

In the Best Interest of the Child

LGBT parents and same-sex parenting in the United States

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Are the arguments regarding "the interest of the child" given by opponents of same-sex parenting founded? Recent studies in the United States compare the academic achievement, personal development and mental health of children raised by same-sex couples with those of children raised by heterosexual couples.

The debate surrounding same-sex marriage, the adoption of children by same-sex couples and their access to assisted reproductive technologies (ART) has become intense in France. This debate also exists in the United States, where the fact that in some states and other countries same-sex couples are allowed to marry, adopt and have access to ART¹ explains the increase over the past twenty-five years in work/research in obstetrics, foetal maternal medicine, paediatrics, sociology, and psychology on the development of children who have two men or two women as parents.

These studies on LGBT families² in general, and on children raised by same-sex couples in particular, reflect the goals of a progressive agenda in the field of so-called "bioethics" issues. The studies question preconceived ideas, open new fields of study, and

¹ New Hampshire, Iowa, Massachusetts, Vermont, Connecticut, and the District of Columbia; the Netherlands, Belgium, Spain, Canada, Norway, Sweden, South Africa. Moreover, since the beginning of April 2010, in Britain it is now possible for both members of a same-sex couple to become the legal parents of a child following surrogacy or IVF (in the case that one of the parents is the "natural"/biological parent of the child and the other parent has filed a parental order): http://www.bionews.org.uk/page_57926.asp?iruid=3585 (accessed 28 April 2010).

² "LGBT parent" means the status of parent is attributed to one, the other or both members of a same-sex couple who are raising a child so that they can enter into a socially accepted filial relationship with the child. For example, a 2002 law in Quebec converted the social fact of a same-sex couple raising a child into legal recognition of both people as the parents of the child in question.

insist on empirical data and transparency in research.³ Through the very fact of their existence, these studies not only refute the recurring arguments about the lack of data concerning the development of children raised by same-sex couples, but they seriously call into question other frequent arguments (which have no evidence whatsoever) that criticise families headed by same-sex parents by appealing to "the interest of the child". Specifically, these studies respond to the questions that are raised regarding the supposed differences in academic achievement, personal development and even the psychological stability of children raised by same-sex couples compared to those raised by heterosexual couples.

We present here a synthesis of all these studies, first noting their methodological difficulties and pitfalls, followed by the results of four studies that are considered to be the most rigorous. We are especially interested in the new family types in the United States, where two of the four studies were conducted (as compared to the other two studies which were carried out in England and Belgium). Prior to that, however, we will outline the legal framework within which these new families come to be in the United States, whether they are the result of blending families or using assisted reproductive technologies (ART).

ART: Federal Regulation in the U.S.

Contrary to popular belief, the use of ART in the United States does not exist in a "no man's land" without laws or structure. At the federal level, the Supreme Court established that human reproduction belongs to the private sphere, and thus defined a right to privacy.⁴ In addition, in *Bragdon v. Abbott*⁵, the Supreme Court held that reproduction is a "major life activity" for every human being. In that decision and thereafter, a person with HIV, whether asymptomatic or not, falls under the protection of the *American Disabilities Act* (ADA) in case of discrimination, since having the virus stops the person from having children for fear of transmitting the virus to the child. Since that decision, a number of courts have found that people with fertility issues are also protected under the ADA.

This rather remarkable constitutional protection does not mean that American citizens can do anything and everything they want. Two federal laws governing ART should be

³ "Progressivism is predicated on the questioning of assumptions, on openness of inquiry, on reliance on empirical data, and on transparent communal investigation". Jonathan Moreno & Sam Berger, "Bioethics Progressing" in *Progress in Bioethics: Science, Policy, and Politics*, Cambridge, MIT Press, 2010, p. 8.

⁴ *Skinner v. Oklahoma*, 316 U.S. 535, 1942; *Griswold v. Connecticut*, 381 U.S. 479, 1965; *Eisenstadt v. Baird*, 405 U.S. 438, 1972; *Roe v. Wade*, 410 U.S. 113, 1973; *Relf v. Weinberger*, 73-1557, U.S.D.C., 1974.

⁵ *Bragdon v. Abbott*, 524 U.S. 624, 1998.

mentioned: The *National Organ Transplant Act* prohibits the sale of organs and other human body parts; what has market value in the case of sperm and ova donation, for example, is the time spent and/or days of work lost by the donor. The second federal law required that the Health and Human Services Department develop a certification process for fertility treatment centres – which they could adopt or not – and furthermore it required fertility treatment centres across the United States to publish an annual activity report on a volunteer basis.⁶ In 2006, of the 483 active clinics, 426 responded to the questionnaire.⁷ There are no sanctions for the centres that do not report apart from the market penalties they pay inasmuch as future "patients" regularly consult the report online before choosing their treatment centre.

