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DO TELL! THE RIGHTS OF DONOR-CONCEIVED OFFSPRING

*Naomi Cahn**

I. INTRODUCTION

In the 2013 movie, *DELIVERY MAN*,¹ actor Vince Vaughn finds out that his decades-old anonymous contributions to a sperm bank have resulted in 533 children, and that more than 140 have filed a lawsuit against him, trying to force him to reveal his identity.² In the United States, no law requires him to come forward;³ when a man or woman produces gametes for another person, it is entirely legal to do so anonymously, although some sperm banks and egg agencies do offer the option of willing-to-be-known donors.⁴ Indeed, in the movie (spoiler alert), the court does not order Vaughn to come forward, although his own feelings of responsibility for the children he has helped to create serve as an opposing theme to the court's protection of his anonymity.⁵

But, while parents, donors, and the fertility industry establish the terms of donation, successful use of the gamete results in a child who

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1. *DELIVERY MAN* (DreamWorks Studios 2013). For further discussion of the movie, see Joanna Grossman, *Sperm Donors on the Large and Small Screen*, *VERDICT* (Nov. 27, 2013), <http://verdict.justia.com/2013/11/27/sperm-donors-large-small-screen>.

2. *Delivery Man*, DREAMWORKS STUDIOS, <http://www.dreamworkstudios.com/films/delivery-man> (last visited July 20, 2014). Such a lawsuit has not yet happened in the United States, although donor-conceived offspring in other countries have sued to find the identity of their donors. See *Pratten v. British Columbia* (Att'y Gen.), [2012] B.C.C.A. 480, para. 4 (Can. B.C.).

3. Washington is the only state to have enacted legislation allowing for the identity of donors to be released, but a donor can opt out. WASH. REV. CODE ANN. § 26.26.750 (West 2014).

4. See *Frequently Asked Questions*, WORLD EGG BANK, <http://www.theworldeggbank.com/donors-faqs.html> (last visited July 20, 2014).

5. See *Delivery Man*, *supra* note 2.

was not a party to any of the arrangements before her birth, and may never even know about them. In this Article, I explore the law's treatment of children who are born from donor conception, considering some of the issues raised when we expand our perspective beyond childhood.⁶ Donor-conceived children grow up, and many become curious about their origins. Yet, the law's tight focus on the parent-child relationship has left out legal questions relating to donor-conceived *adults*. Expanding our conceptions of donor-conceived families beyond the parents' rights to procreate allows us to respect the offspring's interests.

This Article analyzes two of the questions raised when we consider the laws that apply to those who are donor conceived: first, the ability of offspring to know that they are donor conceived; and second, their ability to know the identity of their donors.⁷ Regardless of whether we can ground the interests of donor-conceived people in constitutional rights (and we may well be able to do so), the existing system, with its virtually relentless focus on parents, can cause anguish to their children.⁸

Part II provides a brief overview of the demography and law applicable to donor conception.⁹ Parts III and IV then turn to arguments for mandating the double disclosure—the fact of donor conception and the donor's identity—expanding on arguments I have made elsewhere advocating identity disclosure.¹⁰ I argue that policy choices concerning

6. See *infra* Part III.A.

7. See *infra* Parts III–IV.

8. See Press Release, Alana S. Newman, The Anonymous Us Project, Announcing "The Anonymous Us Project," First Ever Story-Collective for People Involved in Reproductive Technologies (Jan. 11, 2011), available at <http://anonymousus.org/press/PR-2011-01-26.php#U539WfnIZqx>.

9. See *infra* Part II.

10. See *infra* Parts III–IV. For my previous scholarship in favor of disclosure, see, for example, NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES 144-45 (2013) [hereinafter CAHN, THE NEW KINSHIP]; NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 127 (2009) [hereinafter CAHN, TEST TUBE FAMILIES]; Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 217-19 (2009) [hereinafter Cahn, *Necessary Subjects*]; Naomi Cahn, *No Secrets: Openness and Donor-Conceived "Half-Siblings"*, 39 CAP. U. L. REV. 313, 328-30, 333 (2011) [hereinafter Cahn, *No Secrets*]. Others have similarly supported this right. See, e.g., MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 91 (2001); Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INT'L J. L. POL'Y & FAM. 174, 175, 184 (2009); Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J. L. & HEALTH 1, 16-18 (2008); Dena Moyal & Carolyn Shelley, *Future Child's Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections*, 48 FAM. CT. REV. 431, 438-39 (2010); Vardit Ravitsky, "Knowing Where You Come From." *The Rights of*

donor-conceived people show how we think about children's interests and parental rights.¹¹ While the basic constitutional parameters support family privacy, respect for familial autonomy does not pre-empt the possibilities for reforms affecting donor-conceived people's interests.¹² Even for those who do not believe in identity disclosure, an exploration of existing legal approaches provides insights into family law and health law.

II. THE DONOR WORLD

Using donor sperm or donor eggs is not a casual decision. Choosing to create children through another person's gametes means entering a world of planned families, of choosing genetically-based characteristics, and, often, of secrecy. Although the donor world is populated by hundreds of thousands of people and run by a multi-billion dollar industry, it has, in the past, been characterized by the stigma attached to infertility and male impotency and by beliefs that genetic connection, and only genetic connection, can create bonding.¹³ Consequently, this world has traditionally been secretive, with few parents even telling their children they are the product of donor gametes.¹⁴

The terminology is itself contested.¹⁵ There are no standard "terms to describe the person who 'donated' sperm or eggs (the donor, the vendor, the genetic father or mother, donor dad or mom, or biological father or mother)."¹⁶ In the United States, donors are rarely actually "donors" because they are paid for their sperm or eggs, although there are the occasional altruistic relatives or friends who truly do donate.¹⁷ For the person conceived via donor sperm or eggs (the offspring, donor

Donor-Conceived Individuals and the Meaning of Genetic Relatedness, 11 MINN. J. L. SCI. & TECH. 665, 677 (2010); *Mixed Perspectives on Being Donor Conceived*, OLIVIA'S VIEW (Dec. 3, 2013), <http://oliviasview.wordpress.com/2013/12/03/mixed-perspectives-on-being-donor-conceived> [hereinafter *Mixed Perspectives*].

11. See Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 919-20 (2012); *infra* Parts III.A, IV.B.

12. See *infra* Cahn, *No Secrets*, *supra* note 10, at 318-19; Parts III.B-C, IV.A.

13. This becomes clear, for example, in discussions with parents who are concerned that telling children of their origins will cause them to feel alienation from their non-biologically connected parent. Genetic relatedness is at the core of numerous legal doctrines in family law and trusts and estates.

14. Cahn, *No Secrets*, *supra* note 10, at 328-29.

15. WENDY KRAMER & NAOMI CAHN, *FINDING OUR FAMILIES: A FIRST-OF-ITS-KIND BOOK FOR DONOR-CONCEIVED PEOPLE AND THEIR FAMILIES* 7-9 (2013).

16. *Id.* at 7.

17. That situation leads to different issues that generally do not raise the same identity disclosure issues addressed later in the article because the donors are known. For some of the complexities with known donors, see *id.* at 7-8; Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 380-81 (2012) [hereinafter Cahn, *The New Kinship*].

child, donor-conceived person, or even donor-conceived adoptee), emotions are associated with each term.¹⁸ Many offspring insist that the person who donated sperm is not the parent's "donor" but their "biological" parent or even mother or father.¹⁹

Subpart A provides a brief overview of the donor-gamete world, beginning with an introduction to the people who use donor eggs and sperm.²⁰ It explores the many potential recipients of donor gametes, including heterosexual and same-sex couples, as well as single individuals, all of whom are looking for ways to complete their families.²¹ Subpart B gives an overview of the fertility industry, the business that makes it possible for people who want to become parents to procure the gametes, and the technology that will allow them to have babies.²² Although the first use of donor insemination ("DI") occurred more than one hundred years ago, it is only over the past four decades that DI has become an industry, and only over the past two decades that egg donation has become a possibility.²³

A. *Who Uses Donor Eggs and Sperm?*

For many people—whether they are single, gay or lesbian, medically infertile themselves or partnered with someone who is—reproductive technologies provide their only option for childbearing. Correspondingly, the number of people using assisted reproductive technology ("ART") has increased dramatically over the past several decades.²⁴ Infertility services are expensive, however, depending on the

18. See D.R. Beeson et al., *Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process*, 26 HUM. REPROD. 2415, 2418-19 (2011); Cahn, *The New Kinship*, *supra* note 17, at 380.

19. KRAMER & CAHN, *supra* note 15, at 8-9; see also Vasanti Jadvia et al., *Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor*, 20 REPROD. BIOMED. ONLINE 523, 530 (2010) [hereinafter Jadvia et al., *Experiences of Offspring*].

20. See *infra* Part II.A.

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. Mary Kate Kearney, *Identifying Sperm and Egg Donors: Opening Pandora's Box*, 13 J. L. & FAM. STUD. 215, 224-25 (2011); see Liza N. Burby, *A Fact of Life*, NEWSDAY, Feb. 6, 2006, at B10. In 2012, the American Society for Reproductive Medicine removed the designation of "experimental" from the medical procedure of egg freezing, thereby facilitating even more egg donation. *Fertility Experts Issue New Report on Egg Freezing: ASRM Lifts 'Experimental' Label from Technique*, AM. SOC'Y FOR REPROD. MED. (Oct. 19, 2012), <http://www.asrm.org/news/article.aspx?id=10358> [hereinafter *ASRM*].

24. Compare CENTERS FOR DISEASE CONTROL & PREVENTION, 2011 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 3 (2013), available at http://www.cdc.gov/art/ART2011/PDFs/01_ART_2011_Clinic_Report-FM.pdf (noting that in 2010, about 7.4 million women had received infertility services at some time in their lives), with U.S. CONG. OFFICE OF TECH. ASSESSMENT, OTA-13P-BA-48, ARTIFICIAL INSEMINATION:

type of procedure.²⁵ The average infertility costs per couple are over five thousand dollars.²⁶ Vials of sperm can be several hundred dollars, while a turkey baster is relatively inexpensive; costs can add up once the sperm is used in medical procedures, such as professional intrauterine insemination.²⁷ Donor eggs and related costs are tens of thousands of dollars, and one round of in vitro fertilization ("IVF"), in which the eggs are fertilized, is more than ten thousand dollars.²⁸

About 8% of women in the United States will seek some type of infertility services during their lifetimes, and approximately six million women have problems becoming, or staying, pregnant.²⁹ Couples may need donor gametes when one of them is medically infertile and unable to produce viable eggs or sperm.³⁰ Single people and gay and lesbian couples need donor gametes because they have no other source for the other gamete.³¹

It is comparatively easy to keep track of the number of babies born through donor eggs because the technology requires some type of ART in which a human egg is handled outside of the body, typically through IVF (with sperm donation, a turkey baster is, colloquially, all that is needed).³² And the use of donor eggs is increasing.³³ Approximately 1%

PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY 3 (1988) [hereinafter U.S. CONGRESS] (estimating that in 1986-87, 172,000 women underwent artificial insemination).

25. Genevra Pittman, *Average Out-of-Pocket Fertility Costs Top \$5,000*, REUTERS (Sept. 17, 2013), <http://www.reuters.com/article/2013/09/17/us-fertility-costs-idUSBRE98G13J20130917>.

26. *Id.*

27. J. Farley Ordovensky Staniec & Natalie J. Webb, *Utilization of Infertility Services: How Much Does Money Matter?*, 42 HEALTH SERVICES RES. 971, 975 (2007).

28. See, e.g., Mark P. Connolly et al., *The Costs and Consequences of Assisted Reproductive Technology: An Economic Perspective*, 16 HUM. REPROD. UPDATE 603, 605 fig.1 (2010).

29. CENTERS FOR DISEASE CONTROL & PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2010), available at http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf; ANJANI CHANDRA ET AL., FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 137 tbl.98 (2005), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

30. LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 73-79 (2007).

31. *Id.* at 96.

32. See Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 27-29 (2008).

33. Compare CENTERS FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT: NATIONAL ART SUCCESS RATES 2011 NATIONAL SUMMARY (2011) [hereinafter CENTERS FOR DISEASE CONTROL, 2011 NATIONAL SUMMARY], available at http://nccd.cdc.gov/DRH_ART/Apps/NationalSummaryReport.aspx (providing the number of donor eggs in 2011), with CENTERS FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT: NATIONAL ART SUCCESS RATES 2004 NATIONAL SUMMARY (2014) [hereinafter CENTERS FOR DISEASE CONTROL, 2004 NATIONAL SUMMARY], available at http://nccd.cdc.gov/DRH_ART/Apps/NationalSummaryReport.aspx (providing the number of do-

of all children born in the United States are the result of ART.³⁴ Of that number, at least 10% are born through donor eggs.³⁵ In 2011, the latest year for which figures are available, women went through more than eighteen thousand cycles involving donor eggs or embryos, or almost 12% of all assisted reproduction cycles that year.³⁶ That was double the number of donor egg cycles in 1998.³⁷ Approximately eight thousand babies are born each year in the United States through donor eggs, although that is a tiny percentage of the nearly four million births per year.³⁸ Women over the age of thirty-five are much more likely to use donor eggs—and they work.³⁹ The success rates for women of all ages who use donor eggs are generally above 50%; for example, a forty-five year-old woman has a 2.1% chance of having a child if she undergoes ART with her own eggs, but a 53% chance if she uses donor eggs.⁴⁰ Consequently, donor eggs are alluring options, particularly in a society that finds parenthood, rather than marriage, increasingly important.⁴¹

Indeed, the demand for donor gametes is increasing—and changing. As the average age of first birth increases, and as the number of heterosexual-married-parent families declines, donor gametes provide

nor eggs in 2004), and CENTERS FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT: NATIONAL ART SUCCESS RATES 1998 NATIONAL SUMMARY (1998) [hereinafter CENTERS FOR DISEASE CONTROL, 1998 NATIONAL SUMMARY], available at http://nccd.cdc.gov/DRH_ART/Apps/NationalSummaryReport.aspx (providing the number of donor eggs in 1998).

34. See *Births and Natality*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/births.htm> (last visited July 20, 2014) (providing the number of births per year); Liza Mundy, *The Strange History of the Birth Certificate*, NEW REPUBLIC (Feb. 14, 2013), <http://www.newrepublic.com/article/112375/birth-certificates-age-adoption-and-egg-donation> (stating that there were 61,000 IVF births in 2010).

35. Mundy, *supra* note 34.

36. CENTERS FOR DISEASE CONTROL & PREVENTION, 2011 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 24 (2013) pdf [hereinafter CENTERS FOR DISEASE CONTROL], available at http://www.cdc.gov/art/ART2011/PDFs/ART_2011_Clinic_Report-Full.

37. Compare CENTERS FOR DISEASE CONTROL, 2011 NATIONAL SUMMARY, *supra* note 33 (showing that there were more than 18,000 donor eggs in 2011), with CENTERS FOR DISEASE CONTROL, 1998 NATIONAL SUMMARY, *supra* note 33 (showing that there were approximately 7000 donor eggs in 1998).

38. See *Births and Natality*, *supra* note 34; Mundy, *supra* note 34.

39. See Section 4: ART Cycles Using Donor Eggs: Explanation of Figures 43-47, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/art/ART2010/sect4_fig43-47.htm (last visited July 20, 2014).

