Polymorphous Reproductivity and the Critique of Futurity:  
Toward a Queer Legal Analytic for Fertility Law

Stu Marvel

This article aims to develop a queer legal analytic through which we can engage the complexities of reproductive technology use by queer subjects. It first seeks to reconcile the divide between legal scholarship and queer theory in accounting for the use of reproductive technology by LGBTQ people. It maps a queer legal analytic that can engage articulations of the reproductive family and explores how child-bearing and reproduction have been envisioned by leading scholars within queer theory. It then argues that these visions have fallen short and offers new conceptual frames to encompass the variety and multiplicity of what is referred to as queer biokinship. My argument is that the intrinsically messy queer parenting projects of assisted reproduction demand a re-thinking of the alignments and arrangements pursued under the frame of biological kinship. Instead, the polymorphous reproductivity of queer biokinship can be understood as challenging the central mythology of heterosexual normativity and genital reproduction. Further, by centring the queer reproductive family at the heart of our analysis, we are able to demand access to state-led subsidies that can help mitigate the ruthless logic of medical privatization. A queer perspective offers an extraordinarily useful intervention into the legal morass of assisted reproduction as it allows us to de-naturalise the procreative certainty of erotic coupling and determine where, how and on what grounds queer legal rights around assisted reproduction can and should be staked.

I. INTRODUCTION

This article stems from my experience as co-investigator on a recently-conducted pilot study of the experiences of lesbian, gay, bisexual, trans, two-spirit¹ and queer people (LGBTQ) accessing assisted

---

¹ Postdoctoral Fellow, Vulnerability and Human Condition Initiative, Emory University, USA <smarvel@emory.edu>. Thank you to the ‘Creating Our Families’ team and all study participants for sharing their stories with us. Thanks also to Susan Drummond, Lynne Huffer, Cynthia Willett, Katie Oliviero, Mairread Sullivan, Christina León, and Marta Jimenez for their comments and suggestions. I am especially grateful to Martha Alberston Fineman and the Feminism and Legal Theory Project at the Emory School of Law in Atlanta, Georgia for providing me with the space and latitude with which to write this paper.

1. L.A. Tarasoff, Meeting the Assisted Human Reproduction (AHR) Needs of Lesbian, Gay, Bisexual, Trans and Queer (LGBTQ) People in Canada: A Fact Sheet for AHR Service Providers, LGBTQ PARENTING NETWORK (2012). Two-Spirit is an English language term used to reflect specific cultural words used by First Nations people who have both a masculine and a feminine spirit or to describe their sexual, gender and/or spiritual identity.

ISSN 0975-2498 © O.P. JINDAL GLOBAL UNIVERSITY
human reproduction services in Ontario, Canada. The ‘Creating Our Families’ project interviewed a total of 66 LGBTQ people across Ontario who had accessed any sort of reproductive technology since January 2007 or who had considered using such services but elected not to and/or encountered barriers. To our knowledge, this represents the largest study yet conducted in Canada to focus exclusively on how LGBTQ communities are accessing assisted human reproduction (AHR) and meets a clearly articulated need for empirical data.

In 2008 it was estimated that as much as 15-25% of client traffic at a Toronto-area fertility clinic was comprised of people from LGBTQ communities, while a government-funded research study from 2010 suggested that 55% of all users of third-party donor sperm in Canada are women in same-sex couples. While these numbers are only rough estimates, they indicate that LGBTQ people already account for a substantial percentage of users of AHR services. In step with the growing articulation of LGBTQ-identarian civil rights, these numbers are only poised to expand both in Canada and abroad.

---

2. The project team consisted of principal investigators Dr. Lori Ross and Dr. Leah Steele, as well as Deteje Green, Lesley Tarasoff and Scott Anderson from the Centre for Addiction and Mental Health (Researching for LGBTQ Health, Social & Epidemiological Research Department), Rachel Epstein from the Sherbourne Health Centre (LGBTQ Parenting Network), and myself from Osgoode Hall Law School. Other staff and students from the Researching for LGBTQ Health team also contributed to this project. The Creating Our Families project was funded by the Canadian Institutes for Health Research as well as a Doctoral Canada Graduate Scholarship provided by the Social Sciences and Humanities Research Council of Canada. Additional funding was provided in the form of travel grants and research subsidies by York University and Osgoode Hall Law School.

3. This includes anyone who had begun researching reproductive options, visited fertility clinics, sought the services of surrogate mothers, and/or accessed donor sperm either known or unknown.


5. It is important to note that these estimates came not from empirical research conducted in Canada, but by triangulating Canadian census data from 2006 with a five-year research study on donor sperm conducted in Belgium. The model used in the Canadian report assumed that the demand in Canada will follow a similar ratio of request. J.M. Bowen et. al., Altruistic Sperm Donation in Canada: An Iterative Population-based Analysis, Programs for Assessment of Technology in Health Research Institute (April 2010).


