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# ASSISTED REPRODUCTION INEQUALITY AND MARRIAGE EQUALITY

SEEMA MOHAPATRA, JD, MPH \*

“The first bond of society is marriage; next, children; and then the family.”<sup>1</sup>

-Justice Kennedy, *Obergefell v. Hodges*.

## I. INTRODUCTION

Marianne and Erin Krupa, a married lesbian couple, have been trying to have a baby via in vitro fertilization for three years.<sup>2</sup> Between the two of them, they have suffered six miscarriages.<sup>3</sup> They have spent over \$50,000 on infertility treatments.<sup>4</sup> Although New Jersey is one of fifteen states that requires health insurance companies to offer or cover infertility coverage, the Krupas do not meet New Jersey’s definition of infertility.<sup>5</sup> The Krupas, along with another lesbian couple, have brought suit against the New Jersey Department of Banking and Insurance, based on the claim that the insurance mandate discriminates against their sexual orientation.<sup>6</sup> This Article considers this timely case study in light of the much-heralded *Obergefell v. Hodges* decision and the Affordable Care Act’s nondiscrimi-

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (quoting CICERO, DE OFFICIIS 57 (W. Miller transl. 1913)).

2. Megan Julia, *4 Lesbians Sue Over New Jersey Rules on Fertility Treatment*, N.Y. TIMES, Aug. 8, 2016, <http://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html>.

3. *Lesbian Couple Sues New Jersey Over Infertility Treatment Law*, CBS NEWS, (Aug. 29, 2016, 6:51 AM), <http://www.cbsnews.com/news/lesbian-couple-sues-new-jersey-over-infertility-treatment-law/>.

4. Julia, *supra* note 2.

5. N.J. STAT. ANN., §17B:27–46.1x (West 2016). New Jersey law’s definition of infertility only anticipates opposite-sex couples. In New Jersey’s statute infertility “means the disease or condition that results in the abnormal function of the reproductive system such that a person is not able to: impregnate another person; conceive after two years of unprotected intercourse if the female partner is under thirty-five years of age, or one year of unprotected intercourse if the female partner is thirty-five years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to live birth.” *Id.*

6. *Lesbian Couple Sues New Jersey Over Infertility Treatment Law*, *supra* note 3.

nation protections. In *Obergefell*, Justice Kennedy declared that “marriage is fundamental under the Constitution” and should “apply with equal force to same-sex couples.”<sup>7</sup> This article examines how the advent of marriage equality may impact the rights of same-sex couples to have biological children via assisted reproduction and surrogacy. Specifically, this article points out the ways that the *Obergefell* decision affects the law of infertility. By the law of infertility, I mean the laws that require insurance coverage of infertility treatments and other assisted reproductive technologies (“ART”). Because same-sex couples are not able to have biological children with each other without ART, they are functionally infertile. However, insurance companies and state statutes use a medical definition of infertility. I suggest that this conception must change in order for same-sex couples to enjoy the same ART benefits that heterosexual couples enjoy.

Part II of this Article examines the *Obergefell* decision as a backdrop for the impetus for legal change in the realm of increased access to ART. Part III paints a landscape of how infertility treatment is provided in the United States, and the potential roadblocks for same-sex couples. In this section, I discuss access to infertility and ART services for same-sex couples. Part IV provides an overview of the opportunities and challenges for biological parenthood via surrogacy for same-sex couples.<sup>8</sup> Part V suggests reform efforts that may be needed for the law to be updated to accommodate for same-sex access to these services. Part V also suggests that equality may not be enough, as ART access in the United States is often more a matter of one’s bank account than their sexual orientation. I suggest efforts for activism in this realm to open up ART beyond its typically white, upper-middle-class patrons to all those who wish to have a biological child.

## II. *OBERGEFELL* AND OPPORTUNITIES FOR INCREASED ART ACCEPTANCE

Although scholars and activists have long noted the lack of access to assisted reproduction in gay and lesbian couples,<sup>9</sup> *Obergefell v. Hodges* and

7. *Obergefell*, 135 S. Ct. at 2589.

8. This article will focus on ART services such as IVF and surrogacy. In a few years, it may be possible for LGBT individuals to have uterine transplants. This may be most appealing to a transwoman who wishes to carry a pregnancy. At this current time, uterine transplantation is experimental. However, the state of technology is so rapid, and that this may actually be a possibility as a potential of biological parenthood. See Kavita Shah Arora & Valarie Blake, *Uterus Transplantation: Ethical and Regulatory Challenges*, J. MED. ETHICS 396, 396 (2013).

9. John Robertson has been one of the earliest and most renowned scholars advocating for procreative liberty for LGBTQ couples. See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 331 (2005).

the ACA's nondiscrimination provision provide an impetus for legal equality. ART is "an important tool for leveling the procreative playing field for lesbian, gay, bisexual, and transgender individuals ("LGBT") who seek to procreate in familial units that do not have the potential for coital reproduction."<sup>10</sup> Professor Kimberly Mutcherson rightly notes that ART allows LGBT individuals to build biologically-related families.<sup>11</sup> Equal access to ART can be culled from *Obergefell v. Hodges*' focus on the parenthood rights of LGBT individuals.