40. See *id.*

41. Indeed, 52% of the Millennial Generation (those born after 1980) said that “being a good parent is ‘one of the most important things’ in life,” while only 30% rated having a successful marriage as one of the most important things. Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, PEW RESEARCH CENTER 1 (Mar. 9, 2011), <http://www.pewsocialtrends.org/files/2011/03/millennials-marriage.pdf>.

one important source for creating families.⁴² The average age of first birth is rising for the country as a whole, although it varies by education: for women with less than a high school education, it is twenty, little changed since 1970, when it was nineteen; for women with at least a high school education, it is twenty-four, up somewhat from twenty-one in 1970; and for college-educated women, it is thirty, up from twenty-five in 1970.⁴³ The birth rate is increasing for women over the age of thirty.⁴⁴ At the same time, women's fertility declines with age (although we still cannot precisely measure just how much):⁴⁵ by age thirty, most women retain only 12% of their original egg reserves, and by age forty, just 3%.⁴⁶ Moreover, as women age, so do their eggs, which makes them less capable of fertilization and, once fertilized, less able to implant in the uterus;⁴⁷ the risk of miscarriage and birth defects increases as well.⁴⁸ For a woman in her twenties, the chance of getting pregnant is 20-25%; it drops to 10-15% if she is in her thirties, and 5% when she is in her forties.⁴⁹

The deferral of childbearing for the college educated is one aspect of a changing family structure.⁵⁰ This new culture—geared to the new industrial economy and what June Carbone and I have identified elsewhere as the “Blue Family” model⁵¹—emphasizes the importance of

42. See Carolyn Butler, *Ovaries Have Not Adjusted to Many Women's Decision to Delay Having Children*, WASH. POST, Feb. 23, 2010, at E1 (stating that the amount of eggs a woman has decreases over time, especially after the age of thirty); Kay Hymowitz et al., *The Great Crossover*, KNOT YET, <http://twentysomethingmarriage.org/the-great-crossover> (last visited July 20, 2014) (evidencing that the average age of first birth is increasing, often depending on education level); Wang & Taylor, *supra* note 41, at 2 (noting that previous generations had a higher rate of marriage when at the same age that Millennials are now).

43. Hymowitz et al., *supra* note 42, at figs.10A–C.

44. GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CENTER, *THE NEW DEMOGRAPHY OF AMERICAN MOTHERHOOD* 4 (2010), available at <http://pewsocialtrends.org/files/2010/10/754-new-demography-of-motherhood.pdf>.

45. See, e.g., Am. Soc'y Reprod. Med., *Age-Related Fertility Decline: A Committee Opinion*, 90 FERTILITY & STERILITY S154, S154 (2008); Jean M. Twenge, *How Long Can You Wait to Have a Baby?*, ATLANTIC, July-Aug. 2013, at 56, 56-57, 60, available at http://www.theatlantic.com/magazine/archive/2013/07/how-long-can-you-wait-to-have-a-baby/309374/?single_page=true (noting “The data, imperfect as they are, suggest two conclusions. No. 1: fertility declines with age. No. 2, and much more relevant: the vast majority of women in their late 30s will be able to get pregnant on their own.”).

46. Butler, *supra* note 42, at E1.

47. *Age Guidelines for IVF*, REPRODUCTIVE SCI. CENTER BAY AREA, <http://rscbayarea.com/services/infertility-treatment/ivf/age-for-ivf> (last visited July 20, 2014).

48. *Id.*

49. Holly Finn, *My Fertility Crisis*, WALL ST. J., July 23-24, 2011, at C1.

50. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 45 (2010). See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

51. CAHN & CARBONE, *supra* note 50, at 44-45.

women's as well as men's workforce participation, more egalitarian gender roles, and delay of marriage and childbearing until both parents reach emotional maturity and financial self-sufficiency.⁵² In those parts of the country where the most fertility clinics are located, women are more likely to be part of the Blue Family model: they marry and have children at older ages.⁵³ While infertility (often defined as a failure to achieve pregnancy after a year of unprotected intercourse⁵⁴) is actually higher among women without a college education,⁵⁵ these women are less likely and less able to seek higher tech interventions because of the cost.⁵⁶ Women with higher incomes are more likely to choose surgery or some form of ART compared to women of lower income.⁵⁷

Most IVF cycles do not involve donor eggs or sperm. "In fact, people strongly prefer *not* to use donor gametes. While heterosexual couples are open to the possibility of donor eggs or sperm, both men and women are significantly more negative toward the use of donor sperm than . . . eggs."⁵⁸ Gendered societal norms reinforce the identification of

52. This is by no means the only model for family. The "Red Family" model rejects the new culture. *Id.* at 45. This model emphasizes religious teachings that celebrate the unity of heterosexual sex, marriage, and reproduction. *Id.* at 43. As a result of the emphasis on chastity and the lesser availability of contraception and abortion, however, the red culture is typified by higher teen pregnancy rates, lower average ages of marriage and first births, and the channeling of childbearing into the traditional heterosexual marriage as the only appropriate setting for childbearing. *Id.* at 24.

53. See Ajay K. Nangia et al., *Access to Assisted Reproductive Technology Centers in the United States*, 93 FERTILITY & STERILITY 745, 748-49, 753 (2010). Women with less education, African Americans, and Hispanics have earlier fertility and higher total fertility levels. GLADYS MARTINEZ ET AL., FERTILITY OF MEN AND WOMEN AGED 15-44 YEARS IN THE UNITED STATES: NATIONAL SURVEY OF FAMILY GROWTH, 2006-2010, at 4, 6 (2012), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf>.

54. Cahn, *The New Kinship*, *supra* note 17, at 379 n.48.

55. Tarun Jain, *Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care*, 85 FERTILITY & STERILITY 876, 879 (2006) ("[W]omen with and without a high school diploma had a higher prevalence of infertility than women with a bachelor's degree or higher (8.1%, 8.5%, and 5.6%, respectively).").

56. See *id.*; see also Connolly et al., *supra* note 28, at 607; Daar, *supra* note 32, at 36-38; Staniec & Webb, *supra* note 27, at 982-83. Indeed, regardless of race, women with a higher socioeconomic status, measured by advanced education, household income, and insurance coverage, are more likely to use sophisticated infertility services; among women with infertility, approximately 30% of those who were under 300% of the poverty level compared to about 50% of women above 300% of the poverty level are likely to seek infertility services. Anjani Chandra & Elizabeth Hervey Stephen, *Infertility Service Use Among U.S. Women: 1995 and 2002*, 93 FERTILITY & STERILITY 725, 728 (2010).

57. Staniec & Webb, *supra* note 27, at 983. ART was defined as intrauterine insemination, IVF, and similar medical interventions. *Id.* at 976. For further information, see Adrienne L. Riegler, *Income Disparities in Medical Helpseeking for Infertility 12-15* (2012) (unpublished manuscript) (on file with the *Hofstra Law Review*) (noting that lower income women not only have higher instances of infertility and lower rates of use of infertility services, but are also less likely to perceive themselves as having fertility problems).

58. CAHN, *THE NEW KINSHIP*, *supra* note 10, at 16.

men with their genetic contribution to reproduction,⁵⁹ and this may then have an impact on feelings of disclosure.⁶⁰ With the development in the early 1990s of intracytoplasmic sperm injection (“ICSI”), the need for donor sperm by men has decreased.⁶¹ While there are no reliable figures in the United States on who uses sperm banks, anecdotal evidence suggests that their usage by heterosexual couples is declining, while usage by single women and lesbians is increasing.⁶²

Egg donation is, by contrast, more likely to be used by heterosexual couples and gay or single men.⁶³ The number of egg donors has been more limited than sperm donors.⁶⁴ Moreover, a woman cannot donate eggs as often as a man can donate sperm, and the procedures for women involve more health risks.⁶⁵ Until the early twenty-first century, donor eggs had to be “fresh.”⁶⁶ In 2004, the American Society for Reproductive Medicine (“ASRM”) labeled egg freezing an “experimental” procedure, meaning that patients had to be informed that

59. See GAY BECKER, *THE ELUSIVE EMBRYO: HOW WOMEN AND MEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES* 136-37 (2000).

60. The stigma of infertility for men reflects not just their inability to have a child, but also their lack of virility. CHARIS THOMPSON, *MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES* 133 (2005) (noting that “the infertility stigma for men included compromised virility and was not simply a matter of the compromised ability to have children”). Thompson further notes that men with male factor infertility (with insufficient or inadequate sperm for reproduction) felt significantly more stigma than men whose partners were infertile. *Id.* at 129.

61. Until then, IVF required that a man produce hundreds of thousands of sperm for an egg to become fertilized. *Infertility in Men: Treatment*, UCSF MED. CENTER, http://www.ucsfhealth.org/conditions/infertility_in_men/treatment.html (last visited July 20, 2014). ICSI allows doctors to insert one sperm directly into the egg, meaning that men with extremely low sperm counts can use their own sperm for IVF. See Judith Shulevitz, *Does a Popular Form of In Vitro Fertilization Cause Autism?*, NEW REPUBLIC (July 4, 2013), <http://www.newrepublic.com/article/113765/study-icsi-vitro-fertilization-may-cause-autism>.

62. See Cahn, *The New Kinship*, *supra* note 17, at 377-78; Margaret K. Nelson et al., *Making Sense of Donors and Donor Siblings: A Comparison of the Perceptions of Donor-Conceived Offspring in Lesbian-Parent and Heterosexual-Parent Families*, in 7 *VISIONS OF THE 21ST CENTURY FAMILY: TRANSFORMING STRUCTURES AND IDENTITIES* 1, 2-3 (Patricia Neff Claster & Sampson Lee Blair eds., 2013); Steve Dilbeck, *Sperm Donors Wanted, Only High-Caliber Jocks Need Apply*, DAILY BREEZE (Aug. 26, 2008, 11:07 AM), http://toplistings.dailybreeze.com/sportscolumnists/ci_10307092.

63. Cahn, *The New Kinship*, *supra* note 17, at 374; Nelson et al., *supra* note 62, at 2.

64. See Cahn, *The New Kinship*, *supra* note 17, at 374-75; Paul Raeburn, *Egg Donors vs. Sperm Donors: Who Is Valued More and Why?*, HUFFINGTON POST, June 11, 2007, http://www.alternet.org/story/53817/egg_donors_vs._sperm_donors%3A_who_is_valued_more_an_d_why.

65. Raeburn, *supra* note 64.

66. See CAHN, *TEST TUBE FAMILIES*, *supra* note 10, at 49-50; Jeffrey Kluger, *Eggs on the Rocks: A New Procedure May Offer Women the Chance to Freeze Their Ova—and Stop Their Biological Clock*, TIME, Oct. 27, 1997, at 105 (explaining that while sperm and fertilized eggs can remain viable when frozen, unfertilized eggs are fragile and are often damaged by freezing).

it was not an established medical practice.⁶⁷ Eight years later, the ASRM changed the designation.⁶⁸

B. Treating Infertility

Because of demographics, advances in technology, and social movements, the donor world has changed dramatically and fundamentally over the past half-century. In 1948, the influential physician and lawyer Alfred Koerner, who was the Executive Secretary to the National Research Foundation for Fertility, Inc., wrote one of the first articles in a law journal addressing DI.⁶⁹ It was important, he observed, for the recipient woman to trust her physician to choose the right donor as well as not to disclose her use of donor sperm.⁷⁰ The woman chose her *doctor*, not her *donor*.⁷¹ In fact, in 1987, sixty percent of federally surveyed sperm banks would sell *only* to doctors, and none would sell only to recipients.⁷²

Since then, the reproductive technology industry has become more sophisticated, offering expanded services.⁷³ Most large cities in the United States had at least one infertility clinic by the late 1930s, and, in the mid-1940s, the first human eggs were fertilized outside of a woman's body, in a petri dish.⁷⁴ As technology advanced to allow for freezing sperm, the first commercial sperm bank opened in 1970, and sperm banking became increasingly consumer-oriented throughout the 1980s.⁷⁵ In 1978, Briton Louise Brown became the first baby born through IVF.⁷⁶

67. SARAH ELIZABETH RICHARDS, MOTHERHOOD, RESCHEDULED: THE NEW FRONTIER OF EGG FREEZING AND THE WOMEN WHO TRIED IT 65 (2013); ASRM, *ASRM Urges Caution, Strong Counseling for Women Seeking Egg Freezing*, IVF NEWS (Oct. 17, 2007), <http://www.ivf.net/ivf/asrm-urges-caution-strong-counseling-for-women-seeking-egg-freezing-o3028.html> (emphasizing that egg freezing remains an experimental procedure and that the data available is too limited to allow egg freezing to be considered an established medical treatment).

68. ASRM, *supra* note 23.

69. Alfred Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 484-85, 488 (1948).

70. *Id.* at 490. For further discussion of these issues, see Cahn, *The New Kinship*, *supra* note 17, at 391.

71. See Koerner, *supra* note 69, at 490.

72. See U.S. CONGRESS, *supra* note 24, at 63.

73. See, e.g., DAVID PLOTZ, THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK 29-31 (2005) (discussing the development of increasingly sophisticated sperm banks); DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 23-67 (2006) (discussing the historical development of various fertility techniques ranging from hormones to egg donation).

74. SPAR, *supra* note 73, at 21.

75. *Id.* at 28; Jennifer Bleyer, *A Conception Conundrum*, PSYCHOL. TODAY (Nov. 5, 2013), <http://www.psychologytoday.com/articles/201310/conception-conundrum>.

76. Cahn, *The New Kinship*, *supra* note 17, at 375; SPAR, *supra* note 73, at 24.

IVF then facilitated the development of a market for donor eggs that could be grown in one woman's body, fertilized in vitro, and then placed in another woman's body. Clinics had begun to realize the possibilities of this market by the early 1990s.⁷⁷

While infertility raises social and legal issues, these have become instead perceived as medical problems that can be resolved by the appropriate professionals.⁷⁸ Having a child through donor conception creates new family relationships, but the dominant paradigm is health law with its focus on patients.⁷⁹

Of course, the use of medical advances to manage or resolve infertility is not (or should not be) a problem; the problems arise when medicine becomes the primary focus. Once individuals start to use infertility services, they find it difficult to stop, and the focus becomes curing the illness of infertility rather than, for example, focusing on other means of having children or even the creation of a family without children.⁸⁰

1. Clinically Speaking

Egg and sperm donation programs are structured similarly, with comparable stages for donors and recipients.⁸¹ All programs must first recruit donors, screen them, and then match them with recipients.⁸² The screening process typically includes collection of both medical and personal history data.⁸³ Aside from the laws governing the various contractual relationships, few of which apply directly to reproductive technology, this is perhaps the only stage where the law plays a direct role in the reproductive industry, mandating certain safety tests of

77. SPAR, *supra* note 73, at 44-45.

78. Laura Mamo, *Negotiating Conception: Lesbians' Hybrid-Technological Practices*, 32 SCI., TECH., & HUM. VALUES 369, 385 (2007).

79. See Cahn, *The New Kinship*, *supra* note 17, at 372, 387, 405.

80. See KAREY HARWOOD, *THE INFERTILITY TREADMILL: FEMINIST ETHICS, PERSONAL CHOICE, AND THE USE OF REPRODUCTIVE TECHNOLOGIES* 132-37 (2007). Moreover, as bioethicists observe, broader questions, such as the morality of particular technologies, also come into play, particularly given the relentless move towards increasingly sophisticated technologies in the medicalization of infertility. *Id.* at 86, 92.