Three years later on July 26, 2005, federal Bill C-38, the Civil Marriage Act, took national effect and extended same-sex marriage rights nationwide by codifying a gender-neutral definition of marriage for the first time in Canada.

7. The acronym LGBTQ is here understood as a broad marker of non-normative sexual identity,
However even as LGBTQ people move to access these technologies and create new forms of kinship, both law and language remain ensconced within firmly heterosexual modes of family-making. While I have written elsewhere about the restrictive modalities of family law and regulatory regimes around AHR, in this article I hope to develop a queer legal analytic through which we can engage with the complexities of technologically-assisted kinship. This paper is strongly influenced by the empirical realities encountered during the Creating Our Families research project and is indebted to the time, patience and, most of all, the stories offered by participants. I hope to translate some of their urgency and frustration with current legal and conceptual regimes to this work.

In carrying out this project, I have been especially struck by the theoretical failings of current queer as well as legal models. In seeking to reconcile the divide between legal scholarship and queer theory in accounting for these LGBTQ lives, I hope to demonstrate the importance of creating a vocabulary through which we can make an account for queer subjects in both law and conception. I will begin by mapping out a queer legal analytic that will allow us to engage with articulations of the reproductive family and explore how child-bearing and reproduction has been envisioned by leading scholars within queer theory. I will then explain why I believe these visions fall short and offer new conceptual frames able to encompass the variety and multiplicity of queer family-making strategies encountered in my research. My argument is that the intrinsically messy queer parenting projects of AHR demand a re-thinking of the alignments and arrangements pursued under the frame of biological kinship, even as they occur at the heart of biological citizenship in the most normatively gendered space of the reproductive family.

with a breadth reflective of internal divisions within social movements based on a politics of sexual orientation and gender identity. The methodology of our study specifically aimed at conducting ten interviews with each of the target communities: lesbian, gay, bisexual and trans couples and individuals. The intention here was to reach a wide sweep of participants while recognising the fractured compromise that ‘LGBTQ’ indicates through its multiplicities of desire, sexuality, kinship and community. The usage of ‘queer’ signals a preferred usage by many research participants as well as a methodological approach, not only in that it marks an identifier within these communities of research, but also as it operates as a referent to the particular theoretical knowledges indexed and engaged herein.

II. TOWARD A QUEER LEGAL ANALYTIC

Over the course of conducting this research project, it became clear to me that an empirical study of queer families had much to offer toward the development of family law jurisprudence. To date, issues of reproductive technology have been framed almost exclusively from a heterosexual perspective, even when the intention is to focus a radically critical lens. Yet the inherently non-reproductive modalities of queer sexuality allow us to re-centre the frame of inquiry in conceptually important ways. When queer reproduction at the fertility clinic is foregrounded, it lays bare a medico-juridical order broadly unable to account for all families created beyond the realms of ‘natural’ reproduction.

My hope is that by negotiating between the disciplinary bounds of socio-legal analysis and critical theory on sexuality and identity, we might draw something from cognate knowledges of kinship, embodiment and futurity that will be of use in the service of empirical legal studies. Queer theory in particular has offered deep understandings of sexuality, identity and power and may furnish an especially deft tool to analyse the discursive artefact of the body-in-law. In this section, I am therefore interested in asking: What can queer theory applied to law teach us about the limits of assisted human reproduction legislation and the LGBTQ people seeking to access these technologies? Can it offer a robust framework through which to theorise the structural conditions of queer intergenerational intimacy? What can queer theory tell us about/contribute to an analysis of the legal conditions being faced by queer subjects? Can a queer legal analytic emerge to help us navigate these uncertain waters?

Unfortunately, this is a stratified disciplinary divide at best. Queer theory is in many ways an unmappable discipline, intentionally inchoate, definitionally unstable and in rejection of a substantive project. This stands in contrast to legal scholarship, which even in its most critical formations, nevertheless finds itself oriented toward normative questions if not the pursuit of properly substantive remedies. There are exceptions


10. Alan Hyde, Bodies of Law (1997). As Alan Hyde has argued, even as law seeks to demarcate the property or privacy or threat of the body’s most intimate realms, its boundaries and openings must necessarily be representational, translated through the words and images of legal discourse. The body in law can therefore only properly be understood as a discursive artifact.
within each tradition, of course, but the difficulty of reconciliation remains. As Janet Halley and Andrew Parker point out "the failure of queer theory to engage the critical tradition in legal studies (and its resulting failure to grok the critique of rights)" has found itself met by a "hostility in centrist legal studies [...] to theoretical approaches more generally that do not quickly produce a 'policy recommendation.'"\(^\text{11}\) Such loggerheads, although complicated by polyvalences and tensions within both disciplines, have made conversation difficult.

