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DO TELL! THE RIGHTS OF DONOR-CONCEIVED OFFSPRING

Naomi Cahn*

I. INTRODUCTION

In the 2013 movie, DELIVERY MAN, 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. In the United States, no law requires him to come forward; 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. 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.

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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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).


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. 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. 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.

Part II provides a brief overview of the demography and law applicable to donor conception. 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. I argue that policy choices concerning

6. See infra Part III.A.
7. See infra Parts III–IV.
9. See infra Part II.
donor-conceived people show how we think about children’s interests and parental rights. 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. 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. Consequently, this world has traditionally been secretive, with few parents even telling their children they are the product of donor gametes.

The terminology is itself contested. 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). 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. For the person conceived via donor sperm or eggs (the offspring, donor


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.


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. Many offspring insist that the person who donated sperm is not the parent’s “donor” but their “biological” parent or even mother or father.

Subpart A provides a brief overview of the donor-gamete world, beginning with an introduction to the people who use donor eggs and sperm. 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. 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. 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.

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. Infertility services are expensive, however, depending on the


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

20. See infra Part II.A.

21. See infra Part II.A.

22. See infra Part II.B.


type of procedure.\textsuperscript{25} The average infertility costs per couple are over five thousand dollars.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29} Couples may need donor gametes when one of them is medically infertile and unable to produce viable eggs or sperm.\textsuperscript{30} Single people and gay and lesbian couples need donor gametes because they have no other source for the other gamete.\textsuperscript{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).\textsuperscript{32} And the use of donor eggs is increasing.\textsuperscript{33} Approximately 1\%
of all children born in the United States are the result of ART. Of that number, at least 10% are born through donor eggs. 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. That was double the number of donor egg cycles in 1998. 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. Women over the age of thirty-five are much more likely to use donor eggs—and they work. 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. Consequently, donor eggs are alluring options, particularly in a society that finds parenthood, rather than marriage, increasingly important.

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

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35. Mundy, supra note 34.


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.


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” model 51—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.


48. Id.


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.


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. Riegel, 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).

men with their genetic contribution to reproduction, and this may then have an impact on feelings of disclosure. With the development in the early 1990s of intracytoplasmic sperm injection ("ICSI"), the need for donor sperm by men has decreased. 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.

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


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.


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. Eight years later, the ASRM changed the designation.

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. 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. The woman chose her doctor, not her donor. In fact, in 1987, sixty percent of federally surveyed sperm banks would sell only to doctors, and none would sell only to recipients.

Since then, the reproductive technology industry has become more sophisticated, offering expanded services. 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. 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.

In 1978, Briton Louise Brown became the first baby born through IVF.

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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.


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.\textsuperscript{77}

While infertility raises social and legal issues, these have become instead perceived as medical problems that can be resolved by the appropriate professionals.\textsuperscript{78} Having a child through donor conception creates new family relationships, but the dominant paradigm is health law with its focus on patients.\textsuperscript{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.\textsuperscript{80}

1. Clinically Speaking

Egg and sperm donation programs are structured similarly, with comparable stages for donors and recipients.\textsuperscript{81} All programs must first recruit donors, screen them, and then match them with recipients.\textsuperscript{82} The screening process typically includes collection of both medical and personal history data.\textsuperscript{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

\textsuperscript{77} SPAR, supra note 73, at 44-45.
\textsuperscript{78} Laura Mamo, Negotiating Conception: Lesbians’ Hybrid-Technological Practices, 32 SCI, TECH., & HUM. VALUES 369, 385 (2007).
\textsuperscript{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.
\textsuperscript{82} See id.
the donated gametic material and governing the donors’ agreements with the agencies.

After recruitment and screening, programs help the donor prepare a personal profile to be used to advertise the donor to prospective consumers. 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. Clinics are required to keep few records after the final donation. Indeed, the provision of donor gametes in the United States is lightly regulated. “The medical profession is typically overseen by the states or is self-regulated through physicians’ professional organizations, not by the federal government.” Over the past several decades, the federal government has taken a few tentative steps towards the regulation of reproductive technology. The regulations fall into two categories: safety testing and truth in advertising. Their focus is protecting patients from disease and false claims about ART success rates. 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.
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.
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. 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. As such, they are subject to rules primarily focused on preventing communicable diseases. 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.

As of 2014, 848 establishments handling sperm had registered, while 749 handling oocytes were registered or inactive.

When a potential donor arrives at a clinic, the clinic must take certain steps to determine the donor’s eligibility. 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 gonorrhoea." § 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.
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. Once specimens are determined to be eligible, only then are they made available to potential recipients. There has been an increasing amount of review of establishments, although there is no way to verify much of the information that donors provide.

In explaining what you should know specifically about reproductive tissue donations, the FDA emphasizes that the tissues are screened for communicable and infectious disease. 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. Potential risk factors range from hemophilia to a man having had sex with another man during the previous five years. Id.


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.


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.
The focus is on the patient who is receiving the donated products, 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, 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.

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


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.


FDA, cover both donors and recipients (the FDA covers only donors). 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. 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.” 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.”

