreme Court held that Oklahoma violated the Equal Protection Clause by sterilizing only certain classes of felon. For other invocations of sterilization laws in the context of ART regulation, *see* Daar, *supra* note 2, at 81 (suggesting that “barriers to ART access” are “deprivation[s] of reproductive opportunity just as coercive as any formal, explicit directive to forgo offspring”); Mutcherson, *supra* note 98, at 51 (“[P]lacing the ability to deny access to fertility treatment in the hands of the state is akin to giving the state the ability to sterilize.”).

LGBT-rights advocates thus resort to three main classes of argument with regard to barriers to ART: allegations of disparate-treatment discrimination, allegations of disparate-impact discrimination, and appeals to procreative freedom. They press these grievances in legal and non-legal settings against a varied and growing range of targets. And they do so on behalf of a constituency whose appetite for procreative technologies is only likely to grow in the present age of marriage equality.¹⁰¹ The following Part describes the nature of that appetite.

II. BIOGENETICISM IN LGBT PROCREATION

LGBT people constitute a substantial share of the market for assisted reproductive technologies.¹⁰² Research from Canada indicates that they represent up to twenty-five percent of clients at urban fertility clinics and that most users of donor sperm are “lesbian-identified.”¹⁰³ Anecdotal evidence suggests that, in some areas, gay male couples constitute a similarly large share of the gestational surrogacy market.¹⁰⁴

What accounts for these trends? Why choose to bear offspring rather than adopt? Later in this Article we will see how prospective parents are influenced by regulatory and economic structures that make adoption a daunting prospect.¹⁰⁵ The present Part focuses on the biogeneticist ideology that underlies some of those structures and that directly shapes individuals’ decisions about whether and how to employ ARTs. It shows that many LGBT procreators “adhere to definitions of family” and of coupledom that are, in a word, “reproductive.”¹⁰⁶

101. “[C]hildren are often associated with marriage, and those who marry often want to have children. In that sense it is likely that [legal recognition of same-sex marriage] has increased demand for surrogacy services.” Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1169 (2014). See also *More Gay Men “Married With Children,”* CBSNEWS (Aug. 11, 2008, 11:06 AM), <http://www.cbsnews.com/news/more-gay-men-married-with-children/> [<https://perma.cc/5YE6-R4ET>] (noting a positive correlation between the legalization of same-sex marriage and gay men’s inquiries with surrogacy agencies).

102. LAURA MAMO, *QUEERING REPRODUCTION* 221 (2007) (“[L]esbians are a primary niche market for sperm banks and fertility services . . .”).

103. See RACHEL EPSTEIN, *SHERBOURNE HEALTH CTR., THE ASSISTED HUMAN REPRODUCTION ACT AND LGBTQ COMMUNITIES* (2008); Marvel, *supra* note 70, at 232.

104. Kari Lydersen, *Make Room for Daddies: Surrogate Demand Grows*, *CRAIN’S CHI. BUS.* (Feb. 2, 2013), <http://www.chicagobusiness.com/article/20130202/ISSUE03/302029981/make-room-for-daddies-surrogate-demand-grows> [<https://perma.cc/DE6T-9K5Z>] (citing two surrogacy facilitators in Chicago who say that “[g]ay couples typically make up more than half their clients”).

105. See *infra* Part IV.A.

106. ELLEN LEWIN, *GAY FATHERHOOD: NARRATIVES OF FAMILY AND CITIZENSHIP IN AMERICA* 120–21 (2009).

A. Desire for Offspring

At the most basic level, of course, people use ARTs because they want children—which “almost always” means “children who will be genetically related to them or to their partner and . . . who will have ‘good genes.’”¹⁰⁷ The existence of a genetic tie is “the most oft-cited reason that gay men choose surrogacy,”¹⁰⁸ and the prospects of “pregnancy, birth, and a desired genetic link”—all modes of biological relationship—are lesbians’ most common reasons for choosing assisted insemination over adoption.¹⁰⁹ This longing for offspring is hardly less powerful for the fact that, in the present state of medicine, only one half of a same-sex pair can be the genetic parent of a baby the two plan together. As one lesbian couple put it: “we realized . . . we could have at least one of us in our children, rather than . . . none of us in our children.”¹¹⁰

With remarkable rhetorical consistency, LGBT and non-LGBT people alike speak of a “human desire for a child of one’s own flesh and blood,”¹¹¹ a “natural inclination to reproduce” that we possess “as human beings.”¹¹² Although this “simple human urge” is generally thought to “require[] no special explanation,”¹¹³ some prospective parents cite an evolutionary compulsion to carry on their genes, an inherent craving for “immortality,”¹¹⁴ a need to “cheat[] death of its

107. CAHN, *supra* note 18, at 49; *see also* KARÍN LESNIK-OBERSTEIN, ON HAVING AN OWN CHILD xii (2008) (calling the preference “for an ‘own,’ ‘biological’ child . . . the single underpinning motivation and justification for [ART use]”).

108. Dana Berkowitz, *Gay Men and Surrogacy*, in LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE 71, 76 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

109. *See* Jennifer M. Chabot & Barbara D. Ames, “It Wasn’t ‘Let’s Get Pregnant and Go Do It’:” *Decision Making in Lesbian Couples Planning Motherhood via Donor Insemination*, 53 FAM. REL. 348, 352 (2004).

110. SULLIVAN, *supra* note 15, at 44 (emphasis omitted).

111. Theresa Pinto Sherer, *Can Two Men Make a Baby?*, SALON (Jan. 31, 2001, 2:19 PM) (quoting Felicia Park-Rogers, Director of Children of Lesbians and Gays Everywhere), http://www.salon.com/2001/01/31/eggs_2/ [https://perma.cc/H6X6-BW3Z].

112. Daar, *supra* note 2, at 76 (calling biological parenthood “the most basic of human activities”); *see also* Nicolas, *supra* note 71, at 1309 (calling the desire to reproduce “an innate part of human nature”).

113. LEWIN, *supra* note 106, at 182 (describing the perspective of certain gay fathers).

114. Berkowitz, *supra* note 108, at 75 (discussing findings that both “gay . . . and heterosexual men . . . cite . . . the achievement of some sense of immortality through children” as a reason to become a parent); ABBIE E. GOLDBERG, GAY DADS: TRANSITIONS TO ADOPTIVE FATHERHOOD 26 (2012) (quoting a gay father for whom adoption was “initially difficult” because he wanted a child to “serve [his] immortality element” by “continuing [his] genes”).

finality.”¹¹⁵ Others feel a duty to extend their “ancestral line” or profess the superiority of their particular genetic heritage.¹¹⁶

Again, LGBT ART users are not so different in these respects from their straight counterparts. It is regularly observed (as if the point were obviously reassuring) that LGBT people want children for “pretty much the same reasons” as non-LGBT people.¹¹⁷ Yet some of these common interests may be stronger, or may carry particular inflections, if one is queer. The prospect of “physical and emotional support, especially in old age,” hits a sensitive nerve among individuals terrorized by “the hackneyed image of ‘the older homosexual,’ . . . alienated from relatives and living out his or her last years alone.”¹¹⁸ So, too, does parenthood’s promise of “maturity,”¹¹⁹ “respectability,”¹²⁰ “normalcy,”¹²¹ and “acceptance.”¹²² For many people, having children means “becoming fully adult,”¹²³ “prov[ing] to oneself and to others one’s independence and maturity.”¹²⁴ It means attaining “community stature” and “a kind of cultural recognition,” including social intelligibility as family, “not otherwise available.”¹²⁵

115. Joan Raphael-Leff, *Eros and ART*, in *INCONCEIVABLE CONCEPTIONS: PSYCHOLOGICAL ASPECTS OF INFERTILITY AND REPRODUCTIVE TECHNOLOGY* 35, 36–37 (Janet Haynes & Juliet Miller eds., 2003) (listing reasons why her patients desired children).

116. Aloni, *supra* note 64, at 9; KAHN, *supra* note 52, at 20; *see also* Joan Mahoney, *Adoption as a Feminist Alternative to Reproductive Technology*, in *REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES* 49–50 (Joan C. Callahan ed., 1995) (describing people who “believe that intelligence and personality are largely hereditary” and who prefer ART over adoption because they “believe[] they have good genes” in those respects).

117. William N. Eskridge, Jr. & Edward Stein, *Queer Clones*, in *CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING* 95, 103 (Martha C. Nussbaum & Cass R. Sunstein eds., 1998); *see also* Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 87, at 1525 (attributing to “gays and lesbians . . . the same reasons . . . that motivate reproduction generally”); Robertson, *supra* note 60, at 326 (“[G]ays and lesbians have the same interests in reproducing as do heterosexuals . . .”).

118. KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, AND KINSHIP* 2, 22–23 (1991).

119. “Most people grow up simply assuming . . . that maturity includes ‘settling down and raising a family.’” Shelley M. Park, *Is Queer Parenting Possible?*, in *WHO’S YOUR DADDY? AND OTHER WRITINGS ON QUEER PARENTING* 316, 318 (Rachel Epstein ed., 2009).

120. ELLEN LEWIN, *LESBIAN MOTHERS: ACCOUNTS OF GENDER IN AMERICAN CULTURE* 192 (1998); MAMO, *supra* note 102, at 88.

121. MAMO, *supra* note 102, at 88.

122. Alexis Jetter, *Lesbian Baby Boom*, *HARPER’S BAZAAR*, Oct. 1996, at 66.

123. Raphael-Leff, *supra* note 115, at 38 (noting that becoming a parent signals “maturation growth”).

124. Kenneth D. Alpern, *Genetic Puzzles and Stork Stories: On the Meaning and Significance of Having Children*, in *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 151 (Kenneth Alpern ed. 1992).

125. LEWIN, *supra* note 106, at 48.

Such rewards might carry “special resonance” for members of a community “often seen to be immature and irresponsible,”¹²⁶ for persons scarred by social stigma and moral disapproval,¹²⁷ for couples whose bonds, long denied legal recognition, are still widely denigrated,¹²⁸ and for psyches harboring shame and guilt over sexualities that powerful voices condemn as “intrinsically disordered.”¹²⁹

Other “parenthood motives” fit the same pattern: they often but need not have a biogenetic cast, and this biogenetic cast may weigh differently on LGBT people than it does on non-LGBT people. Take the wish to please family members, especially would-be grandparents, by having a baby. On the one hand, a presumption of biogenetic continuity is often implicit in the plea for grandchildren;¹³⁰ on the other, a desire to placate Mom and Dad by extending their lineage may be especially strong for individuals whose queerness has estranged them from families of origin,¹³¹ whose romantic partnerships are taken less seriously by those families,¹³² and whose coming-outs provoked mourning for the descendants who would never be.¹³³

126. *Id.* at 121; see also Alison Shonkwiler, *The Selfish-Enough Father: Gay Adoption and the Late-Capitalist Family*, 14 GLQ: J. LESBIAN & GAY STUD. 537, 557 (2008) (remarking how the assertion of “maturity through parenthood specifically counteracts the standard narrative of homosexuality as a failure to develop a fully adult sexual identity”).

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (observing that a history of criminalization and disapproval deepened the harm of same-sex couples’ inequality in marriage).

128. “[B]ecause gay men are often denied ceremonial and legal recognition of their families, the presence of a genetic link can be a meaningful symbol that validates their relationship to their child.” Berkowitz, *supra* note 108, at 76.

129. CATECHISM OF THE CATHOLIC CHURCH 566 (2d ed. 2003) (describing “homosexual acts” as “contrary to the natural law. . . . [because t]hey close the sexual act to the gift of life”); see also Stephen Dunne, *I Was a Closet Queer Sperm Donor*, in BEYOND BLOOD: WRITINGS ON THE LESBIAN AND GAY FAMILY 97, 100 (Louise Wakeling & Margaret Bradstock eds., 1995) (suggesting that “the wonders of science” create the exculpatory possibility of “surpass[ing one’s] supposed non-reproductive bent [and] perform[ing one’s] duty to the species”).

130. See SULLIVAN, *supra* note 15, at 128 (describing parents who want grandchildren “from the same blood . . . that pulses through their own bodies”); Berkowitz, *supra* note 108, at 77 (summarizing a number of studies that reach the same finding).

131. “[H]aving children . . . can open up and enrich connections to one’s blood relations. Even reluctant grandparents—those who have long histories of homophobia . . . —seem to rise to the occasion when actual grandchildren make their appearance.” LEWIN, *supra* note 106, at 122.

132. “Blood relatives are much more likely to ‘come around’ [to an existing lesbian family] with the birth of a child with whom they have a perceived biogenetic connection.” SULLIVAN, *supra* note 15, at 133–34.

133. John Leland, *O.K., You’re Gay. So? Where’s My Grandchild?*, N.Y. TIMES (Dec. 21, 2000), <http://www.nytimes.com/2000/12/21/garden/ok-you-re-gay-so>

Or take the goal of “gender realization” that informs many hopes of becoming a mother or father.¹³⁴ On the one hand, parenthood may not fully achieve this purpose if it does not also attest to a person’s virility, fecundity, or capacities for pregnancy and childbirth;¹³⁵ on the other, the appeal of such proof, the underlying need to shore up a gender identity, might be more acute when the mere fact of being L, G, B, or T makes that identity unusually vulnerable to challenge.¹³⁶ As bioethicist Timothy Murphy observes of some transgender women’s interest in having a uterus transplant, gestation—or just the fact of having a womb—“can play a key role in expressing and consolidating a female identity.”¹³⁷

And then there are the many “parenthood motives” that have little or no special relevance to LGBT people but that often do mask biogenetic presumptions in an ostensibly biology-neutral terms. We find several such motives on philosopher Kenneth Alpern’s list of “important and commonly given reasons” for having children:

where-s-my-grandchild.html [https://perma.cc/V3DE-CGYC] (describing “[p]arents who once resigned themselves, however painfully, to what they assumed would be a life without grandchildren” and who are now pushing their sons and daughters to use ARTs).

134. Alpern, *supra* note 124, at 151–52; *see also* FRANKLIN, *supra* note 18, at 226 (“[H]aving children is . . . closely correlated with the successful achievement of adult gender identities.”).

135. FRANKLIN, *supra* note 18, at 212 (describing women who “attempt IVF in order to . . . confirm a gender identity”); *see also* Raphael-Leff, *supra* note 115, at 42 (“For some people . . . the desperate wish to conceive represents . . . [a] desire to be pregnant, or even just a need for evidence of fertility.”).

136. There are several reasons, when it comes to parenthood, why this need exerts itself more forcefully among women. First, women are “taught from birth that their identities are inextricably linked with their capacity for pregnancy and childbirth.” ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND POLITICS OF PARENTING* 35 (1993). Second, many women celebrate pregnancy as “a remarkable natural process, . . . unlike any other” and in turn embrace reproductive labor as “empowering,” especially when undertaken with minimal male involvement. Barbara J. Berg, *Listening to Voices of the Infertile*, in *REPRODUCTION, ETHNICS, AND THE LAW: FEMINIST PERSPECTIVES* 80, 83–84 (Joan C. Callahan ed., 1995); Charlotte Witt, *Family Resemblances: Adoption, Personal Identity, and Genetic Essentialism*, in *ADOPTION MATTERS* 135, 136 (Sally Haslanger & Charlotte Witt eds., 2005). Third, for some women, lesbianism is a form, indeed the apotheosis, of “woman-identification.” *See* MARC STEIN, *CITY OF SISTERLY AND BROTHERLY LOVES* 353 (2000) (noting members of Radicalesbians, an organization best known for the manifesto *The Woman Identified Woman* (1970), who “signaled that they were woman-identified by highlighting their roles as mothers”).