81. See Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AMER. SOC. REV. 319, 325-31 (2007).

82. See *id.*

83. See *id.* at 326; see also Naomi Cahn & Jennifer Collins, *Fully Informed Consent for Prospective Egg Donors*, 16 VIRTUAL MENTOR 49, 49 (2014). See generally Am. Soc'y for Reprod. Med., *Psychological Assessment of Gamete Donors and Recipients*, 77 FERTILITY & STERILITY S11 (2002).

the donated gametic material⁸⁴ and governing the donors' agreements with the agencies.⁸⁵

After recruitment and screening, programs help the donor prepare a personal profile to be used to advertise the donor to prospective consumers.⁸⁶ Clinics vary considerably as to how much information they include in these profiles, but the profile may include level of education and religion, as well as physical characteristics and a baby photo.⁸⁷

Clinics are required to keep few records after the final donation.⁸⁸ Indeed, the provision of donor gametes in the United States is lightly regulated.⁸⁹ "The medical profession is typically [overseen] by the states or is self-regulated through physicians' professional organizations, not by the federal government."⁹⁰ Over the past several decades, the federal government has taken a few tentative steps towards the regulation of reproductive technology.⁹¹ The regulations fall into two categories: safety testing and truth in advertising.⁹² Their focus is protecting patients from disease and false claims about ART success rates.⁹³ They

84. See *infra* note 94.

85. For a description of what donors must do, see, for example, Almeling, *supra* note 81, at 326-27, 329, 334-35; *Sperm Donors Valued Less Than Egg Donors*, SCI. DAILY (May 26, 2007), <http://www.sciencedaily.com/releases/2007/05/070525204143.htm>.

86. Almeling, *supra* note 81, at 329-31.

87. See, e.g., *Donor Search*, CAL. CRYOBANK, <http://www.cryobank.com/Search.aspx?listview=0#> (last visited July 20, 2014); Robin Romm, *All His Children: A Sperm Donor Discovers His Rich, Unsettling Legacy*, ATLANTIC (Oct. 26, 2011, 3:59 PM), <http://www.theatlantic.com/magazine/archive/2011/12/all-his-children/308714>.

88. See 21 C.F.R. § 1271.55 (2011).

89. Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257, 267 (2012).

90. CAHN, TEST TUBE FAMILIES, *supra* note 10, at 52. In addition to their board specialties, doctors must be licensed to practice in a particular state, rather than nationally. Jon H. Sutton, *What Surgeons Should Know About...: Medical Licensure and State Regulation of Medical Practice*, BULL. AM. C. SURGEONS, Mar. 2007, at 10, 10. "The American Board of Obstetrics and Gynecology, which is a non-profit organization, administers both an oral and a written test to doctors who want to become certified as obstetricians or gynecologists." CAHN, TEST TUBE FAMILIES, *supra* note 10, at 52. Once they become board certified, successful applicants also have the opportunity to become certified—following more examinations and a mandatory research thesis—in the subspecialty of Reproductive Endocrinology and Infertility. *Id.* "Urologists, physicians who specialize in the male reproductive tract, undergo a similar certification process administered by the American Board of Urology. There are continuing obligations imposed on physicians to maintain their certification." *Id.* at 52-53; see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) (affirming state control over regulation of health care professionals).

91. See CAHN, TEST TUBE FAMILIES, *supra* note 10, at 53-56.

92. *Id.* at 54.

93. See *Oversight & Regulation of Reproductive Technologies*, REPROD. HEALTH TECH. PROJECT, <http://www.rhpt.org/fertility/regulations/default.asp> (last visited July 20, 2014); *Reproductive Genetic Testing: A Regulatory Patchwork*, GENETICS & PUB. POL'Y CENTER, http://www.dnapolicy.org/policy.international.php?action=detail&laws_id=63 (last visited July 20, 2014).

are not focused on ensuring the safety of offspring, nor protecting their rights.

a. Safety Testing

The U.S. Food and Drug Administration (“FDA”) regulates clinical laboratory services, drugs, and medical devices that are used in IVF treatments, including basic standards for the use of human tissue and for the clinics.⁹⁴ Donor gametes—semen, eggs, and embryos—are defined within the category of Human Cells, Tissues, and Cellular and Tissue-Based Products, and are regulated by the FDA.⁹⁵ As such, they are subject to rules primarily focused on preventing communicable diseases.⁹⁶ The applicable regulations focus on donor testing and record keeping, and, as an initial matter, require that all entities handling sperm, eggs, or embryos register.⁹⁷ As of 2014, 848 establishments handling sperm had registered,⁹⁸ while 749 handling oocytes were registered or inactive.⁹⁹

When a potential donor arrives at a clinic, the clinic must take certain steps to determine the donor’s eligibility.¹⁰⁰ The FDA requires

94. See, e.g., 42 U.S.C. § 263a(b) (2006) (“No person may solicit or accept materials derived from the human body for laboratory examination or other procedure unless there is in effect for the laboratory a certificate issued by the Secretary . . .”); Daar, *supra* note 89, at 287-88 & nn.121-22.

95. 21 C.F.R. § 1271.85 (2011). Sections 1271.85(a)–(c) of the regulations require anonymously donated gametes to be tested for the following diseases: “human immunodeficiency virus, type 1; human immunodeficiency virus, type 2; hepatitis B virus; hepatitis C virus; treponema pallidum; human T-lymphotropic virus, type I; human T-lymphotropic virus, type II; cytomegalovirus (“CMV”); Chlamydia trachomatis; and neisseria gonorrhea.” § 1271.85(a)–(c); Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 VAL. U. L. REV. 1361, 1375 n.78 (2011).

96. Knaplund, *supra* note 95, at 1375.

97. See 21 C.F.R. §§ 1271.21–37; see also *Vaccines, Blood & Biologics: Tissue Establishment Registration*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/EstablishmentRegistration/TissueEstablishmentRegistration/default.htm> (last visited July 20, 2014). For a copy of the two-page form, FDA 3356, see *Establishment Registration and Listing for Human Cells, Tissues and Cellular and Tissue-Based Products (HCT/Ps)*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/UCM082428.pdf> (last visited July 20, 2014).

98. *Human Cell and Tissue Establishment Registration – Public Query 2014*, U.S. FOOD & DRUG ADMIN., <https://www.accessdata.fda.gov/scripts/cber/CFAppsPub/tiss/index.cfm> (last visited July 20, 2014) (select “Semen” under the “Product” parameter, and then click “Continue” to get results). The establishments, either currently or in the past, distribute, label, package, process, recover, screen, store, and/or test semen. *Id.*

99. *Id.* (select “Oocyte” under the “Product” parameter, and then click “Continue” to get results).

100. 21 C.F.R. §§ 1271.45, .75 (2011). To decide on eligibility, the clinic is supposed to review an applicant’s medical records for various communicable diseases, such as chlamydia and HIV. *Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps)*, U.S. FOOD & DRUG ADMIN. 14-21 (Aug. 2007),

screening for each donor that includes a physical examination and a donor medical history interview.¹⁰¹ Once specimens are determined to be eligible, only then are they made available to potential recipients.¹⁰² There has been an increasing amount of review of establishments,¹⁰³ although there is no way to verify much of the information that donors provide.¹⁰⁴

In explaining *what you should know* specifically about reproductive tissue donations, the FDA emphasizes that the tissues are screened for communicable and infectious disease.¹⁰⁵ It does not, however, address any other potential type of testing that might be done, such as testing for

<http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf> [hereinafter *Guidance*]. Not only must the clinic look to see if the applicant has already experienced one of these diseases, but also the clinic must decide whether the applicant shows risk factors for these diseases. *Id.* Potential risk factors range from hemophilia to a man having had sex with another man during the previous five years. *Id.*

101. *What You Should Know - Reproductive Tissue Donation*, U.S. FOOD & DRUG ADMIN. (Nov. 5, 2010), <http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/TissueSafety/ucm232876.htm> [hereinafter *What You Should Know*]. The FDA requires that all reproductive tissue donors be tested for diseases such as HIV and hepatitis, and that medical records be reviewed for risk factors. See 21 C.F.R. §§ 1271.45, .75 (2011); CAHN, *THE NEW KINSHIP*, *supra* note 10, at 25; Nicole J. Messing, *Protecting a Man's Right to Choose: Why Mandatory Identity Release for Sperm Donors Is a Bad Idea*, 16 MICH. ST. U. J. MED. & L. 429, 436-439 (2012); Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 382 (2009).

102. See *Guidance*, *supra* note 100, at 1. In addition to implementing standards for testing donors, the federal regulations require that donation facilities maintain sufficient staff to ensure that they can comply with the federal regulations. 21 C.F.R. § 1271.170 (2011). Clinics must establish their own internal quality control program and set up procedures for all steps involved in the screening, testing, and determination of eligibility. §§ 1271.180, .160. The regulations are thorough and specific concerning the clinic's monitoring requirements. See §§ 1271.195-.220. To help explain how clinics should implement these mandatory screening requirements, the FDA has also issued a "guidance" document that suggests how to determine donor eligibility. *Guidance*, *supra* note 100, at 1. Guidance documents like this one are designed to reflect the FDA's "current thinking on [a] topic," although they are not legally binding. *Id.*

103. *HCT/P Inspection Information: Inspections Performed in Fiscal Years 2004 to 2013*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/ComplianceActivities/ucm136342.htm> (last visited July 20, 2014).

104. See Jenna Marotta, *Do Egg Donors Lie?*, JEZEBEL (Dec. 1, 2011, 1:10 PM), <http://jezebel.com/5863529/do-egg-donors-lie>. The founder of an agency explained how she could ensure that a woman was honest: "I know when a 23-year-old is trying to pull my leg." *Id.* At Circle Surrogacy in Boston, licensed social workers meet with prospective donors to discuss their goals and motivations. *Id.* Rachel Campbell, one social worker, believes that accidental lies by omission are more frequent than outright deception:

It's very, very uncommon that there's nothing in someone's family history—it definitely does tip us off, it makes us press forward. My take is that the donor doesn't know or hasn't asked those questions The majority of donors really are very honest—that's why our rejection rates are so high.

Id. (internal quotation marks omitted).

105. *What You Should Know*, *supra* note 101.

risk of transmission of genetic diseases;¹⁰⁶ the focus is on the patient who is receiving the donated products,¹⁰⁷ not on the child who may ultimately be born. Indeed, aside from these safety and market-protection procedures, federal law does not regulate the medical procedures involved in donation. No additional federal restrictions are imposed on clinics. They are not required to prevent discrimination against certain potential recipients or donors,¹⁰⁸ to mandate an ongoing obligation of donors to report health information, to regulate the disclosure of information to any subsequently-born children, limit the numbers of embryos transferred per cycle, or even to restrict the number of times that one person can donate sperm or eggs. Approximately one-half of the states provide various licensing requirements for sperm banks.¹⁰⁹

Non-binding industry guidelines address additional issues, containing advice and standards on a variety of topics that go beyond basic ART medical practice.¹¹⁰ Their guidelines, unlike those of the

106. See *id.* (focusing only on testing for communicable diseases). Such tests might increase the cost of the gametes. See Carolyn Y. Johnson, *Company Seeks to Make Sperm Banks Safer*, BOS. GLOBE (Oct. 14, 2013), <http://www.bostonglobe.com/lifestyle/health-wellness/2013/10/13/company-seeks-make-sperm-banks-safer-but-raises-questions-about-preconception-dna-testing/rIV2rypd3NnRRYQdeszR1M/story.html>; Drew Anne Scarantino, *Would You Pay for Genetic Testing?*, FORBES (June 13, 2013, 12:18 PM), <http://www.forbes.com/sites/learnvest/2013/06/13/would-you-pay-for-genetic-testing>.

107. See *What You Should Know*, *supra* note 101 (focusing only on testing for communicable diseases).

108. While California law is now clear that clinics cannot discriminate based on sexual orientation, see *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 966-67 (Cal. 2008) (holding that the First Amendment right to free exercise does not grant physicians the right to deny fertility treatments to lesbian patients), the law is far less settled in other states.

109. *Pi*, *supra* note 101, at 384.

110. See generally Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Tech., *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY AND STERILITY 44 (2013), available at [https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_on_number_of_embryos\(1\).pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_on_number_of_embryos(1).pdf); Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Tech., *Recommendations for Gamete and Embryo Donation: A Committee Opinion*, 99 FERTILITY & STERILITY 47 (2013) [hereinafter Am. Soc'y, *Recommendations*], available at [https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete\(1\).pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf); Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Tech., *Recommendations for Practices Utilizing Gestational Carriers: An ASRM Practice Committee Guideline*, 97 FERTILITY & STERILITY 1301 (2012), available at https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/recommendations_for_practices_utilizing_gestational_carriers_nonmembers.pdf; Am. Soc'y for Reprod. Med., *Recommendations for Reducing the Risk of Viral Transmission During Fertility Treatment with the Use of Autologous Gametes: A Committee Opinion*, 99 FERTILITY & STERILITY 340 (2013), available at https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/

FDA, cover both donors and recipients (the FDA covers only donors).¹¹¹ While the federal regulations say *nothing* about disclosure, even the ASRM guideline only mentions the possibility in the context of warning donors that there is no guarantee that their identities will not be disclosed.¹¹² The ASRM notes that “heightened sensitivity to the interests of offspring in knowing their genetic histories suggests that donors may bear some responsibilities in the donation process to facilitate the provision of information about their genetic makeup and family health history,” but it cautions that this “does not require knowledge of the specific identity of the donor or extend to contact with the donor.”¹¹³ With respect to the possibility of identity disclosure, the guidelines provide that the assessment should determine whether the donor has been “well informed about . . . plans . . . relating to [any] future contact.”¹¹⁴

Self-regulation depends on professional reputation and guidelines, but it does not always produce compliance.¹¹⁵ Moreover, its focus is internal to an industry,¹¹⁶ so existing regulations pay little attention to the children who are born from donor gametes.

b. Consumer Protection?

It was not until 1992 that Congress enacted legislation that applied explicitly to the reproductive technology industry itself through the Fertility Clinic Success Rate and Certification Act (“Act”).¹¹⁷ The Act is designed to prevent fertility clinics from reporting

Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_for_reducing(1).pdf.

111. See, e.g., Am. Soc’y, *Recommendations*, *supra* note 110, at 48-49.

112. Ethics Committee of the Am. Soc’y for Reprod. Med., *Interests, Obligations, and Rights of the Donor in Gamete Donation*, 91 FERTILITY & STERILITY 22, 22 (2009).

113. See *id.* at 23.

114. Cahn & Collins, *supra* note 83, at 49-50 (discussing informed disclosure as it relates to sperm donors, egg donors, and embryo donors).

115. E.g., Hillary B. Alberta et al., *Compliance with Donor Age Recommendations in Oocyte Donor Recruitment Advertisements in the USA*, 26 REPROD. BIOMED. ONLINE 400, 401 (2013); Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039, 1079 (2010); Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, HASTING CENTER REP., Mar.-Apr. 2010, at 25, 27.

116. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 106 (1992); Maxwell J. Mehlman, *Professional Power and the Standard of Care in Medicine*, 44 ARIZ. ST. L.J. 1165, 1170-75 (2012); Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL’Y 285, 286-87 & nn.1-7 (2010).

117. 42 U.S.C. § 263a-1 (2011) (requiring ART programs to annually report pregnancy success rates); see Judith F. Daar, *ART and the Search for Perfectionism: On Selecting Gender, Genes, and Gametes*, 9 J. GENDER RACE & JUST. 241, 254-55 (2005) [hereinafter Daar, ART].

misleading data about their pregnancy success rates.¹¹⁸ Even the safeguards it provides concerning the deceptive practices of clinics are relatively minimal.¹¹⁹

The reporting requirements are focused on the mandate that clinics practicing ART provide statistics on their pregnancy success rates to the Center(s) for Disease Control (“CDC”).¹²⁰ Each December, the CDC issues a report that provides a national summary of success rates, data on each of the individual clinics that has reported, and a listing at the end of the non-reporting clinics.¹²¹ Additionally, the CDC offers a comprehensive compilation of information on specific clinics.¹²²

2. Finding Donors

When it comes to the donors themselves, the focus of sperm banks and egg agencies is recruitment.¹²³ The fertility industry uses various methods to encourage a supply of donors; when Yale sociologist Rene Almeling studied a variety of egg agencies and sperm banks,¹²⁴ she found that clinics emphasized that egg donation involves caring and helping others become parents, and tried to encourage feelings of altruism.¹²⁵ A college newspaper might advertise for egg donors, offering “the chance to give ‘the gift of life.’”¹²⁶

By contrast to the recruitment of egg donors, sperm donor solicitation is far more explicitly mercenary.¹²⁷ California Cryobank

118. Daar, *ART*, *supra* note 117, at 254-55.

119. See *id.* at 255. Indeed, if fertility clinics do not provide data about their programs, there are no sanctions beyond the clinic’s listing as nonreporting in the annual compilation of data. See *id.* A second portion of the law required the government to establish a voluntary model program that states could use in certifying embryo laboratories as having satisfied certain safety and other professional quality standards. *Implementation of the Fertility Clinic Success Rate and Certification Act of 1992 - A Model Program for the Certification of Embryo Laboratories*, 64 Fed. Reg. 39,374, 39,374 (July 21, 1999); see 42 U.S.C. § 263a-2(i) (2006).