Self-regulation depends on professional reputation and guidelines, but it does not always produce compliance. Moreover, its focus is internal to an industry, 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”). The Act is designed to prevent fertility clinics from reporting

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


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. Albert 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.


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
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.


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. 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.

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. This would produce what Mary Lyndon Shanley labels the “as if” family, the family that would have been created without third party intervention. It is, by contrast, now well accepted in the adoption world that adopted individuals not only have the right to know they are adopted, but that they also may be interested in finding their birth parents. An increasing number of states now allow adopted individuals to obtain their original birth certificates; thirty-one states have set up mutual consent registries, and others have established search and consent and other procedures. 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.

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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.
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. 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. 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.

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

Although the industry has now advocated this approach towards disclosure, 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. 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. Almost one third of parents who originally reported intending to disclose in the future still had not disclosed by the child’s adolescence. Even parents who intend to disclose do not necessarily

144. CHILD WELFARE INFO. GATEWAY, supra note 142, at 50-51.
146. EVAN B. DONALDSON, supra note 143, at 7. See generally § 109.309.
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.
do so.\textsuperscript{154} Parents have a number of reasons for their reluctance to disclose.\textsuperscript{155}

Of course, with the growing number of single parent families and LGBT families, it is hard to hide.\textsuperscript{156} And the professional advice to tell is based on beliefs that telling children encourages a healthy parent-child relationship.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{155} See KRAMER & CAHN, supra note 15, at 18-20.

\textsuperscript{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.

\textsuperscript{157} Golombok et al., supra note 152, at 838.

\textsuperscript{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).

\textsuperscript{159} Id.

\textsuperscript{160} Astrid Indekeu et al., Factors Contributing to Parental Decision-Making in disclose donor Conception: A Systematic Review, 19 HUM. REPROD. UPDATE 714, 725 (2013).
other damage. Professional opinion supports the disclosing parents, and, with analogies to the adoption world, there are benefits to children from knowledge. 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.

To ensure disclosure, several options are available: parents could be encouraged to disclose; 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. 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), and unenforceable (Hagrids will not come swooping in to tell children their true origins if their parents have not told them). 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 murky—sphere of family privacy, and affects issues at the core of the parent-child relationship. 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. 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.
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.’”).
167. See id.
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, and a few other circumstances, such as mandatory vaccines, various screening tests at birth, et cetera.

The Court’s current constitutional jurisprudence on children’s intrafamilial relationships focuses on parents’ rights, providing dismissive treatment of children’s interests. 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. The Court considered the constitutionality of a Washington statute that permitted “[a]ny person [to] petition the court for visitation rights,” 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.” Both the Supreme Court of Washington and the U.S. Supreme Court declared the statute an unconstitutional infringement on parental rights. 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.”

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

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

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

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


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, or (3) efforts by alleged fathers to be added to, or subtracted from, birth certificates.

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. 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. 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.

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

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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.


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).


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.

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

A birth certificate is proof that a birth occurred, can serve to legally establish a child’s identity and age, and can attribute presumed paternity and maternity. 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.

On the other hand, they are comparatively easy to obtain. Indeed, birth certificates were not intended to serve as the sole proof of identity. 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. Birth certificates can be ordered over the Internet, and fraudulent birth certificates can be used to obtain public assistance, Food Stamps, and Medicaid benefits. 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 QUINNIPIAC 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. Moskow, 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).


201. E.g., MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(6) (West 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.\footnote{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.\footnote{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.\footnote{209}

Finally, a birth certificate creates a presumption of maternity or paternity, but that presumption can be challenged, and the birth certificate later amended.\footnote{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 significance\footnote{211} 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
legal parents. 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.

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. 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” 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, but, as a constitutional matter, the child is then considered an adult, a mature rights-holder. 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, but when that role ends legally and the child is emancipated or

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212. See Blyth et al., supra note 190, at 223.
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 & CAIN, 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.\footnote{Children may find out during routine high school biology assignments. See KRAMER \\& CAHN, supra note 15, at 30.}

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.\footnote{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.}

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.\footnote{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).}

A non-sexual encounter is necessary for a donor-conceived offspring,\footnote{Known donors and intended parents may occasionally have sexual encounters, but they are outliers.} 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.\footnote{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.} The counterargument might be that state action is required to recognize any parent, whether that be through the marital presumption or the Uniform
Parentage Act’s recognition of biological parenthood. That is the default rule; both adoption and donor conception require additional state involvement to terminate the rights of those parents.

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. 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.

Finally, this system does not affect the right to procreate; it does not, in any way, limit the reproductive methods available to intending parents. 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. 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

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.
father even if he never intended to assume parental rights. 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.

