Access to fertility treatment by gays, lesbians, and unmarried persons

The Ethics Committee of the American Society for Reproductive Medicine

American Society for Reproductive Medicine, Birmingham, Alabama

This statement explores the implications of reproduction by single individuals, unmarried heterosexual couples, and gay and lesbian couples, and concludes that ethical arguments supporting denial of access to fertility services on the basis of marital status or sexual orientation cannot be justified. This document was reviewed in June 2009. This version replaces the previous version of this document, published in November 2006. (Fertil Steril® 2009;92:1190–3. ©2009 by American Society for Reproductive Medicine.)

SUMMARY

- Single individuals, unmarried heterosexual couples, and gay and lesbian couples have interests in having and rearing children.
- There is no persuasive evidence that children are harmed or disadvantaged solely by being raised by single parents, unmarried parents, or gay and lesbian parents.
- Data do not support restricting access to assisted reproductive technologies on the basis of a prospective parent's marital status or sexual orientation.
- Programs should treat all requests for assisted reproduction equally without regard to marital status or sexual orientation.

Fertility programs often receive requests for treatment from single persons, unmarried heterosexual couples, and lesbian and gay couples, but programs vary in their willingness to accept such patients. For some programs, it is never acceptable to treat unmarried persons, whether heterosexual or gay or lesbian. Other programs that do treat single women and lesbian couples, however, make it a policy not to treat single men or gay male couples seeking to have children.

Requests for treatment from such individuals or couples present questions about reproductive rights, the welfare of offspring, nondiscrimination against unmarried individuals, and gays and lesbians, and professional autonomy. An overarching ethical question is whether it is acceptable to help unmarried individuals or couples to reproduce, regardless of their sexual orientation. If it is ethical to provide such services, a second question is whether programs have a duty to treat all persons, regardless of their gender, relationship status, or sexual orientation.

Reviewed and updated June 2009; published online September 3, 2009.
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Society has long since moved from restricting reproduction to heterosexual married couples. Although the majority of offspring in the U.S. are born to heterosexual married couples, long experience has shown that variations from this model do not generally harm offspring or society. As a result, we find that neither concerns about the welfare of children nor the desire to promote marriage justify denying reproductive services to unmarried individuals or couples, including those who are gay or lesbian. Although professional autonomy in deciding who to treat is also an important value, we believe that there is an ethical obligation, and in some states a legal duty, to treat all persons equally, regardless of their marital status or sexual orientation.

BACKGROUND: THE CHANGING NATURE OF REPRODUCTION AND THE FAMILY

A family traditionally consisted of a man, married to a woman, and their children. The father was the provider, and the mother stayed at home to raise coitally conceived children. This idealized concept never was fully realized and has changed markedly in recent years as a result of high divorce and out-of-wedlock birth rates, adoption, assisted reproduction, recognition of women's rights, the gay-rights movement, the legalization of same-sex marriage in some jurisdictions, and other social and economic factors (1, 2).

Although the majority of births still occur within the context of heterosexual married couples, variations abound. Marital reproduction no longer is solely coital and may include a third-party gamete donor or a surrogate carrier. The incidence of births to single or unmarried persons also has grown, including among never-married, college-educated, professional women (3). A growing number of professional women without male partners have chosen to have children, sometimes with the help of donor insemination. In 2007, nearly 40% of all U.S. births were to unmarried women (4).

In addition to the shift toward assisted reproduction and the growing frequency of out-of-wedlock births, societal

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0015-0282/09/$36.00
doi:10.1016/j.fertnstert.2009.07.977

acceptance of gays and lesbians also has changed. The U.S. Supreme Court has ruled that criminal bans on homosexual activity are unconstitutional (5). With the exception of military service and marriage in most jurisdictions, discrimination on the basis of sexual orientation no longer appears to be a permissible basis for governmental discrimination (6). In addition, approximately 15 U.S. states (including California, Illinois, Massachusetts, New Jersey, New York, Minnesota, and Wisconsin) now ban private discrimination on the basis of sexual orientation in public accommodations and services (7).