120. § 263a-1.

121. CENTERS FOR DISEASE CONTROL, *supra* note 36, at 3-5.

122. *Id.* at 24. “There is one other possibility for ensuring that clinics’ claims match their practices. The Federal Trade Commission, which has the authority to monitor marketing claims, has sporadically investigated fertility clinic advertisements.” CAHN, TEST TUBE FAMILIES, *supra* note 10, at 248 n.65.

123. Almeling, *supra* note 81, at 325.

124. RENE ALMELING, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM 2-3 (2011).

125. *Id.* at 36-37.

126. Jennifer Wolff, *The Egg (Donor) Market*, WOMEN’S HEALTH 144 (Jan./Feb. 2011), available at <http://www.womenshealthmag.com/life/female-egg-donation>; see Levine, *supra* note 115, at 31.

127. See, e.g., *Sperm Donation*, NW CRYOBANK, <https://www.nwcryobank.com/sperm-donation> (last visited July 20, 2014).

explicitly appeals to the male ego: “*Do You Have What It Takes To Be a California Cryobank Sperm Donor? Being a California Cryobank sperm donor means being the best.*”¹²⁸

Notwithstanding the marketing efforts targeted at them, egg and sperm donors generally claim that they are motivated by both money and altruism.¹²⁹ Their altruistic motives range from a general feeling of hoping to help others to a more specific wish that others enjoy parenting as they have.¹³⁰ In her study of egg donors, psychologist Andrea Braverman found that, while most donors were open to meeting the recipients of their eggs and participating in a donor registry, women who said the donation process made them feel worthwhile were more receptive to the possibility of meeting their offspring when they reach adulthood than were women with different feelings about the process.¹³¹ On the other hand, not all donors are as happy with the process.¹³²

Money also affects donors’ willingness to be known, and sperm banks charge more for donors who are willing to be identified.¹³³ In an innovative study of whether men would agree to become known sperm donors, it turned out that all they needed was another thirty-one dollars to agree to give up their anonymity.¹³⁴ Both egg and sperm donors may worry about having children they will never know, or they may be concerned that, unless they agreed to contribute as known donors, they will be unable to contact these offspring if they choose to do so, and may be unable to even provide medical updates.¹³⁵

128. *Become a Sperm Donor*, CAL. CRYOBANK, <http://www.spermbank.com/> (last visited July 20, 2014). The website does mention, at another tab, that sperm donors can provide hope to those who want to complete their families while also receiving compensation, and offers prizes such as movie tickets for the effort involved. *Do You Have What It Takes to Become a CCB Donor?*, CAL. CRYOBANK, https://www.spermbank.com/cd_secure/apply/index.cfm (last visited July 20, 2014).

129. E.g., Vasanti Jadva et al., *Sperm and Oocyte Donors’ Experiences of Anonymous Donation and Subsequent Contact with Their Donor Offspring*, 26 HUM. REPROD. 638, 641 (2011) [hereinafter Jadva et al., *Sperm and Oocyte*].

130. *Id.*

131. Alan Mozes, *Egg Donors Happy They Helped, Small Study Finds*, USA TODAY (Oct. 31, 2010, 11:00 AM), http://www.usatoday.com/yourlife/health/medical/infertility/2010-10-31-egg-donors_N.htm?POE=click-refer.

132. Nancy J. Kenney & Michelle L. McGowan, *Looking Back: Egg Donors’ Retrospective Evaluations of Their Motivations, Expectations, and Experiences During Their First Donation Cycle*, 93 FERTILITY & STERILITY 455, 460-61 (2010).

133. *What Fees Do Sperm Banks Charge?*, SPERMCENTER.COM (Sept. 9, 2009, 6:05 PM), <http://www.spermcenter.com/content/what-fees-do-sperm-banks-charge>.

134. I. Glenn Cohen & Travis G. Coan, *Can You Buy Sperm Donor Identification? An Experiment*, 10 J. EMPIRICAL LEGAL STUD. 715, 734 (2013).

135. Jadva et al., *Sperm and Oocyte*, *supra* note 129, at 641-42 & tbl.VII; see Ruth Ragan, *Where Are My Eggs?*, N.Y. TIMES, July 22, 2011, <http://parenting.blogs.nytimes.com/2011/07/22/an-egg-donor-responds>. Given the status of informed consent at the time of donation and the lack of knowledge about even mutual consent registries, donors may not fully appreciate

Ultimately, the increasing use of donor gametes has created more donor-conceived people who are asking questions about their donors and their origins. The Donor Sibling Registry, which is based on voluntary disclosure, has matched more than ten thousand donor siblings and donors since its founding in 2000.¹³⁶ On the other hand, many donor-conceived children do not know their status, so they do not even know they need to ask questions about their origins.¹³⁷

III. TELLING—KNOWING THEIR ORIGINS

Donor conception has drawn on traditional adoption practices, including beliefs that a person did not need to know that she was adopted and did not need health or genetic information, but could be brought up as though she were the biological child of her parents.¹³⁸ This would produce what Mary Lyndon Shanley labels the “as if” family, the family that would have been created without third party intervention.¹³⁹ It is, by contrast, now well accepted in the adoption world that adopted individuals not only have the right to know they are adopted,¹⁴⁰ but that they also may be interested in finding their birth parents.¹⁴¹ An increasing number of states now allow adopted individuals to obtain their original birth certificates,¹⁴² thirty-one states have set up mutual consent registries, and others have established search and consent and other procedures.¹⁴³ Of course, the law does not force adoptive parents to reveal that status nor give adopted children any way to find out if they have not otherwise been told, and the registries and laws, like Oregon’s, that mandate disclosure do not help an adopted child who does not know

their possible means for contact. Cahn & Collins, *supra* note 83, at 49-50.

136. THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited July 20, 2014).

137. Lucy Owen & Susan Golombok, *Families Created by Assisted Reproduction: Parent-Child Relationships in Late Adolescence*, 32 J. ADOLESCENCE 835, 836 (2009).

138. Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption: From Secrecy and Stigma to Knowledge and Connections*, EVAN B. DONALDSON ADOPTION INST. 11 (Mar. 2012), http://adoptioninstitute.org/old/publications/2012_03_OpennessInAdoption.pdf.

139. SHANLEY, *supra* note 10, at 12, 15.

140. *See id.* at 12; *see also* ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING OUR FAMILIES—AND AMERICA* 188-89 (2d ed. 2011) (discussing how parents of adopted children handle their children’s questions).

141. Siegel & Smith, *supra* note 138, at 12.

142. CHILD WELFARE INFO. GATEWAY, ACCESS TO ADOPTION RECORDS 4-6 (2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessap.pdf.

143. *Id.* at 4-5; *see also* EVAN B. DONALDSON ADOPTION INST., *FOR THE RECORDS II: AN EXAMINATION OF THE HISTORY AND IMPACT OF ADULT ADOPTEE ACCESS TO ORIGINAL BIRTH CERTIFICATES* 13-14 (2010) [hereinafter EVAN B. DONALDSON], *available at* http://adoptioninstitute.org/old/publications/7_14_2010_ForTheRecordsII.pdf.

he or she is adopted.¹⁴⁴ The state allows parents complete discretion to make the decision on whether to disclose their children's status and whether to choose an open adoption.¹⁴⁵ On the other hand, pragmatically, parents are encouraged to tell, and legally, adoption only occurs after a parent takes the affirmative action of engaging in a court proceeding and adopted individuals have two birth certificates.¹⁴⁶

By contrast, many, if not most, donor-conceived individuals are not told they are donor-conceived.¹⁴⁷ Federal law and state law (outside of Washington state)¹⁴⁸ display little concern about any potential interests that donor-conceived offspring may have in knowing their origins. There are no court proceedings,¹⁴⁹ nor separate birth certificates.

Although the industry has now advocated this approach towards disclosure,¹⁵⁰ parents still are not telling. More than half of egg donor parents in the early twenty-first century are uncertain as to whether they will disclose, for example.¹⁵¹ The European Study of Assisted Reproduction reported that of ninety-four families with early adolescent children, under 10% of the DI children knew about their origins in contrast to 95% of adopted individuals, whose parents had told them of their status.¹⁵² Almost one third of parents who originally reported intending to disclose in the future still had not disclosed by the child's adolescence.¹⁵³ Even parents who intend to disclose do not necessarily

144. CHILD WELFARE INFO. GATEWAY, *supra* note 142, at 50-51.

145. See OR. REV. STAT. ANN. §§ 109.305, .353 (West 2013).

146. EVAN B. DONALDSON, *supra* note 143, at 7. See generally § 109.309.

147. Mary Elizabeth Dallas, *Parents Who Used Donor Eggs Often Struggle Over Decision to Tell Kids*, HEALTH DAY (Oct. 17, 2013), <http://consumer.healthday.com/mental-health-information-25/child-psychology-news-125/asrm-parents-who-use-donor-eggs-struggle-over-decision-to-tell-their-kids-how-they-were-conceived-680991.html>.

148. Naomi Cahn & Wendy Kramer, *The Biological Clock – For Donor-Conceived Offspring?*, HUFFINGTON POST, June 24, 2011, http://www.huffingtonpost.com/naomi-cahn/donor-sperm-washington_b_879066.html.

149. Surrogacy may require court proceedings. See *Donor Insemination*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/infertility/donorinsemination.html> (last visited July 20, 2014).

150. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 530 (2004).

151. Dallas, *supra* note 147.

152. Susan Golombok et al., *The European Study of Assisted Reproduction Families: The Transition to Adolescence*, 17 HUM. REPROD. 830, 832, 836 (2002); Owen & Golombok, *supra* note 137, at 837.

153. Golombok et al., *supra* note 152, at 836; see Susan Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning and Child Development*, 11 HUM. REPROD. 2324, 2329 (1996).

do so.¹⁵⁴ Parents have a number of reasons for their reluctance to disclose.¹⁵⁵

Of course, with the growing number of single parent families and LGBT families, it is hard to hide.¹⁵⁶ And the professional advice to tell is based on beliefs that telling children encourages a healthy parent-child relationship.¹⁵⁷ According to a study of egg donor families by researchers at Weill-Cornell Medical College, parents who told their children before they turned ten years old reported no anxiety relating to disclosure and expressed full confidence that they had done the right thing and were allowing their children to grow up with the true stories of their conception.¹⁵⁸ By contrast, among the non-disclosing families, there were high levels of anxiety as they waited for the “right time” to tell, and found themselves confronting the challenge of disclosing to teenagers or young adults.¹⁵⁹ In a systematic review of forty-three studies on the disclosure decision-making process for heterosexual couples who had used donor eggs, sperm, and embryos, the researchers found that the parents who disclosed emphasized the children’s best interests, their rights to know that they are donor-conceived, honesty as an essential building block in the parent-child relationship, and the stress inherent in keeping a secret.¹⁶⁰ By contrast, while those parents who had not disclosed also emphasized the best interest of the child, they saw no benefit from disclosure and wanted to protect the child from stigma or

154. E.g., Vasanti Jadva et al., *The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type*, 24 HUM. REPROD. 1909, 1909 (2009) [hereinafter Jadva et al., *The Experiences*]; Rikke Rosholm et al., *Disclosure Patterns of Mode of Conception Among Mothers and Fathers—5-Year Follow-up of the Copenhagen Multi-Centre Psychosocial Infertility (COMPI) Cohort*, 25 HUM. REPROD. 2006, 2014 (2010). The majority of parents who tell do so before their children turn five. See Lucy Blake et al., *‘Daddy Ran Out of Tadpoles’: How Parents Tell Their Children that They Are Donor Conceived, and What Their 7-Year-Olds Understand*, 25 HUM. REPROD. 2527, 2527 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2939756>.

155. See KRAMER & CAHN, *supra* note 15, at 18-20.

156. Moreover, children in lesbian and single-parent families appear more likely to learn at an earlier age than children in heterosexual families. Jadva et al., *The Experiences*, *supra* note 154, at 1917; see also Beeson et al., *supra* note 18, at 2416, 2421. Some parents use “more creative, less scientific descriptions to refer to gametes, such as ‘tadpoles’, ‘fish’ and ‘a special ingredient’ (3 DI 30%), or ‘Easter eggs’ (1 ED 8%). For example: ‘Daddy’s run out of tadpoles and that we had to go out and get some tadpoles from somebody else’ (DI mother).” Blake et al., *supra* note 154, at 2530.

157. Golombok et al., *supra* note 152, at 838.

158. Linda Applegarth et al., *Families Created Through Oocyte Donation (OD): A Follow-up Investigation of Disclosure/Non-Disclosure to Offspring, Ages 8 and Older*, 100 FERTILITY & STERILITY S409, S410 (2013).

159. *Id.*

160. Astrid Indekeu et al., *Factors Contributing to Parental Decision-Making in Disclosing Donor Conception: A Systematic Review*, 19 HUM. REPROD. UPDATE 714, 725 (2013).

other damage.¹⁶¹ Professional opinion supports the disclosing parents, and, with analogies to the adoption world, there are benefits to children from knowledge.¹⁶² Lies can corrupt family dynamics, if children learn from other sources—which often happens—they may feel anger and betrayal, and donor-conceived offspring typically report that they want to know.¹⁶³

To ensure disclosure, several options are available: parents could be encouraged to disclose;¹⁶⁴ required to tell their children; or the state could provide a system that, for example, might include some official notation to that effect available to children at a certain age.¹⁶⁵ The first is already being done, and the second is unrealistic (we would have to make failure to tell either a crime or a form of abuse),¹⁶⁶ and unenforceable (Hagrids will not come swooping in to tell children their true origins if their parents have not told them).¹⁶⁷ The third option may be the most feasible.

A. Requiring Parents to Tell

The possibility of forcing parents to tell their children they are donor-conceived involves intervention into the protected—albeit murky¹⁶⁸—sphere of family privacy, and affects issues at the core of the parent-child relationship.¹⁶⁹ In general, the state defers to parental authority based on the assumption that the parents are best suited to raise and socialize their children into responsible citizens.¹⁷⁰ The state is

161. *Id.*

162. See, e.g., KRAMER & CAHN, *supra* note 15, at 12, 21; Cahn, *The New Kinship*, *supra* note 17, at 392; Siegel & Smith, *supra* note 138, at 6-7.

163. See KRAMER & CAHN, *supra* note 15, at 29-33.

164. See Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMP. L. 619, 622 n.11 (2012) ("Whilst acknowledging the importance of allowing donor-conceived children access to information about their genetic background, the English government argued that it was preferable to educate parents 'about the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates.'").

165. See Cahn, *Necessary Subjects*, *supra* note 10, at 218-19.

166. See, e.g., Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 648 (2002).

167. See *id.*

168. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 545 (2000) ("[T]he Court's parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing.").