137. Timothy F. Murphy, *Assisted Gestation and Transgender Women*, 29 *BIOETHICS* 389, 392 & n.26 (2015) (recalling a transgender acquaintance who wished for a womb transfer “just for its own sake, not as a way to have (more) children”); *see also* Leah Samuel, *With Womb Transplants a Reality, Transgender Women Dare to Dream of Pregnancies*, *STAT* (Mar. 7, 2016), <https://www.statnews.com/2016/03/07/uterine-transplant-transgender/> [https://perma.cc/M2RT-RPJG].

- (1) because children furnish opportunities for “specially intimate relationships of mutual knowledge, care, and dependence.”¹³⁸

Notwithstanding studies showing that adoptive parents are as close to their children as birth parents,¹³⁹ some people feel that the “specially intimate relationship” one has with a child would be severely compromised or altogether impossible with a genetic stranger.¹⁴⁰ In the first comprehensive survey of Americans’ attitudes regarding adoption, fully a quarter did not believe “that adoptive parents love their children as much as they would have loved their biological children.”¹⁴¹

- (2) because children “are interesting, rewarding, challenging, and fulfilling”¹⁴²

Less than sixty percent of Americans think that “adoptive parents receive the same amount of satisfaction from raising an adoptive child as from raising a biological child.”¹⁴³ This is partly because, for certain parents, some of the most “interesting” and “fulfilling” things about children are physical, temperamental, and behavioral resemblances to themselves and other relatives, resemblances usually attributed to biogenetic identity.¹⁴⁴

138. Alpern, *supra* note 124, at 151–52, 157.

139. See PETER L. BENSON ET AL., *GROWING UP ADOPTED* 22 (1994); SUZANNE M. JOHNSON & ELIZABETH O’CONNOR, *THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD* 27–28 (2002) (citing Leslie Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 *CHILD DEV.* 1543, 1547 (1985)).

140. See Brenda Almond, *Family Relationships and Reproductive Technology*, in *HAVING AND RAISING CHILDREN* 103, 109–10 (Uma Narayan & Julia J. Bartkowiak eds., 1999) (questioning “the quality of care that can be relied on where purely social connections are involved”); Berg, *supra* note 136, at 82 (noting that adoptive parents lack an “automatic connection or linkage to their child. . . . [and] must be able to love a child who does not represent an extension of their own bodies and genetic lineages . . .”).

141. *Introduction*, *supra* note 17, at 3.

142. Alpern, *supra* note 124, at 151.

143. *Introduction*, *supra* note 17, at 3.

144. “When a child is born there is often an intensive search, by biological parents and those around them, for the characteristics in the child which most resemble each parent (e.g., he has his mother’s hair or temperament; she’s tall or stubborn or bright[,] just like her father).” Berg, *supra* note 136, at 82; see also Rosenblum, *supra* note 38, at 210 (describing the author’s “attention and even delight in seeing kids with their parents and noting similarities and differences in phenotype” and his “curiosity to experience this connection” by having his own child).

- (3) because children are “a vehicle . . . of conspicuous consumption”¹⁴⁵

Whether biological or adoptive, children may well be “the ultimate consumer item” in American culture.¹⁴⁶ But if the success of conspicuous consumption depends upon “the quality of the goods consumed,” whose excellence is “evidence of wealth,”¹⁴⁷ the bespoke products of ART usually will be more efficacious status symbols than “leftovers” procured through adoption.¹⁴⁸ Certain ARTs, moreover, not only require “huge sums of money, but also a privileged lifestyle that permits devotion to . . . arduous [medical] process[es] . . . and often multiple attempts” at childbearing.¹⁴⁹

- (4) because having children is “a cultural norm” so firmly “expected by parents [and] peers” that some people pursue parenthood “merely to fit in.”¹⁵⁰

Where the cultural norm of parenthood is essentially biogenetic,¹⁵¹ adoption may be less effective than procreation in facilitating successful peer “bonding.”¹⁵² It certainly cannot induct one into “the sisterhood of women who have experienced pregnancy and childbirth.”¹⁵³

- (5) because parenthood “contributes to the perpetuation and advancement of . . . one’s ethnic group”¹⁵⁴

Having a child will not satisfy this goal if one, or one’s ethnic community, understands group identity primarily or even partly in terms of blood.¹⁵⁵

145. Alpern, *supra* note 124, at 157.

146. DAN SAVAGE, *THE KID* 13 (1999).

147. THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 52–53 (Martha Banta ed., Oxford University Press 2007) (1899).

148. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 16 (1994) (describing a “grudging” perspective on child welfare that sees “abandoned or orphaned children . . . [as] ‘leftovers’ . . . who had fallen beyond the economic and social pale”).

149. Dorothy E. Roberts, *Race and the New Reproduction*, 47 *HASTINGS L.J.* 935, 940 (1996).

150. Alpern, *supra* note 124, at 151, 157.

151. *See supra* Part II.

152. Berg, *supra* note 136, at 84.

153. *Id.* at 83–84.

154. Alpern, *supra* note 124, at 152.

155. *See* WESTON, *supra* note 118, at 35–36 (observing that study participants who believed that “blood ties represent the only authentic, legitimate form of kinship. . . [were often those] whose notions of kinship were bound up with their own sense of racial or ethnic identity”).

In short, many of the most prevalent reasons for having children refer, either on their face or on closer inspection, to biological children specifically. To the extent that LGBT people share those reasons—and many do—they go far in explaining ARTs’ popularity within this community and, in turn, ARTs’ growing prominence as a concern of LGBT politics.

B. Romantic Reproduction

For many couples, having a child “gives significance to the[ir] . . . personal relationship.”¹⁵⁶ To some extent, this fact simply underscores the dominance of the notion that a “married couple without children does not quite make a family.”¹⁵⁷ It also points to parenthood’s significance in the ideology of romantic and especially marital love.¹⁵⁸ If the institution of marriage has long served as a mechanism for binding parents to children, the institution of parenthood increasingly operates to bind two adults to each other, sometimes functioning in place of marriage.¹⁵⁹

Both biological and adoptive parenthood can declare and deepen “a commitment to having a future.”¹⁶⁰ But procreation is to most minds—well—sexier. In the case of fertile heterosexual couples, the reasons are clear enough. Conceiving “naturally” effects a double merger with one’s partner: merger in intercourse and merger in the resultant offspring.¹⁶¹ For same-sex couples, of course, “transcending separateness through the child born of sexual union” is still an unattainable feat.¹⁶² Nevertheless, many “dream[] of having biological

156. Alpern, *supra* note 124, at 151–52, 157.

157. SCHNEIDER, *supra* note 17, at 33; *see also* LEHR, *supra* note 1, at 65–67 (noting three studies in which “[o]ne point often made by . . . lesbian mothers . . . [was] that in order for a family to be complete, it is necessary that a couple have children”).

158. CORINNE MAIER, NO KIDS 4 (Patrick Watson trans., 2007) (“[H]aving a baby . . . is the outward and visible sign of a couple’s success . . .”).

159. *See* Dan Savage, *The Baby*, N.Y. TIMES MAG. (Nov. 15, 1998), at 95 (describing parenthood’s symbolism for him and his same-sex partner).

160. *Id.*

161. In American kinship ideology, “love in the sense of sexual intercourse . . . stands for [a] unity. . . not only affirmed in the embrace, but also in the outcome of that union, the unity of blood, the child. . . [who] unifies in one person the different biogenetic substances of both parents.” SCHNEIDER, *supra* note 17, at 39.

162. Leon R. Kass, *The Meaning of Life—in the Laboratory*, 146 PUB. INT. 59 (1992) (stressing that only “the complementarity of gender provides [the] bodily means” for this transcendence).

children” together,¹⁶³ and many do their utmost to approximate that ideal.¹⁶⁴

Some lesbians and bisexual women choose to gestate the fertilized egg of one partner in the womb of the other.¹⁶⁵ One couple described this possibility as in vitro fertilization’s “biggest benefit,” because the baby is then truly “a child of the pair of us,” a baby “we both make and grow.”¹⁶⁶ Couples who choose in vivo insemination can simulate a “natural” and “intimate” procreation in the bedroom or even at the doctor’s office.¹⁶⁷ While the opportunity for “music, candles, pillows, and . . . sexual intimacy” makes at-home insemination the preferred method for some, “it is not unusual to hear about romance” in more clinical contexts,¹⁶⁸ where both partners’ participation at the scene of conception enables them (and their future child) to impute “generative power” to the non-biological parent.¹⁶⁹ Such co-creation narratives can be woven even in the absence of one party’s direct involvement at the scene of fertilization. Professor Julie Crawford writes:

While I was neither a genetic nor a gestational mother, . . . I was, in a very real sense . . . a *procreator*[,] one who . . . ‘brings into existence, who gives rise to.’ My partner and I chose to have a child together, and we chose the sperm provider . . . together.¹⁷⁰

Equally illustrative is the widespread practice of “donor matching,” whereby a gamete provider is “chosen for characteristics that . . . the couple believes will capture the [co-parent’s] ethnic and

163. J. Lester Feder, *What Would You Do to Become a Father?*, BUZZFEED (Mar. 22, 2013, 8:59 AM), <http://www.buzzfeed.com/lesterfeder/what-would-you-do-to-become-a-father> [https://perma.cc/987P-GLMM] (quoting a gay man who had twins with his husband through surrogacy); *see also* Andrew Sullivan, *What You Do, in SAME-SEX MARRIAGE PRO AND CON: A READER* 81, 83 (Andrew Sullivan ed., 1997) (arguing that, like infertile heterosexual couples, same-sex couples “may . . . long to have unitive and procreative sex”).

164. Suzanne Pelka, *The Making and Unmaking of Biological Ties in Lesbian-Led Families*, in *WHO’S YOUR DADDY?: AND OTHER WRITINGS ON QUEER PARENTING* 13, 85 (Rachel Epstein ed., 2009) (finding that an “overwhelming, romantic desire to . . . create children together” spurs many of the author’s LGBT clients to choose procreation over adoption).

165. *Id.* at 85.

166. *Id.* at 86.

167. MAMO, *supra* note 102, at 146; Chabot & Ames, *supra* note 109, at 352.

168. MAMO, *supra* note 102, at 145.

169. Hayden, *supra* note 24, at 51.

170. Julie Crawford, *On Non-Biological Maternity, or “My Daughter is Going to Be a Father!”*, in *FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES* 168, 171 (Françoise Baylis & Carolyn McLeod eds., 2014) (internal citation omitted).

genetic heritage.”¹⁷¹ Race, which may well be, “[i]n this society, . . . the most significant genetic trait passed from parent to child,” is not the only consideration driving this practice.¹⁷² As author Amie Klemptauer Miller explains:

I wanted to find a donor who could be a genetic proxy for Jane, because what we really wanted, truth be told, was to make a baby together. I wanted this anonymous man to be a silent partner, to transmit the qualities Jane would give if we could make a baby ourselves.¹⁷³

Small wonder that, for some couples, the “number one preferred” gamete donor or surrogate is a member of the non-genetic parent’s family, ideally a sibling.¹⁷⁴

Biogenetic investments also shape the conduct of gestational surrogacy arrangements. Many male couples who become parents this way opt for a “mixed transfer,” such that “eggs are fertilized with sperm from each man,” giving both of them a chance at being the biological father and introducing temporary ambiguity as to who had the lucky gamete.¹⁷⁵ Some couples mitigate the potential competitiveness of this practice by pursuing “twins”—two children with different fathers, the same gestational mother, and the same genetic mother.¹⁷⁶ This technique recalls the more common practice, employed by men and women alike, of “trading reproductive roles”—alternating over the course of years between one partner’s gametes or womb and the other’s.¹⁷⁷

171. Pelka, *supra* note 164, at 83–84. The prevalence of this phenomenon is well-documented. *See, e.g.*, Berkowitz, *supra* note 108, at 77; CAHN, *supra* note 18, at 53–54; MAMO, *supra* note 102, at 190–91; Chabot & Ames, *supra* note 109, at 352; Dorothy A. Greenfeld & Emre Seli, *Gay Men Choosing Parenthood Through Assisted Reproduction: Medical and Psychosocial Considerations*, 95 *FERTILITY & STERILITY* 225, 226–27 (2011); Hayden, *supra* note 24, at 53.

172. ROBERTS, *supra* note 39, at 267, 282.

173. AMIE K. MILLER, *SHE LOOKS JUST LIKE YOU: A MEMOIR OF (NONBIOLOGICAL LESBIAN) MOTHERHOOD* 14 (2010).

174. JOHNSON & O’CONNOR, *supra* note 139, at 99; *see also* Pelka, *supra* note 164, at 84; Hayden, *supra* note 24, at 50.

175. CAHN, *supra* note 18, at 55. On gay men’s use of mixed transfers and the related pursuit of twins in the context of surrogacy arrangements, *see* Berkowitz, *supra* note 108, at 76; Pelka, *supra* note 164, at 84.

176. *See, e.g.*, LIZA MUNDY, *EVERYTHING CONCEIVABLE* 141 (2007) (describing a couple that refused to hire any surrogate who was not “willing to bear twins”).

177. Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. PUB. L.* 289, 314 (2008).

Whether taking turns or not, same-sex couples who wish to have multiple children often prefer to use the same donor repeatedly, so as to create genetic bonds between siblings.¹⁷⁸ These fraternal connections sometimes become important even to individuals raised in different households by different parents. Recent years have seen the advent of “family communities” centered around individuals conceived by the same donor.¹⁷⁹ Anecdotal reports suggest that participation in these networks may be particularly popular among single women and queer couples.¹⁸⁰

Clearly, same-sex couples can be “just as hesitant to relinquish the notion of biological parenthood as heterosexuals.”¹⁸¹ As therapist Suzanne Pelka observes, some queer couples “will use every available avenue of reproductive technology” to approximate biological procreation as nearly as possible.¹⁸² This longing for jointly conceived children explains why the enthusiasm that once greeted the prospect of human cloning has been largely supplanted by hopes for technologies that would permit genetic mergers between two persons of the same sex: chimerization, whereby cells from two different embryos “mix together and communicate as if they had the same origin,” creating what will develop into a single fetus;¹⁸³ haploidization, which makes clever use of the fact that a fertilized egg does not have a single nucleus but rather two haploid pronuclei, one from each gamete, in the first twenty or so hours after fertilization;¹⁸⁴ and nuclear transfer, whereby an embryo is developed from a fertilized egg that possesses the nuclear DNA of one woman and the mitochondrial DNA of another.¹⁸⁵

A perceived drawback of the aforementioned techniques is that, unlike cloning, they cannot by themselves eliminate the need for third-

178. CAHN, *supra* note 18, at 59.

179. *Id.* at 2, 61–87. These donor-sibling networks, some of which “have begun to organize into more or less durable clans,” Marvel, *supra* note 70, at 233, were largely enabled by the Donor Sibling Registry, an online enterprise that helps donor-conceived individuals “make mutually desired contact with others with whom they share genetic ties.” *Our History And Mission*, THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/about-dsr/history-and-mission> [https://perma.cc/6NC3-CVR6] (last visited Oct. 26, 2016).

180. Marvel, *supra* note 70, at 231–32, 248.

181. GOLDBERG, *supra* note 114, at 47–48.

182. Pelka, *supra* note 164, at 91.

183. Robertson, *supra* note 60, at 368.

184. “If one of the haploid pronuclei is removed before it combines with the other, it could be joined with the haploid pronuclei of the partner produced in another fertilization.” Robertson, *supra* note 60, at 370.

