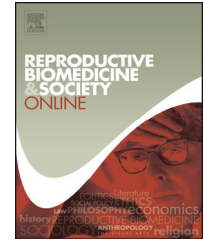




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## SYMPOSIUM: MAKING FAMILIES

# Rights-holders or refugees? Do gay men need reproductive justice?

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**Abstract** A thriving North American industry has emerged designed to help gay men become biological parents through surrogacy and egg donation. Taking as given that gay men have the same ethical right to pursue such reproductive technologies as heterosexual couples or individuals, this article asks whether access to egg donation and surrogacy for gay men specifically could be considered a matter not just of (consumer) rights, but of justice. The idea of shifting discourse about reproduction from the language of 'rights' to that of 'justice' is most notably articulated by women of colour. Their call for reproductive justice seeks to expand discussion beyond the narrow right to an abortion (as a negative privacy right) to encompass broader, positive rights, such as the rights to bear healthy children and to raise them in safe environments. What, if anything, might we learn from reproductive justice movements about how to frame gay men's desire/demand for access to surrogacy? While I find several productive connections between the two groups, two factors lead me to argue against understanding gay access to surrogacy as a matter of justice: first, the necessary reliance on women's reproductive labour; and second, the largely non-structural causes of gay couples' inability to reproduce. Nevertheless, by considering two driving forces behind gay male assisted reproduction – social norms favouring biological family formation and the need for family security – I ultimately conclude that a basis for solidarity exists between gay men and reproductive justice movements. That basis is a concept like 'procreative liberty'.

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In recent years, a thriving (if expensive) industry has emerged in North America designed to help gay men become biological parents through surrogacy arrangements, typically accompanied by egg donation. I take it as given that gay men

have the same ethical right to pursue such reproductive technologies (under consensual, non-exploitative conditions) as heterosexual couples or individuals. Indeed, justice demands that where these rights exist for others, gay men should

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not be excluded. Yet gay men rely particularly on these two specific technologies – which are much more controversial than the sperm donation and artificial insemination often sought by lesbians – to achieve biological kinship.<sup>1</sup> Given this reliance, my question here will be whether access to egg donation and surrogacy for gay men could be considered a matter not just of (consumer) rights, but of justice.

The idea of shifting discourse about reproduction from the language of ‘rights’ to that of ‘justice’ is most notably articulated by women of colour. Their call for reproductive justice seeks to expand discussion beyond the narrow right to an abortion (as a negative privacy right) to encompass broader, positive rights, such as the rights to bear healthy children and to raise them in safe environments. Reproductive justice movements led by women of colour emerge from and in response to their varying positions of social marginalization, and often emphasize a right to have children. Gay men are also considered socially marginalized, and many also seek the right to have children. Yet these two (broad and internally diverse) groups have very different social and material histories, and may live very different realities in the present. What, if anything, might we learn from the reproductive justice movement about how to frame gay men’s desire/demand for access to surrogacy?

I will begin my consideration of this question with a brief description of the part of the surrogacy industry that targets gay men specifically. I will then turn to a brief description of reproductive justice. Next, I will attempt to draw distinctions between three concepts: free-market rights, rights accompanied by duties, and justice. These distinctions will not be comprehensive or universal, but should help us to think through the question of whether biological reproduction, specifically for those who Ikemoto (1995) calls the ‘dysfertile’, qualifies as a matter of justice. Here I will argue that there are significant differences between the situations of women of colour and gay men, particularly those gay men with the financial security to pursue surrogacy. Finally, I will examine what I take to be the ‘gold standard’ of gay male assisted reproduction – hiring a surrogate to carry twins where both eggs come from the same donor and each egg was fertilized by one member of a gay couple. I will argue that two primary forces can be seen as driving the desire for this form of reproduction: social norms favouring biological family formation and the need for family security. While I believe greater social justice would be achieved by challenging rather than pursuing social norms favouring biological relation, the need for family security seems to stem from existing social injustices. In this sense, gay men’s quest for biological kinship – if not owed to them by demands of justice – may at least be supported as a reasonable response to an unjust society. Furthermore, framing gay surrogacy as a response to social injustice, and turning attention to the root causes of that injustice, may present a path for solidarity building between the reproductive justice movement and gay

men trying to create families under the auspices of something like ‘procreative liberty’.