169. See, e.g., Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. GENDER & L. 1, 21 (2012).

170. E.g., Buss, *supra* note 166, at 647. This is true in international law, as well. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221; BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* 249 (2005); Clark, *supra* note 164, at 623.

permitted to intervene in the parent-child relationship in relatively few circumstances: where there has been abuse or neglect; when parents seek custody and child support; when religious practices violate laws;¹⁷¹ and a few other circumstances, such as mandatory vaccines, various screening tests at birth, et cetera.¹⁷²

The Court's current constitutional jurisprudence on children's intrafamilial relationships focuses on parents' rights, providing dismissive treatment of children's interests.¹⁷³ Parents must receive "special weight" for their decision-making, as the plurality of the Supreme Court explained in the 2000 case of *Troxel v. Granville*.¹⁷⁴ The Court considered the constitutionality of a Washington statute that permitted "[a]ny person [to] petition the court for visitation rights,"¹⁷⁵ and granted courts the authority to "order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."¹⁷⁶ Both the Supreme Court of Washington and the U.S. Supreme Court declared the statute an unconstitutional infringement on parental rights.¹⁷⁷ In her plurality opinion, Justice Sandra Day O'Connor emphasized the constitutional protection accorded to "the interest of parents in the care, custody, and control of their children" and observed that the liberty interest at the core of such rights "is perhaps the oldest of the fundamental liberty interests recognized by this Court."¹⁷⁸

Such protections attach to any legally recognized parent-child relationship. Advocates for anonymity suggest that if parents are

171. *Wisconsin v. Yoder*, 406 U.S. 205, 231-34 (1972) (upholding Amish parents' rights not to send their children to school after 8th grade).

172. See Sonia M. Suter, *Did You Give the Government Your Baby's DNA? Rethinking Consent in Newborn Screening*, 15 MINN. J. L. SCI. & TECH. 729, 749 (2014). While there are some universal requirements, intervention in the family is often based on race or class. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 213-17 (1997); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185 (forthcoming 2014) (on file with the *Hofstra Law Review*); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 332 (2002); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 STAN. L. REV. 257, 286-87 (1964), 16 STAN. L. REV. 900, 906-07 (1964), 17 STAN. L. REV. 614, 649-50 (1965).

173. See *Michael H. v. Gerald D.*, 491 U.S. 110, 130-32 (1989) (refusing to recognize a child's claim to establish a relationship with her biological father). Outside of the parent-child context, the Court has become similarly dismissive of minors' free speech and abortion rights. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 396-97 (2007); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326-27 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899-900 (1992).

174. 530 U.S. 57, 69-70 (2000) (plurality opinion).

175. *Id.* at 67.

176. *Id.* at 61.

177. *Id.* at 72.

178. *Id.* at 65.

required, either directly or indirectly (allowing children to find out from someone other than their parents) to tell their children they are donor-conceived, then, as a constitutional matter, this “would presuppose that the fundamental rights to procreate and to raise one’s child are less robust for persons who conceive via ART than they are for persons who conceive through sexual reproduction.”¹⁷⁹ This actually comprises two separate claims: (1) the procreation rights of parents of donor-conceived children are being treated differently from people who became parents by other means; and (2) there is no compelling justification for treating parents differently based on the mode they have used for conception.¹⁸⁰

There is no comparably strong doctrine of “children’s rights” under U.S. law that counterbalances the power of parental rights, although international law may provide some protection.¹⁸¹ Under *Troxel* and *Elk Grove Unified School District v. Newdow*,¹⁸² children’s rights are subordinate to their parents.¹⁸³ Still, the state has a strong interest in the “postnatal welfare” of a child.¹⁸⁴

B. Not the Parents!

But there are alternatives to laws that infringe upon protected liberties by coercing parents to tell. More indirect ways would make this information available to children once they are mature enough to obtain it on their own, thereby side-stepping entirely questions involving both family privacy and parental rights. As this section shows, birth certificates provide the most certain, and potentially the least intrusive, way of ensuring the availability of the information,¹⁸⁵ notwithstanding potential objections. Parents would neither be coerced nor incentivized

179. Bym & Ireland, *supra* note 169, at 4.

180. As discussed *infra*, neither of these claims may be justifiable on a constitutional, moral, or pragmatic level. *See infra* Part III.C. Moreover, it is questionable as to whether telling children they are donor-conceived affects parental procreative rights in any way. *See infra* Part IV.B.3.a.

181. *See* Convention on the Rights of the Child arts. 7-8, Nov. 20, 1989, 1577 U.N.T.S. 3; Clark, *supra* note 164, at 625-33. The United States has not ratified the Children’s Convention, however. Jo Becker, *Dispatches: Will US Be Last to Endorse Child Rights Convention?*, HUM. RIGHTS WATCH (Nov. 26, 2013), <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention>.

182. 542 U.S. 1 (2004).

183. *Newdow*, 542 U.S. at 16-17; *Troxel*, 530 U.S. at 66-68.

184. *See* Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 298-99 (2014).

185. *See infra* notes 186-213 and accompanying text. To be sure, there are potential logistical problems with first, ensuring that parents accurately report their use of donor gametes, and second, ensuring that the information is provided on the certificate with enough privacy that offspring know to look further, but third parties do not necessarily know the children’s origins.

(through tax breaks,¹⁸⁶ for example) for telling. Indeed, this is focused on the offspring, not the parents.

For this first type of telling—of the fact of donor conception—there are methods that protect the privacy of parents and child, yet also ensure that a donor-conceived person can find out the information. Adopted children are issued two birth certificates,¹⁸⁷ and this may well be the appropriate treatment for donor-conceived offspring as well.

Other countries have explored such an option. A New Zealand Law Reform Commission recommended such a move in 2004, although it was never enacted.¹⁸⁸ It considered various alternatives before recommending: “Birth certificates should include a statement to indicate that the Births, Deaths and Marriages register contains other information that may be accessed by the person whose certificate it is.”¹⁸⁹ “In August 2007, the Joint Committee of the House of Lords and House of Commons which was established to undertake pre-legislative scrutiny of the (then named) Human Tissue and Embryos (Draft) Bill recommended that, ‘the fact of donor conception should be registered on a person’s birth certificate.’”¹⁹⁰ In England, as one legislator explained, “If parents wish to deceive children, that is their decision but the state, we argue, should not.”¹⁹¹

186. The tax code provides incentives for charitable gifts; it offers benefits to homeowners, etc. See Dan Froomkin & Jake Bialer, *The Top 10 Tax Breaks – And How They Help the Wealthy the Most*, HUFFINGTON POST, Apr. 18, 2011, http://www.huffingtonpost.com/2011/04/18/the-top-10-tax-breaks-_n_850534.html.

187. See EVAN B. DONALDSON, *supra* note 143, at 11; see also Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 MICH. J. GENDER & L. 33, 43 (2013); Katherine A. West, Comment, *Denying a Class of Adopted Children Equal Protection*, 53 SANTA CLARA L. REV. 963, 971-72 (2013).

188. LAW COMM’N, NEW ISSUES IN LEGAL PARENTHOOD 116-18 (2005), available at http://www.lawcom.govt.nz/sites/default/files/publications/2005/04/Publication_91_315_R88.pdf; Blyth & Frith, *supra* note 10, at 178, 185; Ken Daniels & Alison Douglass, *Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy and Law in New Zealand*, 27 MED. & L. 131, 134 (2008).

189. LAW COMM’N, *supra* note 188, at 120.

190. Eric Blyth et al., *The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception*, 17 INT’L J. CHILD. RTS. 207, 207 (2009).

191. Victoria Fletcher, *Birth Certificates Will Give Details of IVF ‘Parents’*, EXPRESS (Aug. 1, 2007), <http://www.express.co.uk/news/uk/15233/Birth-certificates-will-give-details-of-IVF-parents> (quoting Committee Chairman Phil Willis).

To explore the basis for moving forward on this involves analyzing the history and meaning of birth certificates and the rights and interests of children, parents, donors, and society in knowledge about genetic origins.

In the United States, most contemporary court cases on birth certificates concern one of three issues: (1) attempts by LGBT parents for both to be named on a certificate; (2) recognition of transgender individuals on their birth certificates;¹⁹² or (3) efforts by alleged fathers to be added to, or subtracted from, birth certificates.¹⁹³

Birth certificates have an interesting history and status. Their original purpose was to monitor the well being of the population in relation to birth rates and infant mortality.¹⁹⁴ Eventually, their use shifted from gathering data as a response to public health concerns to establishing one's identity for law enforcement and other purposes, becoming a tool of social citizenship.¹⁹⁵ During and after World War II, new requirements dictated that "families present birth certificates [in order] to collect increased rations when a new child entered the family," in order "to register children for school," in order to gain employment for many wartime jobs, and in order to receive health services for military dependents.¹⁹⁶

States did not keep track of births until 1919, and today, birth certificate forms and information collected varies between states.¹⁹⁷ While the federal government has established birth reporting

192. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 758-59 (2008); see also Carol Sanger, "The Birth of Death: Stillborn Birth Certificates and The Problem for Law," 100 CALIF. L. REV. 269, 287 (2012) (describing the newly developing roles of stillbirth birth certificates). Beginning in the 1980s, adopted individuals sued for access to their original birth certificates, although the efforts for opening these certificates has moved to state legislatures. See EVAN B. DONALDSON, *supra* note 143, at 10.

193. See, e.g., MARRIAGE MARKETS, *supra* note 50; June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 229-30, 233 (2011).

194. See U.S. DEP'T OF LABOR, BIRTH REGISTRATION: AN AID IN PROTECTING THE LIVES AND RIGHTS OF CHILDREN 5-6, 8 (3d ed. 1914).

195. Spade, *supra* note 192, at 743; see also Shane Landrum, *Undocumented Citizens: The Crisis of the U.S. Birth Certificates, 1940-1945*, CLITROPIC (2010), <http://cliotropic.org/blog/talks/undocumented-citizens-aha-2010>.

196. Spade, *supra* note 192, at 743; see also H.L. Brumberg et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407, 408 (2012); Landrum, *supra* note 195.

197. Brumberg et al., *supra* note 196, at 408-10; Mundy, *supra* note 34. The New York State site provides an example. *Birth Certificates*, N.Y.S. DEP'T OF HEALTH, http://www.health.ny.gov/vital_records/birth.htm (last visited July 20, 2014). The five boroughs of N.Y.C. provide other examples. *Birth and Death Certificates: Ordering a Birth Certificate*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, <http://www.nyc.gov/html/doh/html/services/vr-birth-general.shtml> (last visited July 20, 2014).

requirements, states can decide what to include.¹⁹⁸ They may even vary by county.¹⁹⁹

A birth certificate is proof that a birth occurred, can serve to legally establish a child's identity and age,²⁰⁰ and can attribute presumed paternity and maternity.²⁰¹ That is, they are evidence of legal parentage, but do not establish it. Birth certificates do, however, contain vital information about an individual, such as legal proof of parentage, citizenship, and date, place, and time of birth.²⁰²

On the other hand, they are comparatively easy to obtain.²⁰³ Indeed, birth certificates were not intended to serve as the sole proof of identity.²⁰⁴ Some states allow open access to birth records, meaning that virtually anyone can review the records and purchase copies of any birth certificate as long as they know the name and birth date of the person listed on the certificate they are trying to access.²⁰⁵ Birth certificates can be ordered over the Internet, and fraudulent birth certificates can be used to obtain public assistance, Food Stamps, and Medicaid benefits.²⁰⁶ A birth certificate may entitle a person to

198. See, e.g., Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1259 (1994) (stating that some states require "an elaborate series of subcategories for Asian or Pacific Islander respondents"); Jennifer L. LaPorte, *Connecticut's Intent Test to Determine Parentage: Equality for Same-Sex Couples at Last*, 26 QUINNIAC PROB. L.J. 291, 292 (2013) (discussing how some states include both the biological parent and the same-sex partner on the birth certificate, while others do not allow both to be named); Rebecca J. Moskowitz, *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 U. CIN. L. REV. 1421, 1426, 1430-31 (2003) (discussing some states' approaches to altering birth certificates to reflect gender change); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL'Y 301, 304-05 (2003) (discussing states that allow post-operative transsexuals to amend their birth certificates).

199. U.S. GOV'T ACCOUNTABILITY OFFICE, DRIVER'S LICENSE SECURITY: FEDERAL LEADERSHIP NEEDED TO ADDRESS REMAINING VULNERABILITIES 20, 23 (2012), available at <http://www.gao.gov/assets/650/648689.pdf> (noting sample birth certificates).

200. DEP'T OF HEALTH & HUM. SERVS., BIRTH CERTIFICATE FRAUD 6 (Sept. 2000), available at <http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf>; see also Sonja Fagnäs, *Papers, Please! The Effect of Birth Registration on Child Labor and Education in Early 20th Century USA 2* (2012) (unpublished manuscript) (on file with the *Hofstra Law Review*).

201. E.g., MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(6) (West 2013).

202. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 391 (2013). To show citizenship and age, the Social Security Administration uses birth certificates, and other proof. *Documents You Need for a Social Security Card*, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/ss5doc/ss5doctext.htm> (last visited July 20, 2014). To apply for a passport, the best proof is a birth certificate. 22 C.F.R. § 51.42 (2013).

203. DEP'T OF HEALTH & HUM. SERVS., *supra* note 200, at 6-18.

204. *Id.* at 6-7.

205. *Id.* at 9-10.

206. *Id.* at 7-12 (discussing an investigation in Texas that uncovered 100 cases in which

recognition—but not enforcement—of all parental rights under the Full Faith & Credit Clause.²⁰⁷

Additionally, they can be changed fairly easily and are highly amenable to fraud. In New York, for example, birth certificates can be altered to correct a child's name, date of birth, or sex; to signify a legal name change; to remove information from the birth record; to add in another parent's name; and to amend sex based on convertive surgery.²⁰⁸ The alteration process is fairly simple, and either the person named on the certificate or the parents or legal guardians of the person named on the certificate can apply for the correction.²⁰⁹

Finally, a birth certificate creates a presumption of maternity or paternity, but that presumption can be challenged, and the birth certificate later amended.²¹⁰

It is, then, both definitive and somewhat inconclusive. Nonetheless, in popular culture, it remains an identity document and, notwithstanding fraud, it is more likely than not to indicate something about an individual's birth. Its symbolic, performative significance²¹¹ outweighs its actual value.

A variety of options are available for including information about donor conception on birth certificates, ranging from a special stamp to two separate certificates, one indicating "genetic heritage" and the other labeled "certificate of birth," with the latter including the names of the

fraudulent birth certificates were used to obtain public assistance, Food Stamps, and Medicaid benefits totaling \$514,741; and discussing fraudulent birth certificates found at the scene of an automobile accident in Kansas that were linked to \$1 million in public assistance and Food Stamps fraud).

207. See *Adar v. Smith*, 639 F.3d 146, 152-60 (5th Cir. 2011) (finding that "[o]btaining a birth certificate falls in the heartland of enforcement, and therefore outside the full faith and credit obligation of recognition"); Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 477 (2005); Elizabeth Redpath, Comment, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 667-69 (2005) (explaining that states may be required to recognize, but not to enforce, another state's judgment or record, because states are not obligated to adopt another state's practices or statutes, even though states are obligated to give full faith and credit to another state's judgment).

208. *Correcting a Birth Certificate*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE 2 (Mar. 2013) [hereinafter N.Y.C.], available at <http://www.nyc.gov/html/doh/downloads/pdf/vr/bcorrect.pdf>; see also N.Y. PUB. HEALTH LAW § 4138 (McKinney 2012).

209. N.Y.C., *supra* note 208, at 1; see also N.Y. PUB. HEALTH LAW § 4138 (2008). Original documents—such as a parent's passport or birth certificate, a parent's marriage record, a parent's naturalization certificate, or a letter from the hospital where the child was born—may be required, along with a processing fee, in order to complete the application and obtain the correction. N.Y.C., *supra* note 208, at 1-2.

210. Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 69-70 (2003).

211. See Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 624-25 (2013).

legal parents.²¹² Perhaps the easiest would simply be a notation on the certificate that more information is available; this system is currently in effect in the Australian state of Victoria.²¹³

C. Objections

In effect, birth certificates make available information to which parents may object on both a constitutional and pragmatic basis. First, they may claim that it is a parent's right to control whether offspring should know they are donor-conceived, and a state process circumvents this parental prerogative.²¹⁴ Allowing donor-conceived offspring to access information when they are constitutionally mature, however, does not affect parents' rights before their children become independent. Indeed, rather than serving as an "end-run"²¹⁵ around parental rights, such a system serves to respect an adult's interests in knowing that she is donor-conceived without state coercion of parents. Indeed, there are no requirements—nor penalties—that coerce parents to take, or not to take, any actions.

To be sure, a parent may worry about what will happen once the child reaches the age of eighteen,²¹⁶ but, as a constitutional matter,²¹⁷ the child is then considered an adult, a mature rights-holder.²¹⁸ We might even acknowledge that the parent retains the right to withhold the "secret" (the secret relates to both the parent and the child, of course) while the parent is constitutionally entitled to protection for her parental role,²¹⁹ but when that role ends legally and the child is emancipated or

212. See Blyth et al. *supra* note 190, at 223.

213. VICTORIAN LAW REFORM COMM'N, BIRTH REGISTRATION AND BIRTH CERTIFICATES REPORT 3.13 (Nov. 12, 2013), available at <http://www.lawreform.vic.gov.au/content/3-birth-registration>; see also SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMM., DONOR CONCEPTION PRACTICES IN AUSTRALIA 103 (2011), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/201013/donorconception/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/donor_conception/report/report.ashx. This might also be appropriate for adoptees' birth certificates.

214. See Byrn & Ireland, *supra* note 169, at 24.

215. See *id.* For further distinctions, see *infra* Part IV.A.

216. Parents articulate numerous reasons not to disclose donor conception to their children. See, e.g., KRAMER & CAHN, *supra* note 15, at 19-20.

217. See, e.g., Clark, *supra* note 164, at 622 n.11 (2012) ("Whilst acknowledging the importance of allowing donor-conceived children access to information about their genetic background, the English government argued that it was preferable to educate parents 'about the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates.'").

218. See Byrn & Ireland, *supra* note 169, at 24.

219. This may be accurate constitutionally, but I'm unwilling to concede that it is morally or psychologically appropriate.

reaches the age of eighteen, so should the parent's ability to control that "secret." Moreover, pragmatically, in an era of ever-increasing accuracy of genetic testing, parents should already be concerned that a child will find out her biological origins, even if there is no separate state procedure for doing so.²²⁰

A second objection to providing information through a state-sponsored system to mature donor-conceived offspring is based on equal protection—the state is treating donor-conceived children differently from children created through sexual reproduction.²²¹ The reality is that they are, in fact, different, and different enough to satisfy any level of constitutional scrutiny. Even children conceived through a one-night stand involve a sexual encounter. By contrast, like adopted children, donor-conceived children require the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct.²²² A non-sexual encounter is necessary for a donor-conceived offspring,²²³ and adopted individuals are conceived within a different family unit altogether. First, some form of state action is required to recognize the legal parents; in adoption, a formal court proceeding transfers parentage, while in donor conception, many states have statutes terminating the parental rights of donors.²²⁴ The counterargument might be that state action is required to recognize any parent, whether that be through the marital presumption or the Uniform

220. Children may find out during routine high school biology assignments. See KRAMER & CAHN, *supra* note 15, at 30.

221. *E.g.*, Byrn & Ireland, *supra* note 169, at 23-25. They charge:

Lurking behind the scenes of the family, essentially extorting an admission by the parents to the child, lest the government do it for them . . . can hardly be described as respecting family autonomy. Despite the fact that that the child has become a legal adult, the government would be acting as if it knew what was in the child's best interest better than the parents.

Id. at 24. Because the child is now a mature adult, the government is instead enabling that adult to understand her identity and personhood. See Ravitsky, *supra* note 10, at 674-76. Parents continue to be free to make whatever choices they want in raising their children. See Byrn & Ireland, *supra* note 169, at 22.

222. See, *e.g.*, Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1882-84 (2009) [hereinafter Fox, *Racial Classification*]; see also Katherine M. Franke, Comment, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1419 (2004) (discussing contrasting views of just what kind of sexual conduct is constitutionally protected); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 819-20 (2010) (discussing contrasting views of just what kind of sexual conduct is constitutionally protected).

223. Known donors and intended parents may occasionally have sexual encounters, but they are outliers.

224. See, *e.g.*, Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 HOUSTON L. REV. 1295, 1296-97 (2013); Cahn, *The New Kinship*, *supra* note 17, at 387-88.

Parentage Act's recognition of biological parenthood.²²⁵ That is the default rule; both adoption and donor conception require additional state involvement to terminate the rights of those parents.²²⁶

Second, while the constitutional protections of family privacy and parental rights attach to the family in which the child is raised, an intending parent depends on someone else outside of the protected sphere. Consequently, family privacy is not implicated.

Third, parental rights apply once the child is born, not prior to that time.²²⁷ That is, donor conception occurs prior to the creation of a parent-child relationship. Moreover, while parents can withhold that fact while their rights to control their children are constitutionally protected, it is the state that would be providing the information once the children have become legally independent.²²⁸

Finally, this system does not affect the right to procreate; it does not, in any way, limit the reproductive methods available to intending parents.²²⁹ Even if the choice to use certain types of gametes is protected by Supreme Court doctrine on reproductive privacy, that privacy belongs to the adult.²³⁰ The child may have very different interests, and her right to know occurs after the adults have made their choices. To be sure, her right to know affects who is willing to provide gametes, but if it does not otherwise affect the supply, then it should not, in any way, restrict the ability of the adults to procreate.

Parental fears of disclosure may be based on the lack of legal protection for the resulting family. Here, the law can provide reassurance and support for them by, for example, ensuring clarity on donors' rights and protecting functional parenthood. Beyond the stigma of infertility is the uncertainty of legal parenthood. When it comes to legal protection of the resulting relationship, existing laws are inadequate and piecemeal. Under the laws of some states, the legal status of parenthood depends on the involvement—or lack thereof—of a doctor in the insemination process; in the absence of a physician, a donor may become the legal

225. See Cahn, *The New Kinship*, *supra* note 17, at 387-88.

226. See *id.*

227. See, e.g., Fox, *supra* note 184, at 279-81; see also Byrn & Ireland, *supra* note 169, at 11 (government interest in the child's life becomes compelling at the point of viability).

228. Byrn & Ireland, *supra* note 169, at 23-24. At this point, the parents no longer have the right to control the child in the same way, even if parents do not lose the status protections they have *vis-à-vis* the state. Thanks to June Carbone for this qualification.

229. See Byrn & Ireland, *supra* note 169, at 8-9. For further discussion of the relationship between the right to procreate and a ban on anonymous gametes, see *infra* Part IV.B.3.

230. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927 (1992) (plurality opinion) (Blackmun, J., concurring).

father even if he never intended to assume parental rights.²³¹ Indeed, William Marrotta, who responded to an advertisement on Craigslist for donor sperm found out the hard way when the state sued him for child support; he had no intent of ever acting as a parent.²³²

Beyond inconsistent treatment of the same actions, states also vary on whether they address parenthood pursuant to all aspects of reproductive technology. While virtually all states have laws on some aspects of sperm donation, not all states address circumstances involving unmarried parents.²³³ Different states have developed their own approaches to the legal relationships established through collaborative reproduction.²³⁴ These approaches rely on distinct policy preferences, rather than constitutional mandates. Without uniformity between states and legal certainty as to the rights of the intending parents and donors, moving forward with disclosure policies is understandably difficult.

IV. TELLING—IDENTITY INFORMATION

With respect to the second type of “telling,” should donor-conceived offspring be able to learn the identity of their donors? We know that donor conceived offspring have a variety of reasons for wanting to connect. Researchers from Cambridge University and the Donor Sibling Registry found the most common motivations for searching included: “To satisfy my curiosity about similarities in appearance and personalities; To connect with the donor; To share and update medical information with the donor and/or half siblings; To collect information about ancestry and genetic background; To create a larger kin network; [and] to thank the donor.”²³⁵

231. See, e.g., FLA. STAT. ANN § 742.14 (West 2014) (stating that donor has no parental rights); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 790 (Ct. App. 2014) (allowing known donor’s paternity claim to go forward based on post-birth conduct); *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 484 (Ct. App. 2005) (lower court awarded paternity to known donor, but was reversed on appeal); *In re K.M.H.*, 169 P.3d 1025, 1029, 1042 (Kan. 2007), cert. denied sub nom. *Hendrix v. Harrington*, 555 U.S. 937 (2008) (evaluating Kansas statute treating a sperm donor not as the birth father if the semen was provided to a licensed physician); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 241 & n.162 (2009); Naomi Cahn & June Carbone, *Assisted Reproduction: When Does a Father Become One?*, L.A. TIMES (Aug. 12, 2013), <http://articles.latimes.com/2013/aug/12/opinion/la-oe-cahn-sperm-donor-jason-patric-20130812>.

232. See, e.g., Tim Hrenchir, *Defendant in Sperm Donor Case Seeks Summary Judgment*, TOPEKA CAPITAL-J. (July 23, 2013, 2:09 PM), <http://cjonline.com/news/2013-07-23/defendant-sperm-donor-case-seeks-summary-judgment>.

233. See Cahn, *The New Kinship*, supra note 17, at 388.

234. See, e.g., Byrn & Giddings, supra note 224, at 1301-02; Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CALIF. L. REV. 1177, 1187-92 (2010).

235. KRAMER & CAHN, supra note 15, at 100; see also Jadvá et al., *Experiences of Offspring*,

Anecdotally, most people look for their donors out of curiosity.²³⁶ Not all children want to know the identity of their donors, of course, and, even if they do have identity information, they may not want to contact their donors;²³⁷ donor-conceived individuals constitute a difficult population to study because they themselves may not know about their origins. On the other hand, based on existing studies which report donor conceived people express strong interest in knowledge about their biological progenitors for identity purposes and medical information, and emotional needs for this knowledge, there are important reasons to move forward.²³⁸

A. Disclosing Information

There are a series of policy choices on this issue. At one end, we could choose to ban disclosure, based on a belief, for example, that identity release is too threatening to the legal parents or that children have no need for this information. In the middle is the current situation, in which parents can choose anonymous or willing-to-be-known donors; donors who agree to be identified are more expensive, and, in a study of parents through egg donation, recipients did not highly value the donor's willingness to be identified.²³⁹ Or, we could require disclosure once a child is sufficiently mature; such a form of limited disclosure allows offspring to find out the identity of their donor.

At least three reasons support limited disclosure.²⁴⁰

First, openness helps remove the stigma that has surrounded donor conception. Anonymity is a remnant of the secrecy that has surrounded donor conception, and it is time to remove the shame and furtiveness associated with the practice. The secrecy relates both to the shame of infertility in society more generally, and the toxicity of internalized family secrets. The secrecy has an emotional component.

supra note 19, at 527, 528 & tbl.4, 529 tbl.5; Nelson et al., *supra* note 62, at 44 tbl.3.1, 45 tbl.3.2.

236. See, e.g., KRAMER & CAHN, *supra* note 15, at 97-98; Grossman, *supra* note 1 (contrasting Generation Cryo and DELIVERYMAN).

237. See *Mixed Perspectives*, *supra* note 10.

238. For other discussions of these issues, see, for example, KRAMER & CAHN, *supra* note 15, at 100-01; Cahn, *No Secrets*, *supra* note 10, at 336-37; Cahn, *The New Kinship*, *supra* note 17, at 384-85.

239. See generally Andrea M. Braverman et al., *Do Ovum Donor Recipients Preferences Change After Delivery?*, 96 FERTILITY & STERILITY S10 (2011) (donor egg recipients do not highly value the donors' willingness to meet with offspring or sign up with a registry).

240. See, e.g., CAHN, TEST TUBE FAMILIES, *supra* note 10, at 123-24; Cahn, *Necessary Subjects*, *supra* note 10, at 213-14; cf. Byrn & Ireland, *supra* note 169, at 10 (identifying four reasons that support limited disclosure).

Policies of transparency, openness, and disclosure are typically encouraged throughout society, and birth records should be no exception.²⁴¹ Sperm donation has been around for centuries, but it has traditionally been a secret practice²⁴²—the first sperm donors were often medical students, who gave sperm anonymously.²⁴³ In the first documented case of sperm donation, the mother apparently did not even know that her husband's sperm had not been used.²⁴⁴ Women were told not to let anyone know that they had used donor sperm.²⁴⁵

Allowing for limited identity release can challenge this secrecy and stigma, and potentially also affect parents' willingness to discuss donor conception more generally. When University of Texas Professor Anita Vangelisti asked people about family secrets, she identified three different categories: (1) secrets that one person keeps from other family members (never disclosing the number of previous sexual partners); (2) secrets that some members of the family keep from other family members (favoritism of one child); and (3) secrets the family keeps from non-family members (not maintaining religious traditions).²⁴⁶ Not disclosing donor conception potentially occurs within all three categories. Moreover, Vangelisti has found substantial empirical evidence demonstrating that, under certain circumstances, "withholding personal information is associated with negative physiological and psychological outcomes."²⁴⁷ Studies of parents who have told their children as adults about donor conception similarly show the damaging impact of secrecy.²⁴⁸ While parents should not be coerced into revealing

241. See Grossman, *supra* note 1.

242. See Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1048-49 (2002); June Carbone & Paige Gottheim, *Market Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 515-16 (2006).

243. See ALMELING, *supra* note 124, at 26; PLOTZ, *supra* note 73, at 165; Bernstein, *supra* note 242, at 1056.

244. See PLOTZ, *supra* note 73, at 159-60 (describing Dr. William Pancoast's 1884 case); Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law*, 44 DUKE L.J. 524, 533 n.29 (1994) (same).

245. Carbone & Gottheim, *supra* note 242, at 514-16.

246. E.g., David Lundberg Kenrick, *The Caveman Goes to Hollywood*, PSYCHOLOGY TODAY (May 27, 2010), <http://www.psychologytoday.com/blog/the-caveman-goes-hollywood/201005/what-secret-is-your-spouse-keeping-you>. Of course, some of these secrets may be better not revealed (women's magazines are filled with advice columns on whether to disclose past sexual encounters, for example); Denise Schipani, *7 Tips for Revealing Your Sexual History*, WOMEN'S DAY, <http://www.womansday.com/sex-relationships/sex-tips/7-tips-for-revealing-your-sexual-history-104794> (last visited July 20, 2014).

247. Anita L. Vangelisti et al., *Criteria for Revealing Family Secrets*, 68 COMM. MONOGRAPHS 1, 1-2 (2001), available at <http://www.tandfonline.com/doi/pdf/10.1080/03637750128052>.

248. See K.R. Daniels et al., *Factors Associated with Parents' Decisions to Tell Their Adult*

this information, changing the surrounding culture will have an impact on the decision-making process itself.²⁴⁹ This secrecy around donor conception is a heavy load to carry, and the layers of deception build up. The best-kept secret can warp family life, filling children with anxiety they do not understand, and parents with guilt. Donor-conceived families face double layers of secrecy: the fact of conception and the identity of the donor. Researchers have even found that the deeper the personal secret, the more likely it is to be perceived as a physical burden.²⁵⁰

Second, and pragmatically, promises of anonymity are no longer viable. In the age of the Internet, people have even found their donors by accident.²⁵¹

Most fundamentally, however, and the primary justification, is a cluster of reasons that could be labeled the “best interest of the child (or resulting offspring).” Adults have a basic “right to know” personal information about themselves, they may be harmed by not having this information when it comes to identity development or health, and they should not be constrained by decisions on anonymity made by parents and the donor at the time of the pregnancy.²⁵² While the best interest of the child can serve as a cover for a variety of interests not always related to the child herself, it can, nonetheless, provide a persuasive basis for disclosure based on a series of interests articulated by the “children” themselves and public policy reasons for supporting these interests.