Accompanying these changes has been an increase in the number of unmarried persons, including those who are gay or lesbian, who seek medical assistance to reproduce. Although gays and lesbians often have had children when married to persons of the opposite sex, a notable trend is for lesbian women and couples and, increasingly, for single and coupled gay men, to have offspring, most commonly through some form of assisted reproduction (8). Currently in the United States, there are an estimated 6 to 14 million children being raised by at least one gay or lesbian parent, usually as a result of a heterosexual relationship (9).

THE ETHICAL DEBATE

The ethical debate over whether a program may—or must—assist single women and men as well as gay and lesbian couples to have children depends on the balance among three important values. The first is the reproductive interest of unmarried and gay and lesbian persons. The second is the protection of the welfare of offspring. The third is whether professional autonomy, combined with prevailing law, provides a limit on the duty not to discriminate on the basis of marital status or sexual orientation.

The Reproductive Interests of Unmarried Persons and Gays and Lesbians

Although reproduction traditionally has been regarded as an aspect of marriage, single persons and gays and lesbians also have interests in having and rearing offspring even if they are not married or attracted to persons of the opposite sex. Some women and men have no permanent partner, yet are interested in having and rearing children as single parents. Many gays and lesbians already have had children with persons of the opposite sex and share rearing or have sole custody when those relationships end. If they have not adopted or had children, they may wish as single or coupled persons to have offspring for the same reasons of intimacy, companionship, nurturance, family, and legacy that motivate reproduction generally.

Given the importance to individuals of having children, there is no sound basis for denying to single persons and gays and lesbians the same rights to reproduce that other individuals enjoy. No state penalizes reproduction per se by unmarried persons, whether achieved coitally or with medical assistance. All states allow unmarried persons, including gays and lesbians, to be foster parents, and all states but four allow single persons and gay and lesbian couples to adopt (10). Legal developments make it unlikely that the government could constitutionally ban assisted reproduction to single persons or to gay and lesbian couples, even if same-sex marriage or civil unions are not recognized legally (11). Moral condemnation of homosexuality or single parenthood is not itself an acceptable basis for limiting child rearing or reproduction.

Protecting Offspring

Many persons who oppose reproduction by single persons or gay or lesbian couples do so out of concern for the welfare of intended offspring. They argue that the best rearing environment for a child is a two-person, married, heterosexual family and are reluctant to assist or facilitate any different arrangement. They may find that some non-marital arrangements are compatible with a child's welfare, whereas others are not. For example, some fertility programs may treat lesbian, but not gay male couples, or single women, but not single men.

A closer look at the reasoning of opponents of assisted reproduction for unmarried persons or for gays and lesbians reveals that there are important differences in the positions taken. Those clinicians who will not treat single females, for example, may believe that fertility treatment should be restricted to married couples, that treatment should be for the infertile only, or that children need a father and a "normal upbringing" (12, 13). Others may believe that children of gay and lesbian mothers will experience social isolation and gender-identity or sexual-orientation problems (14, 15). One concern with assisting single men to reproduce is that men are perceived as less caring or nurturing than women and that children need a "normal upbringing" with a mother. Some persons also have claimed that children of single men or of gay male couples are at greater risk for sexual abuse, pedophilia, or other mistreatment.

The evidence to date, however, cannot reasonably be interpreted to support such fears (16–19). A task force of the American Psychological Association has reviewed the existing data and found that fears that there would be a higher rate of psychological or social problems among children born in those settings could not be substantiated:

> Results of social science research have failed to confirm any of these concerns about children of lesbian and gay parents. …Research suggests that sexual identities (including gender identity, gender-role behavior, and sexual orientation) develop in much the same ways among children of lesbian mothers as they do among children of heterosexual parents.…Studies of other aspects of personal development (including personality, self-concept, and conduct) similarly reveal few differences between children of lesbian mothers and children of heterosexual parents.…Evidence also suggests that children of lesbian and gay parents have normal social relationships with peers and adults.…

> Overall results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents (20).

With regard to outcomes for children of gay male couples, the task force found that fewer data were available. The literature that does exist, however, found no evidence that being raised by a gay father had any negative effect on children (18, 21–25). Indeed, identified differences tended to favor the gay fathers. They were found to be more alert to children's needs and more nurturing in providing care than heterosexual fathers, who may see themselves primarily as the person providing financial security (26–29).