### A. *Obergefell v. Hodges* and ART Access for LGBT Couples

In justifying the decision to grant marriage rights to gay couples, Justice Kennedy, in the majority opinion in *Obergefell*, notes that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."<sup>12</sup> Kennedy also states that marriage affords "the permanency and stability important to children's best interests."<sup>13</sup> Kennedy specifically acknowledges that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."<sup>14</sup> These excerpts demonstrate the Supreme Court's contemplation of same-sex couples participating in all the same activities and institutions as opposite-sex couples, principally childrearing.

By mentioning biological parenthood in the context of marriage equality, the Supreme Court accepts that same-sex couples can and do have biologically related children via ART. Thus, the *Obergefell* decision acknowledges the reality of gay parenthood, including gay "biological" parenthood, and dispels false stereotypes about gay parents as somehow deviant.<sup>15</sup> Although *Obergefell* does not create a right to biological parenthood, Justice Kennedy mentions the right of gay and lesbian couples to "marry, establish a home and bring up children."<sup>16</sup> For many people, the right to marry is incomplete without the right to have children.<sup>17</sup> An estimated 30% of married same-sex couples have children, and are raising

10. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 41 (2015).

11. *Id.*

12. *Obergefell*, 135 S. Ct. at 2600.

13. *Id.* at 2600.

14. *Id.*

15. Courtney Megan Cahill, *Obergefell and the "New" Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016).

16. *Obergefell*, 135 S. Ct. at 2600. (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

17. Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples*, L.A. LAW., Jul.-Aug. 2016, at 12.

nearly 200,000 children.<sup>18</sup> Many married same-sex couples turn to surrogacy or adoption to grow their families.<sup>19</sup> Although some fear that marriage equality will not mean equality in parenthood,<sup>20</sup> optimistically the *Obergefell* decision may lead to broader acceptance of assisted reproduction, such as surrogacy.<sup>21</sup>

Professor Courtney Cahill notes *Obergefell* suggests that procreation is a constitutionally protected liberty right by acknowledging the interconnectedness of marriage and procreation by calling them “related rights” that compose a “unified whole.”<sup>22</sup> *Obergefell* may bring constitutional parity between sexual and assisted reproduction.<sup>23</sup> Professor Douglas NeJaime deems family-based LGBT equality as “particularly significant to the status of assisted reproduction, which is central to same-sex family formation.”<sup>24</sup> He suggests that marriage equality has the potential to normalize numerous types of ART for all families, including surrogacy.<sup>25</sup>

I agree with the scholars who suggest that the *Obergefell* ruling “extends constitutional shelter to choices concerning . . . family relationships, procreation, and childrearing.”<sup>26</sup> It also establishes a constitutional norm of sexual orientation equality in marriage as the “related rights” of childrearing and procreation.<sup>27</sup> *Obergefell* now leads to the notion that parenthood should accommodate same-sex couples.<sup>28</sup> This article argues that, with this backdrop of marriage equality, there is a push towards assisted reproduction equality. Couples like the Krupas are desperate to have children who are biologically related to them.<sup>29</sup> Their state recognizes their marriage, but there is a question about whether it affords them the same opportunity for ART as it does to opposite-sex infertile couples.

18. June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 663 (2016).

19. Jeang, *supra* note 17, at 12.

20. Carbone & Cahn, *supra* note 18, at 663.

21. *Id.*

22. Cahill, *supra* note 16.

23. *Id.* at 8–10.

24. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1252–1253 (2016).

25. *Id.*

26. Cahill, *supra* note 15.

27. *Id.*

28. NeJaime, *supra* note 24, at 1190.

29. I have written elsewhere about how different forms of ART have made biological parenthood the normative ideal at the expense of adoption, whether justified or not. See Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice*, 30 HARV. J. RACIAL & ETHNIC JUST. 193, 218–19 (2014).

### III. ASSISTED REPRODUCTION FOR ALL?

ART services are costly, and as a result—unless one has access to insurance coverage—primarily the wealthy have access to this avenue of reproduction.<sup>30</sup> Part III provides an overview of how assisted reproduction is provided in the United States and the potential roadblocks for same-sex couples. In this section, I discuss access to ART for same-sex couples.

#### A. Access to ART Services

In light of the increased acceptance of gay and lesbian parenthood, there should be an effort to be more equitable for such couples in terms of access to biological parenthood. I am not making a value statement here about the preference of biological parenthood over other types of parenthood, such as adoption. Instead, out of fairness, LGBT couples, such as the Krupas discussed above, should have the same access to ART as their heterosexual counterparts.

Medical infertility is quite common. According to data from the Centers for Disease Control, 12% of women who are of reproductive age are infertile and 7.5% of all sexually experienced men younger than age 45 reported seeing a fertility doctor during their lifetime.<sup>31</sup> Many health insurance companies do not view having a child as medically necessary, and thus do not cover infertility treatment. Instead, it is considered an elective procedure.<sup>32</sup> Many hoped that the Affordable Care Act would add infertility treatment to its essential health benefits.<sup>33</sup> Access to ART is linked to household income, marital status, education level, race, ethnicity, and age.<sup>34</sup> “A dichotomy exists between the ‘haves,’ those with the financial means to undergo infertility treatment, and the ‘have-nots,’ those who lack such means.”<sup>35</sup>

30. Anne Fidler & Judith Bernstein, *Infertility: From a Personal Public Health*, 114 PUB. HEALTH REP. 494, 497 (1999).

31. Kimberly Leonard, *Who Has the Right to Build a Family? The Focus on LGBT Rights Could Lead to More Options for Those Seeking to Have Biological Children*, U.S. NEWS (Aug. 15, 2016, 12:01 AM), [http://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment?src=usn\\_tw](http://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment?src=usn_tw).