### Men having babies

When last I wrote extensively about commercial surrogacy, India was the most talked-about destination, and its government had just banned same-sex couples from participating in its then-booming reproductive tourism industry. That was in 2013. In 2015, India effectively shut down its global commercial surrogacy services (Rotabi et al., 2017). Following a series of scandals in 2014, the Government of Thailand, another major surrogacy destination, passed legislation in 2015 restricting surrogacy there to heterosexual couples, one of whom must be Thai (Whittaker, 2016). This type of legislation seems to be a trend among developing countries whose lower prices (and perhaps greater emotional distance) used to be a huge draw for Westerners seeking surrogacy. Debates over surrogacy continue in Europe as well, with the practice banned completely in several countries including France, Germany, Italy and Spain, and with commercial surrogacy prohibited in many others, such as Belgium, Denmark, Hungary, Ireland and Portugal (Präg and Mills, 2017). Thus, at the time of writing, despite its high costs, the USA “is rapidly becoming perceived as one of the few, if not the only, stable platform to do surrogacy” for couples both at home and abroad (Fishman, 2017). One notable exception is Mexico, which currently presents the only ‘low-cost’ option for gay surrogacy (Schurr, 2017). One Mexican agency describes itself as “a full-service surrogacy agency based in the United States, offering affordable, ethical, altruistic surrogacy programs for gay couples, single people and straight couples, in Mexico City through our partner fertility clinic, the largest and most experienced fertility group in Mexico with more than ten years of experience in creating families” (Surrogacy in Mexico, 2017). It promises prices as low as one-third of typical costs in the USA, and information on the home page of their website goes on to assure that surrogacy is legal in all but one state of Mexico, not only for straight couples, but also for gay couples and individuals. In fact, according to Schurr, “it is estimated that (gay) men commission 70–80 percent of all surrogacy arrangements realized in Mexico” (Schurr, 2017).

Indeed, many surrogacy agencies and fertility clinics are eager to emphasize their openness to gay male clientele through their websites and search engine advertising. Exact statistics on surrogacy in any location are difficult to pin down, but according to the Centers for Disease Control and Prevention and the Society for Assisted Reproductive Technology, the number of babies born through gestational surrogacy almost doubled between 2004 and 2008 (Shayestefar and Abedi, 2017). Similarly, *The Washington Post*, citing conservative estimates, reports that the number of babies born to surrogates each year in the USA has tripled in the last decade to more than 2000 (Chandler, 2017). One major reason for the rise is likely the technological innovation of and improvements to gestational surrogacy, where the surrogate is not biologically related to the fetus she gestates, reducing, in many cases, legal complications with respect to parental rights. Gestational, rather than traditional, surrogacy now accounts for the vast majority of commercial surrogacy arrangements. At the same time, the *Chicago Tribune* notes that, while no one tracks the number of gay men using surrogates, observers in the industry report a clear increase. Moreover, “An informal survey of fertility clinics

<sup>1</sup> The heightened concern around surrogacy and egg donation might be explained by the greater amount of time and labour both require compared with sperm donation. Such an explanation would be incomplete, however, without consideration of cultural norms that assume and prescribe to ‘good’ women a stronger ‘natural’ attachment to children.

in more than 10 cities conducted for the *Chicago Tribune* by FertilityIQ ([www.fertilityiq.com](http://www.fertilityiq.com)), a website where patients evaluate their fertility doctors, found that 10–20% of donor eggs are going to gay men having babies via surrogacy, and in many clinics, the numbers have increased by 50% in the last 5 years” (Schoenberg, 2016). “Although heterosexuals may still be the primary users of surrogates, increasing demand from gay couples may help to account for its persistent availability in the USA.”

In fact, while much of the developing world seems to be shutting down surrogacy, the USA as a whole, whose surrogacy laws vary between states, seems to be moving in the opposite direction. Recently (effective April 2017), the District of Columbia reversed its 25-year ban on surrogacy contracts. According to the *Washington Post*, “The shift signals sweeping changes in how reproduction is being re-engineered. State and city governments are rethinking old policies, as gay rights and infertility advocates, joined by a lucrative fertility industry, are protesting barriers to building families. Many see more-permissive surrogacy laws as a natural progression from marriage equality” (Chandler, 2017). Thus, while most US states that permit surrogacy for straight couples also permit it for gay couples, gay rights activists may prove strong advocates of change in places like New York State, one of five states where commercial surrogacy is still prohibited (U.S. Surrogacy Map, 2017). In fact, a legislative committee in Albany recently (June 2017) approved a pro-surrogacy bill that had been stalled for years (Chandler, 2017). These moves may build pressure on other Western countries, like the UK, to change their laws.<sup>2</sup> Only time will tell.

Another sign of the growing movement is Men Having Babies, a non-profit organization that runs monthly workshops on surrogacy in New York City, and organizes annual two-day surrogacy conferences and gay parenting expos around the world. In 2017, Men Having Babies held conferences in San Francisco, Tel Aviv, Chicago, Dallas, Brussels and New York (Events, 2017). A similar organization in Australia, Families Through Surrogacy, holds annual conferences in cities around Australia and in Scandinavia (Event Schedule, 2017). In the UK, the Square Peg Media Group has been putting on the My Future Family Fertility Show in London for 9 years (My Future Family Fertility Show, 2017). Besides helping gay prospective parents to understand their family formation options, Men Having Babies offers their Gay Parenting Assistance Programme, which offers discounts, free services and cash grants to help those gay men who cannot afford to pay full price for their surrogacy journey. Full price for a surrogacy journey has been estimated at between \$100,000 and \$200,000, with an average cost of \$120,000–130,000. The website ‘Gays With Kids’ breaks down the estimated costs as follows: \$10,000–15,000 for egg donation; \$40,000–80,000 for gestational carrier costs; \$25,000–30,000 for agency fees; \$15,000–25,000 for the in-vitro fertilization (IVF) procedure; and \$5000–10,000 for legal fees (How Much Does Surrogacy Cost Gay Men?, 2017).

