The Rights of the Child in a Globalized World
Assisted reproductive technology at home and abroad
Duke Law/CAP

Naomi Cahn, GWU Law School
SPERM DONATION
SURROGACY
EMBRYO DONATION
EGG DONATION
My Daddy's Name Is Donor
You’re never quite ready for what life delivers.

VINCE VAUGHN
DELIVERY MAN

NOVEMBER 22
ART technology
History (and secrecy)

- 1884 – William Pancoast – 1st AI procedure
- Mother never knows
- 1909 – Pancoast story published
Technology

- Early 1950s: Frozen sperm
- 1970s: Sperm bank business
- 1978: Louise Brown, First IVF baby
- 1984: embryo freezing
- 2000s: egg freezing becomes more common
Numbers: where are we now?

- 2014 (latest date): more than 18,000 cycles w/ fresh and frozen donor eggs (>12% of all ART cycles)
- More than 10,000 donor egg babies
- Sperm? Who knows?
  - 40,000/year?
- Embryos – several hundred
Surrogacy – growing use
Gestational carrier cycles as % of total
Gestational Surrogacy Law by State
(Green = yes, red = No, yellow = caution)
Credit: Creative Family Connections)
Globalization of fertility markets

- Fertility treatments
- Competition on price; IVF in Mexico
- Leveraging jx differences: Gay friendly countries
- US clinics: eager to attract high end international customers
- Interstate as well as international competition
Reasons patients engage in Fertility Tourism/cross-border reproductive care

- To access different types of treatments
- To take advantage of different ART and parentage laws
- For privacy or cultural comfort
Percent of gestational carrier ART cycles where intended parent was non-US Resident,
<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
<th>ART cycles</th>
<th>Oocyte donor cycles</th>
<th>Gestational carrier cycles</th>
<th>PGD/PGS cycles</th>
<th>ICSI cycles</th>
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<tbody>
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<td>1</td>
<td>United States</td>
<td>1,211,072</td>
<td>128,693 (10.6)</td>
<td>19,915 (1.6)</td>
<td>39,963 (5.3)</td>
<td>585,483</td>
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<tr>
<td>2</td>
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<td>845 (25.1)</td>
<td>3,129</td>
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<tr>
<td>3</td>
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<td>66 (2.0)</td>
<td>159 (6.4)</td>
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<td>281 (11.6)</td>
<td>302 (20.8)</td>
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<td>2,059 (90.8)</td>
<td>114 (5.0)</td>
<td>105 (9.1)</td>
<td>1,099</td>
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<td>6</td>
<td>People’s Republic of China</td>
<td>1,539</td>
<td>380 (24.7)</td>
<td>341 (22.2)</td>
<td>348 (40.0)</td>
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<td>172 (26.5)</td>
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<td>313 (48.3)</td>
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<td>116 (24.2)</td>
<td>29 (9.6)</td>
<td>253</td>
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<td>188 (42.7)</td>
<td>50 (19.9)</td>
<td>247</td>
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<tr>
<td>11</td>
<td>Spain</td>
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<td>195 (49.2)</td>
<td>81 (34.2)</td>
<td>229</td>
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<tr>
<td>12</td>
<td>Israel</td>
<td>283</td>
<td>201 (71.0)</td>
<td>147 (51.9)</td>
<td>22 (13.7)</td>
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<td>13</td>
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<td>44 (15.7)</td>
<td>(0)</td>
<td>11 (5.5)</td>
<td>183</td>
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<td>7 (2.5)</td>
<td>12 (6.7)</td>
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<tr>
<td>15</td>
<td>Switzerland</td>
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<td>111 (40.5)</td>
<td>53 (19.3)</td>
<td>23 (14.9)</td>
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<td>16 (6.0)</td>
<td>37 (22.6)</td>
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<td>New Zealand</td>
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<td>193 (82.5)</td>
<td>19 (8.1)</td>
<td>31 (21.4)</td>
<td>127</td>
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<tr>
<td>18</td>
<td>Ireland</td>
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<td>105 (49.3)</td>
<td>63 (29.6)</td>
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<td>113</td>
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<td>Sweden</td>
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<td>99 (47.6)</td>
<td>18 (16.5)</td>
<td>71</td>
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<tr>
<td>20</td>
<td>United Arab Emirates</td>
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<td>53 (29.9)</td>
<td>17 (9.6)</td>
<td>30 (27.0)</td>
<td>103</td>
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<tr>
<td>21</td>
<td>Norway</td>
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<td>62 (40.8)</td>
<td>67 (44.1)</td>
<td>26 (27.1)</td>
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<tr>
<td>22</td>
<td>Netherlands</td>
<td>144</td>
<td>66 (45.8)</td>
<td>44 (30.6)</td>
<td>8 (9.9)</td>
<td>77</td>
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<tr>
<td>23</td>
<td>Argentina</td>
<td>142</td>
<td>47 (33.1)</td>
<td>50 (35.2)</td>
<td>13 (14.9)</td>
<td>84</td>
</tr>
<tr>
<td>24</td>
<td>India</td>
<td>131</td>
<td>7 (5.3)</td>
<td>_</td>
<td>26 (27.1)</td>
<td>94</td>
</tr>
</tbody>
</table>