32. *Id.*

33. *Id.*

34. Marissa A. Mastroianni, *Bridging the Gap Between the “Have” and the “Have-Not”s: The ACA Prohibits Insurance Coverage Discrimination Based Upon Infertility Status*, 79 ALB. L. REV. 151, 151 (2016); Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J.L. SCI. & TECH. 41, 49–50 (2009).

35. Mastroianni, *supra* note 34, at 151.

The lack of coverage has forced many couples to go into debt or mortgage their homes in order to access ART. "Among employers with 500 or more workers, last year only 54% covered an evaluation provided by a specialist, 32% covered drug therapy and 24% covered in vitro fertilization, according to Mercer consulting group."<sup>36</sup> This is a decrease since 2013 when coverage reached its peak.

ART can be very expensive, and even when covered, unlimited cycles are not covered.<sup>37</sup> In fact, there is only about a 25%–30% success rate for IVF.<sup>38</sup> Therefore, multiple cycles are often performed. Costs could range for up to \$3,000 per cycle for hormone therapy to between \$10,000 and \$15,000 per cycle for ART that involves tubal surgery.<sup>39</sup> On average, one IVF cycle in the United States can cost between \$10,000 and \$15,000 with only a 25–30% live birth success rate.<sup>40</sup> Therefore, many couples will need to undergo several IVF cycles to achieve their desired outcome. The cost to conceive a child through IVF ranged from \$44,000 to \$211,940 in 1992 dollars.<sup>41</sup> Thus, ART services are usually utilized for the wealthy that can afford to pay out of pocket for the services. However, access to insurance does increase access to ART. One study noted in states requiring that insurance cover IVF, the rate of utilization was 277% of the rate when there was no coverage.<sup>42</sup> Thus, insurance coverage of ART allows greater access to it.<sup>43</sup> It follows that in the states that require insurance companies to offer or cover ART, we should ensure that gay and lesbian couples have the same access as straight couples.<sup>44</sup>

36. Leonard, *supra* note 31.

37. Barton H. Hamilton & Brian McManus, *The Effects of Insurance Mandates on Choices and Outcomes in Infertility Treatment Markets*, 21 HEALTH ECON. 994, 994–95 (2012).

38. *Id.* at 994.

39. Mastroianni, *supra* note 34, at 158.

40. *Id.* at 157–58.

41. Marianne P. Bitler & Lucie Schmidt, *Utilization of Infertility Treatments: the Effects of Insurance Mandates*, 8 (Nat'l Bureau of Econ. Research, Working Paper No. 17668, 2011), <http://www.nber.org/papers/w17668.pdf>.

42. Tarun Jain et al., *Insurance Coverage and Outcomes of In Vitro Fertilization*, 347 NEW ENG. J. MED. 661, 664–65 (2002).

43. Hamilton & McManus, *supra* note 37, at 1009.

44. Of course, there is the risk that these states may stop offering ART coverage if the population who is eligible to utilize ART increases. Because there is no requirement that ART is covered under the ACA, that is always a risk.

### B. Insurance Coverage of Infertility Services

Currently, fifteen states require insurers in their state to either offer or cover ART services.<sup>45</sup> However, according to the American Society of Reproductive Medicine, Arkansas, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, and Rhode Island are the only ones that mandate coverage; the rest require only that insurers offer plans that include it, a loophole that leaves it up to employers to decide whether to offer those plans to their employees.<sup>46</sup> Of the fifteen states, two of them—California and Texas—only require an insurer to let employers know that coverage is available.<sup>47</sup> They do not require insurers to cover or employers to actually purchase such policies. In the public sector, the Department of Defense covers in vitro fertilization for active duty members, but the Department of Veterans Affairs bans it even for former service members who sustained injuries during battle that rendered them infertile.<sup>48</sup> Further, states do not offer such coverage to low-income people in their Medicaid programs. Advocates of expanding access maintain that it is unfair to same-sex couples to force them to biologically demonstrate infertility, and it is critical that we deliver family building under insurance contracts to people who need different things.<sup>49</sup>

Because these are state by state issues, these laws are often inconsistent in terms of what type of infertility services are covered, whether marital status is an issue, and whether there is a maximum age of coverage.<sup>50</sup> Of these states, only Connecticut, Illinois, Maryland, Massachusetts, Montana, New Jersey, Ohio, and West Virginia actually require insurers to cover IVF.<sup>51</sup>

45. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (June 1, 2014), <http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx>; See also ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West 2016); CAL. HEALTH & SAFETY CODE § 1374.55 (West 2016); CAL. INS. CODE § 10119.6 (West 2016); CONN. GEN. STAT. § 38a-536 (West 2016); HAW. REV. STAT. §431:10A-116.5(a) (West 2016); MD. CODE ANN., INS. §15-810 (West 2016); MASS. GEN. LAWS ANN. ch. 175, § 47H (West 2016), 176A § 8K (West 2016), 176B § 4J (West 2016), 176G § 4 (West 2016); MONT. CODE ANN. § 33-31-102 (West 2016); N.J. STAT. ANN. § 17B:27-46.1x (West 2016); N.Y. INS. LAW §§ 3221(k)(6), 4303(s) (McKinney 2016); OHIO REV. CODE ANN. § 1751.01 (West 2016); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (West 2016); TEX. INS. CODE ANN. art. 1366.005 (West 2016); W. VA. CODE §33-25A-2 (West 2016).