<sup>2</sup> Gamble (2016) suggests that US practices may put pressure on the UK to reform their surrogacy laws in two ways: first, by providing an example of the successful functioning of more liberal surrogacy laws; and second, by providing a place where UK citizens will go to seek surrogacy away from UK regulation as long as the UK continues to forbid commercial surrogacy.

Clearly then, gay men or couples with scarce financial resources, or without access to significant amounts of credit, will find biological kinship difficult, if not impossible, to attain. This brings the question of justice into stark relief. So too do claims like those made by Sam Everingham, the Executive Director of Australia’s Families Through Surrogacy, who calls gay prospective parents whose home countries forbid surrogacy ‘reproductive refugees’, pointing to the fact that their options for surrogacy abroad have also been dwindling (Preiss and Shahi, 2016). Marcia Inhorn uses similar language when she speaks of a certain group of ‘reprotravelers’ from the UK who seek IVF treatment in Dubai. She calls them ‘NHS refugees’ because, on her account, their plight stems from a resource crisis where, despite the seeming availability of publicly funded IVF, services remain out of reach for many due to extremely long wait times, overtaxed clinics and various exclusion criteria (Inhorn, 2015). The demands for justice implied by the language of ‘refugees’ go beyond those for rights, as I will elaborate below. Literal refugees, I would argue, are not simply in need of rights, they are in need of justice. Their lives are full of deprivations and insecurities that a ‘laissez-faire’ approach to granting rights would never allow most of them to combat. They lack the basic resources required to make their own way in the world. They need and deserve social assistance to survive, let alone thrive. Can the same be said for gay men in pursuit of biological kinship, even if only to a much lesser degree?

### The reproductive justice framework

One way to begin to explore these questions is through the reproductive justice framework elaborated by various groups of women of colour. While not all women of colour organizing around reproduction use the term ‘reproductive justice’ to the exclusion of ‘reproductive rights’, where the two terms are contrasted, the former indicates a need to broaden the narrow focus often held by middle-class white women’s reproductive advocacy groups – that is, a focus on winning and maintaining access to abortion and birth control (Silliman et al., 2016). A privacy-based right to make a choice about whether or not to have children is only one part of the reproductive needs and concerns that occupy women and communities of colour. Other key elements include both the right to have children and the right to parent the children one has in safe and healthy environments.

In their research on groups of women of colour organizing for reproductive justice, Silliman et al. found that, despite significant differences between groups, all are engaged in: “(i) redefining reproductive rights to include the needs of their communities; (ii) leading the fight against population control and asserting an inextricable link between the right to have children and the right not to; (iii) organizing along lines of racial and ethnic identity in order to create the spaces to confront internalized and external oppression, forge agendas and engage with other movements; and (iv) promoting new understandings of political inclusion and movement building that bridge historic divisions and create new alliances” (Silliman et al., 2016, pp. 10–11). The reproductive justice framework also sees these rights as entailing “the obligation of government and society to ensure that the conditions are suitable for implementing

one's [reproductive] decisions," requiring at a minimum that all reproductive choices be safe, affordable and accessible to women (SisterSong, 2014).

This introduction to reproductive justice is quite brief (and I will continue to refer back and add to it in the rest of this article), but already both similarities and differences may be apparent between gay men seeking biological kinship, on the one hand, and women of colour concerned about reproduction, on the other. For instance, gay men do represent a specific identity-based community with specific reproductive needs, yet they have typically not lived together in geographically segregated communities subject to distinct race-based economic discrimination and heightened health and safety hazards. This is just one of myriad reasons why the lived histories of these two marginalized (and internally diverse) groups, and the way that social movements have evolved from those lived histories, cannot be conflated. Nevertheless, I am interested in whether understandings of justice articulated by women of colour might apply to gay men as a group seeking better access to biological reproduction.

We might, for example, consider any similarities in the subjection of the two groups to population control measures. In this respect, gay men have not been targeted to the same extent as women of colour, especially not in the USA, but they have still been subject to medical interventions of varying severity, up to and including both chemical and non-chemical castration, and forced sterilization (Shapiro and Powell, 2017). As with attempts to control the reproduction of women of colour, justifications for these practices have varied and shifted. In Nazi Germany, for example, perceived homosexuals could be involuntarily castrated under two different laws: the Hereditary Sickness Law (used less often) and the Law Against Habitual Criminals and Sex Offenders (used more often). That is, castration could be justified either in terms of eugenics or as a measure to alter behaviour seen as dangerous to the community (as could the sending of homosexuals to concentration camps). Yet, as Giles argues, there is good reason to believe that the drive to castrate homosexuals in Germany was as much a desire to punish as anything else. Moreover, false accusations of homosexuality could be levied for personal or political reasons, as sometimes occurred amongst the Hitler Youth (Giles, 1992). Similarly, while justifications for reproductive interventions imposed upon women of colour have involved both eugenic and behaviour modification arguments revolving around the issue of poverty, the urge to punish is often evident in the practices. Additionally, as Dorothy Roberts has argued, public efforts to control the reproduction of women of colour shore up the impression that social inequalities stem from the behaviours and biological inclinations of individuals or groups rather than from correctable structural forces within society (Roberts, 2005). Thus, while due attention must be paid to the particularities of each context, gay men could conceivably follow in the footsteps of reproductive justice movements by grounding claims to greater access to reproduction in the history of sexual/reproductive injustices to which they have been subjected as members of a socially marginalized identity group.