**TABLE 3**

Countries and types of treatments:
Levine et al., forthcoming, Fertility & Sterility (2017)
What about the children?

UN Convention on the Rights of the Child
In Child Friendly Language

"Rights" are things every child should have or be able to do. All children have the same rights. These rights are listed in the UN Convention on the Rights of the Child. Almost every country has agreed to these rights. All the rights are connected to each other, and all are equally important. Sometimes, we have to think about rights in terms of what is the best for children in a situation, and what is critical to life and protection from harm. As you grow, you have more responsibility to make choices and exercise your rights.
Identity rights
ARE YOUR PARENTS REALLY YOUR BIOLOGICAL PARENTS?
- For children of married parents, misattributed paternity of 1-3%
- For donor gamete children, 100% of legal fathers/mothers are not genetic
improved searching techniques available from genetic testing and the internet. Anonymity promise is no longer feasible
So where is the law?

- Health law steps in to determine the safety of gametes/medical procedures

- Family law:
  - establishes parentage
  - And – slowly – the rights of donor-conceived offspring
    - But not yet on surrogacy
Comparative Comparisons
### Table 1: Jurisdictions requiring a gamete or embryo donor to agree to the disclosure of his or her identity to any offspring

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Date of implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sweden</td>
<td>Lag om insemination (Law on Insemination) 1984 (replaced by Genetic Integrity Act 2006)</td>
<td>18 March 1985</td>
</tr>
<tr>
<td>Austria</td>
<td>Fortpflanzungsmedizingesetz. 275 Bundesgesetz.</td>
<td>1 July 1992</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Wet donorgegevens kunstmatige bevruchting, 2002</td>
<td>1 June 2004</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Human Reproductive Technology Amendment Act 2004</td>
<td>1 December 2004</td>
</tr>
<tr>
<td>Norway</td>
<td>Act on Biotechnology 2003</td>
<td>1 January 2005</td>
</tr>
<tr>
<td>UK</td>
<td>Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (and Human Fertilisation and Embryology Act 2008 – due to be implemented during 2009)</td>
<td>1 April 2005</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Human Assisted Reproductive Technology (HART) Act 2004</td>
<td>22 August 2005</td>
</tr>
<tr>
<td>Finland</td>
<td>Act on Assisted Fertility Treatments (1237/2006)</td>
<td>1 September 2007</td>
</tr>
</tbody>
</table>
US: Legal rights: identifying and balancing

Adults’ privacy rights. v. Offsprings’ right to know genetic origins?
Moving towards Disclosure

- Washington state law
  - Permits adult donor-conceived individuals to access identifying information UNLESS
  - Donor has indicated this is impermissible

- Utah – 2015 –
  - Utah passed a law giving children conceived via sperm donation access to the medical histories of their biological fathers.
Uniform Parentage Act – July 2017

- requires fertility clinics to collect info from D donor.
- donor must sign a “declaration” on whether they Donor agrees to disclosure.
- Even if the donor has not consented to disclosure, the clinic must take certain actions.
Surrogacy?
Additional claims

1) donor-conceived offspring increasingly advocating for additional information about their donors;

2) growing numbers of families who cannot “cover” their use of a donor;

3) donor-conceived half-siblings are increasingly connecting
The Adoption Analogy

- Mutual consent registries
  - 30 states

- Confidential intermediary
  - At least 11 states

- Access to original birth records/files
  - Increasing number – 8
    - Some have contact vetoes – approx. 7
    - Some require both birth parents to consent - 3

- “Good cause” in court order –
  - Approx. 25 states

- 95% of agencies allow open adoption from the beginning – shift in practice
Adopt new laws to facilitate connection?

- Disclosure – or Mandatory registries?
- Limits on no. of donations/person?
- Amend FMLA?
THANK YOU