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THE NEW ART OF FAMILY: CONNECTING ASSISTED REPRODUCTIVE TECHNOLOGIES & IDENTITY RIGHTS

Naomi Cahn *

Abstract

The technology of assisted reproduction, along with the reality of modern families, has fostered law reforms that address how to establish parentage, the number of potential parents, and the rights of those involved in creating a child through assisted reproduction. Yet, in the United States, it has not yet fostered law reform on the rights of a child in these new families; substantively, with respect to the anonymity of donors and siblings’ rights, there has been comparatively minimal legal movement until recently.

Yet a number of developments call into question the ethics of anonymity -- indeed, the very ability to “promise” anonymity itself may border on the fraudulent. This paper focuses on legal and pragmatic issues concerning the status of the rights and interests of donor offspring and of children born through surrogacy. It argues that assurances of anonymity to donors are questionable, points out the differences between donors and surrogates on this issue, and advocates for the rights of donor-conceived offspring to learn the identity of their donors.

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* Naomi Cahn is the Harold H. Greene Chair, George Washington University Law School. Thanks to Glenn Cohen, June Carbone, Karen Clark, Marilyn Crawshaw, Mary Kate Hunter, Aaron Levine, and Robin Fretwell Wilson for their generous engagement with this project, and to Priom Ahmed for her research assistance. This article is based on my speech accepting the Harry Krause Lifetime Achievement Award in Family Law from the University of Illinois College of Law in September 2017.

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Introduction

In June, 2017, the Supreme Court – in one of its rare opinions addressing family law – considered the status of a child born through assisted reproduction.¹ The Court required the state of Arkansas to include the female spouse of a woman giving birth on the child’s birth certificate, just as it would include the male spouse. The Court’s opinion rests on its holding in *Obergefell*² concerning marriage between same-sex couples, but it is also a stunning recognition that families no longer depend on biological ties.

Of course, the biology of reproduction – so far – requires sperm and egg.³ Historically, parentage law presumed that a wife provided the egg, and her husband provided the sperm, and granted not only the rights of parentage to the couple but also the right to inherit to their child. While this paradigm has never fit all families, it has been under increasing challenge and scrutiny over the past 50 years in light of the number of children born outside of this paradigm to: 1) their married parents of the same sex; 2) parents who may be neither cohabiting nor married; or 3) a parent [or

¹ Pavan v. Smith, __ U.S. . __ (2017). The term “assisted reproductive technology” is not used explicitly in the per curiam opinion. The Court has twice explicitly used the term: in a 2016 case concerning whether Alabama was required to give full faith and credit to a Georgia adoption decree, *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), and in a 2012 trusts and estates case, in which the Court considered the relationship between posthumous conception and Social Security. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).

² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³ As discussed *infra*, the development of in vitro gametogenesis may render this obsolete.

parents] who intentionally use[s] an unknown donor⁴ to contribute the gametes resulting in their birth, potentially to a surrogate.⁵

The technology of assisted reproduction along with the reality of modern families,⁶ has fostered law reforms that address how to establish parentage, the number of potential parents,⁷ and the rights of those involved in creating a child through assisted reproduction.⁸ Yet, in the United States, it has not yet fostered law reform on the rights of a child in these new families; substantively, with respect to the anonymity of donors and siblings' rights, there has been comparatively minimal legal movement until recently.⁹ The Supreme Court has held that parents deserve "special weight" when it comes to decisions about their children.¹⁰ Cases that have considered the rights of donor-conceived offspring to establish relationships with one another have rejected any such rights.¹¹ And no state yet gives donor-conceived offspring the right to know the identity of their donors. Instead, donor-conceived offspring have formed relationships with one

⁴ I realize that the term "donor" in relation to the child is controversial, but I chose to use this term to simplify the discussion. *See, e.g.*, Olivia Montuschi, *The Issue of Language* (n.d.), <https://www.dcnetwork.org/story/issue-language>.

⁵ Although we do not know how many children are born as a result of sperm donation, we do have some numbers on egg donation and surrogacy. *E.g.*, K.M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 *FERTILITY & STERILITY* 435 (2016) (approximately 3500 gestational carrier cycles in the US in 2013). In 2014, more than 20,000 ART cycles involved donor eggs or embryos. CDC, 2014 National Summary Report 45-49 (2016), <https://www.cdc.gov/art/pdf/2014-report/art-2014-national-summary-report.pdf>.

⁶ On the realities of modern families, *see, e.g.*, June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 *Chi.-Kent L. Rev.* 9 (2017); June Carbone & Naomi Cahn, *Three-Plus Parents*, *Fam. Ct. Rev.* (forthcoming 2017).

⁷ *See id.*

⁸ *See, e.g.*, Jody Meyer Yazici David I. Grund Marvin J. Leavitt, § 703. *Parentage of child of assisted reproduction*, 12 *ILL. PRAC., FAM. L.* 750 46/703 (2017 ed.).

⁹ The 2002 UPA maintains and expands the same [appropriate] protections against granting donors parental rights as the 1973 version, but does not recognize children's rights. As discussed *infra*, the 2017 revision has limited recognition for children's rights; see generally Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 *FAM. L.Q.* 93, 114 (2015) ("How would we analyze known-donor controversies if we shifted the focus to children?"). For further argument on the need to respect children's rights in assisted reproductive technology, see Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 *AM. J.L. & MED.* 337 (2003).

¹⁰ *Troxel v. Granville*, 530 U.S. 57 (2000); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

¹¹ *See infra* TAN __ (discussing sibling cases).

another, or learned the identity of their donors, through more non-governmental means, such as registering on the Donor Sibling Registry.¹²

Both the legal and the pragmatic contexts for nondisclosure are changing. A variety of developments call into question the ethics of anonymity -- indeed, the very ability to “promise” anonymity itself may border on the fraudulent. This Article examines how these new developments are resulting in new challenges to current policy choices about the regulation of assisted reproductive technology (ART). First, donor-conceived offspring are increasingly advocating for additional information about their donors, leading to more awareness of, and engagement, with these issues. Second, growing numbers of single-parent and same-sex families mean that the use of donor gametes is coming out into the open and subject to more public discussion. Moreover, surrogates and the families they have helped create are forming bonds that ensure the surrogate is known to the child. Third, advances in technology, ranging from genetic testing to internet expansion, enable offspring to find siblings and the donor -- and to find out that they themselves are donor-conceived. Moreover, technology is facilitating the use of the intending parents’ own gametes (through, for example, in vitro gametogenesis). Fourth, advocates are claiming that lack of access to information violates offsprings’ right under international law.¹³ Finally, recent legislation and proposed legislation (e.g., provisions in the Uniform Parentage Act (2017)) directly address identity disclosure, although do not yet permit it..

This Article focuses on legal and pragmatic issues concerning the status of the rights and interests of donor offspring and of children born through surrogacy. It argues that assurances of anonymity to donors are questionable – and raises questions about the future need for donors at all – and points out the differences between donors and surrogates on this issue. Section I briefly describes current law on the rights of donor-conceived offspring. Section II then discusses pragmatic issues, including new research on the potential costs of ending anonymity, the development of new technologies that may obviate the need for donor gametes and that call into question the future of anonymity, and empirical evidence on donor-conceived families.. The next section addresses surrogacy. Surrogacy raises overlapping issues but it involves a different kind of “player” in the reproductive technology game, as surrogates do not necessarily contribute a

¹² The Donor Sibling Registry is a private nonprofit with a goal of connecting, supporting, and educating. <https://www.donorsiblingregistry.com/>.