46. Leonard, *supra* note 31.

47. Jillian Casey et al., *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 113 (2016).

48. Leonard, *supra* note 31.

49. *Id.*

50. Mohapatra, *Fertility Preservation*, *supra* note 29, at 206.

51. *Id.* at 207.



Many of these state statutes do not actually define infertility. In those that do—California, Connecticut, Illinois, Massachusetts, New Jersey, New York, and Rhode Island—all of the definitions include the inability to conceive after a year or more of sexual relations.<sup>52</sup> This does not apply in terms of same-sex couples, because they cannot conceive without ART. Some states' definitions include requirements that the individual be married, and the *Obergefell* decision at least allows same-sex married couples to fit into this category now. Additionally, some states require specific diagnosis by a physician of a condition as the cause of the infertility.<sup>53</sup> In each of these scenarios, gay and lesbian couples would have a more difficult time proving infertility than heterosexual couples. Thus, even in those few states where insurance companies have to cover ART, the definitions of infertility often anticipate medical infertility—not infertility due to being in a same-sex relationship. Arguably, this inequity discriminates against same-sex couples.

### C. The ACA and Nondiscrimination

This is a problem because the Affordable Care Act requires nondiscrimination in the provision of health care services.<sup>54</sup> Under the ACA, discrimination exists if insurers differentiate among individuals in designing and implementing private health insurance coverage.<sup>55</sup> Of course, the ACA does not actually require ART coverage.<sup>56</sup> The ACA's statutory language does not mention infertility treatment coverage or its effect upon the fifteen states that have enacted state insurance mandates.<sup>57</sup> Additionally, the Department of Health and Human Services ("DHHS") has not included infertility coverage as an essential health benefit in any subsequent regulation.<sup>58</sup> Each state has the authority to create its own essential benefits under the ACA. DHHS gave states the authority to create their own essential health

52. *Id.* For example, Massachusetts law defines infertility as "the condition of an individual who is unable to conceive or produce conception during a period of one year if the female is age 35 or younger or during a period of six months if the female is over the age of 35." 211 MASS. CODE REGS. 37.03 (LexisNexis 2016).

53. *Id.* Mohapatra, *Fertility Preservation*, *supra* note 29, at 207.

54. 45 C.F.R. § 156.125(b) (2016); 45 C.F.R. § 156.200(e) (2016).

55. Mastroianni, *supra* note 34, at 176–77.

56. See Kenan Omurtag & G. David Adamson, *The Affordable Care Act's Impact on Fertility Care*, 99 FERTILITY & STERILITY 654 (2013) (minimum insurance coverage required under the ACA does not cover infertility services).

57. Paul R. Brezina et al., *How Obamacare Will Impact Reproductive Health*, 31 SEMINARS REPROD. MED. 189, 194 (2013).

58. Kate Devine et al., *The Affordable Care Act: Early Implications for Fertility Medicine*, 101 FERTILITY & STERILITY 1224, 1225 (2014).

benefit standards based upon typical insurance coverage plans within the state.<sup>59</sup> Therefore, the states with insurance mandates regarding infertility treatments have adopted essential benefit standards that incorporated such laws.<sup>60</sup> Thus, this is seen by many as a lost opportunity. Instead of increasing access to ART, the ACA just maintained the same level of access that existed prior to the ACA. That said, even if infertility was covered, it would not necessarily apply to gay or lesbian couples without an explicit statement to that effect. Health insurance covers medical ailments, and insurers could continue to define infertility in ways that do not apply to LGBT individuals.

Even well-meaning efforts to even the playing field in states such as a California and Maryland do not completely solve the problem of ART inequity.

The Krupas are making the argument that, as a same-sex couple, they are requesting the same access to ART services as heterosexual couples receive.<sup>61</sup> This example highlights the ways that a gay married couple may be treated differently than a heterosexual married couple under state insurance laws. Two states recently made amendments to their insurance laws to prevent discrimination; California defines infertility as “either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception.”<sup>62</sup> In order to be clear that infertility coverage must be provided to same-sex couples, California amended this law to include an antidiscrimination provision. It states that coverage for the treatment of infertility

shall be offered and, if purchased, provided without discrimination on the basis of age, ancestry, color, disability, domestic partner status, gender, gender expression, gender identity, genetic information, marital status, national origin, race, religion, sex, or sexual orientation. Nothing in this subdivision shall be construed to interfere with the clinical judgment of a physician and surgeon.<sup>63</sup>

59. See CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, *Essential Health Benefits: List of The Largest Three Small Group Products by State* 3 (2015), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/largest-smgroup-products-4-8-15-508d-pdf-Adobe-Acrobat-Pro.pdf>; see generally 45 C.F.R. § 156.100 (2015) (granting States the ability to select their own benchmark plan).