The absence of any other federal legislation regarding ART can be simply explained by the principle of separation of powers and how federalism works in the United States. Article 1, Section 8 of the U.S. Constitution delegates a certain number of powers and duties to Congress, and the 9th and 10th Amendments delegate the remaining powers to the individual states or to the people.⁸ In practice, this simply means that states and their institutions – their assemblies, their representatives, their courts – have been given the power to propose, create and evaluate public policy in all the domains not mentioned in Article 1, Section 8 of the Constitution. Therefore, each state can make its own policies regarding health, families, education, penal law, family law, etc. A number of states have already passed laws regarding the use and consequences of ART (filiation, etc.), some of which are quite restrictive, as in the case of Louisiana, and others of which are much less so, such as in California.

Laws Regarding Marriage and LGBT Families

In the United States, marriage between same-sex couples is not federally recognised. Furthermore, in 1996 the American Congress passed the *Defense of Marriage Act* (DOMA), which defines marriage as a contract between a man and a woman. This federal law also allows states to not recognise same-sex marriages contracted in states that permit it, should they so wish. President Barack Obama has also come out against same-sex marriage, but he

⁶ The National Organ Transplant Act (1984 Public Law 98-507, amended 1990). The Fertility Clinic Success Rate and Certification Act of 1992 (Pub. L. 102-493, 42 U.S.C. 263a-1 et seq.).

⁷ Centers for Disease Control/Department of Health and Human Services, Assisted Reproductive Technology 2006 Report: <http://www.cdc.gov/art/ART2006/section1.htm>.

⁸ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (9th Amendment), and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (10th Amendment).

supports civil unions such as they exist in some states. He has furthermore asked Congress to repeal DOMA, and he wants to see the federal rights granted to heterosexual couples extended to homosexual couples. In the same vein, on 15 April 2010 Obama issued a presidential memorandum declaring that all public hospitals and clinics treating recipients of Medicare (national health insurance for the elderly) and Medicaid (national health insurance for the poor) must now allow patients to choose who their legal representative will be in case of incapacity.⁹

At the federal level, same-sex couples can marry in five states and in the District of Columbia, and they enjoy all the rights and duties of married heterosexual couples. Some 45 states have enacted laws reserving marriage for opposite-sex couples, but some of these states have also/nonetheless established forms of civil union that grant same-sex couples some or even all of the rights associated with traditional marriage. In addition, in several states where same-sex couples are not permitted to marry or enter into a civil union, legislators have nevertheless enacted a number of laws according homosexual couples certain rights enjoyed by heterosexual couples in areas such as health and life insurance, the ability to make medical decisions for an ill partner, or adopting a child. Thus, in most states, same-sex couples have at least some of the rights and duties granted to heterosexual couples.

Also falling under the domain of states, the question of the child-parent relationship for same-sex couples and their children varies from state to state and depends on the type of family. In many families headed by LGBT parents, one member (A) brings one or more children from a previous heterosexual union to the relationship. The child therefore already has two "natural" parents (A and B), whose rights supersede those of the new partner (C), unless the birth parent B legally abandons the child, allowing the new partner C to adopt him or her.

In the case where the child is adopted or the result of ART, same-sex couples have different possibilities, depending on the state they live in. For adoption, the majority of states allow adults to adopt regardless of sexual orientation, and in many states joint adoption by unmarried and/or same-sex couples is permitted. If a child is conceived using ART, most states allow second-parent adoption, that is, adoption by the non-biological parent, the one

⁹ "Presidential Memorandum - Hospital Visitation", 15 April 2010: <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation> (accessed 28 April 2010).

who did not provide gametes or carry the child.¹⁰ In states or jurisdictions that don't offer this possibility, there may be other solutions, such as step-parent or domestic partner adoption by the partner of the child's biological parent where the child already lives with the same-sex couple, or the non-biological parent may be granted the status of guardian (which has fewer rights than adoption).

