SEXUAL ORIENTATION AND THE LAW

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the gender classification inherent in disadvantaging an individual based solely on the fact that the members of a couple are of the same gender.\(^\text{136}\) Even under rational basis review, the statute’s validity is questionable. According to the dissent, “[t]he legislature received no meaningful evidence to show that homosexual parents endanger their children’s development of sexual preference, gender role identity, or general physical and psychological health any more than heterosexual parents” because “the overwhelming weight of professional study . . . concludes that children raised by homosexual parents are no different from their peers.”\(^\text{137}\) Under the weakest formulation of the rational basis test, the legislature can arguably enact legislation unsupported by scientific evidence unless “the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”\(^\text{138}\) Although the legislature conceivably could have believed that gay men or lesbians would not be appropriate role models for children, its tenacity in persisting in this belief in the face of “the overwhelming weight” of professional research to the contrary is strong evidence that the true motivation for this legislation was “irrational prejudice”\(^\text{139}\) rather than concern for children’s welfare. Under this analysis, the legislation is unconstitutional.\(^\text{140}\)

C. Procreation and Parenting

“[H]omosexuals are as capable of procreation as are bisexual or heterosexuals.”\(^\text{141}\) Today, many gay men and women, especially les-


\(^\text{137}\) 129 N.H. at 290, 530 A.2d at 28 (Batchelder, J., concurring in part and dissenting in part). In addition, the assumption that becoming gay is harmful to the child is questionable. See supra pp. 128-29.


\(^\text{140}\) Cf. United States Dept of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”); supra p. 53.

\(^\text{141}\) J. Money, Gay, Straight, and In-Between: The Sexology of Erotic Orientation 54 (1988).
Lesbian couples, are choosing to have children. However, gay and lesbian parenting is frustrated by a number of legal barriers. First, lesbians and gay men may be denied access to necessary reproductive techniques such as artificial insemination, in vitro fertilization, or surrogate motherhood. Second, once they have children, gay and lesbian parents face further problems in defining the legal relationships both between the child and the second biological parent, and between the child and the "co-parent" — the nonbiological parent in a same-sex couple.

1. Access to Reproductive Techniques. — (a) Issues Faced by Lesbians. — Most lesbians wishing to become pregnant can do so through either artificial insemination or sexual intercourse. Both techniques are simple procedures easily done at home. Thus, although some states have fornication statutes and/or statutes that can be interpreted as prohibiting the artificial insemination of unmarried women, states cannot easily prevent access to either technique. In the case of artificial insemination, however, such statutes may inhibit physicians from performing artificial insemination on unmarried women. Denial of access to physician-performed artificial


143 In artificial insemination, semen is introduced into a woman's uterus or vagina by means other than sexual intercourse.

144 Women who cannot conceive due to fallopian tube disorders use this technique, in which an egg is fertilized outside a woman's body and then implanted in her uterus. See Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 HARV. L. REV. 669, 679 n.7 (1985) (hereinafter Note, Reproductive Technology).

145 In surrogacy, a woman agrees to be artificially inseminated and to surrender the resulting child to the father or the father and his wife, usually for a fee. See id. at 669 n.4.

146 Some lesbians who cannot conceive through either of these techniques may be able to become pregnant through in vitro fertilization. See supra note 144.

147 See Note, The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act, 10 GOLDEN GATE U.L. REV. 1007, 1009 n.17 (1980) (stating that a woman can artificially inseminate herself "with a needless syringe, turkey baster, or eyedropper").


149 See, e.g., CONN. GEN. STAT. § 45-60g(b) (1989) (requiring the consent of both the husband and wife for artificial insemination); IDAHO CODE § 39-5403 (1987) (requiring the consent of the woman's husband); OKLA. STAT. ANN. tit. 10, § 552 (West 1987). One might, however, interpret these statutes as requiring the husband's consent only if the woman is married. See Kritcheksky, The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family, 4 HARV. WOMEN'S L.J. 1, 19 (1981).