60. Mastroianni, *supra* note 34, at 153–54.

61. *Lesbians Challenge New Jersey's Infertility Definition*, 26 WESTLAW J. INS. COVERAGE (2016) (citing *Krupa et al. v. Badolato*, No. 16-cv-4637 2016 WL 4250861, at \*1 (D.N.J. Aug. 1, 2016)).

62. CAL. HEALTH & SAFETY CODE §1374.55 (b) (West 2014).

63. *Id.* §1374.55 (g).

Although this is a well-meaning change, it still appears that a licensed physician must recognize that being part of a same-sex couple is the “condition” that is the cause of the infertility. It would have been far more explicit to add a provision noting that same-sex couples are, by definition, *per se* infertile and would thus have access to infertility coverage.

Like California, Maryland amended its state law requiring ART and IVF coverage to accommodate same-sex lesbian couples.<sup>64</sup> The Maryland provision is more explicit than California’s. It specifies that “insurers, non-profit health service plans, and health maintenance organizations [are prevented] from requiring specified conditions of coverage for specified infertility benefits for a patient who is married to an individual of the same-sex.”<sup>65</sup>

#### *D. Definitions of Infertility in Private Insurance Contracts*

It is not just a matter of state insurance coverage mandates where there is an equality concern. Private insurers also have definitions of infertility that do not allow lesbian or gay couples to gain access to ART Services. For example, Jill Soller-Mihlek sued UnitedHealthcare because she could not meet its definition of infertility because she was a lesbian.<sup>66</sup> Her UnitedHealthcare insurance policy defined infertility as an “inability to achieve pregnancy after 12 months of unprotected heterosexual intercourse.”<sup>67</sup> The policy actually tacitly acknowledged lesbian couples and deemed that they must use sperm donors, and must pay for expensive donor insemination for 12 months before they meet the definition of infertility.<sup>68</sup> UnitedHealthcare stated that its policy was based on ASRM’s clinical disease definition of infertility.<sup>69</sup> It does not seem fair to use the clinical definition of infertility in the case of same-sex couples. Julien Murphy uses the term “relational infertility” to describe lesbian relationships “because there is no biological

64. Eli Y. Adashi, *JAMA Forum: A Same-Sex Infertility Health Insurance Mandate in Maryland?*, NEWS AT JAMA (May 20, 2015), <https://newsatjama.jama.com/2015/05/20/jama-forum-a-same-sex-infertility-health-insurance-mandate-in-maryland/>.

65. *Id.* At the same time, it also amended its outdated statute to ensure that male medical infertility was acknowledged. MD. CODE ANN., INS. §15-810 (West 2016).

66. Stephanie Fairington, *Should Same-Sex Couples Receive Fertility Benefits?*, N.Y. TIMES, Nov. 2, 2015, [http://well.blogs.nytimes.com/2015/11/02/should-same-sex-couples-receive-fertility-benefits/?\\_r=0](http://well.blogs.nytimes.com/2015/11/02/should-same-sex-couples-receive-fertility-benefits/?_r=0).

67. *Id.*

68. *Id.*

69. *Id.*

way for two women to conceive together without the advantage of medical intervention.”<sup>70</sup>

The Krupa case is a narrow one. It involves a lesbian couple who actually is medically infertile. They are correct in their assertion that they are being treated differently from other infertile individuals because the definition of infertility in New Jersey does not include women like them—women in lesbian relationships who are medically infertile.<sup>71</sup> It is important to change the language in state insurance statutes to ensure that medically infertile individuals receive access to ART regardless of sexual preference. The language of the statute should be amended the way Maryland’s was—and all states requiring ART coverage should ensure that they remove language that differentiates based on sexual orientation.

This change, however, still does not go far enough in putting LGBT couples on equal footing with heterosexual couples. The reality remains that access to ART will remain mostly out of pocket. This does harm gay couples because it is impossible for them to reproduce “naturally.” With the acceptance of gay marriage, there will be great acceptance of biological parenthood for gay couples, via ART and surrogacy. It would be ideal if the grassroots efforts that got the marriage equality effort success would coalesce around the effort to have greater access to ART for all people.

#### IV. ACCESS TO SURROGACY SERVICES FOR SAME-SEX COUPLES

I have written extensively about surrogacy, both domestic and internationally.<sup>72</sup> In this short Part IV, I aim to provide a snapshot of what access to surrogacy looks like for a gay married couple in the United States. Currently, gay couples wishing to have a biological child must use a surrogate, since neither male partner can carry a child.<sup>73</sup> Commercial gestational sur-

70. Julien S. Murphy, *Should Lesbians Count as Infertile Couples?: Antilebian Discrimination in Assisted Reproduction*, in EMBODYING BIOETHICS: RECENT FEMINIST ADVANCES (NEW FEMINIST PERSPECTIVES) 103, 111–12 (Anne Donchin & Laura M. Purdy, eds., 1999).