¹³ E.g., Brigeite Clark, A Balancing Act: *The Rights of donor-Conceived Children to Know their biological Origins*, 40 Ga. J. INT'L & COMP. L. 619 (2012).; Martin Hevia & Carlos Herrera Vacafior, *From Recognition to Regulation: Access to in Vitro Fertilization and the American Convention on Human Rights*, 25 FLA. J. INT'L L. 453, 473 (2013).

gamete, but do provide gestation. Surrogacy has received a disproportionate amount of attention compared to the number of children actually born through the process¹⁴; it brings together commercialization, babies, women’s bodies, and definitions of parenthood. The interests and rights of the children born through surrogacy, however, have been the subject of much less research and commentary. The final section addresses objections to ending anonymity.

1. Current Law

There are few laws in the United States directly concerned with donor conception, apart from health and safety regulations relating to gamete testing and parentage determinations for a donor-conceived child or child born through surrogacy. This section focuses on developments in the law concerning anonymity and siblings’ connection rights.

A. Donors and anonymity

1. Caselaw

States have considered requests to disclose a donor's identity but never in the context of offsprings' liberty claims; so far, no court has ordered disclosure.¹⁵ In perhaps the most famous, *Johnson v. Superior Court*, the disclosure of the genetic parent's identity was incidental to the tort claims being brought against the clinic that had provided the allegedly defective sperm.¹⁶ The court held that, under certain circumstance, records relating to insemination, “including a sperm donor's identity and related information contained in those records” could be subject to disclosure.³¹ Because the case concerned the parents’ tort claims, the court was not required to decide whether offspring could sue for disclosure. Nonetheless, by recognizing that disclosure might be permitted under certain conditions, the court left open that possibility.¹⁷

2. Statutes

A few states have begun to address issues involving donor disclosure, and the 2017 Uniform Parentage Act contains provisions

¹⁴ See, e.g., HEATHER JACOBSON, *LABOR OF LOVE* (2015).

¹⁵ 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). The *Johnson* court did recognize that the state's interests outweighed those of the donor. See 95 Cal. Rptr. 2d at 878; Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 *HOFSTRA L. REV.* 1077, 1124 (2014). Other countries have chosen different approaches to anonymity. See, e.g., Sonia Allan, *Donor Identification: Victorian Legislation Gives Rights to All Donor-Conceived People*, 98 *FAMILY MATTERS* 43 (2016).

¹⁶ The relevant law allows for “inspection” of records relating to the insemination “only upon an order of the court for good cause shown.” *Johnson*, *supra* note ___, at 876.

¹⁷ Naomi Cahn, *Necessary Subjects: The Need for A Mandatory National Donor Gamete Databank*, 12 *DEPAUL J. HEALTH CARE L.* 203, 211 (2009).

directly related to anonymity.¹⁸ In what is apparently the first domestic law to do so, a 2011 Washington state law requires disclosure of donor-identifying information and medical history when a child turns 18, but the donor can sign an affidavit of nondisclosure at the time of donation.¹⁹ Even if the donor has signed such an affidavit, however, the child is entitled to receive information regarding the donor's medical history when the child turns 18.

In 2015, potentially far-reaching legislation was introduced in Utah that would have permitted a donor-conceived individual who was at least 18 years old to access identifying information about the donor, unless the donor had submitted an affidavit denying such disclosure.²⁰ Shortly after its introduction, the original bill was replaced by a substitute bill that allowed donor-conceived offspring access only to non-identifying medical information.²¹ It was this bill that was signed into law.²²

A more promising development is the 2017 Uniform Parentage Act, which is modeled on the Washington state law. It requires that fertility clinics collect identifying information from the donor and that the donor sign a “declaration” on whether the donor agrees to disclosure.²³ Even if the donor has not consented to disclosure, the clinic must make a “good faith” effort to provide the child with non-identifying information and also to notify the donor of any request for information, allowing the donor to reconsider the disclosure declaration.²⁴ It remains to be seen whether, and

¹⁸ See, e.g., *States Not Eager to Regulate Fertility Industry*, Pew Charitable Trusts (Mar. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry>.

¹⁹ Wash. Rev. Code Ann. § 26.26.750 (2017); see Cahn, *Do Tell!*, *supra* note __, at 1077; Maya Sabatello, *Disclosure of Gamete Donation in the United States*, 11 IND. HEALTH L. REV. 29, 41 (2014).

The impact of the Washington state law is unclear: “It is worth noting that the WA law has been widely reported as resulting in large numbers of donors being recommended to sign, and signing, the affidavit of non-disclosure and thus the law is reportedly not accomplishing its intended purpose.” Susan Crockin, Memo (2016), http://www.uniformlaws.org/shared/docs/parentage/2016mar8_AUPA_Comments_SART%20and%20ASRM_Crockin.pdf.

²⁰ Rights of Children Conceived Through Artificial Insemination, H.B. 249, 2015 Leg., Gen. Sess. (Utah 2015). <https://le.utah.gov/~2015/bills/static/HB0249.html>.

²¹ Health and Human Servs. Comm., Letter on H.B. 249 (Feb. 24, 2015), <https://le.utah.gov/~2015/comreport/HB249H10.pdf>; H.B. 249, 2015 Leg., Gen. Sess. (Utah 2015).

²² <https://le.utah.gov/~2015/bills/static/HB0249.html>

²³ Uniform Parentage Act (Nat’l Conference of Comm’rs on Unif. State Laws 2017), <http://www.uniformlaws.org/Committee.aspx?title=Parentage%20Act,%20Revised/>

²⁴ The accompanying memo explains that the Article “addresses the right of children born through assisted reproductive technology to access medical and identifying information

how quickly, states will adopt legislation based on the revised UPA. Nonetheless, it is a significant step that would also change clinics' record-keeping requirements.

B. Half-siblings and anonymity

When it comes to half-siblings' rights, there is little law on the right to identifying information or to remain in contact. The United Kingdom, which does not permit anonymous donation, provides some opportunities for donor siblings to contact one another through the Donor Sibling Link. The Link is a government-supported mutual consent registry that allows siblings to share information.²⁵

In the United States, even for full-blooded siblings, the Supreme Court has never held there is an associational right that must be protected, although states may have their own laws to preserve such relationships.²⁶ While numerous minors who are half-siblings (because they share a donor) have established close relationships,²⁷ this occurs through mutual consent registries and generally involves parents who are supportive of such relationships.²⁸

Only a few cases have considered the rights of donor-conceived half-siblings. Indeed, because of the lack of legal support more generally for claims between siblings, attempts to enforce visitation between donor half-siblings are unlikely to succeed.

1. *Perry-Rogers v. Fasano*²⁹

Perhaps the first case to consider the potential of sibling rights in the ART context was *Perry-Rogers* (the two children did not share a donor).

regarding any gamete providers. . . . it is increasingly important for states to address the right of children to access information about their gamete donor. Article 9 does not require disclosure of the identity of a gamete donor. It does, however, require covered facilities to collecting [sic] identifying information and medical history information from gamete donors, and to obtain a declaration from gamete donors addressing whether they would like their identity disclosed upon request once the child turns 18. In addition, regardless of whether the donor's identity is disclosed, Article 9 requires covered facilities to make a good faith effort to disclose nonidentifying medical history information regarding the gamete donor upon request." Memo, June 9, 2017, http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_IssuesMemo.pdf

²⁵ *Donor Sibling Link*, HFEA, <http://www.hfea.gov.uk/donor-sibling-link.html>. For further information about the UK system, see Human Fertilisation & Embryology Authority, Welcome to the HFEA, <https://www.hfea.gov.uk/>.

²⁶ See Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012); Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012).

²⁷ See, e.g., DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/>.