In her introduction to the anthology *Feminist and Queer Legal Theory*, Martha Albertson Fineman explains what must be brought to the table when getting these disciplines into conversation: it requires the exploration of "evolving and contested assertions about the centrality of a positive theory of sexuality to the formulation of critical perspectives on legal, social, political and cultural institutions."\(^\text{12}\) Toward this end, how can we begin to speak of the relations of kinship pursued by LGBTQ subjects through AHR? In order to approach the empirical as well as discursive artifacts of the queer body in fertility law, we will need to move away from static categories of naturalised procreation. As we walk into relatively uncertain ground, it will be necessary to add to our theoretical arsenal in the hope of locating fresh conceptual models. The neologism of *polymorphous reproductivity* is offered as a bridge to move us through the first steps of our analysis.

III. MODES OF ACCESS TO POLYMORPHOUS REPRODUCTIVITY

This concept finds its departure in the psychoanalytic concept of the "polymorphously perverse," a term which Sigmund Freud coined to describe the latent human ability to locate erotic pleasure through any part of the body.\(^\text{13}\) Freud argued that while a child may turn to any number of body parts for sexual gratification, through the civilising conventions of society the adult erotic field is gradually narrowed to focus on the genitals. Yet those adults with a polymorphously perverse disposition – either through a persistence of latent potential or through the process of active 'seduction' – are able to experience a greater range of bodily pleasures and may not obey the rules determining perverse behaviour.


Polymorphous perversity has been notably reinterpreted by a series of twentieth century scholars. In *Eros and Civilization*, Herbert Marcuse critiqued Freud’s conservative reading of genital sexuality and proposed an active cultivation of non-reproductive forms of sexual behaviour, including oral and anal eroticsms, capable of resisting the restriction of *eros* to procreative sexuality. Marcuse envisioned an ideal of radical hedonism where sex for pleasure and not for reproduction was the norm; the homosexual was to be the archetypal form of this new hedonist. Dennis Altman then seized upon the utopian elements of this Marcusian strand to argue that (male) homosexual sex in particular represented an expression of pleasure, and love free of any utilitarian ends. Altman’s work understood the homosexual libido to have been loosened from the imperatives of heterosexual reproduction, allowing a liberatory relation to consumer capitalism that was able to sidestep the demands of the modern industrial state.

More than thirty years later, Leo Bersani picked up this utopian strand to trace Freud’s understanding of polymorphous perversity to the writing of Michel Foucault. Bersani saw in Foucault’s work a grounding in Freudian thought that was able to generate “Foucault’s [call] for a degenitalising of erotic intensities,” and underscore Bersani’s own argument for the self-shattering pleasures of sadomasochism.

While these authors differed on the nature of power, psychic life and sexual repression, they were in agreement regarding a deep scepticism of heterosexual models of desire, pleasure and the chores of reproduction. Yet their focus was largely (if not exclusively) upon male homosexuality and the radical potential to be found in anonymous anal sex, as Bersani would say, and non-reproductive sex pursued for the sake of pleasure, according to Marcuse and Altman. Marcuse summed this up nicely in arguing: “Against a society which employs sexuality as a means for a useful end, the perversions uphold sexuality as an end itself [...] and challenge its very foundations.”

My concern is that while the repudiation of social norms organised around genital heterosexuality and biological reproduction has been advanced as a broadly liberatory and even utopian political aim, it finds itself based upon a specifically phallic homosexuality. This is a gleeful

sodomitc stance that has positioned itself as merrily disinterested in accounting for the reproductivity of female-born bodies and unconcerned with utilitarian drags such as the gendered domesticities of childcare. While the suspicion of commodity culture and neoliberal ideals is one that we shall address later in the text, it is clear from the contemporary marketisation of homosexual lifestyles that mere sexual perversion is unable to deliver the utopic visions dreamed of by Marcuse and Altman.19

I wish to demarcate myself from these queer masculinist intellectual histories even as I seek to find continued utility in the Freudian concept of the polymorphously perverse. In taking up the central line of homosexual liberation scholarship written against the reproductive imperative, I intend to re-frame this concept in the service of what we might call a queer reproductivity. By focusing on the bodies at work in both conceptual models, we can draw a useful ontological parallelism between ‘perversities’ and ‘reproductivities’. As will be seen, I also wish to recuperate the reproductive potential of queer socialities by doing a far more reparative reading of procreation than has been afforded by most queer scholars to date.

I draw from Freud’s perverse potential for a greater range of bodily erotic encounters than merely genital to advance the idea of polymorphous reproductivity and similarly circumvent an emphasis upon genital intercourse as the only appropriate modality for human procreation. Rather than affording exclusive privilege over reproduction to the heterosexual model of penile-vaginal insertion, I look instead to the multiplicity of actions through which reproduction can occur. This may be as complex as the laboratory manipulation of embryonic tissue or as simple as the ‘turkey baster’ method of home insemination. What marks these actions as polymorphously reproductive is their reliance upon any number of modalities to create biological offspring beyond the enmeshing of sex organs.