71. N.J. STAT. ANN. § 17B:27-46.1x(a) (West 2016).

72. See generally Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012); Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, (2012); Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012); Seema Mohapatra, *A Race to the Bottom? The Need for International Regulation of the Rapidly Growing Global Surrogacy Market?*, in GESTATIONAL SURROGACY AND THE WOMB FOR RENT INDUSTRY IN INDIA (Sayantani DasGupta & Shamita Das Dasgupta eds., 2013).

73. Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U. J. GENDER SOC. POL’Y & L. 781, 788 (2014). In the future, artificial wombs may change this.

rogacy is the most common method of surrogacy.<sup>74</sup> In such arrangements, there is a contractual relationship between the surrogate and the intended parents, where the surrogate is paid to carry the child with whom she has no genetic relationship.<sup>75</sup> A gay couple can use a donor egg and sperm from one of the partners outside the body to form an embryo via IVF which will then be implanted into the non-genetically related surrogate.<sup>76</sup>

Although surrogacy arrangements can cost up to \$100,000 in the United States, the cost has risen 89% from 2004 to 2008.<sup>77</sup> Surrogacy laws vary widely from state-to-state.<sup>78</sup> Some states outright ban surrogacy and criminalize those entering into agreements.<sup>79</sup> Others view surrogacy as a form of adoption, rather than allowing the intended parents to be on the birth certificate immediately.<sup>80</sup> New Hampshire and Maine had passed comprehensive surrogacy legislation even before *Obergefell*, and their laws made no distinction between same-sex and heterosexual couples. Some commentators have noted that “married same-sex couples building families through gestational surrogacy can now obtain a parentage order and have both parents’ names on the birth certificate in 32 green-light states.”<sup>81</sup> Although this is a majority of U.S. states, there is a long way to go to have true parity between same-sex and heterosexual couples.

Surrogacy statutes in some states specifically only apply to married couples.<sup>82</sup> Post-*Obergefell*, some claim that these states ignore the statutes’ language referring to the infertility of the intended mother.<sup>83</sup> However, this is not real assurance that surrogacy is allowed.

There are only nine surrogacy-friendly states in the United States for gay married couples.<sup>84</sup> These are California, Connecticut, Delaware,

74. Seema Mohapatra, *Adopting an International Convention on Surrogacy—A Lesson from Intercountry Adoption*, 13 LOY. U. CHI. INT’L L. REV. 25, 32 (2015).

75. *Id.*

76. Paulk, *supra* note 73, at 788.

77. Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples*, L.A. LAW, July–Aug. 2016, at 12.

78. *Id.*

79. *Id.*

80. *Id.*

81. Diane S. Hinson, *Parentage Rights for Same-Sex Couples: State-by-State Gestational Surrogacy Laws*, 38 SPG FAM. ADVOC. 42, 43–45 (2016) (green-light states are states where surrogacy is permitted, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate).

82. Seema Mohapatra, *States of Confusion: Regulation of Surrogacy in the United States*, in COMMODIFICATION OF THE HUMAN BODY: A CANNIBAL MARKET (J.D. Rainhorn & S. El Boudamoussi eds., 2015).

83. Diane S. Hinson, *Ask The Expert*, 38 SPG FAM. ADVOC. 42, 42 (2016).

84. *Gestational Surrogacy Law Across The United States*, CREATIVE FAMILY SOLUTIONS, LLC, <http://www.creativefamilyconnections.com/us-surrogacy-law-map/married-same-sex-couples> (last

Maine, New Hampshire, Nevada, Oregon, Rhode Island, and Texas.<sup>85</sup> In these states, surrogacy is permitted, and pre-birth orders are granted throughout the state.<sup>86</sup> Additionally, in these states, both same-sex parents will be named on the birth certificate.<sup>87</sup> There are twenty-three states where surrogacy is permitted but where it is not clear that pre-birth orders are allowed.<sup>88</sup> There are nineteen “hostile jurisdictions” to surrogacy generally, with Mississippi specifically discriminating against the sexual orientation of the intended parents.<sup>89</sup> Michigan law not only prohibits surrogacy contracts, but criminalizes attempts at making such contracts.<sup>90</sup>

For gay couples who wish to seek biological parenthood, their only current option is surrogacy. Similarly, if neither woman in a lesbian couple can successfully carry a child, surrogacy may be an option for them. Citizens living in one of the many states where commercial surrogacy is not available will have to travel to a more surrogacy-friendly state for such an arrangement. This is not only inconvenient, but also expensive. Surrogacy is really only available to those gay and lesbian couples who are upper class. This means that poorer and middle-class gay and lesbian couples will either have to seek the uncertain and inconvenient prospect of international surrogacy, or not be a parent to a biological child at all.

#### *A. Surrogacy Acceptance Post-Obergefell*

Many expect the law of surrogacy to continue to become more open post-*Obergefell*. In New York, an openly gay state senator—who along with his partner had a baby via surrogacy in California—unsuccessfully attempted to lift New York State’s commercial-surrogacy ban.<sup>91</sup> The bill would have allowed “compensated gestational surrogacy and would have furnished mechanisms by which ‘intended parents’ could secure parentage judgments.”<sup>92</sup> Additionally, intended parents could include same-sex

visited Sept. 4, 2016) (Creative Family Solutions, LLC is a surrogacy law firm that publishes an online “surrogacy map” which uses color coding to visually demonstrate the relative stance towards surrogacy taken by different states).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (these include Alabama, Arkansas, Colorado, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Missouri, North Carolina, North Dakota, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Wisconsin, and West Virginia).