Finally, in the states and/or jurisdictions where there is no provision for the parentage of a child adopted by a same-sex couple and/or resulting from the use of ART and both parents want to be recognised as legal parents, they may eventually obtain recognition of their status as co-parents from the state court under the psychological parent doctrine. In this case, the non-biological parent must convince the court of the need for a legal decision that protects his or her relationship with the child in question and that it is in the interest of the child. Thus, the court is led to consider the child's interest and well being almost exclusively. This type of petition most often occurs when a couple with a child or children separate and the non-legal parent wishes to be granted a form of guardianship over the child that he or she raised along with the biological parent. But as the psychological parent doctrine has been established as a model to follow more or less across the country, there is a growing number of such petitions at a very early stage, that is, even before the birth or arrival of a child to a same-sex couple living in a region where it is permitted.¹¹

Children Raised by Same-Sex Couples: Some Statistics

Turning to a more precise subject, let's start with some important figures. The first official figures on LGBT households, released in 2000 by the U.S. Census Bureau, estimated that there were 658,000 such households and 27% of them had children, which would mean about 166,000 children living with LGBT parents.¹² The most recent figures, also from the

¹⁰ "Types of Same-Sex Adoption", About.com, part of The New York Times Company: <http://gaylife.about.com/od/gayparentingadoption/a/samesexadoption.htm> (accessed 28 April 2010). "Gay and Lesbian Adoption State-by-State", About.com: <http://gaylife.about.com/od/gayparentingadoption/a/gaycoupleadopt.htm> (accessed 28 April 2010).

¹¹ Kathy T. Graham, "Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children", *Santa Clara Law Review*, 48, 2008, p. 999-1037.

¹² U.S. Census Bureau, U.S. Census Bureau, "Married Couple and Unmarried-partner households: 2000" (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf> (accessed 8 February 2010). See also an analysis of the difficulty in collecting these data: "Counting Paper", U.S. Census Bureau, <http://www.census.gov/population/www/socdemo/files/counting-paper.pdf>. It should be noted that the census form does not specifically ask about sexual orientation. However, two questions allow gay couples/households to identify themselves as the form asks for the name and sex of each person living in a household as well as the relationships between them (see page 11 at the following site - <http://www.census.gov/dmd/www/pdf/d02p.pdf>). It should also be noted that activist groups in favour of gay rights have actively encouraged each gay couple "to

U.S. Census Bureau, show that of the nearly 77.4 million underage children in the United States, approximately 250,000 of them are being raised by a gay or lesbian parent or a same-sex couple.¹³

Methodological Pitfalls

In the mid-1980s, the first studies on LGBT families were carried out by activist groups supporting gay rights. They mostly consisted of informal interviews with parents who were concerned about their children, who were often very young. Their conclusions, which almost always praised LGBT parenting, were quickly criticised and rejected. Nevertheless, they had the positive effect of pushing a number of researchers from various disciplines in the humanities and social sciences to become interested in these new family types. The first "scientific" studies were thus conducted through the media's coverage of certain court cases and therefore were thrust into the public eye. Often these cases involved requests for child custody in the case where a heterosexual couple divorced and one of the parents moved in with their same-sex partner. Along with the development of ART and the lack of regulation in some states regarding access to these techniques, the courts began to see petitions for joint custody by same-sex couples – two women, one of whom became pregnant via artificial insemination, or two men who turned to surrogacy.

One of the first methodological problems that comes up when looking at studies on the effect that these new family types have on children lies in the fact that these configurations are very different. In other words, as William Meezan and Jonathan Rauch pointed out in an interesting article, studying LGBT families means studying many family structures rather than just one.¹⁴ Meezan and Rauch highlight the other methodological difficulties that researchers

be counted". See Phuong Ly, "Be Counted in Census, Groups Urge Gay Live-Ins", *Washington Post*, March 12, 2000, p. A 14.

¹³ American Community Survey, U.S. Census Bureau, "Population and Housing Characteristics: Group Housing, 2006", available at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&submenuld=datasets2&_lang=en. According to a more in-depth study of these data, analysed by the Williams Institute at the University of California, Los Angeles, between 600,000 and 4 million children in the United States have at least one if not two gay parents. See Gates, G., "Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey", available at <http://www.law.ucla.edu/WilliamsInstitute/publications/ACSBriefFinal.pdf>. See also Gates, G.J. & Ost, J., *The Gay and Lesbian Atlas*, Washington D.C., Urban Institute Press, 2004; Rogers T.L., "Sexual Minorities Seeking Services: A Retrospective Study of Mental Health Concerns of Lesbian and Bisexual Women", *Journal of Lesbian Studies*, 7(1), p. 127-140; Sullivan, A., "Issues in Gay and Lesbian Adoption", *Proceedings of the Fourth Annual Pierce Warwick Adoption Symposium* (Vol. 6, p. 1-42), Washington D.C.: Child Welfare League of America.