In sum, on the basis of the available evidence, we do not believe that one can reasonably claim that unmarried persons or gays and lesbians harm their children by reproducing outside of heterosexual marital relations. Children born in such situations do not appear to have appreciably worse lives than do children born to heterosexual married parents. Given the importance of reproduction to unmarried and gay and lesbian persons and the absence of harm to children from being reared by such parents, we find that programs act ethically in assisting unmarried persons or gays and lesbians to reproduce when they meet the same medical criteria for treatment as married heterosexuals.

Professional Autonomy and the Obligation to Treat Equally

Despite these social trends and these data, some persons still may view homosexuality as immoral or may oppose facilitating gay and lesbian or unmarried reproduction. As a result, fertility programs may differ in their willingness to provide reproductive services, regardless of the marital status or sexual orientation of prospective patients. Sometimes, the unwillingness to treat is based on religious or personal moral views about the propriety or desirability of unmarried persons or gays and lesbians having children. At other times it may reflect the administrative complications of working with egg donors or surrogate mothers that assistance to gay male individuals or couples entails.

As a matter of law, fertility programs may be prohibited from denying ART services to patients on the basis of their marital status or sexual orientation. In 2008, the California Supreme Court ruled that refusal to treat a lesbian patient based on the physician's religious views violated state law. The court found that assertions of religious freedom are preempted by state law that prohibits discrimination in public accommodations based on sexual orientation (30). Since medical offices are considered public accommodations under civil rights laws, and about half of all states ban discrimination on the basis of marital status, with another third banning discrimination on the basis of sexual orientation, provider autonomy may not protect physicians who refuse ART services based on patient demographic characteristics (7).

As a matter of ethics, we believe that the ethical duty to treat persons with equal respect requires that fertility programs treat single persons and gay and lesbian couples equally to heterosexual married couples in determining which services to provide. Other professional organizations have expressed support for nondiscriminatory access to assisted reproduction, including the American College of Obstetricians and Gynecologists which said of physicians who refuse to provide infertility services to same-sex couples:

> [A]llowing physicians to discriminate on the basis of sexual orientation would constitute a deeper insult, namely reinforcing the scientifically unfounded idea that fitness to parent is based on sexual orientation, and, thus, reinforcing the oppressed status of same-sex couples (31).

Unless other aspects of the situation also would disqualify heterosexual married couples or individuals from services, such as serious doubts about whether they will be fit or responsible child rearers, or the fact that the program does not offer anyone a desired service, for example, gestational surrogacy, we find no sound ethical basis for licensed professionals to deny reproductive services to unmarried or gay and lesbian persons.

Acknowledgments: This report was developed by the Ethics Committee of the American Society for Reproductive Medicine as a service to its members and other practicing clinicians. While this document reflects the views of members of that Committee, it is not intended to be the only approved standard of practice or to dictate an exclusive course of treatment in all cases. This report was approved by the Ethics Committee of the American Society for Reproductive Medicine and the Board of Directors of the American Society for Reproductive Medicine.

The members of the ASRM Ethics Committee have the following potential conflicts of interest: Robert Brzyski, M.D., Ph.D., Chair, has nothing to disclose. Andrea Braverman, Ph.D., has nothing to disclose. Andrea Stein, M.D., has nothing to disclose. Bonnie Steinbock, Ph.D., has nothing to disclose. Bruce Wilder, M.D., M.P.H., J.D., has nothing to disclose. G. David Adamson, M.D., has nothing to disclose. John Robertson, J.D., has nothing to disclose. Judith Daar, J.D., has nothing to disclose. Leslie Francis, J.D., Ph.D., has nothing to disclose. Mark Gibson, M.D., has nothing to disclose. Robert Rebar, M.D., has nothing to disclose. Rosamond Rhodes, Ph.D., has nothing to disclose. Sean Tipton, M.A., has nothing to disclose. Senait Fisseha, M.D., J.D., has nothing to disclose. Steven Ralston, M.D., has nothing to disclose.

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