In a more current US example, openly gay men have generally been forbidden to donate sperm at sperm banks due to US Food and Drug Administration regulations, ostensibly because they represent a high-risk population for human immunodeficiency virus (Culhane, 2005). While

sperm donation is not a path to parenthood in a social sense, it is still a potentially procreative act which would allow gay men to participate biologically in the future of the human race. Moreover, regardless of its lack of genuine scientific justification, the ban serves to stigmatize gay male sexuality and reproductive capacity, just as so much policy pertaining to women of colour over the last century has done. Yet, despite these possible points of connection and solidarity, and while gay men certainly represent a group that has been able to organize around identity to confront oppression and force agendas, if organizations representing gay men seeking surrogacy have sought or created alliances with reproductive justice movements led by women of colour, I am not aware of them.

## Rights versus justice

As already stated, if anyone has a right to surrogacy, gay men must be included. Writing as 'The Ethicist' in the *New York Times*, Kwame Anthony Appiah, himself a gay man, states the case clearly. He was asked by David Lat of *New York*: "Are we acting unethically – or at the least selfishly or self-indulgently – in pursuing biological children instead of adopting orphans who could benefit from what (we like to think) would be a good home?" Appiah's response begins:

"Anybody who is contemplating having a baby, by whatever means, could be adopting a child instead. If those who chide you include people who have biological children themselves, you might want to point this out. Come to think of it, your friends who don't have children are also free, if they meet the legal requirements, to adopt. Every child awaiting adoption is someone who could benefit from parental volunteers. There is no good reason to pick on you" (Appiah, 2016).

The response goes on to note that a responsible surrogacy agency should be able to help avoid exploitation of surrogates and egg donors, and to describe the desire to have biologically related children as 'pretty normal', being rooted in evolutionary mandate to pass on one's genes.

Although I think it is, in fact, quite difficult to separate what is 'natural' and what is social in the (albeit widespread) desire to have biologically related children, I think Appiah's point is generally quite apt. Gay men have no special duty to adopt children, and if reproductive technologies are made available to others unable to have biological children without them, so too should they be available to gay men. This minimum of non-discrimination concerns what I am calling 'free-market rights'.

Free-market rights are essentially negative rights – they offer freedom from interference in the marketplace. People are not prevented from buying those things that are offered on the open market, so long as they can afford those things and are willing to pay the amount asked. There is no obligation to make the desired good affordable or to assist any particular person or group in buying the desired good, but the ability to buy, where it already exists, is not impaired. This freedom also operates on the other side of the transaction. Women are free to offer their services as egg donors or surrogates, so long as a couple or an agency deems those services valuable, and that value can be agreed upon. While an agency may claim to be protecting the

wellbeing of surrogates through its screening process – and that may, in fact, be a major motivator for the screening – stringent screening is also in the interest of the agency as a business and of its customers. A surrogate who will not deliver the contracted good without significant complication – either legal or health – makes for a bad investment.

In short, free-market rights exist for gay men with respect to reproduction when: (i) women are willing to sell their eggs; (ii) women are willing to serve as surrogates; (iii) agencies are willing to coordinate these services; and (iv) gay men are willing to spend money that they have or can borrow for these services. An analogue in reproductive activism could be drawn concerning abortion. Free-market rights exist for women with respect to abortion when: (i) doctors are trained and willing to perform abortions; (ii) women are not prevented from seeing these doctors; and (iii) women have or can borrow the money to pay these doctors. In both examples, however, there is much that can stand in the way without a specific denial of free-market rights. There could be a shortage of women willing to donate eggs or serve as surrogates, just as there could be (and often is) a shortage of doctors trained and willing to perform abortions. Gay men may lack the financial means necessary to pay for having a biological child, just as women may lack the financial means for an abortion. Relatedly, a lack of surrogacy agencies or abortion services near one's home could increase the cost in terms of time and money, making those goods even less available.