The best interest of offspring includes (among others) medical history information, personal narrative information, and the opportunity for meaningful social contact. Some donor-conceived children experience emotional and psychological harm from their inability to obtain information about their genetic parent. Some report feeling genealogical bewilderment.²⁵³ Indeed, while many will have no interest in obtaining identifying information, they may be reassured to know it is

Offspring About the Offspring's Donor Conception, 26 HUM. REPROD. 2783, 2785-86 (2011), available at <http://humrep.oxfordjournals.org/content/26/10/2783.full.pdf>; Sarah LeTrent, *When a Parent Really Isn't Yours*, CNN (Oct. 8, 2013), http://www.cnn.com/2013/10/08/living/relationships-ronan-farrow-frank-sinatra-questions/index.html?iid=article_sidebar (Expert Jennifer Hogan has stated that “Secrets are inherently destructive to families.”).

249. For comments on parents feeling silenced, see generally Ilke Turkmendag, et al., *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L. J. L. POL'Y & FAM. 283 (2008), available at <http://lawfam.oxfordjournals.org/content/22/3/283.full.pdf>.

250. Michel L. Slepian et al., *The Physical Burdens of Secrecy*, 141 J. EXPER. PSYCHOL. 619, 622-23 (2012).

251. See, e.g., KRAMER & CAHN, *supra* note 15, at 145-46; Cahn, *The New Kinship*, *supra* note 17, at 427.

252. See EVAN B. DONALDSON, *supra* note 143, at 11, 27-28.

253. E.g., KRAMER & CAHN, *supra* note 15, at 63-64, 80.

available.²⁵⁴ Moreover, they may fear accidental incest, unintended romantic relationships between donor-conceived half-siblings.²⁵⁵ Finally, genetic information can prove critical in helping offspring treat medical conditions because they are denied access to genetic information.²⁵⁶ Diagnosing some medical conditions may require testing the donor parent.

Third, and lastly, we might address children's identity rights more generally.²⁵⁷ It is the children—and not the parents or gamete providers—who should decide whether there will be any contact between the providers and their offspring. At the time that a donor conceived child wants to know, the rights of donors, parents, and offspring are not symmetrical. Donors and parents take actions and enter into contracts at the time they donate; offspring can only look back, caught in an agreement that someone else has made about them.²⁵⁸ Additionally, contracts involving children are subject, throughout the family law area, to court review.²⁵⁹ For example, prenuptial agreements cannot bind the parents to custody arrangements.²⁶⁰ Moreover, one of the few courts to consider whether a donor's anonymity could be breached if that was in the child's interest tentatively answered yes.²⁶¹

States have a legitimate role in facilitating the provision of this information. They could easily conclude that biological information provides unique opportunities for health, self-knowledge, and connection that should be clearly respected and not surrendered by

254. See, e.g., *Mixed Perspectives*, *supra* note 10 (reporting on Lara, a nineteen year-old for whom "the value of removing donor anonymity is in making the information available, not necessarily in accessing the information itself and not in trying to choose the features of future children").

255. Given the lack of limits on how many times one individual can donate, there is an increased chance of incest between donor-conceived offspring. See Naomi Cahn, *Accidental Incest: Drawing the Line – Or the Curtain? – For Reproductive Technology*, 32 HARV. J. L. & GENDER 59, 81-83 (2009).

256. See KRAMER & CAHN, *supra* note 15, at 20.

257. See generally Michelle Giroux & Mariana De Lorenzi, "Putting the Child First: A Necessary Step in the Recognition of the Right to Identity," 27 CAN. J. FAM. L. 53 (2011).

258. States have considered requests to disclose a donor's identity but never in the context of offsprings' liberty claims; so far, no court has ordered disclosure. See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 879 (Ct. App. 2000); *Doe v. XYZ Co.*, 914 N.E.2d 117, 123-24 (Mass. App. Ct. 2009). But the *Johnson* court recognized that the state's interests outweighed those of the donor. See 95 Cal. Rptr. 2d at 878.

259. See *Johnson*, 95 Cal. Rptr. 2d at 878 ("But . . . Cryobank cannot block disclosure of a relevant donor information in every instance solely because it has a confidentiality agreement.").

260. Katherine Stoner, *Prenuptial Agreements – What the Law Allows*, NOLO, <http://www.nolo.com/legal-encyclopedia/prenuptial-agreements-what-law-allows-30283.html> (last visited July 20, 2014).

261. *Johnson*, 95 Cal. Rptr. 2d at 879. For a careful discussion of this case, see Messing, *supra* note 101, at 449-51.

others. Potentially, there may be a constitutional basis for finding that withholding this information violates legal equal protection guarantees by denying them the same rights as other persons—a counter to the argument that different treatment of the donor conceived violates equal protection.²⁶²

B. *Why Not?*

Recognizing that donor-conceived offspring have the right to learn the identity of their donor faces numerous objections. First are a cluster of arguments focused on the child herself: the best interest of the child is not, according to this perspective, harmed by continuing the existing system, and further restrictions might prevent children from being born. Second are arguments focused on the adults. Identity disclosure unconstitutionally limits parental choice and infringes donor privacy. Third are arguments that the state should not be involved in “private” family matters.

1. Child-Based Arguments: Best Interests, Really?

“They’re born, right?” Glenn Cohen articulated the so-called Non-Identity Problem.²⁶³ He argues that any justification based on the best interest of the child for donor identity disclosure is a victim of the non-identity problem: “The punch line of the problem is that we cannot be said to harm children by creating them as long as we do not give them a life not worth living.”²⁶⁴ He argues from what he terms a somewhat libertarian perspective that the state should not intervene unless it is protecting a child from a life that is not worth living.²⁶⁵ Consequently, the state should not regulate how an individual can reproduce based on

262. See Byrn & Ireland, *supra* note 169, at 23-25. Of course, as discussed *supra*, for identity disclosure to be a viable option, laws must ensure that donors are not legal parents, so they have no obligations to pay child support nor right to request visitation or custody. See *supra* Part III.C. This becomes more complicated where there are contrary agreements or where a “donor” functions as a parent. See, e.g., Cahn & Carbone, *supra* note 231. At the very least, when gametes are obtained through a sperm bank or egg provider or fertility clinic, the gamete donor should be statutorily recognized as a non-parent, contrary to the current situation. See, e.g., Cahn, *The New Kinship*, *supra* note 17, at 387-88.

263. E.g., I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1192 (2012) [hereinafter Cohen, *Beyond Best Interests*]; I. Glenn Cohen, *Prohibiting Anonymous Sperm Donation and the Child Welfare Error*, HASTINGS CENTER REP., Sept.-Oct. 2011, at 13, 13; I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 435 (2012) [hereinafter Cohen, *Response*].

264. I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437 (2011) [hereinafter Cohen, *Regulating Reproduction*].

265. See, e.g., *id.* at 429; Cohen, *Response*, *supra* note 263, at 435.

any justification that relates to the best interest of the child.²⁶⁶ Given that the child's best interest is to be born, mandating identity disclosure limits the possibilities for being born. That is, by mandating limited disclosure, the state regulates reproductive choice. Cohen contends that:

Whenever the proposed intervention will itself determine whether a particular child will come into existence, best interest arguments premised on *that* child's *welfare* are problematic. . . . [A]ny attempt to use [Best Interest of the Resulting Child] reasons to justify a regulation of reproduction that will alter when, whether, or with whom individuals reproduce . . . cannot be said to be in the best interests of the resulting child because a different child will result.²⁶⁷

There are three major problems with this argument against.²⁶⁸ First, mandating identity disclosure does not regulate how an individual can reproduce; anyone is still free to use donor eggs or sperm, and, as discussed earlier, parents will remain free not to disclose anything to their children.²⁶⁹ While the cost may increase, donor gametes will remain available; experience in other countries shows that not paying donors has an impact on supply, but changing anonymity requirements does not necessarily have the same effect.²⁷⁰ The government already sets limits on who may become a donor (and the type of gametes available to parents), preventing men who have had sex with another man during the previous five years from providing sperm.²⁷¹ While this particular ban is discriminatory, the government can, and has, taken steps that affect supply.²⁷²

266. Cohen, *Regulating Reproduction*, *supra* note 264, at 435-36.

267. Cohen, *Beyond Best Interests*, *supra* note 263, at 1208 (emphasis added).

268. Others have also responded to Professor Cohen's arguments. *See generally* Helen M. Alvaré, *Response to Professor I. Glenn Cohen's Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. HEADNOTES 8 (2012), available at <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/AlvareFinal.pdf> (agreeing with Cohen's argument that the "best interests of the resulting child" rationale cannot justify laws and policies regarding procreation); Bridget J. Crawford, *Authentic Reproductive Regulation Response*, 96 MINN. L. REV. HEADNOTES 31 (2012), available at <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/CrawfordFinal.pdf> (lauding Cohen's work as a significant contribution to the content and conversations about reproductive law and medicine); Kimberly M. Mutcherson, *In Defense of Future Children: A Response to Cohen's Beyond Best Interests Response*, 96 MINN. L. REV. HEADNOTES 46 (2012), available at <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/MutchersonFinal.pdf> (critiquing Cohen's work as unconvincing by failing to take into account that procreation as more than a matter of rights and autonomy).

269. *See supra* Part III.

270. *See generally* Cohen & Coan, *supra* note 134. The cost of donor gametes is a serious issue that may be better addressed through an improved insurance system.

271. 21 C.F.R. §§ 1271.75(a), (d) (2011).

272. § 1271.45 (establishing guidelines for donor eligibility).

Second, the argument from the non-existence or the non-identity problem focuses on the wrong point in time, and is, ultimately, irrelevant.²⁷³ Taking the non-identity problem to its logical conclusion, abortion—and contraception and masturbation—should be banned because they prevent children from being born. But even accepting that the state cannot justify banning anonymity “by concern for protecting the resulting child’s welfare unless the child would have a life not worth living absent the intervention,”²⁷⁴ that says nothing about protecting a child’s interests once she is born (this is a variation of the next argument). Regulations that promote a child’s welfare that have an incidental effect²⁷⁵ on others do not need to be justified based on the extreme argument that, in their absence, a child will not have a life not worth living. Cohen concedes that there is no harm in not being created, and I agree with him in that “we cannot be said to harm children by creating them as long as we do not give them a life not worth living.”²⁷⁶

Third, and finally, while the corollary—that no one is harmed if they are brought into existence with a life worth living—is also true,²⁷⁷ both this argument, and the original, are completely irrelevant to questions of how to maximize the lives of people, including children, parents, and donors, currently in existence. Of course, once children are born, they have rights, and a focus on those rights and interests once born supports identity disclosure. This may be, as Cohen points out, one of those pictures shown in introductory psychology classes: do you see a young woman or the face of an older woman?²⁷⁸ Can you see both at the same time? The law balances conflicting interests whenever it regulates. Here, the question of whether parents’ rights to procreate are affected by respect for their resulting child begs the question of how parental rights are affected; my argument is that they are not. Even were I to concede that they are, the effect is minimal, potentially slightly higher payment

273. After all, those who were never born were never given the opportunity to feel pain—or happiness. See Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, SOC. PHIL. & POL., Autumn 1986, at 145, 154-56.

274. Cohen, *Response*, *supra* note 263, at 435.

275. I understand that others may not see banning anonymity as having an “incidental” effect on a parent’s choice of gamete donors, but it does have an “incidental” effect on reproductive choices because it does not affect the ability to use donor gametes, and because it only has an impact on who makes the choice to donate. To be sure, some parents may choose not to reproduce in a system that bans anonymity; but, given that potential parents (at least egg donor recipients) do not rate the donor’s willingness to be contacted highly, then this suggests the anonymity issue is not all that important.

276. Cohen, *Beyond Best Interests*, *supra* note 263, at 1208. Some donor-conceived people believe that they should never have been born. See *id.*

277. See Cohen, *supra* note 264, at 439.

278. See Cohen, *Response*, *supra* note 263, at 445.

for gametes.²⁷⁹ Moreover, as discussed earlier, parents and donors may benefit from the increased openness and dissolving of secrecy that limited disclosure symbolizes.²⁸⁰ Ultimately, the real issue is acting in the interests of children once they exist. Even if we assume that *some* parents and donors may not like this and may feel slightly disadvantaged, we can also assume that some parents and donors will be benefitted by knowing that children will exist in a system that supports identity disclosure.

Critics charge that, even accepting a best interest of the existing child rationale, the number of studies on the identity and health needs of donor-conceived offspring are limited.²⁸¹ It is certainly true that there are comparatively few studies, and that it is difficult to do a controlled experiment. Nonetheless, the studies and anecdotes, along with the studies of why people search, provide some evidence of the interests and needs of donor-conceived people.²⁸²

2. Treats Donor Kids Differently from Non-Donor, Non-Adopted Children

Even when children can identify their two biological parents, they cannot know whether they are right. That is, in some unknown percentage of cases, children believe that a man is their father but he is not actually biologically related to them. In fact, donor-conceived children (who have been told they are donor-conceived) may actually be in a better position because, by the time they are interested in identity disclosure, they know that they are not related to at least one of their parents, while coitally-produced children do not know. Moreover, even adopted children do not, in most states, have access to their original birth certificates²⁸³—nor is there any means for assuring that they know they

279. Expanding health insurance—which only covers advanced reproductive technology in approximately fifteen states—is one option. See June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FLA. INT'L U. L. REV. 287, 312 (2013). The economic class of most people who use donor gametes means that these additional expenses are affordable. See *id.* at 306-07. I have explored elsewhere the larger—and critically important—class issues of who is able to use, and then who uses, reproductive technology. See *id.* at 287-88; Carbone & Cahn, *supra* note 172.

280. But see Cohen, *Response*, *supra* note 263, at 435 (arguing that “harm to parental interest should be discarded as a strong justification for a mandatory donor registry of the kind Cahn supports”).

281. E.g., Byrn & Ireland, *supra* note 169, at 13; Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 940 (2009); Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 544 (2006). But see Cahn, *No Secrets*, *supra* note 10, at 330-32; Dennison, *supra* note 10, at 17.

282. Analogies to adoption similarly suggest the importance of disclosure. See EVAN B. DONALDSON, *supra* note 143, at 4.

283. CHILD WELFARE INFO. GATEWAY, *supra* note 142, at 5-6.

are adopted. So, special notations on birth certificates as well as allowing for identity release would treat donor-conceived children differently from them.²⁸⁴

The differences in conception do become salient. While the actual biological non-paternity rate, outside of donor conception and adoption, is probably under 5%,²⁸⁵ in 100% of donor conception cases, the children have an unknown biological parent. At least one legal parent (and there may only be one) has made a deliberate choice to use a third party, unlike in other types of biologically-formed families, when children are created through intimate acts. This also makes donor conception unlike adoption, where birth parents relinquish a child; in donor conception, the birth parent keeps the child, albeit without the involvement of the other parent.