My argument is that sexual identity figures in our analysis not as an essentialist category of orientation or desire but as a social effect that determines a mode of access to particular kinds of reproductive technologies

19. DENNIS ALTMAN, COMING OUT IN THE SEVENTIES 84 (1979). To be fair, upon his return to the U.S. after the publication of his classic 1971 text, Altman already found a gay civilisation in decline. In 1979, he chronicled how the “[c]orporative relaxation of the taboos against homosexuality has led to a blossoming of bars, saunas, restaurants, and theatres which hold out the promise of endless gang bangs available across the length and breadth of the country [...] what [this] represents however is the emergence of a luxury-oriented, commercial gay world where instant sex is provided in surroundings of some opulence [...] [This] has had the effect of giving many male homosexuals the illusion that oppression is a thing of the past.”
delimited by biological capacities and erotic sociality. This allows us to understand the queer parent both as a parent who cannot ‘naturally’ produce offspring through sexual contact within an erotic pair bond and as a parent who views this incapacity not as an aberration but rather as a consequence of sexual object choice. Thus the queer parent is not an infertile parent (as most fertility clinics will assume) nor does this parent expect to draw exclusively upon the biological modes of reproduction around which Euro-U.S. family law is constructed. Such a formulation asks that we problematise the legal ground as well as the discursive conditions through which relations of non-reproductive sexuality are producing queer intergenerationalities.

Indeed the consequences of sexuality as a mode of access are already rendered starkly through the differential legal recognitions and strategies available to queer and non-queer parents using assisted reproduction. While the queer parent knows sexuality as inherently non-reproductive and therefore reliant upon alternative means of procreation, the non-queer parent has no such expectation. On the contrary, non-queer parents who find themselves infertile and suddenly at the mercies of assisted reproduction tend to experience this biological limitation as deprivation. Importantly, it is because of this deviation from the ‘natural’ mode of reproduction (and the trauma and loss that results) that a legal claim of discrimination may be launched, triggering a demand for state involvement and compensation. For example, a flagship court case initiated by a heterosexual couple in the Canadian province of Nova Scotia sought provincially-funded monies for reproductive assistance, explicitly framing their inability to conceive ‘naturally’ as a disability.

20. As I develop my critique of medical infertility in subsequent writing, I will describe the ways in which certain types of heterosexual reproduction through AHR may also participate in polymorphous reproductive activity as well as the ways in which they may not; here I identify this figured primarily as a social effect in regard to the communities of practice around queer desire and, increasingly, queer parenting.

21. Supra note 7. My intention is not to marginalise those queer parents who might have had children earlier in life through heterosexual means, or to minimise their legal difficulties in maintaining custody rights in the face of a homophobic legal regime. However, I do think these are substantively different cases. It is the contrast between determining whether one is a fit parent (in the case of a child created by a formerly ‘straight’ parent) and the determination whether one even is a parent at all (where no genetic ties exist). Thus I wish to draw attention to the ways in which the polymorphic reproducitivities of queer biokinship create new genetic linkages as well as new challenges in determining legal parentage and lateral relation.

22. Janet Jaffe & Martha O. Diamond, Reproductive Trauma: Psychotherapy with Infertility & Pregnancy Loss Clients (2011). There is a substantial medical literature devoted to discussing and caring for heterosexual couples who are dealing with infertility. This recent 275-page and encyclopedic volume in the field of reproductive counseling is typical of the genre.

23. See Cameron v. Nova Scotia, [1999] 177 D.L.R. (4th) 611 (N.S.C.A.). The appellants were a married heterosexual couple who had not been able to conceive due to the husband’s diagnosed “severe male factor infertility.” They argued that by virtue of a physical disability —
The appellants maintained an experience of discrimination due to their biological limitation and sought relief within the constitutionally protected grounds of physical disability. While I will elsewhere address the problematic use of disability as a lever for the instrumentalisation of normative reproductive goals by heterosexual couples, what matters here is the distinction with the *contextual purposive intent* of the queer parent.24

My argument is that ‘queer biokinship’ is a purposive form of kinship that expects to locate procreation outside the marital bed. I use the term biokinship here in explicit regard to the application of biotechnologies through assisted human reproduction. I wish thereby to de-naturalise the presumptively biological ties of kinship that Euro-U.S. knowledge systems have long universalised as being at the heart of the reproductive family.25 By rejecting the conflation of kinship and biology, I intend to open room for different forms of family-making and models of legal recognition that do not privilege the biological tie above other social bonds. My hope is that by drawing attention to the constructedness of biokinship as a *particular form* of family-making, one reliant upon assisted reproductive technologies, the cultural foundation of *all* forms of biological kinship stand revealed.

The frame of queer biokinship also differentiates between queer parents using AHR and those who have adopted children or fostered children or created families through other forms, for example through prior heterosexual unions. These distinctions are important in regard to infertility — they had experienced discrimination through lack of provincial coverage for IVF and thus their equality under Section 15 of the *Charter* was violated. Although the court ruled in favour of the Camerons, the exclusion to publicly funded infertility care was ultimately justified under Section 1 of the *Charter*.