185. June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?*, 79 UMKC L. REV. 333, 342 (2011).

party donors.¹⁸⁶ Hence the special appeal of in vitro gameteogenesis (IVG), a process successfully tested in mice, whereby a sperm cell is created from an egg cell—or, alternatively, an egg cell is created from a sperm cell. IVG could allow same-sex couples to have offspring biologically related to both partners and, by eliminating the need for third-party gametes, enable them “to reproduce in a manner similar to fertile straight couples.”¹⁸⁷

If the speculative technologies just described were to become realities, and if society were to permit their use, many same-sex couples will jump at the opportunities they present. Already, biogenetic ideas about family and selfhood strongly influence why and how LGBT people use ARTs, and many queer couples are firmly wedded to a romantic ideal of procreation. These tendencies are nothing if not understandable. As we have seen, the norm of biogenetic parenthood, powerful throughout our society, can be all the more compelling to those whom that norm has historically rejected.

Then again, exclusion from the biogenetic family paradigm can spur quite a different reaction: defiance. Indeed, defiance of biogeneticism has long been—and in many ways continues to be—a distinctive part of LGBT culture and politics. Part Three below surveys that tradition.

III. AGAINST BIOGENETICISM: QUEER KINSHIP

There is something like poetic justice in the fact that private practices of assisted procreation, so deeply touched by biogeneticism, themselves gave rise to the cases that most eloquently stated the LGBT movement’s own counter-ideology. The first subsection below describes those cases—namely, battles for parental rights involving children conceived through reproductive technologies. The second subsection charts the political, cultural, and intellectual currents that informed and continue to inform the movement’s stress on functional rather than biological conceptions of family. The third subsection discusses LGBT adults’ familial but nonbiological relationships with children.

186. This drawback theoretically could be overcome through an intricate combination of cloning and gene splicing. Aloni, *supra* note 64, at 21; see also Carbone, *supra* note 185, at 334 (“[A]s reproductive technology becomes more sophisticated, prospective parents are likely to choose, if they can, to have children who are closely related to them and not to others.”).

187. Sonia M. Suter, *In Vitro Gametogenesis: Just Another Way to Have a Baby?*, 3 J.L. & BIOSCIENCES 87, 103 (2016) (noting that, “until artificial wombs become available, gay [male] couples would still require a surrogate”).

A. Legal History: Custody and Visitation Cases

In 1977, during her stint at the helm of an organization called “Save Our Children,” singer and erstwhile beauty queen Anita Bryant repeatedly proclaimed that, because “homosexuals cannot reproduce, they must recruit.”¹⁸⁸ The slogan obliquely but pithily communicated Save Our Children’s foremost objection to a Miami ordinance prohibiting schools, among other employers, from discriminating on the basis of sexual orientation.¹⁸⁹ The real problem with the measure was not, as Bryant’s pastor suggested, that placing a known homosexual at the head of a classroom was tantamount to “letting a fox in the chicken coop.”¹⁹⁰ Rather, the bogeyman of the homosexual predator was conjured to dramatize the more plausible fear that openly gay teachers would send a blasé or even favorable message about homosexuality, thereby derailing students’ development into healthy heterosexuals.¹⁹¹

Bryant’s “crusade,” as she called it, was an especially sensational articulation of the imperative to keep LGBT people away from children.¹⁹² This imperative has long been a motivator and rhetorical mainstay of opposition to LGBT rights, particularly in the domain of family law.¹⁹³ Jurisdictions like Florida, which in 1977 responded to events in Miami by enacting a ban on adoption by “practicing homosexuals,”¹⁹⁴ simply ratified the exclusionary policies that most adoption agencies then pursued voluntarily—and that many agencies, often religiously affiliated, still follow today.¹⁹⁵ Meanwhile, for years before and after Bryant’s confident assertions that “homosexuals cannot

188. ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 146 (1977).

189. *Bias Against Homosexuals Is Outlawed in Miami*, N.Y. TIMES (Jan. 19, 1977), <http://www.nytimes.com/1977/01/19/archives/bias-against-homosexuals-is-outlawed-in-miami.html> [https://perma.cc/UR89-DW9Z].

190. Theodore Stanger, *Dade Approves Ordinance Banning Bias Against Gays*, MIAMI HERALD, Jan. 19, 1977, at A1.

191. “[T]he major harm is when a person wants to flaunt homosexuality, wants to be able to come out of the closet” *Tropic Interviews Anita Bryant*, MIAMI HERALD TROPIC MAG., May 29, 1977, at 6 (quoting Bryant).

192. Dennis A. Williams, *Anita Bryant’s Crusade*, NEWSWEEK, Apr. 11, 1977, at 39 (quoting Bryant’s promise to “lead such a crusade to stop [homosexuality] as this country has not seen before”).

193. See generally Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013).

194. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 806, 806 (11th Cir. 2011); see also 1977 Fla. Laws 466; FLA. STAT. § 63.042(3) (2002).

195. See Adam Pertman & Jeanne Howard, *Emerging Diversity in Family Life: Adoption by Gay and Lesbian Parents*, in *ADOPTION BY LESBIANS AND GAY MEN* 20, 26–27 (David M. Brodzinsky & Adam Pertman eds., 2012). Several states have statutes explicitly permitting agencies to discriminate on “religious or moral” grounds. See, e.g., N.D. CENT. CODE § 50-12-07.1 (2013); VA. CODE ANN. § 63.2-1709.3 (2012).

reproduce,” scores of gay men and lesbians who had done just that were alleged and often adjudged to be incapable of “promoting and protecting their children’s well-being.”¹⁹⁶

In custody and visitation suits involving individuals who became parents before emerging from the closet, LGBT advocates forcefully invoked the constitutional and statutory rights of biological mothers and fathers.¹⁹⁷ Yet by the mid-1980s, in cases occasioned by the spread of “lesbian insemination” and the resultant “gayby boom,”¹⁹⁸ it became clear that litigators’ appeals to biology were more strategically than ideologically motivated. The new cases appearing on their dockets typically arose in two scenarios: either a nonbiological mother would seek to preserve a relationship with the child of her former partner; or a biological father, most often a semen donor and sometimes a gay man, would assert paternal rights vis-à-vis a child raised by two women.¹⁹⁹ Although the major LGBT litigation firms had never before represented an openly queer person against another, they quickly resolved that in neither kind of case could they allow genetic affinity to undermine practical, if not genetic, parent-child bonds.²⁰⁰

LGBT advocates’ functionalist stances in disputes involving children created through assisted procreation—their claims that legal recognition as family should follow conduct and attachment rather than biology—contrasted only superficially with their ongoing representation of clients with offspring from prior heterosexual relationships. As movement scholar Carlos Ball explains, much more than biogenetic ties was at stake in the first-generation custody and visitation cases. The LGBT parents who fought those battles, no less than the lesbian co-mothers who came later, were seeking to preserve established relationships of physical care, financial support, and bilateral affection. Biology was but one basis—“neither necessary nor sufficient”—for retention of parental rights.²⁰¹

Today, in confronting relatively new questions like whether and how to apply the presumption of paternity to married same-sex couples,

196. CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 9 (2012).

197. See, e.g., *In re J.S. & C.*, 324 A.2d 90, 94 (N.J. Super. Ct. 1974); *In re Jane B.*, 380 N.Y.S.2d 848, 856–59 (Sup. Ct. 1976).

198. See *supra* notes 54–55 and accompanying text.

199. Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 323 (John D’Emilio et al. eds., 2000).

200. *Id.* at 323–24. Lambda Legal had never before sued an openly LGBT individual, BALL, *supra* note 196, at 89, and the National Center for Lesbian Rights chose to abandon its explicit rule against “representing one lesbian against another.” Polikoff, *supra* note 199, at 323.

201. BALL, *supra* note 196, at 139.

LGBT advocates maintain their principled opposition to “[p]referring biological parent-child relationships over other legal parent-child relationships, and preferring traditional family structures over non-traditional family structures.”²⁰² As movement lawyers told the Iowa Supreme Court in 2013, such preferences “‘stigmatiz[e] adoption as second-best,’ . . . [and they] stigmatiz[e] other children who are not genetically related to their parents, whether because they were conceived through reproductive technology or [through] intercourse with a non-marital partner.”²⁰³

B. Political, Social, and Intellectual History

The principle that biogenetic affinity is “neither necessary nor sufficient” to establish familial relationships boasts an extensive genealogy in LGBT politics and culture. At least since Stonewall,²⁰⁴ LGBT people’s “exclusion from family” as conventionally defined has informed the construction of competing ideals and practices of intimacy and kinship.²⁰⁵ As writer and activist John Preston observed in the early 1980s, “alienation . . . from our genetic families” is a common LGBT experience.²⁰⁶ To this day, coming out to relatives as gay, lesbian, bisexual, or transgender “put[s] to the test the unconditional love and enduring solidarity commonly understood . . . to characterize blood ties.”²⁰⁷ At the same time—and contributing mightily to individuals’ estrangement from families of origin—LGBT people historically have been excluded from “the patterns of . . . love, marriage, children, etc.,

202. See Brief for Petitioner at 71–72, *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243).

203. *Id.* (quoting Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 229 n.11 (2006)).

204. See PETER M. NARDI, *GAY MEN’S FRIENDSHIPS* 52–53, 196 (1999) (citations omitted) (identifying antecedents of more contemporary queer kinship patterns in scholarship about lesbian and gay subcultures in the United States from the 1920s to the 1960s). See also Matt Cook, *Families of Choice? George Ives, Queer Lives and the Family in Early Twentieth-Century Britain*, 22 GENDER & HIST. 1, 10, 13 (2010) (describing George Ives’ queer, class-mixed household as an “adopted family” “connected by co-residence rather than by ‘blood’ ties”).

205. LEHR, *supra* note 1, at 41 (arguing that this exclusion led to “the development of an alternative understanding of family”); see also Didi Herman, *Are We Family? Lesbian Rights and Women’s Liberation*, 28 OSGOODE HALL L.J. 789, 801 (1990) (same).

206. John Preston, *Brothers and Fathers and Sons*, in THE CHRISTOPHER STREET READER 191, 195 (Michael Denny et al. eds., 1983).

207. WESTON, *supra* note 118, at 43–44; see also *infra* notes 289–290 and accompanying text (discussing LGBT youth’s overrepresentation in foster care and among the homeless).

upon which the dominant culture rests.”²⁰⁸ entry into heterosexual marriage; maturation into procreative sexuality; and conformity to a gender system that “equates male, masculine, man ONLY with husband and Father . . . [and] female, feminine, woman ONLY with wife and Mother.”²⁰⁹

It was thus from a perspective of personal and symbolic dissociation from the traditional family that, in the early 1970s, gay liberationists articulated a stinging and multifarious critique of that institution. Many of the flaws they identified were (or at the time seemed) inextricably bound up with the family’s procreative function: its instrumentalist view of sex and its “negative attitude toward all sexual urges other than those that are genital and heterosexual;”²¹⁰ its insistence on monogamy;²¹¹ its “bondage” of wife to husband and of mother to child;²¹² its inculcation of the “artificial” categories of gender and sexual orientation;²¹³ and its satisfaction of “capital’s need for a labour supply.”²¹⁴ In feisty manifestos imagining the demise or even the “abolition of . . . the bourgeois nuclear family,”²¹⁵ liberationists endorsed gay communes as “a new form of extended family,”²¹⁶ and they championed homosexuality as an “expression of hedonism and love free of any utilitarian social ends,”²¹⁷ an antidote to “biological functionalism.”²¹⁸ They called for “radical changes in [society’s] attitude towards bearing and raising children,” beginning with relief

208. JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 65 (2d ed. 1983) (quoting The Mattachine Society, a ‘homophile’ organization founded in 1950).

209. *Id.* (quoting The Mattachine Society).

210. Jill Johnson, *Selections from Lesbian Nation*, in *RADICAL FEMINISM* 351 (Barbara A. Crow ed., 2000).

211. The Red Butterfly, *The Anthropological Perspective* (1970), reprinted in *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 157, 164–65 (Karla Jay & Allen Young eds., 1972); Carl Wittman, *A Gay Manifesto*, S.F. FREE PRESS, Dec. 22, 1969, reprinted in *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 330, 333 (Karla Jay & Allen Young eds., 1972).

212. *Emancipation of Wives*, *THE EFFEMINIST*, Fall 1971, at 3, 15.

213. A.N. DIAMAN, *GAY FLAMES COLLECTIVE, ON SEX ROLES* (1971); *THIRD WORLD GAY REVOLUTION, WHAT WE WANT, WHAT WE BELIEVE* (1971), reprinted in *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* 363, 365 (Karla Jay & Allen Young eds., 1972).

214. RAEWYN W. CONNELL, *GENDER AND POWER* 36 (1987) (describing how gay-liberationist theoretical work of the early 1970s “generally saw the family”).

215. *THIRD WORLD GAY REVOLUTION*, *supra* note 213, at 363, 365.

216. DENNIS ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* 124 (1971).

217. *Id.* at 89. See also GUY HOCQUENGHEM, *THE SCREWBALL ASSES* 39 (Noura Wedell trans., Semiotext(e) 2010) (1973) (“We do not have children. We do not secrete that kind of surplus value.”).

218. SIDNEY ABBOTT & BARBARA LOVE, *SAPPHO WAS A RIGHT-ON WOMAN* 145 (1972).

from “social pressures to[] procreat[e].”²¹⁹ Echoing the childfree movement that emerged at roughly the same time, some liberationists proposed “voluntary childlessness” not only as “a legitimate alternative to parenthood, but a better lifestyle—better for individuals, better for couples, better for the planet.”²²⁰ They touted homosexuality as “the strongest remedy” to the global “pollution” wrought by humanity’s unprecedented proliferation.²²¹ Placards at early gay pride events proclaimed, “More deviation, less population[!]”²²²

Liberationist critiques of the reproductive family would reverberate decades later in some of the most influential works of queer theory. The parallels are striking. Where Guy Hocquenghem suggested in 1972 that “[t]he great fear of homosexuality” is in essence “a fear that the succession of generations, on which civilization is based, may stop,”²²³ Lee Edelman argued more than thirty years later that “*queerness* names the side of those” who contest “reproductive futurism,” society’s commitment to literally and figuratively reproducing itself.²²⁴ Where Dennis Altman in 1971 espoused the Nietzschean idea that “the desire for children is often a product of suffering, of a need to reject oneself,”²²⁵ Michael Warner coined the term “reprosexuality” in 1993 to describe a subjectivity that, among other things, must “find[] its . . . fulfillment in generational transmission.”²²⁶ Where the Seattle Gay Liberation Front railed two years after Stonewall against the “myth” that happiness lies only in “raising children in a nuclear family” with one’s “one-and-only-true-love-forever,”²²⁷ Jack (then Judith) Halberstam wrote in 2005 that queerness is out of step with the regular march of “reproductive time” from love to marriage to baby carriage.²²⁸ Finally, in their distinctive voices, three of queer theory’s most prominent thinkers—Judith Butler, David Halperin, and Eve Kosofsky Sedgwick—have shared gay liberation’s dream of structures beyond the procreative nuclear family

219. ALTMAN, *supra* note 216, at 90–91.

220. ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 182 (1995).

221. HOCQUENGHEM, *supra* note 217, at 39. *See also* ABBOTT & LOVE, *supra* note 218, at 204 (endorsing a turn from “repressing to encouraging nonprocreative behavior” as a “step[] to cut down population growth”).