These types of obstacles give critical legal theorists (or indeed any activists concerned with concrete reductions in lived hardships and inequalities) grounds to argue that certain (negative) forms of rights are useless unless accompanied by a recognized duty on the part of some identifiable entity to ensure access to the good(s) that the right is meant to offer (also described as 'positive rights').<sup>3</sup> In the abortion example, that could mean: (i) a duty on the part of doctors to learn and be willing to perform abortions; (ii) a duty on the part of the state or federal government to fund enough clinics to have one operating within a reasonable driving distance of most women; (iii) a duty on the part of insurance companies to cover abortion services; and (iv) an additional government duty to cover abortion costs for low-income women without private insurance coverage. Already in this case, a significant ethical challenge arises. Are we ready to demand that doctors perform abortions whether they agree with the practice or not?<sup>4</sup>

The severity of the consequences (economic, psychological and in terms of life course) for a woman of having a child she did not want – along with the established codes of professional medicine – may convince us that, yes, doctors must be required to perform legal abortions. The problems in identifying duties owed to gay men wishing to have biological children, however, feel rather different. While we might entertain a requirement that insurance companies and government funds cover the costs of gay couples using surrogates and donors the way they

cover other infertility treatments (or even standard pregnancies), surely it is not appropriate to describe women as duty bound to donate eggs or serve as surrogates. Such duties are the stuff of reproductive dystopias. Even asking for expanded insurance coverage within the US system dominated by private insurance companies poses risks. I am reminded of the notices I receive from my insurance carrier each time they pay a claim on my behalf. They begin with the amount billed by the providers, then show the discount they have already negotiated on that service, before listing the amount they paid on the claim and concluding with the amount for which I am responsible. While I am perfectly happy that they have negotiated a discount on my son's X-rays, I am much less comfortable imagining large insurance companies negotiating discounts on egg donations and surrogacy services. Nevertheless, a state duty to reduce costs to gay men for reproduction would no doubt be welcomed by gay men wishing to have babies.

Still, while a slight improvement over the highly neoliberal logic of free-market rights, rights with duties does not precisely capture what is intended by movements for reproductive justice. In fact, much of what we find in reproductive justice movements is articulated in opposition to limited market logics. Moreover, if we are attempting to get at reproductive justice, abortion rights make for a poor example, as an almost myopic focus on those very rights is precisely what proponents of reproductive justice wish to overcome. Struggles for justice (in this and many other contexts) are, I would argue, struggles based in persistent and group-based social inequality and discrimination. The need to elaborate something like the right to have children, or the right to raise the children one has in safe and healthy environments, only arises when people are deprived of that right. It only makes sense when such deprivation is not sporadic or largely due to accident or chance. Women of colour articulate this need under the banner of reproductive justice because people have attempted to control and limit their fertility, because the many problems which plague their communities have been caused by systemic discrimination and are often ignored, and because those problems typically include various environmental hazards and poor access to affordable, high-quality health care. Put simply, reproductive justice movements are responses to structural injustices visited upon minority communities subject to other forms of discrimination (Silliman et al., 2016).

### Do gay men face reproductive injustice?

Gay men have certainly faced and continue to face discrimination, both simply for being gay and in the attempt to pursue and sustain long-term, same-sex relationships. Before marriage equality, which still feels quite tenuous, gay men (and women) were shut out of a variety of benefits that accrued automatically to straight couples who were legally considered family. Given a variety of emotional and financial advantages to legal marriage, the absence of it for gay couples can definitely be considered structural injustice resulting from discrimination. Gay men and couples may also be subject to a variety of other forms and manifestations of discrimination based on the intersection of their sexuality with other socially vulnerable identities (in terms, for example, of race, class, ability or

<sup>3</sup> For a description of the broad challenges of bringing about positive rights in a US judicial system more comfortable with negative rights, see Neuborne (1988).

<sup>4</sup> Debates over whether doctors should have a right to conscientious objection are quite active. See, for just one recent example, Stahl and Emanuel (2017).

immigration status, to list a few). In these cases, it is never possible to neatly theorize homophobic discrimination apart from the other factors.

Where reproduction is concerned, for those gay (or bisexual) men who have had children with female partners, a loss of custody could be considered a specifically reproductive injustice – at least where the loss of custody explicitly or implicitly results from a perception that homosexuality constitutes a form of deviance that renders a parent unfit. An analogue for women of colour is found in the disproportionate rates at which children are removed from the homes of poor and minority women, where the explicit cause of the removal results from structural injustices beyond the woman's control, while the implicit cause is a widespread social perception that poor women of colour are incorrigibly bad and dangerous mothers (Miller et al., 2013). Barriers to adoption based on the same perceptions of unfitnes (whether implicit or explicit) would also be considered reproductive injustice.

For poor women and women of colour, correcting these injustices calls not only for a change in a broad social perception of them as deviant parents – which would also apply to gay men of all sorts – but also for improved provision of social services and broader changes in the social landscape that would allow them to raise their children in safe and healthy environments. In other words, correcting for reproductive injustice would call for structural changes such that poor women and women of colour are not unduly burdened in their quests to be good parents (and not then subsequently punished for failing to overcome these undue burdens). The implicit contrast here in terms of burdens is with white middle-class heterosexual families, who are presumed to be adequate parents unless proven otherwise, and for whom the ability to earn a living wage will typically not be in conflict with the ability to keep their children safe and well parented. Faced with these class–race contrasts between poor women of colour and white middle-class families, which are crucial to the social landscape within which reproductive justice movements have emerged, it is difficult to know where to place gay men. While subject to perceptions of deviance and unfitnes, those gay men seeking the costly surrogacy and egg donation services at issue here are more likely to have a comfortable middle-class lifestyle, allowing for a safe, healthy child-rearing environment (Smietana, 2017).