²⁸ See, e.g., *11 Siblings Met in Orlando*, DONOR SIBLING REGISTRY (Jan. 22, 2017), <https://www.donorsiblingregistry.com/members/ViewSuccessStory?ssID=253>.

²⁹ 715 N.Y.S.2d 19 (1st Dep't 2000),

Two couples, one white (Donna and Richard Fasano) and one black (Deborah Perry-Rogers and Robert Rogers), were patients at the same fertility facility. Embryos from both couples were transferred to Donna Fasano, and, as a result of the fertility clinic's mistake, Fasano effectively became the gestational carrier for the Perry-Rogers. When Fasano subsequently gave birth to two children, one was her biological child and the other was the biological child of the Perry-Rogers. Approximately four months after the babies were born, the Fasanos agreed to relinquish custody of the black child to his biological parents, conditioned upon visitation. Although the Perry-Rogers subsequently opposed the visitation provision, the lower court granted visitation. On appeal, the court interpreted New York law, which entitles "siblings related by whole or half-blood"³⁰ to petition for visitation, not to include the Fasano child, who was related only through gestation to the Perry-Rogers child.

2. *Bobbi J R. v. Traci W.*³¹

In perhaps the first case to consider donor-conceived half-sibling rights explicitly, a West Virginia court rejected a mother's claim of associational rights between her child and the child of another woman born through the same donor.³² In that case, Bobbi Jo sought visitation rights on behalf of her son with a half-sibling. Bobbi Jo had been involved with the birth mothers of each child and also claimed custody rights for herself. (One suspects that she helped choose the same donor for each child.) The court noted that it might have been more hospitable to a claim had the siblings been close at any point in their lives; there was no such claim in the case.³³

3. *Pasik v. Russell*

I became involved as an amicus in the Florida case of *Pasik v. Russell*.³⁴ Susan Russell and Elizabeth Pasik, who became involved in 1998, decided to start a family together. Pasik purchased donor sperm, and, using that sperm, Pasik and Russell each gave birth to two children. The four children share the same donor sperm and the women raised the four children together. When the mothers' relationship ended in April 2011,

³⁰ *Id.* At 25.

³¹ Courtney Joslin sent an email in 2013 asking if I had seen this West Virginia case. While there may be additional cases raising these issues, they are not reported.

³² *Bobbi Jo. R. v. Traci W.*, No. 11-1753 (W. Va. 2013). The court stated: "it is noteworthy that [the two-half-siblings] never lived together, and likely never met. Our jurisprudence on matters of sibling visitation emphasizes the continuation of established, beneficial relationships." *Id.* at 3 n.4.

³³ See Naomi Cahn, *The Uncertain Legal Basis for the New Kinship*, 36 J. FAM. ISSUES 501 (2014), <http://journals.sagepub.com/doi/abs/10.1177/0192513X14563797>

³⁴ *Russell v. Pasik*, No. 2D14-5540 (Fl. Dist. Ct. App. 2015), <http://caselaw.findlaw.com/fl-district-court-of-appeal/1715542.html>.

each woman assumed custody of the two children to whom she had given birth. For the next two years, Pasik continued to be involved with the two children living with Russell and even provided financial support health insurance.

After Russell cut off contact, Pasik petitioned the court for time-sharing with the children as the de facto or psychological parent. Russell moved to dismiss Pasik's Petition, claiming that Pasik did not have standing to pursue visitation because Florida does not recognize de facto parenthood. The trial court denied Russell's motion to dismiss, and she then appealed. That was the point at which I became involved in an amicus brief. The brief focused on sibling rights and the significant harm that separating siblings and severing the relationship between them has on the children.³⁵ When the Florida Appellate Court issued its decision, finding that Pasik did not have standing, the court did not even address the issue of sibling rights.

Federal legislation recognizes siblings' associational claims in foster care,³⁶ but it is rarely recognized in other contexts.³⁷ Consequently, the rights of donor-conceived offspring to maintain contact with one another is one part of this larger [non]recognition of sibling rights and shows the importance of state law.³⁸

II. Pragmatic issues

Before turning to the legal issues involved in ending donor anonymity, a series of pragmatic concerns frame the legal feasibility of anonymity.

A. Supply

What impact might ending anonymity have on the US baby markets system? In an effort to test how ending anonymity in the United States would affect men's willingness to donate sperm, Glenn Cohen and his

³⁵ Elliot H. Scherker of Greenberg Traurig was the primary author.

³⁶ See Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 14 (2011); Dawn J. Post, et al., *Are You Still My Family? Post-Adoption Sibling Visitation*, 43 CAP. U. L. REV. 307, 329 (2015).

³⁷ E.g., Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012); Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1195 (1993); Rebecca L. Scharf, *Separated at Adoption: Addressing the Challenges of Maintaining Sibling-of-Origin Bonds in Post-Adoption Families*, 19 U.C. DAVIS J. JUV. L. & POL'Y 84, 125 (2015).

³⁸ See Douglas Nejaime, *The Family's Constitution*, 32 CONSTIT. COMM. 413 (2017).

colleagues conducted a study with actual donors.³⁹ The study provides important data on both the cost and willingness of these anonymous donors to become known: approximately 29% of the active donors would choose not to donate under a disclosure system, and, among those who would, the average increase in payment to donate was \$60.⁴⁰

The author's conclusions are, necessarily, somewhat speculative. The authors note that a potential decrease of almost 30 percent in the number of donors "would arguably have economic implications for the market for sperm donation." (p. 482). Yet without knowing the size of the current donor supply – and the US keeps no records on donor sperm, apart from those related to medical testing⁴¹ -- there is no way of estimating these "arguable" financial implications, a point they acknowledge explicitly (p. 487). Indeed, the authors note there is "considerable uncertainty [] regarding the likely market reaction to mandatory donor identification rules and what this mean for price" (p. 486).

Moreover, speculation about the supply of gametes in a post-anonymous world must contend with the reality of what has happened in other countries. In the United Kingdom, which ended anonymous donation in 2005,⁴² the supply dipped for a few years, but it has increased far beyond where it was prior to the beginning of identity disclosure. In other countries, supply dipped when donors could no longer be paid.⁴³

Beyond issues of supply, however, are numerous technological, moral, and legal developments that affect the need to move forward toward ending anonymity, particularly with a focus on children's rights.

B. Technology and anonymity

In contemplating the future of anonymity, technological developments provide additional context, suggesting that – once again – the law lags behind technology in this area.⁴⁴ The first is the future of reproduction and the questions it raises about the potential need for gamete donation. The second is the "virtual" end of anonymity.

³⁹ I. Glenn Cohen et al., *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J. LAW & BIOSC. 468 (2016).

⁴⁰ *See id.* at 470, 482.

⁴¹ *See, e.g.,* WENDY KRAMER & NAOMI CAHN, FINDING OUR FAMILIES (2013).

⁴² HFEA, Latest Donation Figures, <http://www.hfea.gov.uk/9370.html>.

⁴³ In Canada, for example, the imposition of both a ban on payment and more stringent testing requirements caused a decrease in the number of sperm donors. Daria O'Reilly et al., *Feasibility of An Altruistic Sperm Donation Program in Canada: Results From a Population-Based Model*, 14 REPROD. HEALTH 8 (2017), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-016-0275-0>.

⁴⁴ *See* Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV. 963 (2004); *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

Will we still need donors?