222. JACK ONGE, *THE GAY LIBERATION MOVEMENT* 53 (1971).

223. GUY HOCQUENGHEM, *HOMOSEXUAL DESIRE* 150 (Daniella Dangoor trans., 1993) (1972).

224. LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* 3, 7, 13, 22, 40 (2004).

225. ALTMAN, *supra* note 216, at 90.

226. Michael Warner, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 9 (1993).

227. *Gay Love, Seattle Gay Liberation Front Newsletter*, Feb. 23, 1971, at 1.

228. JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE* 5 (2005).

that “better serve [people’s] needs for companionship, love, sex, [and] all that is humanizing.”²²⁹

In the decades separating Stonewall-era discourses on family and reproduction from their queer-theory descendants, the anti-biogenicism of LGBT subcultures grew more perspicuous. In *Families We Choose* (1991), a now-classic study of gay and lesbian life in and around San Francisco, anthropologist Kath Weston wrote that, “at a certain point in history”—certainly by the late 1970s—there arose in queer communities an explicit distinction between “chosen” family, identified as gay, and “blood” family, identified as straight.²³⁰ “[C]onceived in opposition to biogenetic givens,” gay and lesbian families of choice were more than voluntary social “networks.”²³¹ These queer kinship arrangements “quite consciously incorporated symbolic demonstrations of love, shared history, material or emotional assistance, and other signs of enduring solidarity.”²³² Chosen families could “incorporate friends, lovers, or children, in any combination,” and very often they included ex-lovers who had become friends.²³³ Because one’s identification of kin within this framework “pictured . . . a cluster [of persons] surrounding a single individual,” rather than flanking a married pair with children, “even the most nuclear of couples would construct theoretically distinguishable families”²³⁴

Some participants in the *Families We Choose* study “had chosen to create families and some had not, some had become parents and some had not”²³⁵ But on one point Weston found virtual unanimity: “almost all [subjects] associated their sexual identities with a release

229. DIAMAN, *supra* note 213, at 2; Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 34 (2002) (endorsing anthropologist “David Schneider’s suggestion that kinship . . . does not reflect a prior structure but . . . can only be understood as an enacted practice”); DAVID M. HALPERIN, *HOW TO BE GAY* 450 (2012) (critiquing a “style of social existence [in which] . . . love, . . . solidarity, sex, reproduction, child-raising, generational succession, caretaking, mutual support, shared living space, shared finances, property ownership, and private life [all] go together”); EVE KOSOFKY SEDGWICK, *Queer and Now*, in TENDENCIES 1, 5 (1993) (proposing to disaggregate the many properties—“a surname[,] a sexual dyad[,] a legal unit based on . . . marriage[,] a circuit of blood relationships[,] a system of companionship and succor[,] . . . a . . . site of economic . . . [and] cultural consumption[,] a mechanism to produce, care for, and acculturate children[,]” etc.—currently “impacted” in the ideal of “the family”).

230. WESTON, *supra* note 118, at 29, 35, 74. For an early use of the expression “chosen family,” see O’Donnell, *supra* note 60, at 8 (“Hospital Guidelines and health-insurance plans do not recognize a lesbian’s lover and friends as her chosen family.”).

231. WESTON, *supra* note 118, at 109–10.

232. *Id.* (using terminology—“enduring solidarity”—borrowed from SCHNEIDER, *supra* note 17, at 61).

233. *Id.* at 27, 111–12, 196.

234. *Id.* at 109–10.

235. *Id.* at 210.

from any sort of procreative imperative.”²³⁶ This was a politically potent dispensation. When “people who claim nonprocreative sexual identities and pursue nonprocreative relationships . . . lay claim to family ties,” wrote Weston, they mount an “attack on the privilege accorded to a biogenetically grounded mode of determining what relationships will count as kinship.”²³⁷

Statistics will never tell just how many LGBT people have understood themselves to have “chosen” their “families.” Some, no doubt, have felt more constraint than volition in this aspect of their lives,²³⁸ while others have worried that the whole notion of “family” is itself irredeemable.²³⁹ But Weston’s central thesis—that “lesbians and gay men . . . have formulated a critique of kinship that contests assumptions about the bearing of biology, genetics, and heterosexual intercourse on the meaning of family”²⁴⁰—is corroborated by sources spanning more than half a century and representing a wide range of LGBT cultures and experiences.²⁴¹ Auto-biographical accounts,²⁴² literary works,²⁴³ and documentary films like *Paris Is Burning* (1990),

236. *Id.*

237. *Id.* at 35 (emphasis omitted).

238. Elizabeth Freeman, *Queer Belongings: Kinship Theory and Queer Theory*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* 295, 304 (George E. Haggerty & Molly McGarry eds., 2007) (arguing that the term “‘chosen family’ . . . presumes a range of economic, racial, gender, and national privileges to which many sexual dissidents do not have access . . .”).

239. *See, e.g.*, Ruthann Robson, *Resisting the Family: Repositioning Lesbians in Legal Theory*, 19 *SIGNS* 975 (1994); Eve Kosofsky Sedgwick, *Tales of the Avunculate*, in *TENDENCIES* 52, 71–72 (1993).

240. WESTON, *supra* note 118, at 34.

241. While it is important to acknowledge that some LGBT individuals and communities maintain a biogenetic conception of family alongside or even in lieu of a social one, it is equally important to distinguish between prioritizing biogenetic ties *per se* and prioritizing relationships with people to whom one is biologically related. Thus, for example, it would be premature to conclude that the lesbian couples studied by Mignon Moore are simply deferring to the primacy of genes when one or both partners considers the biological mother the primary parent. In over two-thirds of the families Moore studied, “the biological mother’s partner moved into an existing single-parent household that the biological mother had established.” Mignon R. Moore, *Gendered Power Relations Among Women: A Study of Household Decision Making in Black, Lesbian Stepfamilies*, 73 *AM. SOC. REV.* 335, 348 (2008).

242. *See, e.g.*, MILLER, *supra* note 173, at 69–70 (recounting the author’s own experience of “family” in friendship); JAY QUINN, *THE MENTOR: A MEMOIR OF FRIENDSHIP AND GAY IDENTITY* 3 (2000) (recounting the evolution of one particularly important friendship in the course of a broader “discussion of mentoring and gay identity”); LARRY KRAMER, *REPORTS FROM THE HOLOCAUST: THE STORY OF AN AIDS ACTIVIST* 271 (1989) (describing how gay people “have turned to our friends to take the place of families”); ETHAN MORDDEN, *BUDDIES* 48 (1987) (explaining that “my family is my buddies”).

243. *See, e.g.*, HANYA YANAGIHARA, *A LITTLE LIFE* (2015); ALISON BECHDEL, *THE ESSENTIAL: DYKES TO WATCH OUT FOR* (2008) (collecting selections from a comic

with its riveting depiction of the “house” culture of black and Latino drag queens in New York City,²⁴⁴ attest to the ongoing centrality of friendships and other “bonds that tie” in LGBT lives.²⁴⁵ So do numerous academic studies.²⁴⁶ Throughout these literatures, terms like “family,” “brother,” “sister,” “mother,” and “father” are regularly applied to persons related by neither law nor genes, but rather through bonds of care and affection²⁴⁷—or even through bonds of political and

strip about lesbian culture that ran from 1983 to 2008); MICHAEL CUNNINGHAM, *A HOME AT THE END OF THE WORLD* (1990); FANNIE FLAGG, *FRIED GREEN TOMATOES AT THE WHISTLE STOP CAFE* (1987); TERRENCE McNALLY, *LOVE! VALOR! COMPASSION!* (1995); ALICE WALKER, *THE COLOR PURPLE* (1982).

244. These houses generally consisted of a “‘mother’ and ‘father’ [who] supervise[d] the training and activities of their ‘children.’” Jackie Goldsby, *All About Yves*, 2 *OUT/LOOK* 34, 35 (1989).

245. Richard Goldstein, *The Gay Family, Motherhood, Fatherhood, and Selfhood: The Bond That Ties*, *VILLAGE VOICE*, July 1, 1986, at 19.

246. See, e.g., David M. Frost et al., *Social Support Networks Among Diverse Sexual Minority Populations*, 86 *AM. J. ORTHOPSYCHIATRY* 91, 95–96 (2016) (finding that gay and bisexual men of all races—but not, interestingly, lesbian and bisexual women—received most of their “major support, such as . . . a large sum of money in an emergency,” not from kin but “from other individuals, who were mostly . . . LGB . . .”); Jacqueline S. Weinstock, *Lesbian Ex-Lover Relationships*, 8 *J. LESBIAN STUD.* 1 (2004) (describing “a commitment to ex-lovers” and “a sense of uniqueness about the prevalence and closeness” of those relationships as hallmarks of lesbian communities); JEFFREY WEEKS ET AL., *SAME SEX INTIMACIES* 76 (2001) (calling “a friendship ethic . . . the key feature of the contemporary non-heterosexual world”); NARDI, *supra* note 204, at 13, 164 (positing that “[f]riendship may be the central organizing element of gay men’s lives,” and finding, in a study of 543 gay men with AIDS, that “41 percent [were being cared for] by friends . . . [and] less than a fifth were being cared for by either legal or blood relatives”); MARTIN P. LEVINE, *GAY MACHO* 43–44, 46 (1998) (demonstrating that members of a 1970s subculture remembered for little more than sex, drugs, and disco depended on “cliques . . . that proved remarkably stable over time” and “served all the functions of the family, except, of course, that of biological reproduction”); KENNETH PLUMMER, *TELLING SEXUAL STORIES* 154 (1995) (discussing “networks of support, care and friendship that are as strong as any family, and maybe stronger because they are chosen rather than simply given”).

247. See, e.g., Katherine Arnup, *Family*, in *LESBIAN HISTORIES AND CULTURES: AN ENCYCLOPEDIA* 288, 290 (Bonnie Zimmerman ed., 2000) (describing lesbians who “have adopted the term ‘family’ to apply to the communities of support, solidarity, and love in which they live and work[,]” rather than or in addition to “their families of origin or their coupled relationships”); NARDI, *supra* note 204, at 48–49 (quoting a study participant who said, flatly, “[m]y gay friends are like family” and another who reflected on “‘the importance and meaning of having my gay brothers and sisters act as surrogate family members’”); LEVINE, *supra* note 246, at 46–47 (noting that members of urban “cliques” in the late 1970s assumed roles like “mother,” “big brother,” “kid brother,” “brother,” “sister,” and “cousin”); WILLIAM HAWKESWOOD, *ONE OF THE CHILDREN: GAY BLACK MEN IN HARLEM* 64 (1997) (reporting informants’ regular use of “brother” and “sister” to refer to friends); Preston, *supra* note 206, at 192–94 (conceptualizing the author’s closest relationships in terms of “brotherhood”); BRUCE RODGERS, *THE QUEENS’ VERNACULAR* 25, 37, 60, 138, 181–82 (1972) (including entries for familial terms (used by gay men, lesbians, or both) like “sister,” “auntie,” “brother,” “mother,” and “daughter”); Jean Weber, *Lesbian Networks*,

quasi-ethnic solidarity.²⁴⁸ Time and again, such usages are accompanied by explicit affirmations that love is yet thicker than blood.²⁴⁹

C. Nonbiological Bonds with Children

Intergenerational kinship has long been a feature of LGBT families of choice. Often, such relationships have been experienced and theorized through metaphors of adoption and avuncularity (literally, “the state of being an uncle”).²⁵⁰ While adoption (again, as a metaphor)

CHRISTOPHER STREET, Apr. 1979, at 51, 51 (referring to “[c]ountless gay women” who belong to “insular circles of friends . . . that often resemble extended families”).

248. The idea that, in Weston’s words, “community would replace alienated biological ties” has persisted since the early 1970s, when liberationists wrote idealistically of gay living collectives. WESTON, *supra* note 118, at 127. *See, e.g.*, Lyndsey D’Arcangelo, *A Different Kind of Family*, BUFFALO LOOP, April 2015, at 7 (reflecting on the continued invocation of the word “family” to describe other gay people); NARDI, *supra* note 204, at 52 (“[I]t is not uncommon today nor has it been uncommon historically for people to signal that others . . . are also gay or lesbian by suggesting that they are ‘a member of the family’ [or by using] more explicit kinship terminology.”); Susan Harben, *We Are Family*, in BEYOND BLOOD: WRITINGS ON THE LESBIAN AND GAY FAMILY 5, 6 (Louise Wakeling & Margaret Bradstock eds., 1995) (“[T]he gay and lesbian family at the macro level[,] . . . [is] a social and cultural construct . . . [whose] members are bound by common interest and relationships of care.”); NANCY ANDREWS, FAMILY: A PORTRAIT OF GAY AND LESBIAN AMERICA (1994) (noting in the author’s foreword that “[t]he word *family* is slang for ‘gay’ in many parts of the country”); Preston, *supra* note 206, at 129 (assigning significance to the fact that the hit song, “‘We Are Family[,]’ swept gay discos with . . . a powerful impact” when it appeared in 1979); ALTMAN, *supra* note 216, at 124 (advocating gay communes as “a new form of . . . family”).

249. *See, e.g.*, MILLER, *supra* note 173, at 70 (comparing the special status of “ties of blood and marriage” in “the broader world” to the “blurred” lines between family and friend in the gay world); YVETTE TAYLOR, LESBIAN AND GAY PARENTING 60 (2002) (describing study participants who “articulated notions of an extended family, . . . refusing the connections of blood alone”); Terry Boggis, *Affording Our Families: Class Issues in Family Formation*, in QUEER FAMILIES, QUEER POLITICS 175, 180 (Mary Bernstein & Renate Reimann eds., 2001) (“Many of us have . . . created families for ourselves, based not so much on blood connections but on intimate friendship [and] shared struggle”); LEVINE, *supra* note 246, at 43 (“[I]solated from their biological families . . . , the clique was [a] surrogate for the nuclear family.”); Clare Riley, *American Kinship: A Lesbian Account*, 8 FEMINIST ISSUES 75, 90–91 (1998) (finding that, for lesbian study participants, a “traditional model . . . [of kinship] based on blood and marriage” had “little significance in their [daily] lives”); Robert E. Goss, *Queering Procreative Privilege: Coming Out as Families*, in OUR FAMILIES, OUR VALUES 3, 8, 11 (Robert E. Goss & Amy A.S. Strongheart eds., 1997) (“Queer folks undermine the idea of family as a biological kinship unit” and “Queer sexuality proclaims an independence from the procreative model”); PLUMMER, *supra* note 246, at 154 (contrasting “families we choose or create” with “biological/blood families”).

250. *Avuncular*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/13848?redirectedFrom=avuncularity#eid31668239> [<https://perma.cc/36GZ-28PG>] (last visited Oct. 26, 2016). For an influential meditation on queerness and avuncularity, see Sedgwick, *supra* note 239.

has tended to describe relationships between adults—like the “fascinating tendency on the part of more experienced gay men to ‘adopt’ young, less knowledgeable gay men”²⁵¹—avuncularity has more often described adult relationships with children. These latter relationships have sometimes had a biological component,²⁵² but they have also arisen in the absence of any tie through blood or marriage.²⁵³ Author Stefan Lynch recalls that, after his parents were “essentially . . . disowned” by their relatives when they both came out of the closet, “my family were these mostly gay guys, whom I called my aunties.”²⁵⁴

What is avuncular is not—or not quite—parental, a distinction that may be particularly poignant to LGBT parents themselves, who are often the first to observe that having and raising a child, even in an alternative family, can cut short a hitherto alternative lifestyle.²⁵⁵ But if parenthood is sometimes said to wrench individuals “out of their location in gay life,”²⁵⁶ non-parental relationships with young people

251. Preston, *supra* note 206, at 193. See also GERRE GOODMAN ET AL., NO TURNING BACK: LESBIAN AND GAY LIBERATION FOR THE '80S, at 97 (1983) (“[I]n the gay world, . . . there are many men who assume they should be ‘big brothers’ and show newcomers the ropes.”); LEVINE, *supra* note 246, at 47 (discussing men who took up the role of “mother” or “big brother” to relative newcomers to the gay subculture); NARDI, *supra* note 204, at 54 (describing a respondent who “spoke about his much older close friends as a ‘role model, a mentor’”). Such “parenting” or “mentoring” relationships would remain a feature of many gay lives. See QUINN, *supra* note 242, *passim*.