One solution is to ensure paternity certainty for all children. Somewhat tongue-in-cheek, Cohen has developed a “modest proposal” that would “require every individual who engages in coital sex with a fixed probability of conception to put his or her name and contact information in a registry.”²⁸⁶ When children turn eighteen, they can contact the registry for information.²⁸⁷ This would provide certainty to all children, regardless of how they were conceived.²⁸⁸ If the registry was also used to establish paternity, it might actually be similar to paternity registries, although those are only available based on a claimed birth.²⁸⁹ Bioethicists Guido Pennings and An Ravelingien have suggested that paternity testing be performed on all babies born to heterosexual couples.²⁹⁰

284. Kearney, *supra* note 23, at 233. Byrn & Ireland note that:

[P]arents of children conceived via sexual reproduction during a one-night stand, an extra-marital affair, or any number of other circumstances are permitted to have children despite their intention to lie to their child about the identity of her genetic father. These children face the same risk of emotional and psychological harm as children conceived via anonymously provided sperm, yet the proposed ban would do nothing to address the risk of harm to them.

Byrn & Ireland, *supra* note 169, at 15.

285. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006), available at <http://faculty-staff.ou.edu/A/Kermyt.G.Anderson-1/papers/worldwidepatconf.pdf>.

286. Cohen, *Response*, *supra* note 263, at 443 (footnote omitted).

287. *See id.* at 443-44.

288. *Id.* at 446-47.

289. CHILD WELFARE INFO. GATEWAY, THE RIGHTS OF UNMARRIED FATHERS 3 (2010), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.pdf.

290. An Ravelingien & Guido Pennings, *The Right to Know Your Genetic Parents: From Open-Identity Gamete Donation to Routine Paternity Testing*, AM. J. BIOETHICS, May 2013, at 33, 35. June Carbone and I similarly made such a proposal in 2003. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1066-70 (2003).

The concern that allowing identity release for donor-conceived offspring treats them differently and gives them different rights is somewhat disingenuous. While it may make sense to ensure parental certainty for all children, let us start with donor-conceived offspring. Children are already treated differently in terms of determining legal parentage and for such purposes as inheritance, depending not just on whether they are conceived within marriage or not, but also on whether they are conceived with donor gametes or not. Parentage determinations in these contexts differ when it comes to identifying the legal parent for purposes of bringing up the child, for conferring citizenship, and for purposes of inheritance, and each of these has passed constitutional scrutiny.²⁹¹ Treating children differently based on their origins is subjected to an intermediate level of review. The important governmental interest in protecting children, and then, in ensuring liberty rights to mature offspring, seems adequate to satisfy the constitutional standard. It is of legal significance that the deliberate creation of children through donor conception causes them to exist, and it is this fact which positions their interests, both in terms of their individual interests and with respect to the level of state intrusion necessary to effectuate those interests. Consider the motives of the biological progenitors. A donor deliberately provides material to be used in the creation of a child; a romantic relationship is typically not intended to result in the creation of a child, and these moral differences can serve as an explanation (albeit not a complete justification) for legal intervention.²⁹²

291. *Lalli v. Lalli*, 439 U.S. 259, 261-63, 275-76 (1978) (upholding the requirement of a judicial order of filiation for a child to inherit through intestacy from his nonmarital father); *Fiallo v. Bell*, 430 U.S. 787, 799-800 (1977) (upholding exclusion of children of nonmarital fathers from preferential treatment under federal immigration law); *Labine v. Vincent*, 401 U.S. 532, 535, 539-40 (1971) (upholding the exclusion of children who had been acknowledged by nonmarital fathers from inheritance through intestate succession). For an examination of illegitimacy-based discriminations that persist today, see Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 358-59 (2012); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 351-52, 355, 361-62 (2011).

292. See Pepe Lee Chang & Diana Buccafurni-Huber, *On the Moral Asymmetry of Gametic Contributions*, AM. J. BIOETHICS, May 2013, at 56, 57 (noting it is a mistake to "infer identical moral obligations (i.e., mandatory discourse of paternity) from nearly identical causal chains").

3. What About Adults' Rights?

Beyond the best interests of the child are the rights of adults: parents and donors.

a. Parents' Rights

The objection alleges that requiring identity release limits the reproductive methods available to ART users, and so intrudes into private decision-making concerning procreation.²⁹³ As discussed earlier, it would have a significant effect on "the ability [of persons] to choose whether and when to have a child."²⁹⁴ If the supply is decreased, then this affects any reproductive option involving gametes, including surrogacy.²⁹⁵ Moreover, it may go beyond interference and serve as a complete bar to individuals who want the protections they believe are offered by anonymous sperm provisions and, if the supply of gametes is diminished with corresponding increases in price, may be unable to procreate because they cannot afford to buy gametes or because none are available.²⁹⁶ A ban, then, interferes with the right to procreate because it might deter individuals from procreating altogether.

These claims focus on constitutional protections for the right to procreate. The Supreme Court has considered the right to procreate in the context of cases that address interference with the right to procreate as well as with the right not to procreate. Jurisprudence on the right to reproductive autonomy developed as: protection against unwanted sterilization;²⁹⁷ protection for married individuals to use contraception;²⁹⁸ an equal protection expansion of the rights of married people to unmarried individuals;²⁹⁹ and the right to an abortion, including without spousal consent.³⁰⁰

As a constitutional matter, the parameters of a procreative right to use assisted reproduction are less than clear.³⁰¹ While rights to adult

293. Byrn & Ireland, *supra* note 169, at 9.

294. *Id.* at 7.

295. See Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 299-308 (2013).

296. Byrn & Ireland, *supra* note 169, at 9-10.

297. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

298. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

299. *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).

300. *Planned Parenthood v. Casey*, 505 U.S. 833, 893-94 (1992); *Roe v. Wade*, 410 U.S. 113, 166 (1973).

301. Indeed, the parameters of the right to procreation are less than clear. See, e.g., Mary Lyndon Shanley, *Infertility, Social Justice, and Equal Citizenship*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 327-28, 343 (Linda McClain & Joanna Grossman eds., 2009) (addressing the importance of access to reproductive technology to the concept of reproductive freedom); Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to*

sexual intimacy and to bear and rear children are protected, these may or may not include the ability to use ART.³⁰²

b. Donors' Rights

If children have rights, should not donors also have rights? Donors may have preferences on what should happen to their gametes; while there are no studies on this, anecdotes from the surrogacy and embryo donation communities suggest that reproductive product providers do care about the intending parents.³⁰³ Some surrogates affirmatively choose gay couples, for example.³⁰⁴ Among gamete providers, some sperm banks cater to lesbians, so donors know there is a higher likelihood of who will receive their gametes.³⁰⁵ To ensure symmetry between the rights of donors and the offspring they create, perhaps donors should be able to require intermediaries only to make available their gametes to certain population groups. Donors will then, on this argument, feel better about the donation process and about the families to which they are contributing. The right to set their own terms of donation could be empowering.

Marry, 110 COLUM. L. REV. 1348, 1359 (2010) (suggesting how *Skinner* can be read as a case about "disentangling sex from reproduction and the social anxieties raised by that separation"); Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 993-94 (2002) (describing ambiguity in Supreme Court jurisprudence on procreational rights relating to reproductive technology); Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1520-27 (2008); Elyse Whitney Grant, Note, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 HASTINGS L.J. 997, 1007-08 (2010) (predicting the passage of legislation regulating reproductive technologies and the subsequent due process analyses of such legislation).

302. See Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462-68 (2008) (discussing the arguments for and against a constitutional right to use reproductive technologies); Fox, *Racial Classification*, *supra* note 222, at 1882 (noting the uncertainty surrounding a constitutional right to use reproductive technologies). But see John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1441 (1998) (opining that there is a constitutional argument that "a ban on safe and effective human cloning in all circumstances is not justified").

303. See Margaret Talbot, *The Year in Ideas: A to Z: Open Sperm Donation*, N.Y. TIMES, Dec. 9, 2001, <http://www.nytimes.com/2001/12/09/magazine/the-year-in-ideas-a-to-z-open-sperm-donation.html> (discussing sperm banks that take donations from men who are willing to allow their identities to be disclosed to any children conceived with their sperm).

304. Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, <http://www.nytimes.com/2005/05/27/national/27surrogate.html>.

305. See Talbot, *supra* note 303 (noting that some sperm banks that cater to lesbians and single women have created identity-release programs, allowing children born from sperm bank donations to access information about the donor).

Legally, there appears to be no prohibition against this. First, egg agencies and donor banks are not subject to anti-discrimination laws.³⁰⁶ And sperm banks and egg agencies list the donor's race, along with educational credentials and other information.³⁰⁷ These are private contracts, with no state involvement.

Second, although gamete providers may have no special rights to control what happens to their contributions, there is no prohibition against asserting these rights in advance of the donation process. When a donor allows physicians to take tissues without explicitly establishing the terms of the transaction, then, by analogy, the germinal California Supreme Court's opinion in *Moore v. Regents of University of California*³⁰⁸ "instructs courts to treat the absence of an explicit contract for compensation as if the donor abandoned the tissue or made a gift of it to the researchers."³⁰⁹ Nonetheless, the court noted that even in the context of research, "we do not purport to hold that excised cells can never be property for any purpose whatsoever."³¹⁰ Thus, in advance, the donor can attempt to establish terms dictating her preferences, and once the gametes are produced, the provider may still have some cognizable interest in them that could at least extend to knowing what becomes of them.

But, there are two problems with recognizing donors' rights to discriminate. First, is the general moral horror of discrimination. Second, as a policy matter, consider whether this type of discrimination should be supported.³¹¹ While laws prevent employment discrimination based on race, gender, or age, no such laws exist when it comes to choices by donors or parents.³¹² Nonetheless, we might want to adopt a system

306. See Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 12 (2011) [hereinafter Fox, *Choosing*].

307. Fox, *Racial Classification*, *supra* note 222, at 1849-50.

308. 793 P.2d 479 (Cal. 1990).

309. *Id.* at 491-92; Russell Korobkin, "No Compensation" or "Pro Compensation:" *Moore v. Regents and Default Rules for Human Tissue Donations*, 40 J. HEALTH L. 1, 10 (2007); see David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 564 (2014); see also Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 572-73 (2013) ("[T]he central holding of *Moore* is merely an articulation of the standard for abandonment in the context of bodily material: we abandon our bodily material when we consent to its removal and make no provision for its disposition or return.").

310. *Moore*, 793 P.2d at 493.

311. Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 67, 75 (2012); Fox, *Choosing*, *supra* note 306, at 5-6; Fox, *Racial Classification*, *supra* note 222, at 1882.

312. See generally Fox, *Choosing*, *supra* note 306; Fox, *Racial Classification*, *supra* note 222. Congress has enacted laws preventing public actors from the consideration of race in adoption and foster care placements. 42 U.S.C. § 671(a)(18) (2006 & Supp. 2012); Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17

suggested by Dov Fox that allows donors to state their preferences but does not give those preferences legal weight,³¹³ or implement a stronger bar, comparable to the ban on considering race in adoption. Ultimately, while I think donors should have the right to know how many offspring their gametes have produced, and, perhaps, general characteristics of the recipients, I do not believe donors should be able to require that gametes be given, or not, to recipients of particular races, sexual orientations or marital status. This is, at a minimum, what informed consent means.³¹⁴

4. Grand Objections to Donor Conception.

Some believe that, as a political and personal matter, donor conception is wrong for bringing children into the world without one biological parent.³¹⁵ Some offspring are angry with their parents for doing so.³¹⁶

These objections remain the same, regardless of whether donors are anonymous, and they raise constitutional issues surrounding the right to procreate, policy choices on enabling the medically and socially infertile to do so, as well as determining the best interest of the child, and political perspectives on the future of the family. On a personal level, they are revealing on the depth of anger felt by some donor-conceived people.

COLUM. J. GENDER & L. 1, 32-34 (2008). The bar applies to public agencies and private agencies that receive federal funds. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 536, 580 (2014). It has no application, however, to donor conception.

313. See Fox, *Racial Classification*, *supra* note 222, at 1887-88.

314. See, e.g., CHILD WELFARE INFO. GATEWAY, *supra* note 142, at 2-6.

315. See, e.g., Allie Jones, *Why Vince Vaughn's New Movie Is Bringing Out the Anti-Gay Crowd*, WIRE (Dec. 2, 2013, 4:23 PM), <http://www.thewire.com/politics/2013/12/why-vince-vaughns-new-movie-bringing-out-anti-gay-crowd/355651>; Chris Lisee, *Conservatives Line up Against Sperm Donors, but Lack the Power to Ban Them*, HUFFINGTON POST, June 28, 2012, http://www.huffingtonpost.com/2012/06/28/sperm-donation-conservati_n_1632551.html.

316. Consider these poignant letters from donor-conceived offspring, posted on an Internet site guaranteeing them anonymity:

Donor conception is wrong because it is geared towards fulfilling the needs of adults - at the expense of the needs of the child. Circumstances vary, but the bottom line remains the same. People believe they have a right to a child and are therefore entitled to remove a child from its kin to be raised by an alternative family.

Stories from Donor Conceived: Synthesis of Loss, ANONYMOUS US PROJECT (May 26, 2013), <http://anonymousus.org/stories/index.php?cid=2#.UnZNz5RgblO>. Another person shares: "I've tried to tell you that your use of an anonymous sperm donor in having me was wrong. All you can say is 'but otherwise you wouldn't be alive! Aren't you happy you're alive?'" *Stories from Donor Conceived: Mom's Bad Meal*, ANONYMOUS US PROJECT (May 26, 2013), <http://anonymousus.org/stories/index.php?cid=2#.UnZNz5RgblO>.

The Supreme Court, while protecting against intrusions into reproductive autonomy for both single and married people,³¹⁷ has not addressed whether there is a constitutional right to affirmative assistance to reproduce through ART.³¹⁸ Pragmatically and politically, however, donor conception will remain important in helping to create families, and it thus becomes critical for states to address how to recognize the interests of both parents and children.

5. Achieving Balance

There are numerous other objections to limited disclosure. This step, it is feared, starts regulation down the slippery slope of even more restrictions, elevates genetics, and may appear to minimize the role of a functional parent.³¹⁹ Yet, limited disclosure can be profoundly meaningful to donor-conceived offspring without any impact on the right to procreate or on parental rights. It recognizes the significance of biological connection without undercutting functional parents; limited disclosure does not convert donors into parents. And, as family law moves away from the traditional heterosexual family model, it serves as a symbol of increasing transparency and openness.

Moreover, the benefits from the positive vision articulated may justify any hypothetical costs of the regulation. We are balancing two different visions of the family: one is characterized by affective ties, openness, fairness, and respect for families and the individuals within those families, while the other is associated with protecting parental rights (even when their children become adults), privacy, and the traditional family. A legal system that does not protect each member of a family can profoundly harm those whose interests are not safeguarded.

V. CONCLUSION

The existing emphasis in the donor world on patients' rights has distracted from exploring how the law could safeguard and promote the interests of the resulting families. This narrow focus of existing law—

317. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

318. See, e.g., Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 *FORDHAM URB. L.J.* 57, 60 (2002); Fox, *Racial Classification*, *supra* note 222, at 1882; see also Rao, *supra* note 302, at 1466-67; John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 *GEO. WASH. L. REV.* 1490, 1491-92, 96 (2008); John A. Robertson, *The Future of the Constitution: Reproductive Rights and Reproductive Technology in 2030*, *GOVERNANCE STUDIES AT BROOKINGS* 5 (2011), http://www.brookings.edu/~media/research/files/papers/2011/1/21%20reproductive%20technology%20robertson/0121_reproductive_t_echnology_robertson.pdf.

319. See Cahn, *No Secrets*, *supra* note 10, at 318, 332-33, 337.

which both dismisses children and then fails to recognize that children become mature adults—is misguided. State and judicial decision-making could benefit from a more robust examination of children’s interests both as minors and as adults. Of course, such an examination involves complex and complicated balancing, tradeoffs, and decisions. Yet, parents are not the only people profoundly affected by ART, and policies that address the interests of the resulting offspring deserve further development. This was an issue that even Vince Vaughn recognized in *DELIVERY MAN*.