There are a number of potential technologies on the horizon that will largely, although perhaps not completely, eliminate the need for donor gametes. Consider that, with the development of ICSI, many heterosexual couples no longer need sperm donation; it appears that the majority of those seeking sperm donors are now single women and lesbians, though accurate records do not exist. In addition, single men and gay male couples still need eggs (and a woman to bear them), although the costs of surrogacy inhibit demand. The use of mitochondrial replacement, which does require a donor egg, is now possible, but it involves a technologically complex procedure that will not require a significant number of donors.⁴⁵

And the development of in vitro gametogenesis may involve ways to produce an unlimited supply of sperm and eggs genetically related to the intended parents, largely eliminating the need for donor gametes altogether as a response to infertility.⁴⁶ IVG is a technique that allows for the creation of gametes from pluripotent or other appropriate stem cells. As Glenn Cohen and his co-authors suggest, “consider the speculative possibility of so-called multiplex parenting, where one gamete is derived from two individuals and combined with the gamete of a third individual.”⁴⁷ Future developments in IVG may eventually allow not just two men or two women to produce a child on their own, but also various combinations of adults to produce children together. While anonymity may still be an issue, depending on who is involved in creating the child, the need for donor gametes promises to be less important with increased possibilities of potential “parents.”

Nonetheless, in the short-term, the majority of those seeking donors will probably continue to be single men or women or those in same-sex relationships who need donor gametes to procreate, whatever their fertility status.⁴⁸ The role of anonymity in these relationships may change the dynamic underlying gamete donation; their use of donor gametes is not something that can be hidden, so that may prompt further openness about the gamete donor in their relationship with their children.

⁴⁵ See Cahn & Carbone, *Three-Plus Parents*, *supra* note ____.

⁴⁶ Sonia M. Suter, *In Vitro Gametogenesis: Just Another Way to Have a Baby?*, 3 J.L. & Biosciences 87, 103 (2016); HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* (2016); Glenn Cohen et al., *Disruptive Reproductive Technologies*, 9 SCI. TRANSLATIONAL MED. (2017).

⁴⁷ Cohen et al., *Sperm Donor Anonymity*, *supra* note ____.

⁴⁸ See WENDY KRAMER & NAOMI CAHN, *FINDING OUR FAMILIES* (2013); JUDITH DAAR, *THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES* (2017).

The future of sperm – and egg – donation is thus under pressure from a variety of technologies, both internal and external to the reproductive market.

b. The Technology of Knowing

Advances in DNA testing, including direct-to-consumer kits, mean the ability to maintain secrecy about involvement in donor conception is questionable. Overall, more than 3 million people have already used these testing kits to find information about their ancestry.⁴⁹ The ubiquity of this technology challenges the maintenance of anonymity; even if banks promise not to release records,⁵⁰ genetic testing could easily lead learning the identity of the donor, an issue that parents and donors need to consider as they “choose” anonymity. Ryan Kramer swabbed the inside of his cheek; his story helps show the increased likelihood of unplanned disclosure and its associated risks.⁵¹ Of course, he knew he was donor-conceived, but he is not the only donor-conceived person to use such testing.⁵² Indeed, people who were not even aware of their donor conception have used this “direct to consumer” testing to learn that they are donor-conceived, even though they did not have cause to question their origins.⁵³ While parents are under no obligation to tell their children that they are donor-conceived, such secrets may damage relationships – and may not even continue to be secrets.⁵⁴

Thus, although sperm banks and egg agencies may continue to guarantee that they will not release records, they cannot guarantee that offspring will not be able to discover the identity of the donor. They may, consequently, have a duty to warn gamete donors.⁵⁵ And, in its guidelines, the ASRM should require that banks and agencies provide counseling to donors about this potential loss of anonymity.

⁴⁹ Joyce C. Harper et al., *The End of Donor Anonymity: How Genetic Testing is Likely to Drive Anonymous Gamete Donation Out of Business*, 31 HUMAN REPRODUCTION 1135 (2016).

⁵⁰ E.g., as one bank explains: “California Cryobank . . . will always exercise our most strenuous efforts to assure donor anonymity.” *California Cryobank’s Commitment to Donor Privacy*, <http://www.spermbank.com/about/sperm-donor-confidentiality>.

⁵¹ See Wendy Kramer, *Sperm Donors Who Wish To Remain Anonymous Just Shouldn’t Donate*, HUFFINGTON POST (Jul. 28, 2015), http://www.huffingtonpost.com/wendy-kramer/sperm-donors-who-wish-to_b_7878688.html.

⁵² See, e.g., Lucy Johnston, *Sperm Donors Fear ‘Hi Dad’ Showdown As DNA Testing Becomes More Accessible*, EXPRESS (Jul. 3, 2016), <http://www.express.co.uk/life-style/health/685599/Sperm-donors-DNA-testing-biological-father-offspring-anonymity>; Harper, *supra* note __.

⁵³ See Marilyn Crawshaw, *Direct-to-Consumer DNA Testing: The Fallout for Individuals and their Families Unexpectedly Learning of their Donor Conception Origins*, HUMAN FERTILITY (2017); Libby Copeland, *Who was She? A DNA test only Opened New Mysteries*, WASHINGTON POST (July 27, 2017), https://www.washingtonpost.com/graphics/2017/lifestyle/she-thought-she-was-irish-until-a-dna-test-opened-a-100-year-old-mystery/?utm_term=.f957ac863db8.

⁵⁴ See KRAMER & CAHN, *FINDING OUR FAMILIES*, *supra* note __.

⁵⁵ Pascal Borry et al., *Genetic Testing: Anonymity of Sperm Donors Under Threat*, NATURE (Apr. 11, 2013), <https://www.nature.com/nature/journal/v496/n7444/full/496169e.html>.

C. The Intending Parents Themselves

Donor gametes are marketed to potential parents; they are the consumers and patients. This then raises questions concerning their actual preferences as well as their rights to choose specified gametes.

While anonymity is offered in respond to the perceived desire of parents to have “choices,” the parameters of such a demand are unclear. In one of the few studies to compare families who had chosen known v. unknown donors, the vast majority of both mothers and comothers were satisfied with the type of donor they had chosen; “the only significant differences were that those selecting open-identity donors were more satisfied than dissatisfied and that those using unknown donors were more dissatisfied than satisfied.”⁵⁶

And, in another study comparing heterosexual-partnered mothers and single-parent mothers, the “Partnered mothers were more likely than solo mothers to feel neutral, ambivalent or negative about having used an identifiable donor ($P < 0.05$), and were less likely to consider children's knowledge of their genetic origins as extremely important.”⁵⁷ Because heterosexual partnered women are becoming less likely to need sperm donors, the interests of solo mothers become increasingly relevant. Of course, not all single mothers would choose identity-release donors.⁵⁸

A second issue concerning parents’ rights is the deference accorded to their choices in choosing gametes and raising children. As a constitutional matter, the state grants parents the authority to raise children as they choose.⁵⁹ The state rarely intervenes in the parent-child relationship unless there has been abuse or neglect, parents are involved with the public welfare system or go to court for custody and child support,⁶⁰ religious

⁵⁶ Nanette Gartrell et al., *Satisfaction With Known, Open-Identity, Or Unknown Sperm Donors: Reports From Lesbian Mothers of 17-Year-Old Adolescents*, 103 FERTILITY & STERILITY 242 (2015), [http://www.fertstert.org/article/S0015-0282\(14\)02171-2/abstract](http://www.fertstert.org/article/S0015-0282(14)02171-2/abstract).

⁵⁷ Tabitha Freeman et al., *Disclosure of sperm donation: a comparison between solo mother and two-parent families with identifiable donors*, 33 REPROD. BIOMED. ONLINE 592 (2016); Margaret K. Nelson & Rosanna Hertz, *Donor-Insemination Motherhood: How Three Types of Mothers Make Sense of Genes and Donors*, J. GLBT Fam. Studies (2016), <http://www.tandfonline.com/doi/full/10.1080/1550428X.2016.1249585>.