89. Hinson, *Ask The Expert*, *supra* note 84, at 45.

90. Connor Cory, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. POVERTY L. & POL’Y 133, 143–44 (2015).

91. NeJaime, *supra* note 24, at 1253.

92. *Id.*

spouses, unmarried intimate partners, and single individuals.<sup>93</sup> Professor Douglas NeJaime notes that, had this effort passed, male same-sex couples, single parents, and heterosexual couples who also engage in assisted reproduction, including surrogacy, “would have benefited from wider availability and recognition.”<sup>94</sup> Although this bill did not pass, we can expect similar efforts to continue in New York and other states that do not recognize gestational surrogacy.

### *B. International vs. Domestic Surrogacy*

Gay married couples in the United States often prefer entering into a surrogacy arrangement within the United States because many foreign countries still prohibit same-sex marriage.<sup>95</sup> Therefore, same-sex couples must pay a higher price for the same arrangement that would cost less than half of the price abroad.<sup>96</sup> I have argued elsewhere that the hodgepodge of surrogacy laws in the United States poses a real problem for potential intended parents.<sup>97</sup> In light of changes occurring post-*Obergefell*, it may not be long before a federal surrogacy law is enacted. The issue of cost is an issue that still must be addressed. Can we see a future where one can purchase literal fertility insurance, including access to surrogacy or a surrogacy employment benefit? We are not at that point right now, but with the growing acceptance of surrogacy, this may be coming.

### V. “INFERTILITY” EQUALITY

With the overview provided thus far about the push towards ART equality for same-sex couples, this section revisits the Krupa case to consider what legal changes would ensure equality. New Jersey’s statute mandates that insurance plans operating in the state cover medically necessary expenses incurred in the diagnosis and treatment of infertility.<sup>98</sup> New Jersey’s insurance mandate defines infertility to include a

disease or condition that results in the abnormal function of the reproductive system such that a person is not able to . . . conceive after two years of unprotected intercourse if the female partner is under 35 years of

93. *Id.*

94. *Id.*

95. Jeang, *supra* note 17, at 12.

96. *Id.*

97. Mohapatra, *States of Confusion*, *supra* note 83.

98. N.J. STAT. ANN. § 17B:27-46.1x(a) (West 2016)

age, or one year of unprotected intercourse if the female partner is 35 years of age or older.<sup>99</sup>

The Krupas' complaint—filed in the U.S. District Court for the District of New Jersey—says the requirement denies lesbians due process and equal protection under the law “by mandating that the infertility care of heterosexual women be covered by their insurance carriers but failing to mandate that the same infertility care be covered for women in same-sex relationships.”<sup>100</sup> The Krupas claim that relief from the mandate definition is necessary because, given the high cost of infertility, women in same-sex relationships have to “choose between starting a family and their financial security.”<sup>101</sup>

Compared with opposite-sex couples, a lesbian couple would have to pay for one to two years of artificial insemination out-of-pocket before it qualifies as medically “infertile.” Additionally, because the statute requires that the inability to conceive after the period of unprotected intercourse be caused by a disease or condition that results in the abnormal function of the reproductive system, it is not clear that a gay couple could actually qualify as infertile.<sup>102</sup> New Jersey mandates insurance coverage for infertility treatments; however, wording in its law asks couples to demonstrate they have tried to conceive naturally by having unprotected sex for a year or two, depending on their age.<sup>103</sup> The Krupas have argued that the language is discriminatory, as unprotected sex does not lead naturally to conception for same-sex couples.<sup>104</sup>

It does not make sense for insurance companies to only cover so-called medical infertility. Just as lesbian couples cannot have a baby without ART, nor can medically infertile persons. Professor John Robertson points out that if one rejects the argument that infertile individuals should not be helped because “nature has not equipped people to reproduce,” the same logic causes us to reject the exceptionalism for LGBT individuals.<sup>105</sup>

The American Society for Reproductive Medicine (“ASRM”) defines infertility as “a disease, defined by the failure to achieve a successful pregnancy after 12 months or more of appropriate, timed unprotected inter-

99. *Lesbians Challenge New Jersey's Infertility Definition*, *supra* note 61.

100. *Id.*

101. *Id.*

102. 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, 667 (2011).