252. Jack Drescher, *The Circle of Liberation*, in GAY AND LESBIAN PARENTING 119, 124 (Deborah Glazer & Jack Drescher eds., 2001) (noting that, “at the start of the modern gay liberation movement, being an uncle or an aunt was [sometimes] the only significant child-rearing role envisioned for gay men and lesbians”).

253. See Gary Dunne, *Happy Little Vegemites*, in BEYOND BLOOD: WRITINGS ON THE LESBIAN AND GAY FAMILY 5, 93 (Louise Wakeling & Margaret Bradstock eds., 1995) (avowing that the author would not be “any more protective or loving towards a child I’m related to than I’ve been with my nieces and nephews”) (emphasis added).

254. Stefan Lynch, *Stefan Lynch, 40, Remembers His Family to His Friend Beth Teper, 43*, in TIES THAT BIND 69 (Dave Isay & Lizzie Jacobs eds., 2013). It would be interesting to know whether any of these aunties left or intend to leave Lynch an inheritance. Law professor Daniel Monk’s study of will-writing practices found that gay men and lesbians are far more likely than heterosexuals to make some provision for “godchildren” and “children of friends.” Daniel Monk, *Sexuality and Children Post-Equality*, in AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP 200, 209–11 (Robert Leckey ed., 2015).

255. See GOLDBERG, *supra* note 114, at 2 (describing a same-sex couple that, after having children, “noted shifts in their support networks in that they spent less time with their nonparent friends (who were mostly gay), and more time with their friends who were parents (and who were often heterosexual)”; SAVAGE, *supra* note 146, at 26 (noting that, with parenthood, Savage and his partner had to “give[] up certain things that . . . [for them] define what it means to be gay”); JETTER, *supra* note 122, at 66 (observing that motherhood has shifted “[t]he lesbian paradigm . . . from playing softball in the park to pushing strollers down the avenue”).

256. LEWIN, GAY FATHERHOOD, *supra* note 106, at 184; see also AMIN GHAZIANI, THERE GOES THE GAYBORHOOD? 122 (2014) (observing in a number of his

largely have been construed as markers of LGBT distinction, broadening the range of possible answers to the question, “how am I to be involved with children?”²⁵⁷ The erstwhile gay commune consisted primarily of members “from the same generation,” but it also offered a “solution for lesbian mothers and homosexuals [both male and female] who wish[ed] to participate in child care.”²⁵⁸ In later years, becoming “honorary aunts and uncles, godparents, role models, and mentors to . . . friends’ children,” are some of the means by which LGBT people have forged intergenerational attachments without undertaking all the responsibilities associated with parenting.²⁵⁹

Of course, huge numbers of LGBT people have fully undertaken parental responsibilities—some in the context of heterosexual relationships, others via reproductive technologies, and still others by adoption and fostering. These last two methods have been easily “conceptualized . . . in terms of the values of the [LGBT] community,”²⁶⁰ which stress the affective and practical, rather than formal and biological, markers of kinship.²⁶¹ Open adoption, also known as adoption-with-contact, has held particular appeal for LGBT parents. A reaction against the secrecy that characterized an age when adoptive families frequently sought to imitate the biogenetic model in all respects—“the child is *as-if-begotten*, the parent *as-if-genealogical*”²⁶²—adoption-with-contact comports well with the “openness and honesty” associated with queer life since Stonewall.²⁶³

LGBT-parent subjects the “ascendance of a parent identity while sexual identity recedes in comparison”); ARLENE STEIN, *SEX AND SENSIBILITY* 137 (1997) (finding, in a study of lesbian mothers, that “the locus of lesbian life was shifting away from communal attachments”); Jack Drescher, *Are the Kids Alright? Avuncular Reflections on the Gayby Boom*, 18 J. GAY & LESBIAN MENTAL HEALTH 222, 228 (2014) (recounting how, in the early 1990s, after two decades of seeing “heterosexual friends disappear into their child-rearing caves,” the author “suddenly . . . was seeing a similar thing happen to . . . gay and lesbian friends . . .”).

257. I borrow this phrasing from PLUMMER, *supra* note 246, at 154.

258. ALTMAN, *supra* note 216, at 147–48.

259. APRIL MARTIN, *THE LESBIAN AND GAY PARENTING HANDBOOK* 43 (1993).

260. Abbie E. Goldberg et al., *The Transition from Infertility to Adoption: Perceptions of Lesbian and Heterosexual Couples*, 26 J. SOC. & PERS. RELATIONSHIPS 938, 955 (2009). See also Tyzoon Tyebjee, *Attitude, Interest, and Motivation for Adoption and Foster Care*, 82 CHILD WELFARE 685, 703–04 (2003) (counting LGBT identity as a strong “ideological” influence on willingness to adopt).

261. These values recall beliefs and practices associated with African-American cultures, whose “ethic” for “dealing with infertility”—grounded in “skeptic[ism] about any obsession with genes” and a relaxed boundary between kin and non-kin—has often meant “reach[ing] out to the thousands of Black children in need of a home.” ROBERTS, *supra* note 39, at 260–61.

262. JUDITH S. MODELL, *KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE* 2 (1994).

263. GOLDBERG, *supra* note 114, at 51. The open adoption movement is sometimes said to “owe[] a debt to the lesbian and gay Pride movement—the idea of

No later than the mid-1970s, and amid considerable controversy, social service agencies began placing sexually active, gay-identified adolescents in households headed by gay men and lesbians.²⁶⁴ By the late 1980s, and despite the insulting truth that their homes usually were considered a “last resort,” gay and lesbian people had demonstrated an unusual willingness to adopt or foster other “hard-to-place children—older children[. . .] those with developmental delays, psychological issues, [and] physical disabilities,” especially AIDS.²⁶⁵ To this day, gay and lesbian adopters remain more amenable than heterosexuals to accept children who are “the most difficult to place,” and same-sex couples are more likely than different-sex couples to adopt “across racial lines.”²⁶⁶

Lesbians, gay men, and bisexuals are also more likely than non-LGB people to adopt,²⁶⁷ more likely to contemplate adopting,²⁶⁸ and

being out of the closet and dispelling shame . . .” Rachel Epstein, *Extra Love: An Open Adoption Story*, in *WHO’S YOUR DADDY?: AND OTHER WRITINGS ON QUEER PARENTING* 93, 94–95 (Rachel Epstein ed., 2009). See also Abbie E. Goldberg et al., *Choices, Challenges, and Tensions: Perspectives of Lesbian Prospective Adoptive Parents*, 10 *ADOPTION Q.* 33, 46 (2007) (noting that ten of thirty-two lesbian women “explicitly noted that they were pursuing domestic open adoption because of their belief that adoption should not start with secrecy and deception, about sexual orientation or anything else”).

264. See *Families by Adoption: A Gay Reality*, *ADVOCATE*, Aug. 28, 1974, at 1; Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parenting*, 51 *HARV. C.R.-C.L. L. REV.* 363, 375–78 (2016).

265. George, *supra* note 264, at 17; see also David Perry, *Homes of Last Resort: Is America Dumping Its Unwanted Children on Gays Hoping to Adopt?*, *ADVOCATE*, Dec. 5, 1989, at 45.

266. MOVEMENT ADVANCEMENT PROJECT ET AL., *LGBT FOSTER AND ADOPTIVE FAMILIES: FINDING CHILDREN FOREVER HOMES 3* (2002) (citing Gary Mallon, *Assessing Lesbian and Gay Prospective Foster and Adoptive Families*, 86 *CHILD WELFARE* 67 (2007)); Rachel H. Farr & Charlotte J. Patterson, *Transracial Adoption by Lesbian, Gay, and Heterosexual Couples*, 12 *ADOPTION Q.* 187, 200 (2009); Abbie E. Goldberg & Mark Gianino, *Lesbian and Gay Adoptive Parent Families*, in *ADOPTION BY LESBIANS AND GAY MEN* 204, 211 (David M. Brodzinsky & Adam Pertman eds., 2012) (citing “evidence that white same-sex couples are more likely to be open to, and to adopt, transracially compared to white heterosexual couples”).

267. See GARY J. GATES, WILLIAMS INST., *DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 1* (2015) (“Same-sex couples are nearly three times as likely as their different-sex counterparts to be raising an adopted or foster child.”).

268. The 2002 National Survey of Family Growth (NSFG) found that nearly half of lesbian and bisexual women, compared to one-third of heterosexual women, had considered adoption, and that lesbian and bisexual women were more likely than heterosexual women to have “taken concrete steps toward adopting” (5.7 percent versus 3.3 percent). GARY J. GATES ET AL., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 6* (2007). The NSFG did not ask men the same questions about adoption but, since “gay and bisexual men are even more likely than lesbian and bisexual women to express an interest in having children,” and since neither partner in gay male couple can carry and deliver a child, gay men are probably more

more likely to identify adoption as “their preference from the start.”²⁶⁹ Research comparing LGBT and non-LGBT adopters reveals significant differences in attitudes toward biogenetic parenthood. A 2009 study found that, despite the relative ease of assisted insemination, female same-sex couples who adopted were markedly less likely than their different-sex counterparts to have pursued fertility treatments.²⁷⁰ Even more tellingly, same-sex couples were far less likely than different-sex couples to feel “a strong desire for biological children”—40% of lesbians and 34% of gay men, versus 90% of straights.²⁷¹ Complementary results were obtained in a 2011 study finding that same-sex adoptive couples were considerably less prone than different-sex couples to “internalize adoption stigma,”²⁷² defined as the “feeling that being an adoptive parent is inferior to being a biological parent.”²⁷³

LGBT people’s uncommonly warm embrace of adoption demonstrates the persistence, even in this age of assisted procreation, of the belief that love does not need blood to make a family. This belief is no mere acquiescence to circumstance—a defense against mourning what one cannot easily have. To the contrary, as this Part has shown, the particular ethic on which LGBT adoptive parents build their “families of choice” partakes of a rich history of queer resistance, both personal and political, to the ideology of biogenetic kinship.

likely than lesbians to be interested in this option. *Id.* If so, two million is a “conservative” estimate of the number of gay, lesbian, and bisexual Americans who have contemplated adoption.

269. Gerald P. Mallon, *Lesbian and Gay Prospective Foster and Adoptive Families: The Homestudy Assessment Process*, in *ADOPTION BY LESBIANS AND GAY MEN* 130, 131 (David M. Brodzinsky & Adam Pertman ed., 2012).

270. Goldberg et al., *supra* note 260, at 959–60. Another study surveyed 106 adoptive families—twenty-nine lesbian couples, twenty-seven gay male couples, and fifty heterosexual couples—and found that “the vast majority of heterosexual[s] . . . reported ‘challenges with infertility’ as a motivation for adopting children,” while less than half of the (necessarily dysfertile) same-sex couples offered this reason. Rachel H. Farr & Charlotte J. Patterson, *Lesbian and Gay Adoptive Parents and Their Children*, in *LGBT-PARENT FAMILIES, INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE* 39, 42 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

271. Farr & Patterson, *supra* note 270, at 42; RACHEL H. FARR, MOTIVATIONS TO ADOPT AMONG LESBIAN, GAY, AND HETEROSEXUAL PARENTS: ASSOCIATIONS WITH COPARENTING AND MENTAL HEALTH (poster presented at the annual Meeting of the Society for Personality and Social Psychology, New Orleans, January 2013) (on file with author).

272. Abbie Goldberg et al., *Perception and Internalization of Adoption Stigma Among Gay, Lesbian, and Heterosexual Adoptive Parents*, 7 *J. GLBT FAM. STUD.* 132, 136 (2011).

273. Farr & Patterson, *supra* note 270, at 45. *See also* GOLDBERG, *supra* note 114, at 60 (citing a 2012 study of gay adoptive fathers in which roughly “half the men . . . did not espouse to value or prioritize biology in their relationships with children”).

IV. A CRITIQUE OF THE POLITICS OF LGBT PROCREATION

The previous Part documented what has long seemed a quintessential strain of LGBT culture—or indeed cultures, so many different lives and lifestyles has an anti-biogeneticist conception of family, belonging, and community enabled. It further showed that this “kinetic,” as opposed to genetic, idea of kinship has been a matter of political and legal principle within LGBT communities and in LGBT activism. Nowhere has this principle been pursued more clearly than in movement lawyers’ steadfast insistence that procreation and the biogenetic connections to which it gives rise are “neither necessary nor sufficient” to ground a right to legal recognition as family.²⁷⁴

“Neither necessary nor sufficient” is hardly the most radical way to imagine the relevance of biological to legal parenthood. Plato’s *Republic*, for example, describes an ideal society in which children are raised collectively, without knowledge of their progenitors, so as to foster allegiance to *polis* rather than clan.²⁷⁵ The LGBT discourse of kinetic kinship makes more modest claims—namely, that biogenetic relationships are not superior to non-biogenetic ones and need not be more definitive of personal identity. Yet even this relatively moderate stance risks dilution as LGBT activists seek to expand and facilitate access to ARTs. The problem is not, or not only, that such efforts are fueled by, and in turn invigorate and legitimate, biogeneticist preferences and practices in the private sphere.²⁷⁶ Of far greater concern is biogenetic bias in the *politics* of LGBT parenthood. This bias has two manifestations: first, the markedly different understandings of equality—full versus formal, lived versus legal—that underlie movement approaches to assisted procreation and adoption, respectively; and second, invocations of a fundamental “right to procreate” that valorize reproduction, idealize a biological model of parenthood, and threaten to entrench regressive doctrines in family and constitutional law.

A. *The ART-Adoption Double Standard*

Whether or not they happen to allege violations of positive law, LGBT equality arguments about access to ART fall into two broad categories: claims of disparate treatment and claims of disparate impact.²⁷⁷ The former require relatively little elaboration. As explained

274. See *supra* note 174 and accompanying text.

275. REPUBLIC OF PLATO 455C–57D (Benjamin Jowett trans., Oxford at the Clarendon Press 3d ed., 1908).

276. See *supra* Part II.

277. See *supra* notes 70–88 and accompanying text.

in Part I, disparate-treatment claims concern policies and practices that specifically disadvantage LGBT people. They provoke identitarian umbrage because, in the typical case, they are consciously motivated by disapproval, prejudice, or animus.