⁵⁸ Sophie Zadeh et al., *Absence or Presence? Complexities in the Donor Narratives of Single Mothers Using Sperm Donation*, 31 HUM REPROD. UPDATE 117–124 (2016).

⁵⁹ 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*. *Troxel v. Granville*, 530 U.S. 57 (2000). For a discussion of parental rights and secrecy, see, e.g., Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 Colum. J. Gender & L. 1, 21 (2012); see Cahn, *Do Tell!*, *supra* note ___, at 1105. Of course, parental discretion is subject to limits based on abuse or neglect.

⁶⁰ See June Carbone & Naomi Cahn, *The Triple System*, 2013 MICH. ST. L. REV. 1216.

practices violate laws, or a few other limited circumstances, such as mandatory vaccines, various screening tests at birth, et cetera.

Moreover, limiting the choices of parent has resulted in the related claims that the law is unjustifiably treating the procreation rights of parents of donor-conceived children differently from the rights of people who became parents by other means, reifying a binary in conception and inhibiting freedom of procreation.⁶¹

III. Respecting Donor-Conceived Offspring: Ending Anonymity

The most significant component involved in the ethics of anonymity involves donor-conceived individuals themselves and how to account for their interests. The parents purchase the donor gametes and children. They are not involved in the initial transactions surrounding their creation,⁶² and, once born, they have interests – and, ultimately, rights – that differ from those of their parents.⁶³ Parents are legally entrusted with the care and custody and medical choices while their children are minors; but, certainly by the time the children reach adulthood, they have independent rights.⁶⁴

In discussing anonymity, there are two layers of disclosure. The first is telling children they are donor-conceived; the second is obtaining access about the donor. Each is briefly discussed below.

A. Disclosure of donor conception

It was long assumed that donor-conceived people need not know the truth of their origins - and that they should simply be glad to exist. For decades, doctors, and employees at fertility clinics and sperm banks told parents never to tell anyone that they used donor eggs or sperm.⁶⁵ Yet the past several decades have demonstrated problems with this approach.

Indeed, professional opinion has changed on the need to tell children of their origins. In its 2013 Ethic Committee Opinion, the American

⁶¹ See, e.g., Cohen, *supra* note __; Courtney Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 619 (2016) (“[R]eproductive binarism [is] the belief that sexual and alternative reproduction are essentially different in fact and therefore deserve different treatment in law”).

⁶² This piece focuses on the rights of donor-conceived offspring. Questions about a reciprocal right of donors, who have donated under a system of anonymity but may have subsequently changed their minds, to learn the identity of offspring created through their gametes are beyond the scope of this piece. See I. Glenn Cohen, *Sperm and Egg Donor Anonymity: Legal and Ethical Issues* 499, in *THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS* (Leslie Francis ed., 2016).

⁶³ E.g., CATHERINE ROSS, *LESSONS IN CENSORSHIP* (2015).

⁶⁴ Cohen, *Sperm and Egg Donor Anonymity*, *supra* note __, at 516-17 (discussing the non-identity problem).

⁶⁵ See NAOMI CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* (2009).

Society for Reproductive Medicine suggests that “disclosure to the child of the fact of donor conception and, if available, characteristics of the donor may serve the best interest of the offspring.

The disclosure decisions are – for obvious reasons -- more straightforward in single parent and LGBT families.⁶⁶ By contrast, for different-sex couples, so they can “pass” without disclosing use of a donor. Indeed, to be sure, the empirical base for promoting disclosure is not as robust as it could be with random samples;⁶⁷ of course, the empirical evidence for promoting non-disclosure is similarly limited.⁶⁸ Because of the type of families involved, large-scale, randomized studies do not exist.

Adoption offers some analogies, albeit imperfect ones. First, in contrast to the culture of secrecy that surrounds assisted reproductive technology, adoptive parents have been advised for decades to inform their children that they are adopted and to celebrate the child’s “special status.”⁶⁹ Indeed, adopted children are much more likely to be told of their origins. As reported by one study of ninety-four families with young adolescent children, under 10% of the donor-conceived children knew about their origins in contrast to 95% of adopted individuals, whose parents had told them of their status.⁷⁰

Adoptive parents are not legally required to tell their children that they are adopted. And it would be constitutionally suspect to require parents to tell their children they are donor-conceived.⁷¹ On the other hand, legal regulation can provide mechanisms outside of the parent-child relationship that support offspring learning of their donor conception.

⁶⁶ Naomi Cahn & Wendy Kramer, *Let's Get Rid of the Secrecy in Donor-Conceived Families*, Slate (Dec. 13, 2013, 3:11 PM), http://www.slate.com/blogs/xx_factor/2013/12/13/donor_conceived_children_deserve_to_know_the_truth_about_their_origins.html.

⁶⁷ Guido Pennings, *Disclosure of Donor Conception, Age of Disclosure and the Well-Being of Donor Offspring*, 32 HUM. REPROD. 969 (2017); *Donor Children Do Not Benefit From Being Told About their Conception*, BIONEWS (May 15, 2017), http://www.bionews.org.uk/page.asp?obj_id=842013&PPID=841585&sid=563.

⁶⁸ Marilyn Crawshaw, et al., *Disclosure and Donor-Conceived Children*, 32 HUMAN REP. 35 (2017).

⁶⁹ E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 87-88 (2000) (“Throughout the twentieth century, there never was a time when professional adoption workers advised parents not to tell their children of their adoption. Child-placing experts routinely recommended that all adopted children be informed ‘when very young’”).

⁷⁰ Susan Golombok et al., *The European Study of Assisted Reproduction Families: The Transition to Adolescence*, 17 HUM. REPROD. 830, 832, 836 (2002); Cahn, *Do Tell!*, *supra* note __, at 1096.

⁷¹ See *Troxel v. Granville*, 530 U.S. 57 (2000).

Other countries have begun to address this first level of disclosure, albeit not by requiring parents to disclose. In its 2008 legislation, the Australian state of Victoria provided for an annotated birth certificate; when a donor-conceived individual applies for a birth certificate, the individual will be informed of the existence of the annotated certificate and able to view it, upon request.⁷² Legislation adopted in Ireland in 2015 mandates that children be informed, when they ask for their birth certificates, whether they are donor-conceived.⁷³ If parents know that their children may learn this information, this might have a channeling effect that promotes disclosure. Parents could even be asked, at the time of using donor gametes, whether they intend to tell, as a way of reminding them of the importance of disclosure.⁷⁴

B. Disclosure of the Donor's Identity

Turning to the second level of disclosure, access to identifying information, some, but not all, donor-conceived individuals, want access to such information, regardless of whether they will use the information, such as by making contact with the donor.⁷⁵ As studies have shown, access to identifying information may help offspring socially, emotionally, psychologically, and physically; offspring explain that this will help them in numerous ways, such as offering a better understanding of their social, cultural and biographical heritage, satisfying their curiosity, completing their identity, and learning about medical risks.⁷⁶

Studies also show that donor-conceived offspring use different terms to refer to their “donors,” ranging from donor, dad, or father, although the terminology does not necessarily indicate a desire for a more formal parental relationship.⁷⁷

Of course, many offspring will not choose to access their original birth certificates, and they will, of course, be under no pressure to do so. What is important is the opportunity to do so, the capacity for “self-authorship.”⁷⁸ The Supreme Court has acknowledged the existence of a

⁷² Donna Lyons, *Extending the “Right to Identity” to Donor-Conceived Children in Ireland: A Jurisdictional Case Study*, 7 IRISH J. LEGAL STUDIES 32 (2017), http://ijls.ie/wp-content/uploads/2016/12/Vol_7_Issue_1_Article_1_DonnaLyons22-12-2016.pdf

⁷³ Harper, *supra* note __, at 1136.