103. Leonard, *supra* note 31.

104. *Id.*

105. John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 331 (2005).



course or therapeutic donor insemination.”<sup>106</sup> Even the World Health Organization (“WHO”), defines infertility as “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”<sup>107</sup>

Many insurance companies use the ASRM’s definition.<sup>108</sup> The ASRM and the WHO, the international public health advisory group, should consider adding a statement that same-sex couples are deemed per se infertile as they cannot produce a child without ART. This would ensure clarity and access and comport with ASRM other public statements about the rights of LGBT individuals to access ART.<sup>109</sup>

## VI. CONCLUSION

The scientific advances of assisted reproduction, and the public embrace of it, have made the use of in vitro fertilization relatively commonplace in the United States today. Gone are the days of Louisa Brown being labeled as a “test tube baby.” In many social circles (often white, and upper middle class), the use of IVF is not unusual, even when one lives in one of the thirty-five states that do not have required insurance coverage of infertility services.<sup>110</sup>

Access to biological parenthood for LGBT individuals is a matter of reproductive justice. Reproductive justice occurs “when [all people] have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities.”<sup>111</sup> The reality is that access is assisted reproduction in the United States is enjoyed by the privileged few, with many medically infertile not seeking ART due to the high costs of such treatment.<sup>112</sup> With compelling stories like the Krupas, LGBT groups should

106. Practice Committee of the American Society for Reproductive Medicine, *Definitions of Infertility and Recurrent Pregnancy Loss: A Committee Opinion*, 99 FERTILITY & STERILITY 1, 63 (Sept. 13, 2012),

[https://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Practice\\_Guidelines/Committee\\_Opinions/Definitions\\_of\\_infertility.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/Definitions_of_infertility.pdf).

107. WORLD HEALTH ORG., *Infertility Definitions and Terminology*, <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/> (last visited Sept. 26, 2016).

108. For example, in the earlier example of UnitedHealth, the definition in the policy was based on the ASRM definition. Fairington, *supra* note 66.

109. See Practice Committee of the American Society for Reproductive Medicine, *supra* note 107.

110. See Dorothy E. Roberts, Race and the New Reproduction, 47 HASTINGS L.J. 935, 938 (1996) (“Most couples who use IVF services are white, highly educated, and affluent.”).

111. See Asian Communities for Reprod. Just., *A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice* 1, 2 (2005), <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf>.

112. Mastroianni, *supra* note 34, at 162.

band together with infertility advocates such as RESOLVE to build a coalition to increase access and decrease cost of ART. This Article began by describing how the *Obergefell* decision emphasized parenthood by LGBT couples and how some couples are now demanding equal rights in ART. Then, I highlighted state differences in coverage for ART and varying state legal stances on surrogacy. This shows how difficult it is for a LGBT couple to navigate their eligibility for ART or surrogacy services. Of course, as I noted, the biggest determination of who accesses ART is the size of one's bank account. I have outlined some suggestions about how to increase access to ART for LGBT couples by changing definitions to allow LGBT couples to have the same privileges as heterosexual couples. However, this is not enough. ART coverage in the United States is still far too limited. It is not true equity when only the rich can access these services. All insurance companies should have to cover ART services. I realize that this is a tough sell, when insurance coverage in general with the ACA is such a political hot button issue. However, the road to marriage equality was tough and full of early setbacks.<sup>113</sup> With the dogged determination of LGBT community groups, marriage equity was achieved.

If there is a desire for ART equity, LGBT activists could similar push for increased, not just equal, coverage. Insurance coverage greatly increases who will actually have a chance to be a biological parent, if they are medically infertile (such as someone that has a biological cause for infertility) or per se infertile (such as in the case of an LGBT individual). One way to increase access to ART is to push for lower costs for ART. This would allow a more diverse group of people to use it. The Economist recently published a story entitled "An Arm and a Leg for a Fertilised Egg," which outlines current efforts to make IVF cheaper.<sup>114</sup> Cheaper IVF would reduce the cost of surrogacy, so it would help same-sex couples of both genders, as well as heterosexual couples.

It is important to recognize that all individuals, whether LGBT or not, should have access to biological parenthood, not just the ones who can afford it.<sup>115</sup> Blacks access ART at levels much lower than whites, although

113. Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 472 (2012).

114. *An Arm and a Leg for a Fertilised Egg*, ECONOMIST (Aug. 27, 2016), <http://www.economist.com/news/briefing/21705676-doctors-have-spent-decades-trying-make-ivf-more-effective-now-they-are-trying-make-it>.

115. Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73, 82 (2013).

they face higher rates of infertility.<sup>116</sup> Being Black<sup>117</sup> and gay or lesbian is a double whammy, and makes one even more vulnerable in society.<sup>118</sup> We need to be sensitive that there is no true ART equality if ART is mainly accessed by wealthy white LGBT couples.

This article suggests that access to ART should be equivalent regardless of your sexual orientation. However, I acknowledge that this does not go far enough. The legal landscape for coverage of ART and surrogacy services is bleak in many states. For example, if the Krupas were unsuccessful with IVF and wished to use the services of a surrogate, they would not be able to do so in New Jersey. New Jersey bans surrogacy arrangements for all, regardless of sexual orientation, after their much maligned Baby M case. Instead, infertility advocates, such as RESOLVE, would do well to partner with the lesbian gay bisexual and transgender ("LGBT"), to fight for better access to ART services for all.

116. June Carbone & Jody Lyn   Madeira, *Buyers in the Baby Market: Toward A Transparent Consumerism*, 91 WASH. L. REV. 71, 76 n.21 (2016); see Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 39 (2008) ("Hispanic women, non-Hispanic black women, and other women of color are significantly more likely to be infertile than white women."); see also Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 222 (2013) ("[A] disproportionate number of infertile women in this country are Black.").

117. I capitalize Black when referring to the racial group. See Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun").

118. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 (1991).