24. See Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 Wake Forest L. Rev. 641, 659 (2010). The concept of *contextual purposive intent* was recently advanced by Professor Nancy Kim at the California Western School of Law to more accurately describe the embedded sociocultural matrix of contract law. Professor Kim’s scholarly focus is quite different than mine, and referenced a contractual intent dispute involving two Korean claimants in a California appellate court which was dismissed because the contract was signed in blood. Kim argued that the strict application of objective consideration doctrine ignored Korean cultural expectations, and called instead for a *contextual purposive intent* that would require courts to consider facts in cultural context and include the social identities of the parties to the contract. I think this sensitivity to the social identities of the claimants can also offer an important corrective within the contractual arrangements of family law, and is neatly able to capture something of the intentional complexity of queer reproductive projects. See also Deborah W. Post, *Cross-Cultural Readings of Intent: Form, Fiction, and Reasonable Expectations*, 1 Wake Forest L. Rev. Online 94 (2011).

to the reproductive technologies under discussion and the attendant legal frameworks that must be negotiated by queer families who seek to genetically reproduce. This is not, however, to make the essentialist claim that biology creates a ‘special’ or differently enduring tie than other forms of kinship. On the contrary, the fundamental intent of biokinship is to make strange the supposed centrality of genetic descent with a particular disruption of the process through which this social fiction finds application in family law.

It is also evident that most instances of queer biokinship will only include one parent as biological relation (i.e. a gay male couple in which only one of the men provided semen for in vitro fertilisation; a lesbian couple in which only one woman produces the egg and/or gestates the child; any number of permutations of single or multiple LGBTQ parentage which involve reproductive material being obtained from an outside party). My framing of queer biokinship thus aims to simultaneously mark the genetic relations upon which law relies as a merely contingent category while implicitly naming the many other types of queer non-biokinships that foster and nurture our intimate relationships.

Families of queer biokinship are intentional families of genetic connection that rely joyfully upon procreative models that have nothing to do with sexual intercourse. The children produced are unlikely to have any illusions about the circumstances of the birth, while the need to source gametes from outside the sexual dyad invites more than two parents to be implicated in the family unit - if not actively involved in child-rearing. When we understand queer orientation not only as erotic charge but also as a mode of access that takes in stride the expectations of polymorphous reproductivity, we can see the very different ground upon which queer biokinship depends. This has concrete outcomes in terms of legal recognition, as statutory regimes designed to shore up heterosexual reproduction and keep intact the myth of genital reproduction are unable to account for the particularities of queer families.

Framing this as an issue of purposive intent has an advantage in terms of contract law as well, and transcends the idea of intended parent with

26. In the interviews I conducted, respondents commonly related their nervous excitement walking into the fertility clinic, happiness at finally taking the steps to create their queer families, and joy at finding willing sperm donors or surrogates. This is very much in contrast to heterosexual loss and ‘coping’ in the face of reproductive trauma, supra note 22.
27. A.A. v. B.B., [2007] O.J. No. 2 (Ont. C.A.). The Court ruled that three legal parents could be recognised under guiding provincial legislation: a lesbian couple who were the child’s guardians, and the child’s biological father.
a contextual sociality that not only accommodates but anticipates the queer reproductive project. As Sarah Franklin has pointed out: "the law now regulates reproduction in terms of contract: property, patenting, and criminal sanctions protect human embryos in many countries." By using the legal notion of contextual purposive intent and applying it to queer parenting projects, we may find a useful strategy to dislodge the normative heterosexual family from the heart of family law.

Our engagement with queer legal theory leads us from fertility law to contract law and offers a few conceptual tools to smooth our path. We have also pulled from queer theory to advance a polymorphous reproductivity that intentionally moves away from the Freudian phallocentric legacy and allows us to start thinking of queerly reproductive bodies. What might contemporary scholarship in queer theory say about this, then, and where can we look to find theoretical devices to help translate the polymorphous reproductivity of queer subjects into legal models capable of challenging the suffocating normativity of fertility law? In the service of an experiential theorising based upon the empirical legal subjects of my research, the next section will explore how a recent strand of queer scholarship has thought about the intergenerational body and mull the rather curious abjection it has made of biogenetic reproduction within a larger critique of futurity.

Abjection of Queer Biokinship in Queer Scholarship

In his much-chewed-over 2004 text No Future: Queer Theory and the Death Drive, Lee Edelman makes a case for the rejection of liberal utopianism through a politics of negativity. The primary fuel for Edelman’s thesis crackles within a deep suspicion of the procreative imperative as he infamously exhorts all queers to “fuck the social order and the Child in whose name we’re collectively terrorised.” Thus the Child is positioned in antagonism to the Queer (who is read as an unparalleled figure of nonproductivity) as Edelman argues, that the Child actually represents a figure for the universal value attributed to political futurity. Through this move he is able to concretise the Child as a marker of heterosexist strivings upon which can be layered imperialism, middle-class logics, and a manifest destiny channelled through the property values of primogeniture.