⁷⁴ See Adrienne Asch, *Licensing Parents: Regulating Assisted Reproduction*, in FAMILIES: BEYOND THE NUCLEAR IDEAL 123, 133 (2012); Sabatello, *supra* note __.

⁷⁵ Blyth et al., *supra* note __.

⁷⁶ Marilyn Crawshaw, et al., *Can the UK's birth Registration System Better Serve the Interests of Those Born Following Collaborative Assisted Reproduction?* (2017), [http://www.rbmsociety.com/article/S2405-6618\(17\)30003-5/pdf](http://www.rbmsociety.com/article/S2405-6618(17)30003-5/pdf).

⁷⁷ See Vasanti Jadva et al., *The Experiences of Adolescents and Adults Conceived By Sperm Donation: Comparisons By Age of Disclosure and Family Type*, 24 Hum. Reprod. 1909, 1917, Table IV (2009); see Nelson et al., *supra* note 45, at 8.

⁷⁸ Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1700 (2016).

significant connection between identity, self-expression, and liberty, and noted that expressing one's formation can depend on the development of close relationships with others.⁷⁹

It is important to note another significant contextual issues: the complicated and sometimes paradoxical importance of the genetic connection.⁸⁰ Parents who choose to use donor gametes rather than adopt often do so because they want a child to whom they are genetically related to them as part of their own expression of individual values.⁸¹ Their children may similarly want to explore both halves of their genetic lineage in coming to their own conclusions about how they think of themselves and how they want to live their lives.⁸² Understandably, offspring may be curious about their other genetic half, and preventing them from such access perpetuates a double standard in which genes are important to parents, but not to their children.⁸³

IV. The Art of Surrogacy

Surrogacy presents somewhat different issues from families created solely through donor gametes.⁸⁴ First, the surrogate is known to the parents; there is no issue of anonymity. Second, in the most common type of contemporary surrogacy, the surrogate does not contribute her gamete, and the gamete[s] are either from a donor or the intending mother. Third, surrogacy is subject to a different regulatory regime; traditional surrogacy did not require donor gametes, and the law has intervened from the vantage points of contracts and parentages.

A. Statistics

Federal law requires that US clinics report annual data on their assisted reproductive technology (ART) cycles to the Centers for Disease Control and Prevention (CDC), and the CDC estimates that it is able to

⁷⁹ 468 U.S. 609 (1984).

⁸⁰ Tabitha Freeman, *Gamete Donation, Information Sharing and the Best Interests of the Child: An Overview of the Psychosocial Evidence*, 33 MONASH BIOETHICS REV. 45 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4900443/>

⁸¹ Id; Elia Wyverkens et al., *The Meaning of the Sperm Donor for Heterosexual Couples: Confirming the Position of the Father*, 56 FAMILY PROCESS 203, 204 (2017).

⁸² Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 127-28 (1995)(noting the need for children to claim rights in the context of their functional, social family, and in their "identity of origin").

⁸³ Issues of genetic essentialism are discussed *infra*.

⁸⁴ Gaia Bernstein, who is one of the few scholars to bring together donor gametes and surrogacy, argues that moving away from anonymity for gamete providers would have implications for surrogacy. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 292 (2013).

collect information on more than 95% of all such cycles.⁸⁵ From 1999-2013, there were 30,927 gestational carrier cycles in the United States, which resulted in 13,380 deliveries; because more than a third of the deliveries resulted in multiple infants, there were 18,400 babies born through gestational surrogacy during this time period.⁸⁶ The number of gestational carrier cycles increased by a factor of almost 5, from 727 in 1999 to 3,432 in 2013, and, in 2013, these cycles constituted 2.5% of all assisted reproductive technology cycles.⁸⁷ The CDC does not appear to collect information on non-gestational carrier surrogacy cycles, and researchers suggest that today 95% of all surrogate births involve gestational arrangements.⁸⁸ Just more than half of these cycles were performed in 4 states: California, Connecticut, Texas, and Illinois.⁸⁹ Almost 20% of all cycles involve foreign intending parents.⁹⁰ In just over half of the cycles, a donor egg was used.⁹¹

B. Regulation

The law of surrogacy reflects a combination of state law and private law, with contracts of uncertain enforceability (in many states) shaping the courts' and the parties' expectations about the outcomes in the event of a dispute. While this creates substantial uncertainty about surrogacy law, the states that enjoy the most robust surrogacy practices do have comprehensive legal standards, and jurisdiction shopping within the United States is relatively easy to do. Consider that 29% of gestational carrier cycles occurred in states that were not the intended parents' state of residence, and this was true, for example, for 70% of all cycles in Connecticut.⁹²

⁸⁵ Centers for Disease Control and Prevention, ART Success Rates (2016), <http://www.cdc.gov/art/reports/>; Perkins (next note re 95%).

⁸⁶ Perkins, *Trends*, supra note ____.

⁸⁷ *Id.* at p. 3.

⁸⁸ J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 355 (2011). Another review suggests that almost one-half of all surrogacies involve donor eggs, with the other half using the surrogates' own eggs. Susan Imre & Vasanti Jadva, *The Long-Term Experiences of Surrogates: Relationship and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements*, 29 REPROD. MED. ONLINE 424, 425 (2014). The variation shows the difficulty in constructing a full picture of the number of surrogates.

⁸⁹ Perkins et al., *State Differences in Gestational surrogacy, United States, 2009-2013*, http://journals.lww.com/greenjournal/Abstract/2016/05001/State_Differences_in_Gestational_Surrogacy,_United.211.aspx.

⁹⁰ Perkins, *Trends*, supra note ____.

⁹¹ Kiran Perkins, et al., *Differences in the Utilization of Gestational Surrogacy Between States in the USA*, -- REPROD. BIOMED. & SOC. ONLINE (forthcoming 2017), [http://www.rbmsociety.com/article/S2405-6618\(17\)30022-9/fulltext](http://www.rbmsociety.com/article/S2405-6618(17)30022-9/fulltext).

⁹² *Differences in the Utilization*, supra note ____ (draft at 4)

As the Uniform Law Commission recognized when it updated the Uniform Parentage Act in 2017, surrogacy is “controversial,”⁹³ even though litigation is comparatively rare.⁹⁴ The states that have addressed surrogacy operate on a continuum that ranges from outright prohibition to liberal enforcement of surrogacy contracts.⁹⁵ A few states ban surrogacy, so surrogacy contracts are invalid and are unenforceable.⁹⁶ In more than a dozen states, statutes explicitly regulate surrogacy in some form.⁹⁷

The majority of states lack statutes on surrogacy,⁹⁸ and while courts in a number of these states have addressed surrogacy, other states have no binding precedent. States that do not explicitly address surrogacy may still permit pre-birth parentage orders,⁹⁹ which establish the intending parents as the legal parents.