This is how, when we move away from cases involving existing children, it becomes more difficult to identify structural injustices faced by (white and/or middle-class) gay men, specifically as gay men, which might be remediated through public support for their use of egg donation and surrogacy. We are talking now about infertility, loosely understood as the inability to have children. For women of colour, infertility becomes an issue of reproductive justice when its causes are not 'natural' (unknown or unpreventable) or incidental (just happening to occur to a woman of colour), but structural. For example, major causes of infertility among poor women (and disproportionately minorities) are untreated sexually transmitted diseases or poor medical treatment during an earlier birth, related to the structural problem of poor access to affordable, quality health care. Similarly, infertility among industrial and agricultural hourly waged workers is often the result of workplace and environmental toxins, related to

the structural problem of economic and educational divides which force the least advantaged to accept the most hazardous working conditions in order to support themselves and their families (Shanley and Asch, 2009). In addition, there are the various population control measures which have targeted women of colour for forced sterilization or coerced them into using experimental or dangerous methods of birth control (Roberts, 1999; Washington, 2006). These injustices do not necessarily call for access to reproductive technology – although that might be one option. More fundamentally, they call for structural changes aimed at improving general health services, the reduction (or fairer distribution) of environmental risks, and an end to interference in women of colour's reproductive capacity.

Where gay men lack access to basic health care or are exposed to environmental risks that compromise their fertility, those situations should certainly be remediated, but it is likely rare that such situations are a direct result of their sexuality.<sup>5</sup> Indeed, in the specific scenario we have been exploring – where gay men are seeking biological kinship – they are not biologically infertile. Rather, we might describe their relationship or marriage as 'dysfertile' – that is, as a relationship within which biological children cannot be produced without third parties. I borrow this term from Lisa Ikemoto, who uses the term to connote a perceived dysfunction or unnaturalness, but I intend my use to be more neutral (Ikemoto, 1995). Whereas infertility is an individual physical state, dysfertility is a state of a relation (or even lack thereof). We might consider straight couples to be dysfertile where, for example, a wife is fertile but a husband is infertile. We might also consider single people to be dysfertile, especially in the case where a single person wishes to have biological children without needing a partner.

Some forms of infertility – those which occur naturally, at random, without a social-structural cause – cannot be considered injustices to be remediated. Similarly, I would argue that most cases of dysfertility, while emotionally painful and frustrating, are not structural and therefore do not qualify as injustices. That gay men (or naturally infertile straight people) cannot have biological children without assistance is not a punishment that society has issued against them, whether intentionally (via discrimination) or unintentionally (via neglect). It is a lived reality that may be experienced as a hardship, but not a result of injustice. What I am finding here, then, is that neither gay nor straight people (nor people who defy that binary) are owed access to reproductive technology by society as a matter of justice. Moreover, to approach the problem in this manner risks conscripting women to serve as reproductive donors or labourers. However, once again, if reproductive technologies are available to some people, they should also be available to all people. Furthermore, if a society believes that biological children are an important social good, and if that society decides to do more to help people achieve biological parenthood, then I believe justice would demand that it do so for people of all races, ethnicities, classes and sexual orientations.

<sup>5</sup> Some exceptions to this trend may include cases where human papillomavirus goes unrecognized or untreated in gay men because of hetero-bias leading to infertility, or where treatment of trans youth does not prioritize preserving fertility.

Nevertheless, rather than concluding on this point, I prefer first to delve further into this question of social goods and structures by looking at what I will call the 'gold standard' of gay male assisted reproduction.

### One egg donor, one surrogate, two children and two biological fathers

What I am calling the 'gold standard' is the intended surrogacy journey described by David Lat (mentioned above):

"Chalk it up to vanity, but we both want to be biological fathers, which means having at least two children. Rather than decide who gets to go first by flipping a coin or having a foot race (which Zach would surely win), we decided to try for two at once. Here's how it works: We'll use the same egg donor; half of the harvested eggs will be fertilized with Zach's sperm, and the other half with mine. The embryos will be evaluated by the fertility clinic, and the most promising one from each of us will be implanted in the surrogate's uterus. Transferring two embryos provides no guarantee of twins – implantations don't always succeed, and miscarriages can occur. But implanting two embryos creates at least the possibility of twins, who would be biological half-siblings (remember: same egg donor). Implanting two embryos also increases the chances of at least one surviving to term" (Lat, 2016).

The challenges for this particular path include the increased risk of complications during a twin pregnancy and greater difficulty in finding a surrogate willing to carry twins. It also costs approximately \$5000 more than having a single child through surrogacy, although, obviously, going through two separate surrogacy processes to have two children would be significantly more expensive.