For this is not a living child, a body that requires feeding and care and trips to the pool, but, as Edelman describes, a stand-in for “the whole network of Symbolic relations and the future that serves as its prop.”\(^30\) The Child is deposited centerstage as an absurdly affective referent for the maudlin, the vulnerable; the terminally apple-cheeked, and the decidedly non-queer imperative to protect, to nurture and to secure the well-being of a never-arrived future imaginary. Edelman’s ‘reproductive futurism’ thus sardonically locates the redemptive hopes of humanity within the small bodies of humans with no material form.

Perhaps more crucially this creature cannot exist: as the promise of an always-vanishing future horizon, it must blink its dewy eyes from the time of the never-here. As Edelman continues his tirade, he aims his approbation toward purely fictional characters, at the literary signification of childhood at its most adorable: “fuck the social order and the Child in whose name we’re collectively terrorised; fuck Annie; fuck the waif from Les Mis; fuck the poor, innocent kid on the Nct.”\(^31\) The damnable Child who holds us all in check, demanding adherence to a standard of saintly innocence that ruins our distinctly adult enjoyments must be rejected. This trope finds its apex of abjection in Edelman’s work but it is by no means controversial to argue that the Child currently functions across much of queer theory as a cipher for the worst kind of normativity.

Indeed, despite rejecting certain elements of this ferociously antisocial thesis, scholars like Judith Halberstam are among many who have found themselves in agreement with Edelman’s suspicion of reproductive futurity. Halberstam suggests in her book, In a Queer Time and Place, that an alternate vision of queer time must preclude the normative modalities of child-bearing and rearing. For Halberstam: “[q]ueer uses of time and space develop [...] in opposition to the institutions of family, heterosexuality, and reproduction.”\(^32\) She offers instead the idea that “[q]ueer time [...] is [...] about the potentiality of a life unscripted by the conventions of family.”\(^33\) This notion of a ludic freedom from the bourgeois trappings of reproductive temporality underscores much of the writing on queer kinship in recent years, leaving little purchase for the centring of intimate parent-child relationships.

30. Id.
31. Id.
33. Id. at 2.
For as the body of the queer-born infant/child slips into a jeremiad against heteronormativity, by extension the queer parent also vanishes into the bourgeois mist of heterosexist capitulation. If the infant/child can only exist in a relation of heterosexual capital, then neither can a queer parent hold bodily integrity within these rigid economies. As Halberstam approvingly characterises the crux of Edelman’s queer anti-thesis:

[While the heteronormative political imagination propels itself forward in time and space through the indisputably positive image of the child, and while it projects itself back on the past through the dignified image of the parent, the queer subject stands between heterosexual optimism and its realisation.]

Thus are queer bodies positioned as a bulwark against the “forward looking, reproductive and heteronormative politics of hope that animates all too many political projects.” This move necessarily excises queer subjects from the category of parent and simultaneously casts those queers who do/have/are engaged in primary relations of parental care as failing to figure and register within an anti-imperialist, queer counter-hegemonic imaginary.

IV. INTERSECTION OF QUEER ABNEGATION AND CANADIAN FERTILITY LAW

My concern here is that the equation of happy, shiny heteronormativity with the unbearable lameness of childbearing has left few locations for the queer parent to exist. This was not always the case. Judith Butler for example has written thoughtfully about the psychic lives of those who live outside of normative kinship with specific reference to children born through donor insemination. For me, the critique against reproductive futurity brings to the fore the theoretical terms at stake and the importance of centring queer lives in the conceptual models we create. It seems clear that the repudiation of reproductive futurity by the antisocial turn cannot account for the queer lives I have encountered in my research.

As Eve Kosofsky Sedgwick has rightly pointed out, the anti-social thesis follows in the wake of queer theory’s emergence in the late 1980s

35. Id.
36. Id. at 142.
38. Thanks to Lynne Huffer for helping me clarify my precise investment in critiquing the antisocial thesis.
and early 1990s amidst the AIDS crisis and the paranoia wrought by widespread and uncertain death. She writes: “It was not an uncommon experience then to be in a room of vibrant young people, conscious that within a year or two, all but a few of them would have sickened and died.”39 Such a paranoid reading continues to infuse queer scholarship but it does so increasingly outside of a context that reflects daily reality. For example, Edelman offers the following remark in a 1998 article that would later come to ground the invective for No Future:

Choosing to stand, as many of us do, outside the cycles of reproduction, choosing to stand, as we also do, by the side of those living and dying each day with the complications of AIDS, we know the deception of the societal lie that endlessly looks toward a future whose promise is always a day away.40

Given more than two decades of advances in medical technology, anti-retroviral drugs, and access to assisted reproduction alongside increasing LGBTQ civil rights, this is simply no longer the empirical reality for many queers. Indeed it is more likely that queer affiliations will soon produce the following scenario: “It will not be an uncommon experience to be in a room of vibrant young people, conscious that they are all queer spawn, all created through reproductive technologies, some even holding biological affiliation with the same donor.”41 The material conditions of queer child-making offer abundant reproductivities and multiplied kinships as the opposite of wasting death. Yet even as these projects have grown exponentially, the idea of queer parenting has remained eminently unfashionable as a theoretical project.42