No national regulatory agency exists overseeing surrogacy or other aspects of assisted reproduction, nor do such entities exist within individual states, and there is no state legislation on identity disclosure in the context of surrogacy. In contrast to the increasing advocacy for disclosure of donor gametes, there is virtually no discussion of this issue among the surrogacy community. This may result from the relatively small number of surrogate-born children, or because approximately half of surrogate children know the identity of both their legal and biological parents (the legal parents are their

⁹³ Draft Uniform Parentage Act 67 (2017),

http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_Draft.pdf

⁹⁴ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 Ind. L.J. 1223, 1230 (2013) (observing that “the lack of litigation is remarkable”). On the other hand, those rare cases of litigation are often highly publicized. E.g., Tamar Lewin, https://www.buzzfeed.com/tamarlewin/wisconsin-surrogacy-case?utm_term=.dfzwXEzMO#.rpDEJMDgy;

⁹⁵ See Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 23, 23 (Rachel Cook et al. eds., 2003)(suggesting that states have adopted four approaches: prohibition, inaction, status regulation, and contractual ordering).

⁹⁶ Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.* 9 (2016),

http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf; see

Kristen Bradley, Note, *Assisted Reproductive Technology After Roe v. Wade: Does Surrogacy Create Insurmountable Constitutional Conflicts?*, 2016 U. ILL. L. REV. 1871, 1883 (2016).

⁹⁷ Finkelstein, *supra* note __, at 9.

⁹⁸ Adam Quinlan, *Recognizing Gestational Surrogacy Contracts: "Baby-Steps" Toward Modern Parentage Law in Maine After Nolan v. Labree*, 65 Me. L. Rev. 807, 812 (2013)(17 states as of 2013); see Victoria R. Guzman, *A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be A Uniform Federal Law Permitting Commercial Surrogacy?*, 38 HOUS. J. INT'L L. 619, 628 (2016).

⁹⁹ Finkelstein, at 11 (listing Oregon).

intending parents, and one-half of gestational surrogacies involve the intending parents' gametes).

C. Surrogacy relationships

Gestational carriers typically state that they view the child as the offspring of the intended parents, a baby to give “back” rather than give “up.”¹⁰⁰ Because surrogates do not view the children they have birthed as their own, they connect with the intending parents. Their satisfaction with the surrogacy process often depends on the quality of the relationship they develop with the intended parents, rather than the relationship with the child.¹⁰¹ This echoes studies of embryo donation.¹⁰²

Studies show that surrogates often remain in contact with the children and their families, although the level of such contact varies. In one comprehensive study of 34 surrogates who had given birth to 102 children, the authors found that almost all had remained in contact with the mothers (85%) and most had remained in contact with the father (76%) and the children (77%).¹⁰³ The surrogates were more likely to have more frequent contact with the mother - -almost half were in touch with her at least once a month -- than with the father or the child. And the contact was typically via face-to-face, although there was some Facebook or email contact as well. Surrogates reported that they were generally happy with the level of contact. In another study of gay fathers, the men were more likely to remain in touch with the surrogate than with the egg donor, even though most of the men had chosen open-identity donors, and many of those had met with the egg donor.¹⁰⁴ Although they were generally positive about the level of contact, some would have preferred greater contact. In terms of disclosure, when they talked to their children, they were twice as likely to mention the surrogate as the use of a donated egg.¹⁰⁵ There are few studies on the children of surrogacy, perhaps due to the difficulty of finding research subjects,¹⁰⁶ although the few studies that exist show that children of

¹⁰⁰ Jacobson, *supra* note __, at 58 (“Surrogates merely ‘take care’ of the IPs’ babies during the prebirth period and ‘return them’ to their rightful parents after birth”).

¹⁰¹ Laufer-Ukeles, *supra* note __, at 1232.

¹⁰² E.g., Jenni Millbank, Anita Stuhmcke, and Isabel A. Karpin, *Embryo Donation and Understanding of Kinship: The Impact of Law and Policy*, 32 HUMAN REPROD. 133 (2017), <https://ssrn.com/abstract=3044205>.

¹⁰³ Imre & Jadva, *supra* note __.

¹⁰⁴ Lucy Blake et al., *Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children’s Origins*, 106 *Fert. & Steril.* 1503 (2016).

¹⁰⁵ *Id.*, Tbl. 2; see Jacobson, *supra* note __, at 106 (reporting on types of contacts based on interviews with 31 surrogates).

¹⁰⁶ There is, of course, information about Baby M. See Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, March 23, 2014, <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html> (at that point, she was 28, married, and living in London). And, focusing

surrogacy are not negatively affected by their origins.¹⁰⁷ And there is growing attention being paid to the rights of these children in international law.¹⁰⁸

Although there is little research on this issue, disclosure of the surrogate's identity seems likely to be less controversial. First, she is already known to the intending parents, and second, parents are more likely to remain in contact with the surrogate than with an egg donor following birth. Moreover, because many surrogates have not contributed their own gametes, contact may seem less threatening to the intended parents. Indeed, given that intended parents already seem more likely to introduce the concept of the surrogate, disclosure of her identity seems like a small step.

V. Reservations

Proposals to end anonymity are controversial; scholars and the ART business community have raised numerous objections. First is a concern for equality between donor-conceived; that is, treating donor-conceived offspring differently by, for example, permitting identity disclosure, “frustrate[s] procreative and familial intent by imposing a particular image of family—biological paternity—on those who might want to define family in less-traditional ways”¹⁰⁹ and, based on this [misguided] focus, gives them rights that other children do not have. Second is a worry that permitting disclosure of identifying information will decrease the supply of donors, perhaps even harming children yet to be born, and infringing on parents' reproductive choices,¹¹⁰ with insufficient countervailing benefits. A final set of concerns relate to the potential for privacy breaches of arguably constitutionally-protected interests for invading the privacy rights of donors and the donor-conceived family.

on parental decisionmaking does result in some attention to children. *See, e.g.,* Vasanti Jadva, et al, *Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins*, 27 HUMAN REPROD. 3008 (2012);

¹⁰⁷ Sital Kantry, *Should Compensated Surrogacy be Permitted or Prohibited?* 19 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3039011.

¹⁰⁸ *E.g.,* Richard Blauwhoff & Lisette Frohn, *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW – PUBLIC AND PRIVATE LAW PERSPECTIVES 211, 231-32(2016), <https://www.iji.nl/media/1031/artikel-asser-bundel.pdf>.

¹⁰⁹ Cahill, *Reproduction Reconceived*, *supra*, note __, at 656, 685.

¹¹⁰ *See* Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4 LAWS 352, 357 (2015),

A. Biology, genes, and family, sameness and different

The argument that identity disclosure treats donor-conceived offspring differently is multi-layered. Allowing for identity disclosure, according to this argument, results in over-emphasizing connections based on biology at the expense of the functional family, in reinforcing "genetic essentialism," the concept that a person is the sum of her genes,¹¹¹ and in giving donor-conceived children rights that other children do not have.

Shared genes may be important to the parents who choose donor gametes, and intending parents may deliberately choose a donor who resembles them; this in turn may help create a feeling of family.¹¹² At the same time, many of these same parents support the increasing legal recognition that families involve adults related by emotional and sexual intimacy,¹¹³ and may include children related through biology or legally recognized adoption who share (or, in the case of divorce, have shared) lives together.

Yet acknowledging that offspring may want access to information about the donor is neither equivalent to genetic essentialism nor to denying that families are formed through function, not just biology. It simply allows a child to make her own decisions on the importance of finding information about the gamete provider.¹¹⁴ For children born to married couples, there is an approximately 97% certainty that their mother's husband is their father¹¹⁵; for donor gamete conceived children, of course, there is 100% certainty that they are not.

¹¹¹ See Kimberly Leighton, *The Right to Know Genetic Origins: A Harmful Value*, Hastings Center Report (2014), <http://onlinelibrary.wiley.com/doi/10.1002/hast.334/full> (suggesting that the right to know is based on the argument that genetic connection is inherently valuable); see generally Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2280 (2017) (discussing the Court's use of reproductive biology in determinations of parenthood). Of course, both aspects of this process – couples seeking to have one parent genetically connected- and ending anonymity -- may appear to raise the danger of overemphasizing one's genetic identity at the expense of the functional family. Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 418 (2012)

¹¹² Astrid Indeku, *Parent's expectations and experiences of resemblance through donor conception*, 24 NEW GENETICS AND SOCIETY (2015), <http://www.tandfonline.com/doi/abs/10.1080/14636778.2015.1098525>.