Disparate-impact claims, by contrast, concern policies and practices that do not single out LGBT people for unfavorable treatment but nonetheless affect them disproportionately relative to the population at large. In the United States, where such claims are available as a legal matter under some but not all antidiscrimination mandates,²⁷⁸ the doctrine of disparate impact has been justified under two (not mutually exclusive) theories. The first, sometimes called the “fault theory,” sees disparate-impact liability as “an evidentiary dragnet” designed to catch impermissible but “hidden” motives: deliberately concealed intentions to discriminate, as well as (on some interpretations) unconscious bias.²⁷⁹ The second model of disparate impact liability, sometimes called the “effects theory,” sees the doctrine primarily as a tool for eradicating policies and practices that, even if not traceable to nefarious intentions, preserve status- and identity-based disparities without just cause.²⁸⁰

Under the fault theory, any policy or practice that tends to hit LGBT people harder than non-LGBT people should be subject to a rebuttable presumption that it is motivated by antigay, antitrans sentiment. Seldom will this presumption be totally unwarranted as applied to restrictions on assisted procreation. As we saw earlier, hostility to ARTs is often rooted in sex, gender, and kinship norms structured around reproductive heterosexuality.²⁸¹ Yet there are many barriers to ART that, whatever may be said of their ultimate wisdom, cannot fairly be chalked up to such suspect ideology. Cloning bans, for instance, aim to forestall an “effacement of individuality, the commodification of children, and the advancement of eugenics.”²⁸²

278. Disparate-impact claims are unavailable under the Equal Protection Clause of the federal Constitution, which the Supreme Court has held to prohibit only intentional discrimination. *See generally* *Washington v. Davis*, 426 U.S. 229 (1976). They are permitted, however, under many state and federal antidiscrimination laws. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 496 n.15 (2003) (noting permission of such claims under Title VII, the Voting Rights Act, the No Child Left Behind Act, and “state laws that use disparate impact standards”).

279. Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 526 (1991) (identifying the “fault theory” of disparate impact); Primus, *supra* note 278, at 519–20 (noting “ambigu[ity] about whether [the doctrine] seeks to discover . . . hidden *subconscious* discrimination”).

280. Perry, *supra* note 279, at 526 (identifying the “effects theory” of disparate impact); Primus, *supra* note 279, at 587.

281. *See supra* notes 10, 24 and accompanying text.

282. Judith Daar, *The Prospect of Human Cloning*, 33 SETON HALL L. REV. 511, 540 (2003).

Surrogacy prohibitions, too, strike at commodification (here of both women and babies), and they show deference to “the potential bond between a pregnant woman and the child she bears”²⁸³ More prosaic restrictions, like insurance schemes that decline to cover (or do not generously cover) ARTs are often “at the[ir] core” policy choices about “how best and how justly to allocate scarce medical resources.”²⁸⁴ And so on. Far from qualifying as discrimination under the fault theory of disparate impact, barriers like these attest to “the range of public and private interests at stake” in ART regulation.²⁸⁵ Such interests also weaken claims of invidious discrimination under the effects theory—which, again, imagines disparate impact liability as a way to “dismantle hierarchies” that persist for no good reason.²⁸⁶

There is, to be sure, a place for disparate-impact argumentation in LGBT family advocacy. Just because the interests supporting one or another obstacle to becoming a parent are “legitimate” for legal purposes does not mean that, all things considered, they are persuasive as a matter of policy. The LGBT movement is entitled to seek for its constituents what a disparate-impact approach promises to achieve: substantive as well as formal, lived as well as legal, equality.²⁸⁷ But substantive equality in parenthood—equality of opportunity to have children—is one thing. Substantive equality in biogenetic parenthood, and biogenetic parenthood alone, is quite another. Unfortunately, only the latter appears on the movement’s current agenda.

If access to ART has meant trying to change the rules of the game for everybody, access to adoption has simply meant subjecting LGBT people to the same rules as everyone else. Despite the multiplicity of barriers that clutter this route to parenthood, LGBT adoption advocacy is limited almost exclusively to fighting disparate *treatment* based on sexual orientation and gender identity.²⁸⁸ This silence is especially suspicious given that adoption is, if anything, more susceptible than ART to disparate-impact analysis. LGBT people are disproportionately

283. Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 217 (2013).

284. Blake, *supra* note 2, at 701.

285. Marsha Garrison, *Law Making for Baby Making*, 113 HARV. L. REV. 835, 859 (2000).

286. Primus, *supra* note 279, at 518–19.

287. See, e.g., Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135–36 (2010) (“[B]ecause the nature of our racial discrimination problem is systemic rather than episodic,” the disparate-impact theory “seems to offer the most realistic hope of [using] . . . the legal system to . . . overcome . . . white privilege”).

288. Notably, not one of the 138 entities that comprise the “working group” lobbying in favor of the Adoption Tax Credit Refundability Act is an LGBT-rights organization. See *About Us*, SAVE THE ADOPTION TAX CREDIT, <http://adoptiontaxcredit.org/about/> [https://perma.cc/ER5B-6VMM] (last visited Oct. 26, 2016).

represented in two groups, perhaps three, with direct interests in expanding access to adoption. First and foremost are the many LGBT children and adolescents who might benefit from being raised by people other than their biological parents. Numerous studies confirm that sexual minorities are substantially overrepresented among homeless youth and among youth in foster care.²⁸⁹ Adoption may not be the best solution for all of these minors, but surely it would be good for the many whose birth parents cannot or will not learn to accept them.²⁹⁰ Second, LGBT people also may be overrepresented in the class of biological parents who want or need to relinquish a child for adoption. Relative to the general population, LGBT procreators tend to conceive and bear offspring at earlier ages and, perhaps surprisingly, LGBT people “are more likely [than non-LGBT people] to experience unintended pregnancy and fatherhood.”²⁹¹ Third, LGBT adults are more likely to “need” adoption than their straight, cisgender counterparts; the same “structural infertility” that drives many prospective LGBT parents into the ART clinic propels many others toward adoption agencies. No doubt the latter trajectory would be even more common if adoption were not so difficult.

289. See, e.g., SOON KYU CHOI ET AL., WILLIAMS INST., SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, OR TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS 4 (2015) (finding that twenty-seven percent of individuals accessing homeless youth services identify as gay, lesbian, or bisexual, and that two percent identify as transgender); LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., SERVING OUR YOUTH 3 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf> [<https://perma.cc/DQS7-HYL6>] (“LGBT youth represent between 30% and 43% of those served by drop-in centers, street outreach programs, and housing programs.”); U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, FRAMEWORK TO END YOUTH HOMELESSNESS 11 (2013) (noting that LGBTQ people are “overrepresented” among homeless youth); BIANCA D.M. WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN LOS ANGELES FOSTER CARE 6 (2014), http://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_summary.pdf [<https://perma.cc/K543-N764>] (finding that nineteen percent of youths in out-of-home care in Los Angeles County identify as LGBTQ and that the percentage of LGBTQ youth in foster care is one-and-one-half to two times greater than the percentage of LGBTQ in the general population).

290. LGBT youth’s overrepresentation in the homeless and foster populations is largely and directly attributable to rejection by families of origin. See, e.g., CHOI ET AL., *supra* note 289, at 5; ANDREW CRAY ET AL., CTR. FOR AM. PROGRESS, SEEKING SHELTER: THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH 9 (2013); HUMAN RIGHTS CAMPAIGN, LGBTQ YOUTH IN THE FOSTER CARE SYSTEM 1–2 (2015).

291. Both of these findings are largely explained by the distinctive stresses of growing up queer in a homophobic and transphobic society. See Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 FUTURE OF CHILD. 67, 73 (2015).

Among the thousands of LGBT people who would like to adopt and the millions who have seriously considered it,²⁹² there are countless individuals who assume, are told, or learn from firsthand experience that the impediments between them and an adoptive child are numerous, steep, and go well beyond the prospect of discrimination based on sexual orientation and gender identity.²⁹³ Such “impediments,” as the term is used here, tend to cluster on the “demand” rather than “supply” side of the “adoption market.”²⁹⁴ Supply-side barriers relate to the quantity and characteristics of children eligible for adoption. The market’s so-called “shortage” of “healthy white infants” would fall into this category,²⁹⁵ as would policies geared toward preserving existing bonds between birth parents and their children—including the kinds of direct welfare provision that sometimes obviate the need to consider

292. See *supra* notes 266–269 and accompanying text.

293. The idea that adoption is difficult, while at least certain forms of ART are easy, echoes throughout the literature on why people choose the latter. See, e.g., Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 428 (acknowledging a common desire for biological children, but suggesting that “the current preference for ARTS” may have more to do with the “specific disadvantages of contemporary adoption practice”); Nicholas K. Park et al., *How Law Shapes Experiences of Parenthood for Same-Sex Couples*, J. GLBT FAM. STUD. 1, 17–18 (2015) (finding, in a study comparing same-sex couples’ paths to parenthood in California and Nebraska, that state “law was an important influence on [decisions about which] method to use to achieve parenthood”); Jurgen De Wispelaere & Daniel Weinsock, *State Regulation and Assisted Reproduction: Balancing the Interests of Parents and Children*, in FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES 131, 143 (Françoise Baylis & Carolyn McLeod eds., 2014) (arguing that the adoption process as presently constituted is so “burdensome . . . that adoption should not be regarded as equivalent to ART when it comes to satisfying” individuals’ desires to become parents).

294. For a paradigmatic use of precisely such economic terminology in this context, see RICHARD A. POSNER, *SEX AND REASON* 408 (1992).

295. Without minimizing the potential challenges of adopting transracially or adopting an older child, it makes little sense to treat (usually) white adopters’ strong preference for white children and many adopters’ preference for infants (as opposed to older children) as “barriers” to adoption. In addition to reinforcing the second-class status of children who do not match this description, there would seem to be few ethically defensible ways to increase the pool of adoptable babies who do match it. For relevant discussions, see GOLDBERG, *supra* note 114, at 49–50 (discussing the preference for infants); Pertman & Howard, *supra* note 195, at 29 (discussing the preference for healthy infants); JUDITH STACEY, *UNHITCHED* 62–63 (2011) (comparing the “white infants” that ARTs enable “[a]ffluent, mainly white couples” to parent with the “grab bag of . . . generally older, darker, and less healthy” children available from public adoption agencies); Michele Goodwin & Naomi Duke, *Parent Civil Unions*, 2013 U. ILL. L. REV. 1337, 1386 (2013) (discussing the preference for white infants); Scott Ryan & Courtney Whitlock, *Becoming Parents*, 19 J. GAY & LESBIAN SOC. SERV. 1, 6 (2008) (discussing the “unavailability of healthy children in public agencies”).

relinquishing a child at all.²⁹⁶ Policies like these should have particular resonance among LGBT people, who have ample experience with unjust estrangement, legal and otherwise, from their offspring.²⁹⁷

In contrast to many supply-side barriers, obstacles on the demand side of the adoption market tend to reflect irrational mistrust of non-biogenetic parenthood, not due regard for extant parent-child relationships.²⁹⁸ These obstacles include an “intrusive” and often “demeaning” screening process,²⁹⁹ endless paperwork and “red tape,”³⁰⁰ and confusing regulations that vary from one jurisdiction to another³⁰¹—all of which can be expensive to navigate³⁰²—as well as the collapse of the international adoption market³⁰³ and persistent discrimination based on age,³⁰⁴ sex,³⁰⁵ race,³⁰⁶ class,³⁰⁷ ability,³⁰⁸ and

296. For a powerful statement of the need for more rather than fewer protections and provisions of this sort, see generally DOROTHY ROBERTS, *SHATTERED BONDS* (2001).

297. See *supra* notes 208–209 and accompanying text. Its experience with discriminatory deprivations of parental rights is one reason why the LGBT community once accommodated “one of the most robust spaces of debate . . . about the politics of transracial and transnational adoption” LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 242, 257 (2012).

298. See BARTHOLET, *supra* note 136, at 48, 231 (arguing that “obstacles” in the “current regulatory framework” “signal adoption’s inferiority to the biologic family and proclaim the dangers allegedly inherent in raising children apart from their birth families”); Goldberg et al., *supra* note 272, at 132–33 (noting the influence of biogeneticist “ideology . . . [on] the social institution of adoption”).

299. Mahoney, *supra* note 116, at 50. See also MODELL, *supra* note 262, at 95 (describing “probing, intrusive, and humiliating” questions regarding, for example, “one’s sex life, contentment in marriage, and feelings for one’s parents”).

300. See MODELL, *supra* note 262, at 95 (describing “loads and loads of forms to fill out”); Susan Frelich Appleton & Robert A. Pollak, *Exploring the Connections Between Adoption and IVF: Twibling Analyses*, 95 MINN. L. REV. 60, 67 (2011) (“[T]he protective restrictions and other legal ‘red tape’ . . . discourage adoption but not [in vitro fertilization] . . .”).

301. Cahn & Hollinger, *supra* note 17, at 5 (describing a “complex web of different, and often inconsistent, . . . laws and . . . procedures at the state, national, and international level[s]”).

302. Goodwin & Duke, *supra* note 295, at 1341 (discussing “implicit and explicit economic criteria [that] often preclude working class and middle class . . . families from adopting”).

303. For a superb collection of essays on the contemporary state of international adoption, including several that argue for correcting and preventing abuses in that market (rather than abandoning it altogether), see generally *THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES* (Robert L. Ballard et al. eds., 2015).

304. See Sara C. Mills, *Perpetuating Ageism via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC’Y 69 (2011).

305. GOLDBERG, *supra* note 114, at 27, 70–71 (describing how stereotypes of men as “less effective nurturers and caretakers than women” influence the work of some social workers and adoption agencies).

marital status.³⁰⁹ An advocate concerned about lived equality in parenthood generally, as opposed to biogenetic parenthood specifically, would recognize these barriers as disparate impacts amenable to correction through direct services to constituents,³¹⁰ public education,³¹¹ government subsidies,³¹² and reform of the adoption process itself.³¹³

306. See Richard F. Storrow, *Marginalizing Adoption Through the Regulation of Assisted Reproduction*, 35 CAP. U.L. REV. 479, 512 (2006) (counting “de facto race matching” among agency practices that “complicate [potential parents’] ability to adopt”).

307. See Goodwin & Duke, *supra* note 295 and accompanying text.

308. See NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 185–92 (2012).

309. See ARIZ. REV. STAT. § 8-103 (prohibiting adoption by unmarried persons); UTAH CODE ANN. § 78B-6-117(3) (West 2016) (same). The Every Child Deserves a Family Act would prohibit federally funded adoption and foster care agencies from discriminating based on sexual orientation, gender identity, or marital status. H.R. 2449, 114th Cong. (2015).

310. Constituent education appears to be the only exception to the rule that individuals and institutions identified with the LGBT movement do not concern themselves with access to adoption beyond efforts to eradicate disparate-treatment discrimination. Certain organizations are devoted specifically to this kind of outreach, see generally *LGBT Adoptions*, LIFELONG ADOPTIONS, <http://www.lifelongadoptions.com/lgbt-adoption> [<https://perma.cc/YJK9-8F93>] (last visited Oct. 26, 2016), and some local LGBT groups regularly host information sessions about adoption and foster care. See, e.g., *Calendar of Events*, LESBIAN, GAY, BISEXUAL, & TRANSGENDER COMMUNITY CTR. (N.Y.C.), <https://gaycenter.org/calendar> [<https://perma.cc/C3L6-PNZZ>] (last visited Nov. 16, 2016) (advertising “parenthood planning workshops . . . [and] adoption, foster care, alternative insemination/IVF and surrogacy referrals”).

311. BARTHOLET, *supra* note 136, at 37–38, 77 (proposing to make useful information about adoption “available . . . to those suffering from infertility . . . early in their struggles” and to actively encourage people “capable of procreation to consider adoptive or foster parenting instead”); GOLDBERG, *supra* note 114, at 43 (describing “[m]any” gay adoptive fathers who “not[ed] that that the more they came to learn about adoption, the more it felt like a viable, attractive, and meaningful option to them”); Michele Goodwin, *The Free-Market Approach to Adoption*, 26 B.C. THIRD WORLD L.J. 61, 77 (2006) (advocating state-sponsored education campaigns about adoption).

