

Biological and Social Approaches to the LGBT Family

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Michael Boucai, [*Is Assisted Reproduction an LGBT Right?*](#), 2016 **Wisc. L. Rev.** 1065 (2017).

For decades, same-sex couples have made claims—in both politics and law—to parenthood. Many of these claims relate to the regulation of assisted reproductive technologies (ART), as same-sex couples pursue modes of family formation made possible by ART and seek legal recognition of the parental ties that grow out of their use of ART. These claims have only grown more potent in the wake of [*Obergefell v. Hodges*](#), the 2015 Supreme Court decision granting same-sex couples access to marriage on both due process and equal protection grounds. The centrality of ART in contemporary claims to LGBT equality leads [Michael Boucai](#) to ask in a timely and fascinating new article, *Is Assisted Procreation an LGBT Right?*

In resisting the turn to ART as an LGBT political project, Boucai contrasts the primacy of biogenetic ties in organizing around ART with the role of nonbiological forms of kinship in the history and ethics of LGBT life. ART's "appeal to American society's pervasive *biogeneticism*, its deep-seated faith in the priority and superiority of biogenetic forms of relationship and identity," Boucai asserts, runs against the LGBT community's longstanding commitment to "a social and functionalist ... conception of familial relationships."

To illustrate the significance of social kinship in the LGBT community, Boucai points to work around adoption. As he notes, LGBT people fought for decades to win rights to form foster and adoptive parent-child bonds. "LGBT people's uncommonly warm embrace of adoption," Boucai argues, should not be interpreted as "mere acquiescence to circumstance," but constitutes "queer resistance, both personal and political, to the ideology of biogenetic kinship."

In contrast, Boucai argues, same-sex couples' claims on ART shore up the importance of biogenetic kinship. Of course, a same-sex couple will ordinarily feature at least one parent without a legally cognizable biological tie to the child. But, as Boucai notes, the choice of gamete donors often reflects an interest in replicating the nonbiological parent's physical features and racial or ethnic identity. Moreover, some may even enlist relatives to serve as gamete donors or gestational surrogates. Same-sex couples, through this lens, seek to replicate the biological family. To be clear, Boucai aims his criticism less at the personal pursuits of LGBT people and more at the biological focus "in the politics of LGBT parenthood."

Boucai's intervention alerts us to the ways in which claims on ART can reproduce normative models of family that historically have justified the exclusion of LGBT people. Reflecting critiques of the push for same-sex marriage, Boucai warns of the assimilationist thrust of LGBT arguments for biogenetic parentage. Yet, at the same time, other work—as Boucai acknowledges—identifies the capacity of ART to disrupt the biological, gender-differentiated, and heterosexual family. It is this doubleness, which runs throughout Boucai's article, that makes ART so fascinating and yet so fraught.

Same-sex couples, unlike many of their different-sex counterparts, use ART in ways that produce nonbiological parent-child bonds and lead to parental recognition without reference to biological ties. Viewed from this perspective, Boucai's attention to adoption as a model of social parenthood can be

seen as connected to fights over ART. For same-sex couples, ART represents a pathway not only to biological but also to nonbiological parent-child relationships. Just as same-sex couples staked out the primacy of social, over biological, bonds in their push for adoption, same-sex couples again ask law to credit social bonds over biological connections in the domain of ART.

Given the complicated relationship between LGBT claims on ART and the historically rich LGBT ethic of social parenthood, how might the LGBT community navigate the terrain of ART, family formation, and parenthood? Boucai's critical intervention points in two related directions.

On one hand, Boucai highlights the need to build out claims in the adoption arena. LGBT people, Boucai shows, have distinctive investments in the adoption regime. As Williams Institute research has shown, same-sex couples are much more likely than their different-sex counterparts to be raising foster or adopted children, and LGBT youth are much more likely than their non-LGBT counterparts to enter the foster care system.¹ In this way, LGBT individuals are overrepresented both in the community of adoptive parents and in the pool of children available for adoption. These features lead Boucai to urge the LGBT community to devote greater attention to adoption law and policy—and specifically to the vindication of social parenthood models. Drawing on [Elizabeth Bartholet's](#) foundational work, Boucai shows how the adoption regime is regulated in ways that continue to express skepticism of nonbiological bonds. Embracing a functional model of family more fully could reshape the adoption regime in ways that render it not only more normatively attractive but also more effective in promoting children's welfare.

On the other hand, Boucai urges the LGBT community to pull back from some claims in conflicts over ART. Claims that sound in the fundamental right to procreate, Boucai warns, reiterate the centrality of the traditional, biogenetic family and marginalize the adoptive family. To be sure, some proponents of the ART-focused fundamental right to procreate argue that the right should include the creation of nonbiological parent-child relationships. But it is easy to see how these arguments may situate such rights as merely derivative of rights to parental recognition based on biological connection.

Boucai also expresses skepticism about equality-based arguments in the ART arena. Certainly, laws that restrict access to ART may disproportionately affect LGBT people. But, for Boucai, equality-based challenges to these laws falter on both doctrinal and normative grounds. Not only do these arguments face the ordinary obstacles that disparate-impact analysis currently entails; but, according to Boucai, they also prioritize biogenetic parenthood over other kinds of parental bonds.

Here, though, is where the doubleness of ART is particularly illuminating. Perhaps equality-based claims offer more transformative potential than Boucai admits. By attending to the law's social meaning, rather than focusing simply on questions of classification or discriminatory purpose, courts might appreciate the harms inflicted by a parentage regime anchored in biological connection. For same-sex couples to be treated as fully belonging, the law must recognize the nonbiological parental ties that LGBT people form through ART. Accordingly, claims to equality entail a challenge to the primacy of biogenetic ties. On this view, same-sex couples using ART have the capacity to remake the law and politics of parenthood, even as in their personal lives they may reiterate the salience of biological ties.

1. See Gary J. Gates, Williams Inst., [LGBT Parenting in the United States](#) 1 (2013); Bianca D.M. Wilson et al., Williams Inst., [Sexual and Gender Minority Youth in Los Angeles Foster Care](#) 2 (2014).

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