¹⁴ William Meezan & Jonathan Rauch, "Gay Marriage, Same-Sex Parenting, and America's Children", *The Future of Children*, Woodrow Wilson School of Public and International Affairs, Princeton University/Brookings Institute, Vol. 15, no. 2, Fall 2005, p. 97-114.

face given the data that is currently available. Without a doubt the biggest challenge is finding a representative sample. In order to find subjects, researchers – who clearly don't have a list of LGBT families to pull from – must "recruit" families via methods that do not allow for a sufficiently representative sample. In the corpus studied, in all cases except for one, subjects were white, middle- or upper-middle class, city-dwellers and highly educated. The large majority of parents were lesbian, and all participants had already come out.

A third difficulty comes from the lack of funding for this type of research, which forces researchers to make do with small sample sizes. As of 2005, no studies had been funded by the federal government, despite the fact that it is the most important funding source for the humanities and social science in the United States. As highlighted above, the sample sizes are too small to be useable, particularly because they do not allow researchers to determine whether there are significant differences between groups.

In making comparisons, one of the main questions researchers ask is not so much "How do children raised by homosexual parents fare?" but rather "How do they fare compared to whom?" Can a child raised by a single lesbian mother be compared to a child raised by a single heterosexual mother? Can a family with two female parents be compared with a family with two male parents? Most of the studies mix family types or do not compare groups. Some studies suggest that comparing a family with same-sex parents to a family with opposite-sex parents imposes a heterosexual norm that the former will be measured against.¹⁵

Another shortcoming of the studies that have been carried out so far is related to the heterogeneity of LGBT families themselves. There are numerous LGBT family types, the details of which are not often taken into account. At least one study grouped together the children of transsexuals and lesbians, the biological children of one of the members of a gay couple, and children adopted by a gay couple.

The final two shortcomings of these studies have to do with the method used for collecting data and the statistical corrections that were applied in order to compensate for the effect of the small sample sizes. Regarding data collection, few studies have been based on exclusive interviews with children or on passive and long-term observation of their behaviour. Instead they have consisted mostly of self-evaluations, which are cheaper and less time-

¹⁵ Gerard Mallon, *Gay Men Choosing Parenthood*, New York, Columbia University Press, 2004. Victoria Clarke, "Sameness and Differences in Lesbian Parenting", *Journal of Community and Applied Social Psychology*, 12, 2002.

consuming. As for the statistical shortcomings, few studies have made the necessary corrections, leaving doubts about their representativeness.

Results

That said, today there is a consensus that the studies on LGBT families are satisfactory, and four studies in particular are cited as exemplary. Which studies are considered to be "methodologically rigorous" and what are their conclusions?

- The study by Wainwright, Russell & Patterson from 2004 was based on a sample of 12,105 American teenagers from which 44 teens raised by lesbian couples and another 44 teens raised by heterosexual couples were selected.¹⁶

- Golombok *et al.*'s 2003 study in England was based on a sample of 14,000 mothers and their children; 39 families headed by a lesbian mother were compared to 74 families where the parents were heterosexual and 60 families headed by single heterosexual mothers.¹⁷

- The study by Chan, Raboy & Patterson (1998) in the United States was based on a sample of people who had used the same sperm bank. They compared 34 families headed by lesbian couples, 21 families headed by single lesbian mothers, 16 families headed by heterosexual couples, and nine families headed by single heterosexual mothers.¹⁸

- The study by Brewaeys *et al.* in 1997 was based on 107 Belgian families. Two groups that had used the same fertility clinic were compared: 39 families headed by lesbian couples who had conceived through artificial insemination, and 38 families headed by heterosexual couples who had also conceived through artificial insemination. These were compared with a group of 30 families headed by heterosexual couples who had conceived naturally.¹⁹

These four studies do not make do with self-evaluations, but rather they use long-term observation; they also employ statistical tools (notably, multivariate analysis) in order to take into account the demographic and social factors of the groups analysed.

What are the main conclusions of these studies? They differ little from other studies using less rigorous methods, but because of their rigour they provide us with new and very interesting elements.

¹⁶ Jennifer Wainwright, *et al.*, "Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents", *Child Development*, 75, no. 6, December 2004, p. 1886-1898.

¹⁷ Susan Golombok, *et al.*, "Children with Lesbian Parents: A Community Study", *Developmental Psychology*, 39, no. 1, January, 2003, p. 20-33.

¹⁸ Raymond Chan, *et al.*, "Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers", *Child Development*, 69, no. 2, April 1998, p. 443-457.

¹⁹ A. Brewaeys, *et al.*, "Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families", *Human Reproduction*, Vol. 12, no. 6, 1997, p. 1349-1359.