This same path is described in the stories of Jeffrey and Brian Bernstein, Cliff Hastings and Ron Hoppe-Hastings, and Edward Palmieri and Christopher Schriever (Chandler, 2017; Fishman, 2017; Schoenberg, 2016). It was also the path taken by actors and husbands Neil Patrick Harris and David Burtka. I have no records of how often this surrogacy journey is chosen (or attempted) over other options. It is worth noting that, as an organization, Men Having Babies discourages this route. In their Framework for Ethical Surrogacy for Intended Parents, the organization urges intended parents to "acknowledge the significant health risks associated with multiple pregnancy for both the carrier and future babies" and warns that "a multiple embryo pregnancy tends to be more painful and disruptive to the surrogate and her family" (Men Having Babies, 2016). Nevertheless, the fact that so many media stories have chosen to feature this particular family configuration seems to place it as a sort of ideal. It is worth attempting to name what makes it so ideal.

I think the first reason (or set of reasons) for its ideal status has to do with family norms in our society – norms built around an image of the white, middle-class, heterosexual nuclear family. The heterosexual nuclear family (and, until recently, marriage itself) is implicitly defined by its reproductive capacity – the possibility of producing and rearing biological children. I would not say that gay men or lesbians want to be straight. Nor would I say that the desire for family is limited to straight, middle-class couples. There is, however, evidence to suggest that when gay or lesbian couples imagine creating

families, they are often drawing from a larger social imaginary in which two parents and (one to four) biological children living as a closed, self-contained unit represent family in its socially clearest form. Aaron Goodfellow, for example, found in his interviews with gay fathers that: "Virtually every family I came to know embraced the ideals associated with bourgeois imaginations of the nuclear family and its value as the primary site for building responsible citizens and securing the future of civil society" (Goodfellow, 2015, p. 22). This stands in ironic contrast to social conservative fears that same-sex marriage will destroy that self-same ideal nuclear family. While neither gay men nor lesbians can replicate that heterosexual form perfectly – to say nothing of the many heterosexual families that come in other shapes and sizes – gay men can approximate the form most closely with the gold standard journey, using biological connections as the strongest determinants of kinship and full family status. Through this particular setup, each father obtains a biological relationship with one of the children, while the two children possess a biological relationship with each other, connecting the entire nuclear family.

Meanwhile, the need for outside assistance is managed by splitting the contributions of women outside the family into two parts. The biological contributor – or egg donor – typically remains anonymous, and does no bonding with the fetus. The gestational contributor – or surrogate – is known and bonds with the fetus, but bears no biological relation to the child and is thus expected to keep a particular distance. Choosing women who have already had their own biological children (as surrogacy agencies like to do) is also meant to ensure that sense of distance. For all that the desire for biological children is framed as natural, the social imaginary has been hard at work privileging biological relationships, and its role in the feelings 'one just has' cannot be ignored. Nor can the fact that, historically, the privileging of biological relationships within the confines of socially sanctioned marriages in the USA has deep ties with the establishment of racial hierarchy and attempted maintenance of racial purity (Ikemoto, 1995). As a matter of justice, then, it might be important to begin to re-imagine the ideology of family, especially where that ideology takes part in stigmatizing families outside the norm, and especially where those families most stigmatized are likely to be poor people and people of colour.<sup>6</sup>

Nevertheless, beyond the ideology of family, I think there is a second reason for the appeal of this particular complex of biological relations (and the disaggregation of other possible maternal ties). That second reason has to do with security and agency. The nuclear family is not just an ideology, it is also a legal entity that is owed a measure of privacy, and within which (certain) parents are granted significant latitude in the raising of their children. The privacy and freedom to make decisions about and for one's children are substantial values in the USA, but they are much more easily attained and preserved in private transactions (such as those organized by a surrogacy agency) than in transactions overseen by the state (such as public adoption). In the story of the Bernsteins, the reporter notes that the couple "had ruled out both fostering and adopting children

<sup>6</sup> Critiques of the uncritical replication of dominant family norms by gays and lesbians – what has been called 'homonormativity' – have a substantial history in queer academic and activist circles. See, for example, Garwood (2016).

because they didn't want their lives thrust under a microscope only to end up at the bottom of the list because they were gay". In Brian's words: "I didn't like the idea of adoption screeners nitpicking every aspect of our life, deciding whether we'd be fit or unfit parents, when heterosexuals can just have a slip-up one night" (Fishman, 2017). In keeping with this statement, Blake et al. found that the most common reason for pursuing surrogacy among gay men is a perception of adoption as "a less desirable and/or achievable path to parenthood than surrogacy" because "fathers felt that they would have had less control over the process of both becoming a parent and raising the child" (Blake et al., 2017, p. 862).

Gay men want to be able to make families on their own terms, without judgement or interference, and they want to know that those families are secure, with no risk of their children being taken from them due to discrimination. Here, we have worked our way back to a matter that sounds suspiciously like a structural injustice. We might, then, say: Sure, gay men are using women's reproductive capacities to buy their way into normalcy by replicating the white, middle-class nuclear family. And, yes, such replication does risk acting against the goals of reproductive justice by allowing for the continued stigmatization of the poor and people of colour raising children outside of the nuclear family model. But gay men, too, face injustice in this imperfect society, and private egg donation and surrogacy arrangements allow them to form stable families with reasonable legal protection, and without undue interference.