312. Federal tax credits and special subsidies relating to children with special needs helped to more than double the annual number of adoptions from foster care. See Cahn & Hollinger, *supra* note 17, at 2. See also Carolyn J. Head, *Adopting the Right Incentives*, 9 J.L. ECON. & POL’Y 717, 727 (2013) (arguing for further financial incentives to “encourage[] . . . [people] to adopt”).

313. Some commentators have called for outright elimination of parental screening, concluding that the double standard applied to adoptive versus biological parents—whereby the former must undergo a rigorous test of fitness while the latter are presumed fit—is unjustifiable. McLeod & Botterell, *supra* note 23, at 151. A less drastic approach would be to assume the suitability of “[a]ll who want to become adoptive parents” and reduce the screening process to a bare minimum by pegging adoption standards to those “used to decide when children can be removed from blood-linked parents.” BARTHOLET, *supra* note 136, at 78.

More ambitiously, we might ask whether the LGBT community's distinctive kinship traditions, its "more fluid conceptions of 'family,'" can inspire new ways of thinking about when and how to support nurturing relationships between adults and other people's (usually biological) children.³¹⁴ Is it possible, for example, to "avuncularize" certain foster relationships, allowing children to form meaningful and even permanent attachments to individuals who presumably will not become their legal parents, but who are ready to take on, as needed, more or less parental responsibility?³¹⁵ The political, legal, and social hurdles to formalizing such arrangements may be too steep to overcome anytime soon,³¹⁶ but complementary—and comparably bold—proposals for "non-exclusive parenting" arrangements have garnered attention and admiration among experts on family law and child welfare.³¹⁷

In sum, whereas the logic of disparate impact discrimination dominates LGBT activism in the ART context, it is almost entirely absent in the adoption context. This disparity signifies a belief, however implicit or even unconscious on the part of individual actors, that

314. E-mail from Johanna Oreskovic, Law Professor, SUNY Buff. Law Sch., to author (Sept. 10, 2015, 11:23 AM) (on file with author).

315. *Id.* This proposal contemplates a significant departure from current legal practice.

[W]hen family law does recognize the efforts of nonparental caregivers who lack biological or legal ties to a child, it does so only where they have assumed completely parental roles and responsibilities. . . . [It] is decidedly less comfortable recognizing nonparents when they are not functioning as parents, but rather, *with* parents in providing care.

Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387 (2008).

316. The Supreme Court has jealously guarded the bright line that separates parenthood from all other adult-child relationships. In 1977, a six-justice majority declined to hold that foster parents have a constitutional interest in a relationship with their foster children, while three justices went out of their way to deny such an interest, stating that "any case where . . . foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure." *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 847 (1977); *id.* at 861 (Stewart, J., concurring). Twenty-three years later, in a case involving grandparents who sought, over their daughter-in-law's objection, to maintain a relationship with their grandchildren, the Court struck down a state statute authorizing visitation rights for "any person" who could show that visitation was in the best interest of the child. *See Troxel v. Granville*, 530 U.S. 57 (2000).

317. *See, e.g.*, Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007); Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835 (2000); Murray, *supra* note 315.

biogenetic parenthood is a more worthwhile priority, a more important prerogative, than adoptive parenthood. This belief persists despite the disproportionately large quantity of LGBT children legally estranged from their biological families, despite continued interest among many LGBT people in adopting, and despite the wide range of reforms that the movement might consider were it to imagine equality in adoption as capaciously as it now imagines equality in procreation.

In neither context, however, should the goal be to secure children for prospective parents by any means possible. Just as there are non-discriminatory motivations for any number of restrictions on ARTs, there are legitimate reasons for certain “impediments” to adoption—particularly, again, on the so-called “supply side . . . of the adoption market.”³¹⁸ The desire to have a child, whether adoptive or biological, must be balanced against other, sometimes weighty, considerations. Regardless of the type of parenthood at issue, cases of disparate-impact discrimination demand a different kind of analysis than cases of disparate treatment. In debates over the former, LGBT activists cannot presume to hold the moral high ground they rightfully occupy in debates over the latter. There may be some efforts to expand access to parenthood in which it is inappropriate to don the mantle of equality and irresponsible to raise the specter of discrimination.³¹⁹

B. The Perilous Right to Procreate

The previous section described how barriers to LGBT procreation are held to a higher standard of equality than barriers to LGBT adoption. Perhaps this double standard is justified? Procreation, after all, is a fundamental right, protected as such under international law and the United States Constitution.³²⁰ Adoption is not.

318. *See supra* note 294 and accompanying text.

319. As legal theorists Mark Kelman and Gillian Lester have argued regarding the use of discrimination frameworks to justify channeling educational resources to learning disabled students, “[m]any perfectly just claims—as well . . . [some] that are either intrinsically unworthy or must be balanced against competing concerns—are *not*,” properly understood, “civil rights claims” Mark Kelman & Gillian Lester, *Ideology and Entitlement*, in *LEFT LEGALISM/LEFT CRITIQUE* 134, 163 (Wendy Brown & Janet Halley eds., 2002).

320. On the right’s status under the Constitution, *see infra* notes 333–352. On its implicit protection under international law, *see*, for example, G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights, art. 23 (naming “[t]he right of men and women of marriageable age to marry and to found a family”); G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights, art. 10 (Dec. 16, 1966) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment”). *See also* U.N. HUMAN RIGHTS COMM., General Comment No. 19 art. 23 (Thirty-ninth session 1990), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&docid=45139bd74&skip=0&publisher=HRC&>

We have heard this distinction before—most gallingly in *Lofton v. Department of Children & Family Services*,³²¹ a challenge to Florida’s prohibition of “adoption by any ‘homosexual’ person,”³²² the same ban we encountered earlier in connection with Anita Bryant’s “Save Our Children” crusade of 1977.³²³ Lead plaintiff Steven Lofton was a pediatric nurse who had “raised from infancy three . . . foster children,” all of them HIV-positive.³²⁴ Lofton argued, *inter alia*, that Florida’s ban discriminated against gay people in violation of the Equal Protection Clause of the Fourteenth Amendment and unjustifiably burdened his right under *Lawrence v. Texas*³²⁵ to choose same-sex relationships.³²⁶ In 2014, the Eleventh Circuit rejected all of Lofton’s claims, emphasizing that “there is no fundamental right to adopt, nor any fundamental right to be adopted.”³²⁷ To the contrary, it said, “‘adoption . . . is a statutory privilege.’ Unlike biological parenthood, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state.”³²⁸

The distinction between a right and a statutory privilege was no answer to the main constitutional grievances at issue in *Lofton*, as Judge Rosemary Barkett maintained in a commanding and ultimately vindicated dissent.³²⁹ Nor is the right/privilege distinction an answer here to the charge that LGBT parenthood advocacy takes a more robust view of equality in procreation than of equality in adoption. The distinction fails even as a matter of strategy. If adoption proponents lack recourse to the politically potent discourse of fundamental rights,

querysi=Thirty-ninth%20session%201990&searchin=fulltext&sort=date (“The right to found a family implies, in principle, the possibility to procreate and live together.”).

321. 358 F.3d 804 (11th Cir.), *reh’g denied en banc*, 377 F.3d 1275 (11th Cir. 2004).

322. *Id.* at 806–07.

323. *See supra* notes 188–192 and accompanying text.

324. *Lofton*, 358 F.3d at 807.

325. 539 U.S. 558 (2003).

326. *Lofton*, 358 F.3d at 809.

327. *Id.* at 812.

328. *Id.* at 809 (quoting *State Dep’t of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1216 (Fla. Dist. Ct. App. 1993)).

329. *See Lofton v. Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1310 (11th Cir. 2004) (Barkett, J., dissenting) (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)) (insisting that “the Supreme Court long ago rejected the rights/privileges distinction”). Judge Barkett’s dissent was one of the earliest and one of the only judicial opinions to say that *Lawrence v. Texas*, 539 U.S. 558 (2003), recognized a fundamental right. That interpretation was explicitly endorsed in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015) (stating that *Bowers v. Hardwick*, 478 U.S. 186 (1986), “upheld state action that denied gays and lesbians a fundamental right”). Five years before *Obergefell*, Florida’s ban on adoption by homosexual persons was invalidated under the equal protection clause of the state constitution. *See Fla. Dep’t of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

they can nevertheless appeal, as ART proponents cannot, to the wellbeing of thousands of live children.³³⁰ Of course this is more than a point about relative rhetorical advantage. Just as one might think, as law professor Elizabeth Bartholet asserts, that “a sane and humane society should encourage people to provide for existing children rather than bringing more children into the world,”³³¹ one could likewise argue that access to adoption should be a more pressing movement priority than access to reproductive technologies. That is not the argument here—to correct the procreation/adoption hierarchy is not necessarily to invert it—but Bartholet’s reasoning illuminates why, morally and politically, the right to procreate’s constitutional pedigree does nothing to excuse the ART-adoption double standard.

And what, exactly, is meant by a “right to procreate?” Normally the term refers to one of two entitlements. The first, a right “very simply . . . to have natural children,”³³² could be thought to serve a number of human interests, among them species survival, bodily integrity, sexual autonomy, and personal longings for genetic immortality. The second, a compound right to both have and rear one’s “natural children,”³³³ presumably serves many of the desires (surveyed

330. The number of children eligible for adoption in the United States is consistently above 100,000. See U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT No. 21, at 1 (2014), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf> [<https://perma.cc/2DLY-8N3F>].

331. BARTHOLET, *supra* note 136, at 35–36. See also Head, *supra* note 312, at 718 (“[G]iven the choice between adoption and IVF, it is more beneficial to society for prospective parents to choose adoption.”).

332. See *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988) (stating that right to procreate, “whether through sexual intercourse or artificial insemination,” does not extend to “[t]he custody, care, companionship, and nurturing that follow birth”); Aditi Gowri, *Reproduction, Rights and Public Policy: A Framework for Assessment*, 35 TEX. INT’L L.J. 13, 22 (2000) (speaking of a “right to reproduce oneself”); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 782 (2001) (interpreting *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942), to have protected “procreation for social survival”).

333. See John Lawrence Hill, *What Does It Mean to Be A ‘Parent’?*, 66 N.Y.U. L. REV. 353, 368–69 (1991) (arguing that “exercising the right of procreation is sufficient to make one a ‘parent’ in the legal sense” and that the right would be “virtually empty” if it were not); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 406 (1983) [hereinafter Robertson, *Control of Conception, Pregnancy, and Childbirth*] (asserting that the right to procreate includes the rights “to become pregnant and to parent”); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 447 (2003) (“[T]he liberty or freedom to have offspring involves the freedom to take steps or make choices that result in the birth of biologic offspring”); Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 827–33 (speaking of a “right to produce one’s own children to rear”).

in Part II above) that inform the ubiquitous preference for biological children, as well as society's perceived interests in making individuals (rather than the community) primarily responsible for the care of children.³³⁴ In the case of women, the compound right to procreate also evinces respect for maternal attachments formed during pregnancy.

Only in the first of these two guises—and only retrospectively—has the right to procreate been the basis of a Supreme Court holding. In 1942, *Skinner v. Oklahoma ex rel. Williamson*³³⁵ invalidated a compulsory sterilization law on the ground that it “r[an] afoul of the equal protection clause.”³³⁶ In dicta, the Court stated that “the right to have offspring” is “one of the basic civil rights of man”—“basic,” that is, “to the perpetuation of a race.”³³⁷ More than sixty years later, in *Obergefell*, the Court gave this dicta the dignity of a holding, citing *Skinner* among several precedents that, implicating “precepts of liberty and equality,” were decided “under [both] due process and equal protection principles.”³³⁸

The picture is murkier when it comes to the compound version of the right to procreate. On the one hand, several Supreme Court rulings have mentioned in a single breath “rights to conceive and to raise one's children.”³³⁹ In one of those decisions, the Court specifically noted that “the usual understanding of ‘family’ implies biological relationships, and most [of our] decisions treating the relation between parent and child have stressed this element.”³⁴⁰ On the other hand, whenever unmarried fathers have pressed claims to a legal relationship with their offspring, the Court has consistently held that the genetic tie, in and of

334. On the relationship between a biogenetic understanding of legal parenthood and the privatization of responsibility for children, see generally Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008).

335. 316 U.S. 535 (1942).

336. *Id.* at 536.

337. *Id.* at 536, 541.

338. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (emphasis added). See also Courtney Megan Cahill, *Obergefell and the “New” Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 8 (2016) (“*Obergefell* provides an opening for what many . . . see lacking in *Skinner*: a robust articulation of procreation's substantive constitutional dimension.”).

339. See *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975) (same); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (same).

340. *Smith*, 431 U.S. at 843.

itself, does not endow a person with constitutionally protected parental rights.³⁴¹

The boundaries of the right to procreate in American law are nothing if not “unsettled,” to recall Professor Obama’s apt description.³⁴² Decisions from lower courts reveal considerably more about what the right does not protect than what it does.³⁴³ Only a handful of judgments have invalidated state action on this ground,³⁴⁴ and in two such cases the court took pains to indicate how the government could accomplish essentially the same infringement without violating the Constitution.³⁴⁵ A substantially greater number of decisions have upheld or imposed both outright deprivations and more narrow curtailments: a regulation outlawing uncompensated sperm donation;³⁴⁶ a probation condition barring a man from siring additional

341. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127, 130 (1989); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392, 394 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

342. See *supra* note 97 and accompanying text. Scholars tend to affirm Obama’s assessment, regardless of their particular views on what the right to procreate ought to protect. See, e.g., Carbone, *supra* note 185, at 357 (calling the right’s “boundaries . . . largely a matter of speculation”); Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 7, 10 (2007) (criticizing “[c]ommon formulations of the procreative right [as] remarkably imprecise” and urging a “narrow” interpretation of it); Robertson, *Control of Conception, Pregnancy, and Childbirth*, *supra* note 333, at 406 (articulating an expansive vision of the right to procreate, but acknowledging that the right is “ill-defined and in some respects unprotected by the law”).

343. I deal here only with decisions, not overturned on appeal or by subsequent case law, in which a court squarely holds that a policy violates—or, more often, does not violate—the right to procreate.

344. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002) (holding a state law unconstitutional insofar as it made a “preclusive or conclusive” presumption that a gestational surrogate, rather than the genetic mother, was the legal mother of the resulting child); *In re Adoption of an Adult by V.A.*, 683 A.2d 591, 595 (N.J. Super. Ct. Ch. Div. 1996) (holding that the right to procreate required an adoption petitioner to give notice to “a natural father of . . . proceedings [that would] terminate his parental rights”); *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (striking an Illinois ban on fetal experimentation that was motivated by opposition to abortion but whose wording was broad enough to forbid certain IVF techniques); *Robinson v. Rand*, 340 F. Supp. 37, 41 (D. Colo. 1972) (invalidating an Air Force regulation providing for immediate discharge of pregnant members).

345. See *State v. Talty*, 814 N.E.2d 1201, 1205 (Ohio 2004) (striking a probation provision that prohibited a man convicted of criminal nonsupport of dependents from fathering more children, but suggesting that the condition would have been constitutional had it allowed suspension of the prohibition upon fulfillment of existing support obligations); *Smith v. Superior Court*, 725 P.2d 1101, 1104 (Ariz. 1986) (holding that, absent specific statutory authorization, a trial court did not have jurisdiction to impose sterilization as a condition of convicted child abusers’ reduced sentences).