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. Different states have developed their own approaches to the legal relationships established through collaborative reproduction. 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.”
Anecdotally, most people look for their donors out of curiosity.\textsuperscript{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;\textsuperscript{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.\textsuperscript{238}

\textit{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{supra} note 19, at 527, 528 & tbl.4, 529 tbl.5; Nelson et al., \textit{supra} note 62, at 44 tbl.3.1, 45 tbl.3.2.  
\textsuperscript{236} See, e.g., KRAMER \& CAHN, \textit{supra} note 15, at 97-98; Grossman, \textit{supra} note 1 (contrasting Generation Cryo and \textsc{deliveryman}).  
\textsuperscript{237} See Mixed Perspectives, \textit{supra} note 10.  
\textsuperscript{238} For other discussions of these issues, see, for example, KRAMER \& CAHN, \textit{supra} note 15, at 100-01; Cahn, \textit{No Secrets, supra} note 10, at 336-37; Cahn, \textit{The New Kinship, supra} note 17, at 384-85.  
\textsuperscript{239} See generally Andrea M. Braverman et al., \textit{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).  
\textsuperscript{240} See, e.g., CAHN, TEST TUBE FAMILIES, \textit{supra} note 10, at 123-24; Cahn, \textit{Necessary Subjects, supra} note 10, at 213-14; cf. Byrn \& Ireland, \textit{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. Sperm donation has been around for centuries, but it has traditionally been a secret practice—the first sperm donors were often medical students, who gave sperm anonymously. In the first documented case of sperm donation, the mother apparently did not even know that her husband’s sperm had not been used. Women were told not to let anyone know that they had used donor sperm.

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). 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.” Studies of parents who have told their children as adults about donor conception similarly show the damaging impact of secrecy. While parents should not be coerced into revealing

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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{253} Indeed, while many will have no interest in obtaining identifying information, they may be reassured to know it is

\textsuperscript{249} For comments on parents feeling silenced, see generally Ilke Turkmendag, et al., \textit{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 \url{http://lawfam.oxfordjournals.org/content/22/3/283.full.pdf}.

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

\textsuperscript{251} \textit{See}, e.g., KRAMER & CAHN, supra note 15, at 145-46; Cahn, \textit{The New Kinship}, supra note 17, at 427.

\textsuperscript{252} \textit{See EVAN B. DONALDSON}, supra note 143, at 11, 27-28.

\textsuperscript{253} \textit{E.g.}, KRAMER & CAHN, supra note 15, at 63-64, 80.
Moreover, they may fear accidental incest, unintended romantic relationships between donor-conceived half-siblings. Finally, genetic information can prove critical in helping offspring treat medical conditions because they are denied access to genetic information. Diagnosing some medical conditions may require testing the donor parent.

Third, and lastly, we might address children’s identity rights more generally. 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. Additionally, contracts involving children are subject, throughout the family law area, to court review. For example, prenuptial agreements cannot bind the parents to custody arrangements. 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.

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.


258. States have considered requests to disclose a donor’s identity but never in the context of offspring’s 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.”).


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.


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. 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. . . . Any 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.

There are three major problems with this argument against. 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. 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. 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. While this particular ban is discriminatory, the government can, and has, taken steps that affect supply.

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

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, 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? 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.
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.
for gametes. Moreover, as discussed earlier, parents and donors may benefit from the increased openness and dissolving of secrecy that limited disclosure symbolizes. 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. 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.

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 certificates—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”).


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.\textsuperscript{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%,\textsuperscript{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.”\textsuperscript{286} When children turn eighteen, they can contact the registry for information.\textsuperscript{287} This would provide certainty to all children, regardless of how they were conceived.\textsuperscript{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.\textsuperscript{289}

Bioethicists Guido Pennings and An Ravelingien have suggested that paternity testing be performed on all babies born to heterosexual couples.\textsuperscript{290}

\begin{itemize}
  \item \textsuperscript{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.
  \item \textsuperscript{286} Cohen, Response, supra note 263, at 443 (footnote omitted).
  \item \textsuperscript{287} \textit{Id.} at 446-47.
\end{itemize}
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 typically is 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


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. As discussed earlier, it would have a significant effect on “the ability [of persons] to choose whether and when to have a child.” If the supply is decreased, then this affects any reproductive option involving gametes, including surrogacy. 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. 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; protection for married individuals to use contraception; an equal protection expansion of the rights of married people to unmarried individuals; and the right to an abortion, including without spousal consent.

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

293. Byrn & Ireland, supra note 169, at 9.
294. Id. at 7.
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.


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”).


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. And sperm banks and egg agencies list the donor’s race, along with educational credentials and other information. 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 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. 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.” 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. While laws prevent employment discrimination based on race, gender, or age, no such laws exist when it comes to choices by donors or parents. 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) (“The 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.
suggested by Dov Fox that allows donors to state their preferences but does not give those preferences legal weight, 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.

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. Some offspring are angry with their parents for doing so.

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.


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.


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.

The Supreme Court, while protecting against intrusions into reproductive autonomy for both single and married people,\textsuperscript{317} has not addressed whether there is a constitutional right to affirmative assistance to reproduce through ART.\textsuperscript{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.\textsuperscript{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—

\begin{itemize}
\item \textsuperscript{319} See Cahn, \textit{No Secrets, supra note 10, at 318, 332-33, 337.}
\end{itemize}
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.