150 See, e.g., Doe v. Duling, 182 F.2d 1273, 1275 (4th Cir. 1960) (dissmissing a constitutional challenge to Virginia's fornication statute because the threat of prosecution was too remote to give standing).

151 In addition, physicians may refuse to artificially inseminate unmarried women or lesbians
insemination is a serious concern in part because the parental rights of the donor may turn on whether a physician performed the procedure.152

Statutes that prohibit the artificial insemination of or fornication by unmarried women should be invalidated as an unconstitutional restriction of the right to procreate.153 The Supreme Court has repeatedly recognized constitutional protection for the “decision whether to bear or beget a child.”154 Although almost all of these cases involve the right of access to techniques that prevent procreation,155 the procreation right also requires a compelling justification for legislation limiting access to reproductive techniques.156 Prohibiting both artifi-


152 See infra pp. 143–44. Women who do not use physicians can decrease the risk of a custody battle by using sperm from more than one donor or by having a third party act as an intermediary to prevent the donor from learning her identity. See Note, Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination, 1 BERKELEY WOMEN’S L.J. 140, 143 (1985) [hereinafter Note, Private Ordering]. See generally Note, The Fourteenth Amendment’s Protection of a Woman’s Right To Be a Single Parent Through Artificial Insemination by Donor, 7 WOMEN’S RTS. L. REP. (RUTGERS UNIV.) 251, 253–57 (1982) [hereinafter Note, Single Parent] (discussing the advantages and disadvantages of using sperm banks, third-party intermediaries, and known donors). Denial of physician-performed artificial insemination also harms women by making access to and screening of potential donors more difficult.

153 See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that procreation is a “basic civil right[ ] of man”); see also Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986) (dictum) (formulating the right to privacy as extending to procreation and procreation decisions). See generally Note, Reproductive Technology, supra note 144, at 754–84 (arguing that restricting unmarried persons’ access to reproductive techniques may violate the right to procreate and the equal protection clause); Note, Single Parent, supra note 152, at 259–83 (same). At least one fornication statute has been held unconstitutional on privacy grounds. See State v. Saunders, 75 N.J. 200, 216–20, 381 A.2d 335, 337–43 (1977).


156 See, e.g., Note, Reproductive Technology, supra note 144, at 754–84; Donovan, The
cial insemination and fornication completely denies an unmarried woman the ability to procreate. Denying access to either form of procreation, furthermore, hinders the procreation decision as severely as prohibitions on either contraception or abortion alone. The Court has held that strict scrutiny is required for legislation that limits access to contraception or abortion even if it does not entirely prohibit access.157 Similarly, prohibiting access only to artificial insemination burdens the right to choose to procreate even though procreation through sexual intercourse may still be available.

The state interests served by prohibitions against artificial insemination or fornication insufficiently justify the burdens they impose on the fundamental right to procreate. The major state interests in prohibiting these practices are in discouraging single-parent families and in encouraging marriage. The former is most likely based on a belief that children are better off in “traditional” two-parent households but is not sufficiently served by these restrictions. It is overinclusive in that many children conceived by unmarried women will be raised by two adults; it is underinclusive since many children born to married women are raised by only one parent.158 Furthermore, recent studies belie the assumption that children are better off in two-parent families.159

The state interest in promoting marriage is likewise insufficient to justify limiting the right to procreate. First, as discussed above,160 this state interest is not compelling enough to justify burdening a fundamental right. Moreover, restrictions on only either artificial insemination or fornication are insufficiently related to the state’s goal. It is improbable that women who otherwise would remain single would choose to marry simply because they could not be artificially inseminated.

(b) Issues Faced by Gay Men. — The major difficulty encountered by gay men wishing to become fathers is not in access to reproductive methods but in ensuring parental rights. Gay men, like lesbians, can use either artificial insemination or sexual intercourse to produce their

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158 Approximately half of first marriages are expected to end in divorce; the more children a woman has, the less likely she is to remarry. See P. Blumstein & P. Schwartz, supra note 85, at 33.
160 See supra p. 100 (arguing that promoting traditional values is an uncompelling state interest).