41. For more on queer spawn and donor sibling relations, see Stu Marvel, supra note 8. This is my fantastic scenario.
42. Sara Ahmed, Happy Futures: Perhaps, in Queer Times, Queer Belongings 174 (E. L. McCallum & Mikke Tuhkanen eds., 2011). Perhaps we should not underestimate the dictates of the academy and the many childless queer scholars who actually produce this scholarship. As a childless queer myself, I know it has been faintly embarrassing to attempt a recuperative approach to LGBTQ parenting. I understand this as stemming from the compulsory expectations of child-bearing which still hold tremendously normative sway over queer lives. For example while discussing the film Children of Men in the midst of a brilliant treatise on the affective role of happiness, Sara Ahmed slips into a rather aggrieved first person as she exhibits frustration at being told that lives without children are worthless. From a complex figuration of the dystopian pall of a future with no children, Ahmed puts forward an exhausted disclaimer about the supposed virtues of parenting: “This is not to say that the idea that lives are pointless without children should not be challenged: many of us who live our lives without having ‘children of our own’ are tired not only of being told we are pointless, but also of making the point that lives do not have to involve having children to have a point.” As a queer who routinely fields similar discussions with elderly aunts at Christmas time, I have
At the same time, however, we must not forget the relationship of reproductive technologies to neoliberalism. Dorothy Roberts has written persuasively of the connections between racial inequality, access to reproductive technology and social trends toward privatisation. Her work in *Killing the Black Body* described the workings of a 'reproductive caste system' which contrasted policies that punish the child-bearing of poor black women with the high-tech fertility industry that promotes child-bearing by more affluent white women.43 There is also a growing international component to this analysis. Cross-border reproductive travel has increased the potential for racialised exploitation as people move out of cautious and prohibitive jurisdictions into more permissive locales, where they may acquire treatment more quickly or substantially reduce costs.44

As Roberts writes in regard to reproductive technologies that fail to address questions of social justice and collective well-being:

> This diversion of attention away from social causes and solutions reinforces privatisation, the hallmark of a neoliberal state that seeks to reduce social welfare programs while promoting the free market conditions conducive to capital accumulation. Thus, reproductive health policies involving women at opposite ends of the reproductive hierarchy play an important role in the neoliberal state’s transfer of services from the welfare state to the private realm of family and market.45

Roberts’ most recent work has re-considered the binary nature of the reproductive hierarchy, however, and nuanced an oppositional reading that assumes white women are always the beneficiaries of reproductive technologies and women of colour are always excluded or exploited.46 Yet even as people of colour are increasingly centred within the new marketing strategies of biomedicine and genetic technologies, Roberts contends that greater representation alone does not correct the role played by reprogenetics in advancing a neoliberal agenda.47 She argues that the draining of public resources for general health care and fiscal channelling into the privatised modes of reproductive technology

---

46. *Id. at 785*.
47. Roberts, *supra* note 45, at 798.
represent a crucial failure of public policy, and one that hits poor minority communities the hardest.  

The empirical research of the Creating Our Families study backs up this finding. Despite a central methodological goal of recruiting LGBTQ people-of-colour and those living outside major urban centres, our research sample nevertheless consisted of predominantly white, same-sex partnered, urban women with relatively high levels of education and income. While additional research is required to more fully identify barriers to access, our sense is that this demographic reflects the predominant users of AHR services from within LGBTQ communities in Ontario. As our study concluded:

> It is notable that despite the relatively high levels of education and income within our sample, one of the most common concerns expressed by our participants was the financial inaccessibility of AHR services.

This data points strongly to the importance of state-funded medical care and the need for reproductive support to ensure that AHR does not remain a remote technology out of the reach of poor, queer and racialised communities. Quebec has recently become the first jurisdiction in North America to institute legislation that offers public funding for AHR under its provincial Medicare regime. Quebec’s health care system now provides coverage for all services related to the medical aspects of ovarian stimulation, artificial insemination and three cycles of in vitro fertilisation (IVF). The new plan also covers up to six natural cycles (meaning a cycle in which ovulation occurs spontaneously, without being stimulated by medication) or modified natural cycles (meaning a cycle of ovarian stimulation through fertility drugs to obtain only one egg). In the case of a live birth resulting from IVF, the patient is eligible for coverage for an additional three-cycle programme. To date, no other province in Canada offers this sweep of coverage under the rationale that AHR is not medically necessary and therefore does not oblige the state to provide subsidised access.