I do not suggest this flippantly. My wife and I have a son, and we relied on a donor. Having a stable, legally protected family, free from interference, is very important to me. Still, if we want to address this question in the spirit of reproductive justice, I do think we have to take a critical stance on the role of family ideology in perpetuating injustice. As Peter Gabel has described, there is always a risk for social movements of falling into the socially dominant mindset of 'rights-consciousness'. In his words: "Rights-victories can facilitate a movement's cooptation by tempting the movement to 'return' its power to the State in exchange for ... a pseudo-recognition of the movement's particular demands" (Gabel, 1983, p. 1591). Gabel argues that every social movement by a marginalized group possesses an authentic self-understanding that seeks not merely to reform the existing system, but to transform it. This transformative potential stems not from the movement's particular and practical needs (which the extension of rights seem to address), but from its "appeal to the universal and authentic meaning of freedom and equality as that meaning would be realized for everyone through the realization of each movement's particular demands" (Gabel, 1983, p. 1588). When a movement is seduced into simply demanding, and eventually receiving, particular rights from the state for its particular class of members, this transformative potential is obscured and goes unrealized. Securing access to the norm of the nuclear family for middle-class gay men and calling it 'justice' runs this very risk of stunting the potential for a more universal and authentic vision of freedom and equality in the realm of procreation.

One alternative, then, would be an attempt to articulate a form of justice that goes beyond eliminating injustice. Something we might call, paraphrasing Roberts (1999), 'procreative liberty', where the use of the word 'procreative' is intended not merely to refer to biological reproduction, but

to emphasize the creative nature of family formation, affective bonds and kinship, whether biological or not. If gay men wishing to form families were to team up with women of colour fighting for reproductive justice, they might achieve the diversity of marginalized standpoints (and critical mass) required to re-imagine procreation and family altogether. Indeed, such efforts towards solidarity would ideally involve any number of other groups (or segments of groups) concerned about procreation, broadly conceived. This might include, but is by no means limited to, persons identifying as intersex, trans or disabled. Moreover, it might involve donors of gametes (both egg and sperm) and surrogates, whose contributions to the family-building projects of others have not always been understood or described as 'procreative'. Widening the possibilities for donors' and surrogates' self-description of what they do and why they do it beyond the narrow social scripts currently offered could prove invaluable for conceptualizing assisted reproduction outside of traditional, (hetero) normative frameworks.

Of course, solidarity is never as easy as one might hope, and the goals of these various groups (not to mention those of the various individuals within them) may not only be different, but may actually conflict at various points. As discussed above, our two target groups in this essay – gay men seeking surrogacy and women of colour in reproductive justice movements – are constituted by very different concrete (and spatial) histories. In order to understand communities in their relation to liberatory change, insists María Lugones (2003), we must recognize and emphasize the inter-relation of their concreteness, spatiality, multiplicity and impurity. In other words, all social groups will consist of heterogeneous membership and exist in complex material and ideological relation to domination and resistance. This means that such groups, no matter how embattled in their own struggles, are almost inevitably implicated in systems of domination affecting both themselves and other groups. Bringing communities together for collective struggle thus requires "the collective work of revealing to each other the interrelatedness of our worlds of sense, our histories (spatialized), [and] of our spatialities (produced)" (Lugones, 2003). That inter-relatedness will not always be positive.

Therefore, in bringing together gay men seeking surrogacy and women of colour in reproductive justice movements – whether it be in thought (as in this essay) or in solidarity on the ground – (at least) three things must be kept in mind. The first two have been the focus on this essay: the differences between the communities and the commonalities that might be discovered. The third and most crucial element is a recognition that the two groups are already inter-related in ways that are far from unproblematic. Thus, ongoing dialogue (and perhaps other forms of reckoning) would be necessary around several issues. These include (but again are not limited to): (i) the intersections of queerness and racialized identity, especially where those intersections are not within the middle-class; (ii) cross-racial donation or surrogacy, and both the power and ideological dynamics involved; (iii) the long-term concerns around inter-racial adoption and the discriminatory forces behind the removal of children from families of colour; and (iv) the racialized and othering discourses of transnational adoption and surrogacy.

While each group might continue to pursue its own concrete objectives in order to reduce current in-group suffering in the short term – and while those objectives may



remain in tension with one another – a fuller re-imagining of procreation and family would go beyond both gay men's request for recognition in terms of rights and women of colour's fight for adequate parenting conditions and resources. It would recognize that the value of procreation stems, as Roberts writes, "as much from its role in social structure and political relations as from its meaning to individuals" (Roberts, 1999, p. 312). Ideally, acting in solidarity, we might imagine (and ultimately enact) broad guidelines for ensuring that all people in our society have not simply the right, but actual concrete access to 'life, liberty, and the pursuit of happiness' within a much wider variety of protected and supported family formations.

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