346. *Doe v. Hamburg*, No. C-12-3412 EMC, 2013 WL 3783749, at *1 (N.D. Cal. July 16, 2013).

children until he could fulfill current support obligations;³⁴⁷ an order enjoining a “homeless . . . drug abuser” from further childbearing until she could take care of extant offspring;³⁴⁸ judicial approval of a guardian’s petition to sterilize her mentally incompetent adult daughter;³⁴⁹ an employment compensation plan’s treatment of maternity leaves a voluntary resignations “without good cause;”³⁵⁰ and rules denying prisoners conjugal visits³⁵¹ and preventing them from sending sperm to their wives for the purpose of insemination.³⁵²

Readers uncomfortable with any of the rulings just cited will have reason to cheer an LGBT movement that, seeking to protect its own constituents’ procreative liberty, could potentially expand that freedom for all. Already LGBT plaintiffs are alleging that ART regulations violate their right to procreate,³⁵³ and it seems likely that the winds of marriage equality will blow more such claims into court.³⁵⁴ Diane Hinson, founder and owner of a Maryland-based law firm and surrogacy agency, predicts that, “[j]ust as it took a Supreme Court ruling for same-sex couples to obtain the right to marry nationwide, it

347. The probationer in this case had been convicted of criminal nonpayment of child support. *State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001). See also *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998) (sustaining probation conditions that require convicted child abusers to complete drug-abuse treatment and anger-management courses before having more children).

348. *In re V.R.*, No. 5616-04, 2004 WL 3029874, at *1 (N.Y. Fam. Ct., Monroe Cty. Dec. 22, 2004).

349. *Estate of C.W.*, 640 A.2d 427 (Pa. Super. Ct. 1994). See also *Conservatorship of Valerie N.*, 707 P.2d 760 (Cal. 1985) (holding that a law barring a guardian from making this choice on behalf of her mentally incompetent ward violates the latter’s procreative liberty).

350. *Sokol v. Smith*, 671 F. Supp. 1243, 1245–46 (W.D. Mo. 1987) (rejecting plaintiffs’ claim that the law violated the “fundamental right to reproductive freedom”). See also *McQuiston v. City of Clinton*, 872 N.W.2d 817, 835 (Iowa 2015) (holding that refusal to assign pregnant employee to “light duties” did not violate the right to procreate).

351. See *Vaughn v. Hvass*, No. C4-99-2184, 2000 WL 730671 (Minn. Ct. App. June 6, 2000).

352. See *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002); *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990).

353. See Second Amended Complaint, *supra* note 6 at 3, 18–21 (challenging New Jersey insurance mandate’s heterosexist definition of infertility as a violation of the right to procreate); Appellee’s Answer Brief at 25 n.12, *D.M.T. v. T.V.H.*, 129 So. 3d 320 (Fla. 2013) (No. SC12-261) (alleging that, as applied to a woman who donates ova to her same-sex partner with the intent to raise the resulting child together, a law that withholds parental status from gamete donors violates the genetic mother’s constitutionally protected rights “to procreate and parent [one’s] child”); Appellant’s Opening Brief at 49–51, *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Cal. Ct. App. 1 Dist. 2004) (No. A101754) (claiming that it violates the “fundamental” right to procreate to apply a law similar to the one at issue in *D.M.T. v. T.V.H.* to a woman who donates ova to her same-sex partner with the intent to raise the resulting child together).

354. See *supra* notes 4–5, 327 and accompanying text.

may similarly require a legal challenge and a Supreme Court ruling for same-sex couples to gain the nationwide right to procreate by gestational surrogacy.³⁵⁵

But there are dangers here. Consider, first, the “expressive harms”³⁵⁶ to nonbiological families that often attend invocations of the right to procreate. The LGBT movement’s campaign for marriage equality is instructive in this respect. Not all constitutionally protected liberties are culturally valorized, but some, like marriage and procreation, clearly are—at least for large segments of the population.³⁵⁷ Just as LGBT efforts to win the right to marry trumpeted “gay couples’ yearning for the dignity of matrimony” and their “subscription to the sentimental ideology of marriage,”³⁵⁸ it will be exceedingly difficult to affirm the right to procreate without affirming—or, at least, being taken to affirm—the dominant (i.e., biogeneticist) ideal of procreation.³⁵⁹

To their credit, the major LGBT litigation firms continue to keep a safe distance from arguments grounded exclusively in biogenetic affinity and from rhetoric that might demean nonbiological parenthood.³⁶⁰ Other advocates are not so careful. A recent challenge to New Jersey’s insurance mandate features allegations that the law’s heterosexual definition of infertility violates the constitutional right to procreate by keeping “women in same-sex relationships” from having children in the “*most effective and healthiest way possible*” and by

355. Diane S. Hinson, *Parentage Rights for Same-Sex Couples: State-by-State Gestational Surrogacy Laws*, 38 FAM. ADVOC. 42, 45 (2016).

356. “An expressive harm is one that results from the ideas or attitudes expressed through a[n] . . . action, rather than from the more tangible or material consequences the action brings about.” Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993).

357. See, e.g., ROBERTS, *supra* note 39 (documenting a range of contexts in which African-American reproduction and parenthood are devalued and discouraged).

358. Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. HUMAN. 1, 76 (2015).

359. The Supreme Court went out of its way to suggest that same-sex couples’ receipt of the right to marry was contingent on precisely such an affirmation. “Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

360. See *supra* notes 200–203 and accompanying text. See, e.g., Brief of Amici Curiae ACLU Foundation, ACLU of Florida, and Lambda Legal in Support of Appellee at 2, 20, *D.M.T. v. T.V.H.*, 129 So. 3d 320 (Fla. 2013) (No. SC12-261) (arguing, in a case where one of the plaintiff’s own arguments relied substantially on the “fundamental right to procreate and raise children,” that the court could reject that argument but still intervene to “protect [a] psychological parent-child relationship”); Appellant’s Opening Brief on the Merits at 58–59, *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Cal. Dist. Ct. App. 2004) (No. A101754) (“[I]t is the *relationship* a biological parent develops with his or her child that is worthy of constitutional protection.”) (internal quotations omitted) (citation omitted).

“denying some the opportunity to have children *at all*.”³⁶¹ Comparable things are said about gestational surrogacy, often cast as “the *only* means by which a gay couple can have a child.”³⁶² Recall, too, the startling submission that surrogacy bans violate reproductive freedom because, “[f]rom the standpoint of a couple whose only hope of procreating is through the assistance of a surrogate, a law that criminalizes that assistance is no different than [a] law providing for the sterilization of convicted felons.”³⁶³ As telling as this claim’s rather extravagant analogy is the “standpoint” it assumes. The heartrending image of a couple with but one “hope of procreating” inevitably trades on a preference for biological children that most readers can be presumed to share. Most judges too. Recently, in a relationship-dissolution dispute between a birth mother and a genetic mother, no less progressive a bench than the California Supreme Court pointedly endorsed “the sanctity of the biological connection.”³⁶⁴

Such language does more than inflict expressive harm. Legal doctrine is built of rhetoric, and rhetoric like this points in disturbing doctrinal directions. Rulings grounded in the “sanctity” of biogenetic parenthood could undermine instrumentalist rationales for procreative liberty—concerns about bodily autonomy, and about sexual and relational liberty—that seem more congruent with core LGBT-movement values.³⁶⁵ They could sow the seeds of a constitutional right to pursue “prenatal interventions” that, however wishfully, seek to eradicate homosexuality in offspring.³⁶⁶ They could buttress constitutional doctrines that draw a sharp distinction between familial and nonfamilial, biological and nonbiological, relationships—the same doctrines that already hinder some of the more creative adoption

361. Second Amended Complaint, *supra* note 6, at 17–18 (emphasis added). Although individuals precluded from adopting conceivably could be counted among those who, without coverage of IVF, would be “den[ie]d . . . the opportunity to have children at all,” there is no indication in the complaint that this formulation refers to anyone but those whose “financial stability” is put at risk by pursuing assisted procreation. *Id.*

362. Knaplund, *supra* note 96, at 930 (emphasis added).

363. Nicolas, *supra* note 71, at 1281.

364. *D.M.T.*, 129 So. 3d at 335 (expressing suspicion of “anything that would sever the biological parent-child link”).

365. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077 (1998) (arguing that constitutional rights relating to procreation derive from privacy interests in bodily integrity and interpersonal (often sexual) relationships); *cf.* Dillard, *supra* note 342, at 50 (positing a very limited conception of the right to procreate and arguing that appeals to “personal autonomy and bodily integrity,” though persuasive when it comes to the right *not* to procreate, are for various reasons unavailing when it comes to the right *to* procreate).

366. For an argument in favor of such a right and a thoughtful presentation of the relevant science, see TIMOTHY F. MURPHY, *ETHICS, SEXUAL ORIENTATION, AND CHOICES ABOUT CHILDREN* (2012).

reforms contemplated in the previous section.³⁶⁷ By the same token, constitutionalizing “the sanctity of the biological connection”³⁶⁸ might embolden judges in same-sex custody disputes—including disputes upon dissolution of marriage—to “weigh genetic connections . . . in favor of . . . the genetic parent.”³⁶⁹

More broadly, decisions that affirm the fundamental right to procreate in biogeneticist terms can only fortify what Professor Katharine Baker calls a “bionormative” parentage regime.³⁷⁰ This is a regime whose vices run with—and may well outstrip—its virtues. Its “private, exclusive, and binary” model of parenthood saves the state money by “identify[ing] two private sources of financial support for each child,”³⁷¹ but the results of this parsimony are abominable—a society that trails the industrialized world in child-directed social welfare provision and a child support system that leaves millions of minors impoverished. This is a regime that fashions a sphere of autonomy cherished by some parents but whose violation is often the price of state support.³⁷² And while this bionormative regime doubtless gives many individuals a sense of security in their legal status (“[a]s a matter of biology, one is or is not a parent”), the fact remains that official recognition of functional or multiple parental relationships is, as LGBT advocates have long contended, sometimes in a child’s best interest.³⁷³

In short, access-to-ART arguments grounded in a fundamental right to procreate tread on treacherous territory. The dangers of these claims, as we have seen, are twofold: they carry a constant risk of glorifying biological reproduction at the expense of adoption; and they

367. See *supra* notes 320–321, 329 and accompanying text. See also *Belle Terre v. City of Boraas*, 416 U.S. 1, 1 (1974) (upholding an ordinance that reserved one-family dwellings to traditional families or “not more than two unrelated persons”).

368. *D.M.T.*, 129 So. 3d at 335.

369. Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 338 (2016) (referencing “the long history linking genetics to parental legal rights”).

370. Baker, *supra* note 27. See also Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 348 (2008) (meticulously describing the ways in which society, despite an expansion of “autonomous choice in shaping family relationships,” has grown only “more obsessed with the biological (and especially the genetic) correlates of family”).

371. Baker, *supra* note 27, at 671, 677, 692–96, 701 n.259. Ironically, the construction of parenthood as private and binary also conscripts non-biological fathers into child support obligations, “[s]ometimes . . . simply because the biological father cannot be found.” *Id.* at 674. In these cases “[t]he law adheres to biology’s binary commandment even as it ignores biology itself.” *Id.* at 674–75.

372. *Id.* at 678–81.

373. *Id.* at 680–84, 697–99.

invite judges to ensconce a preference for biological relationships in our family law and constitutional jurisprudence.

CONCLUSION

The Argonauts, one of the most acclaimed pieces of creative nonfiction in recent memory, is a candid and theoretically sophisticated account of author Maggie Nelson’s journey to parenthood—first as de facto stepmother to the son of transgender video artist Harry Dodge, then as biological mother of the child that, using donor sperm, she had with Dodge not long after their marriage. Throughout the book, Nelson grapples with a conundrum formulated in terms borrowed from philosopher Judith Butler: “When [and] how do *new kinship systems mime older nuclear-family arrangements* [and] when and how do they *radically recontextualize them in a way that constitutes a rethinking of kinship*?”³⁷⁴ At one point in the memoir, Nelson derides “the notion of having children as the ticket—perhaps the only ticket—to a meaningful life,” and she hails the “long history of queers constructing their own families—be they composed of peers or mentors or lovers or ex-lovers or children or non-human animals”³⁷⁵ Elsewhere, though, she bristles at the assumption that there is a necessary “opposition” between “queerness and procreation,”³⁷⁶ and she proposes to define “queer family . . . as an umbrella category under which baby making might be a subset, rather than the other way around.”³⁷⁷

This Article shares Nelson’s queer vision of the family as a social form that neither excludes nor privileges reproductive parenthood. Its critique, rooted in that vision, has aimed not at LGBT procreation, but at the biogenetic bias that marks in subtle but important ways political efforts to facilitate LGBT access to reproductive technologies. The Article’s normative recommendations follow predictably from there. LGBT advocates should hold fast to their movement’s venerable anti-biogeneticist heritage. Individuals and organizations seeking to expand opportunities for LGBT parenthood should pursue at least equally audacious goals for adoption as for ARTs, and they should show restraint and sensitivity, sometimes to the point of forbearance, in their invocations of a right to procreate.

Disavowing the ART-adoption double standard and cautiously deploying the right to procreate clearly would redound to the benefit of the many LGBT people who do or might wish to adopt, as well as the

374. MAGGIE NELSON, *THE ARGONAUTS* 14 (2015) (quoting *The Body You Want: Liz Kotz Interviews Judith Butler*, ARTFORUM 82, Nov. 1992).

375. *Id.* at 71–72.

376. *Id.* at 13.

377. *Id.* at 72.

thousands of adoptive families that LGBT people have already created.³⁷⁸ Less obvious, perhaps, is what past, present, and future LGBT users of reproductive technologies stand to gain. Here we must not forget that these unconventional procreators also find themselves at a significant remove from the apex of biogeneticism's hierarchy. Their need to have offspring via *assisted* reproductive technologies, their failure to procreate "naturally," renders them deficient in a kinship system that takes coitus as its primary "symbol" and that prizes children as incarnations of conjugal love.³⁷⁹ Within this dominant system, reproductive technologies promise, at best, a bloodless imitation of "the real thing."³⁸⁰

Ultimately, then, the very biogeneticism that goes so far in explaining the rise of ARTs belittles the families that ARTs enable.³⁸¹ This ideology also belittles adoption, of course, but since adoption, in its paradigmatic form, has no biological basis whatsoever, it goes farther and is less equivocal in challenging the dogma that demeans it. So long as adoption is seen as inferior, families created by ART will necessarily suffer the same fate, because families created by ART share the same imagined defect. Assisted procreation cannot be equal until adoption is too.

378. "Nearly 27,000 same-sex couples are raising an estimated 58,000 adopted and foster children in the United States." GATES, *supra* note 267, at 1.

379. See *supra* notes 45–49 and accompanying text.

380. See Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003) (tracing the history of American adoption law).

381. For a complementary argument, see Storrow, *supra* note 306, at 516 (arguing that ART regulations "justified in terms of optimal rearing conditions, a child's right to know, or [on the ground] that heterosexual marriage has no value apart from the children it produces . . . [are] based on a narrow view of . . . family" that sees adoption as "a substandard form of parenting . . ."). Similarly, bioethicist and legal scholar Sonia Suter suggests that certain gay-equality arguments for permitting in vitro gametogenesis could be taken to imply "that the families created by same sex (or, for that matter, dual-gendered infertile couples who rely on donor gametes) are inferior to families that straight (fertile) couples can create." See Suter, *supra* note 187, at 18.