48. Id.
50. Id.
52. Id.
Yet reproductive technologies can only be framed as medically unnecessary within a heterosexual model that understands 'normal' reproduction as genital reproduction. When the polymorphous reproductivities of queer biokinship are applied, this drastically opens the conceptual field for all families, gay and straight alike. By centering the queer reproductive family at the heart of our analysis, we are more readily able to demand access to state-led subsidies that can help mitigate the ruthless logics of privatisation. By rejecting a market-based approach to health care and demanding that responsibility for AHR funding belongs with government, not only queer people but all users of reproductive assistance are able to voice a concern for reproductive justice that can account for their specific needs.

V. CONCLUSION

Queer bodies and their unruly parenting desires insist on the livability of biokinship projects. Over the last three decades, AHR technologies have revoked the singular claim to genetic reproduction formerly held by the heterosexual family. Feminist scholars have ruminated at length upon the dramatic re-envisioning of 'nature' and 'family' that has resulted, with heteronormative models of kinship increasingly ruptured through novel relations of capital and care. Yet despite these theoretical interventions into the realm of biotechnology and family-making, a robust language for parenting has barely begun to be developed from within queer scholarship.54 There have instead been studies made of the child-as-queer; the nascent queer body for which we warmingly anticipate a maturity into adulthood.55 And while these works offer a strong foundation for thinking though intergenerationality and queer relations of family, there has been far less attention paid to the queer parent and the polymorphous reproductivities through which their queer spawn are produced.

This article has sought to add to the language of law and queer theory alike by proposing an integrated analysis of LGBTQ assisted reproduction. Without new vocabularies and imaginaries to support the

54. See Laura Mamo, Queering Reproduction: Achieving Pregnancy In The Age Of Technoscience (2007)
creation of families, it will remain impossible to interrogate the legal and discursive ground upon which queer reproductive projects are being pursued. These conceptual limits are no trivial matter. For if the only strategies pursued by queer parents and activists toward recognition and legal protection follow the explicit modelling of heterosexual families, the options will be restricted. We saw the failure to imagine new marital arrangements under the privatised and self-disciplined dictates of neoliberalism collapse into the same-sex marriage model in Canada; this straightened outcome has been roundly criticised by Brenda Cossman as as an exhortation to sexual citizenship that even good queers can enjoy.\textsuperscript{56} Similarly, David Eng has asked that we remain attentive to how the conditions of late capitalism allow queer subjects to inhabit certain types of conventional family and kinship formations or what he has termed “queer liberalism.”\textsuperscript{57} Indeed we must not gamely jettison our suspicion of how the bourgeois family operates via the reproduction of racial and class privileges. What should also be made suspicious, however, is the idea that a singular claim to biological reproduction can any longer be held by the naturalised propriety of heterosexual love. We must also question the ready equation of procreation with the most galling of normative projects and with an inevitable capitulation to privatised modes of bourgeois subjecthood.

Instead, I believe that the polymorphous reproductivities of queer biokinship can be understood as challenging the central mythology of heterosexual normativity. These queer modalities strongly rebut the presumption that a biological mother and biological father must always lie at the heart of the reproductive family. For example, during my interviews I encountered the queer spawn of two married and non-monogamous transmen, a youngster conceived through the help of a sperm donor who lives in a different city. This child literally has no mother but instead can count three fathers, two of whom are biological. Such kinships demand a fundamental re-thinking of the assumed linkage between compulsory heterosexuality, monogamy and the reproductive family and have the capacity to destabilise the hierarchies of sex normativity. Why is it again that queers cannot be non-heterosexual, non-monogamous and reproductive?

The landscape of queer biological kinship remains contested by supporters and detractors from across the ideological spectrum, and

\textsuperscript{56} Brenda Cossman, \textit{Sexual Citizens: The Legal And Cultural Regulation Of Sex And Belonging} (2007).

\textsuperscript{57} David L. Eng, \textit{The Feeling Of Kinship: Queer Liberalism And The Racialization Of Intimacy} (2010).
it has been too easy for queer scholars to abandon these concerns as merely homonormative and misaligned with the transgressive agenda of queer theory and politics. Rather than automatically conjuring the homonormative spectres of the neoliberal subject, queer biokinship asks for fresh legal strategies and conceptual frames to understand how LGBTQ subjects are navigating the challenging and often hostile privatised landscape of for-profit reproductive assistance.

I believe the queer perspective offers an extraordinarily useful intervention into the legal morays of assisted reproduction, as it allows us to de-naturalise the procreative certainty of erotic coupling and determine where, how and on what grounds our legal rights around assisted reproduction can and should be staked. It also helps to de-centre the fiction of nature itself and questions many of the suppositions around proper family-making and kinship. These are of course already rampant (uncertain paternity, joint custodial agreements, known sperm donors for heterosexual couples, surrogacy contracts). Yet bringing the queer frame to the foreground plainly articulates how supposedly normative heterosexuality and family-making is neither the empirical nor the legal reality. Rather than throwing our queer spawn out with the heterosexual bathwater, we might instead look to question the opposition of ‘queer’ to ‘reproduction’ and explore the new intimacies being forged through polymorphous reproductivity.