First, all agree that same-sex parents are "like other parents", and where there are differences between children raised by same-sex parents and those raised by opposite-sex parents, they often favour the same-sex families. For example, emotionally supporting children not only when they are in need but also during "normal" periods is more common in households headed by same-sex couples than those headed by heterosexual parents. Similarly, compared to children raised by heterosexuals (whether in a couple or single), children raised by homosexuals (whether in a couple or single) feel more comfortable at school, have a greater understanding of the importance of education, and do not experience the "crisis" of adolescence as acutely. Researchers note that this is due to the quality of the parent-child-adolescent bond that is established at an early age and is most often maintained by LGBT parents.

On the other hand, children raised by LGBT parents do not experience confusion about their gender identify during childhood or adolescence, and the vast majority of these children are heterosexual when they begin their romantic and/or sexual lives. As same-sex couples often like to point out, one hundred percent of today's homosexuals were raised by heterosexuals. The details provided by the four abovementioned studies highlight some differences in gender behaviour; for example, girls raised by lesbians tend to be more "masculine" – more aggressive, more domineering – when playing, while boys raised by lesbian couples tend to be more conciliatory and less aggressive in play. Another interesting detail coming out of the one of the abovementioned studies is the fact that adolescent girls and young women raised by lesbian couples, unlike adolescent boys and young men, adopt more open attitudes towards their own sexuality and are more likely to experience a same-sex relationship.

A third finding is that children and adolescents raised in families headed by same-sex couples show no difference relative to children raised by heterosexual parents in terms of their cognitive ability, behaviour, general psychological development or in other areas of emotional development such as self-esteem, depression or anxiety. Another finding highlighted in the study by Golombok (2003) shows that on the whole children and adolescents do better with two parents than with just one, regardless of the sexual orientation of the parent or parents.

All these findings reinforce the statement made by the American Academy of Pediatrics in 2002, which was reaffirmed on 1 February 2010.²⁰ At that time the AAP also presented the first serious studies comparing children raised by two men with those raised by opposite-sex couples. These studies highlighted the fact that men in same-sex couples in comparison to men in heterosexual couples tended to be stricter and to place greater importance on the role of the father and on the development of their children's cognitive abilities; in short, they were more engaged in their children's activities.²¹

Conclusion

Let's return to the point made by Golombok's 2003 study regarding children raised by two parents. Very few studies, if any, address the potential benefit children raised by married same-sex parents receive for obvious reasons – few jurisdictions currently allow same-sex couples to marry. However, numerous studies emphasise the "better well being" of children raised by a couple. These studies emphasise above all else that children raised by a couple in a "stable union" (marriage, a civil partnership such as the PACS in France, a civil union, cohabitation) benefit from greater financial security than those raised by a single parent, especially in the case where the parent dies, because of access to health insurance, a household with a double-income, and other combined assets. The studies also show that children raised by a couple enjoy a greater sense of stability, which favours their emotional and cognitive development. In short, these studies find that children raised by couples in a stable relationship benefit from the feeling that comes with social acceptance and having a place from which to be able to contribute to society.²²

It seems likely that these benefits also apply to children raised by same-sex couples. We can thus agree with the authors of a recent article published at the end of 2009 in the

²⁰ AAP initial report :

http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341?maxtoshow=&HITS=20&RESULTFO RMAT=&searchid=1265634052110_748. Reaffirmed by the AAP on 1 February 2010: <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;125/2/e444>

²¹ J.J. Bigner, R.B. Jacobsen, "Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Non-Gay Fathers", *Journal of Homosexuality*, 23, 1992, p. 99-112.

²² See also Wendy Manning & Kathleen Lamb, "Adolescent Well-Being in Cohabiting, Married, and Single Families", *Journal of Marriage and the Family*, no. 65, November 2003, p. 876-893; Susan L. Brown, "Family Structure and Child Well-Being: The Significance of Parental Cohabitation", *Journal of Marriage and the Family*, no. 66, May 2004, p. 351-367; Gudrun Neises & Christian Grüneberg, "Socioeconomic Situation and Health Outcomes of Single Parents", *Journal of Public Health*, Vol. 13, no. 5, October 2005, p. 270-278; Rashmi Garg *et al.*, "Educational Aspirations of Male and Female Adolescents from Single-Parent and Two Biological Parent Families: A Comparison of Influential Factors", *Journal of Youth and Adolescence*, Vol. 36, no. 8, November 2007, p. 1010-1023.

International Journal of Law, Policy, and the Family that the best interest of the child does not depend on the parents' sexual orientation but rather on the ties that unite their parents.²³

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²³ John Tobin & Ruth McNair, "Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of The Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt", *International Journal of Law, Policy, and the Family*, 23, 2009, p. 110-131.