¹¹³ E.g., Njeaime, *The New Parenthood*, *supra* note __; Nordvquist, *supra* note __; June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 14 (2017)

¹¹⁴ See Vardit Ravitsky, *Autonomous Choice and the Right to Know One's Genetic Origins*, Hastings Center Report (2014), <http://onlinelibrary.wiley.com/doi/10.1002/hast.286/abstract>.

¹¹⁵ E.g., *What are the chances that Your Dad isn't Really Your Father?*, April 15, 2014, <http://theconversation.com/what-are-the-chances-that-your-dad-isnt-your-father-24802>.

Identity disclosure is a process that is distinct from the recognition that family connections can be formed without genetic connection¹¹⁶ and does not imply that a genomic sequence is determinative of one's identity nor one's familial relationship. Nonetheless, genes and "genetic thinking" remain an important cultural concept.¹¹⁷ Indeed, in the adoption world, where there is often no genetic connection to either parent, states are increasingly likely to enact legislation that allows adoptees access to their original birth certificates.¹¹⁸

Concerns about genetic essentialism are certainly legitimate, given both the medical and cultural significance of genes – and given their importance to the intending parents.¹¹⁹ Yet acknowledgement of the fear of genetic essentialism does not justify denying offspring the opportunity to obtain information; indeed, it helps explain why access is important and the reasons for giving offspring these rights.

First, one's identity is composed of multiple pieces of information; genetic origins may well be one piece of that composite. Curiosity may be another. The focus should be on access, rather than judgement of the reasons for seeking access, and on the rights of adults to this information, not on the parents' decisions made before the birth of their children.

Second, outside of children who are adopted or donor-conceived, their legal parents are, typically, also their genetic parents.¹²⁰ Ending anonymity gives donor-conceived offspring the same rights as other children to know the identity of their legal and genetic parents, a move that is also occurring for adoptees.

Third, sexual and non-sexual reproduction have similarities and differences; they each involve procreation and a resulting child¹²¹ but the

¹¹⁶ See, e.g., Doug NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017); Cahn & Carbone, *Three-Plus Parents*, *supra* note ____.

¹¹⁷ Use of "the term 'genetic thinking' [captures] the different ways in which connectedness in and through the body (referred to as blood, pregnancy, biology or genes, or a combination thereof) operate to guide people's thinking." Nordqvist, *supra* note ___, at 4.

¹¹⁸ *Child Information Gateway*, <https://www.childwelfare.gov/>; Heather Jacobson, *Anonymity in Third Party Reproduction: An Old Dilemma in New Packaging*, 3 J.L. & Bioscience 660 (2016).

¹¹⁹ E.g., *The Business of Sperm Banks*, THE ECONOMIST, Sept. 14, 2017, <https://www.economist.com/news/business/21728982-modern-families-and-differing-national-laws-mean-opportunities-companies-business>; *supra* TAN ____ (Indeku, New Genetics, genetic essentialism).

¹²⁰ To be sure, in some small percentage of cases, that is untrue – but perhaps no more than 1%. See Carl Zimmer, *Fathered by the Mailman? It's Mostly an Urban Legend*, N.Y. TIMES, Apr. 6, 2016, <https://www.nytimes.com/2016/04/12/science/extra-marital-paternity-less-common-than-assumed-scientists-find.html?mcubz=3>.

¹²¹ See Cahill, *supra* note ___, at 620.

process (and often, the intentionality) for producing that child differs. Donors are subject to regulation to ensure the health and safety of their gametes¹²² (although there is a robust free sperm movement¹²³); sexual reproduction does not involve such screening. Arguably, parents who use donor gametes have more autonomy than parents who do not; where state procedures are followed, donors have no parental rights, and the intentionally-formed family has no obligations to the donor. By contrast, where sexual reproduction is involved, there are mandatory rights and obligations imposed on both parents.¹²⁴

Most children have access to a birth certificate that represents their biological and legal parents; adoptees increasingly have access to their original (biological) birth certificate; donor-conceived offspring, however, are treated differently.¹²⁵ Allowing access, on this argument, actually gives them the same rights as other offspring. Ultimately, it is the underlying identity interest of children that should guide the development of new approaches, with the recognition that donor-conceived children are conceived differently, and this results in different needs. Questions of equality of treatment suggest that access is appropriate.

B. Decreasing Donors?

A second, strongly articulated reservation to identity disclosure concerns the supply of donors. Some have argued that, without a guarantee of anonymity, donor supply will decrease dramatically; moreover, as the Cohen study discussed earlier shows, identity-release donors will probably increase the expense of using gametes from those willing to donate.¹²⁶ This then potentially implicates reproductive technology regulation¹²⁷ as well as procreative rights.¹²⁸ Mandated identity disclosure might also, on this argument, result in donors imposing conditions on their donations, limiting potential recipients of their gametes.

These are actual risks. First, mandatory disclosure appears to have at least some effect on supply, although disagreement arises on the nature of

¹²² 21 C.F.R. § 1271 (2016).

¹²³ See, e.g., Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 96 (2015); Lauren Gill, Note, *Who's Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715 (2013).

¹²⁴ Compare Cahill, *supra* note ____.

¹²⁵ See, e.g., Sabatello, *supra* note ____, at 361.

¹²⁶ See, e.g., Cohen, *supra* note ____.

¹²⁷ See, e.g., Appleton, *Binaries*, *supra* note ____.

¹²⁸ See Judith F. Daar, *Assessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 51- 54 (2008); see generally John Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490 (2008).

that impact.¹²⁹ Many banks have developed new recruiting practices in order to increase their supplies.

Countries, such as Sweden, Canada, Switzerland, and the United Kingdom, that have abolished anonymity experienced shortages when they did so; it is, however, hard to tease out whether these shortages are due solely to ending anonymity or whether they are also due to restrictions on payment.¹³⁰ True, Cohen's studies with potential and actual donors, along with other studies, have shown not only that abolishing anonymity could increase the cost but also that approximately one-half of potential and actual gamete donors would not participate if anonymity were removed – yet that still leaves the other half who would be willing to provide their sperm for more money.¹³¹

Yet the actual experiences are more nuanced. Consider what happened in Sweden, following a 1985 law that mandated the identification of gamete providers when the child reached the age of 18: there was concern that the legislation would cause a severe decline in the number of sperm donors.¹³² Yet that decline appears to have been short-term only.¹³³ In England, once national law precluded anonymous donation in April 2005, similar concerns about decreasing supply were raised – and are still being raised.¹³⁴ Indeed, as anonymity took hold in Britain, the number of both sperm and egg donors did decrease; following enactment of the law, however, the numbers have increased.¹³⁵

¹²⁹ See, e.g., Eric Blyth & Lucy Frith, *The UK's Gamete Donor 'Crisis': A Critical Analysis*, 28 CRITICAL SOC. POL'Y 74 (2008); Neroli Sawyer, *Who's Keeping Count? The Need for Regulation is a Relative Matter*, 92 FERTILITY & STERILITY 1811 (2009).

¹³⁰ See *supra* note __ (discussing Canada); Bernstein, *supra* note __.

¹³¹ See Cohen, *Sperm Donor Anonymity*, *supra* note __; Eric D. Blyth, Lucy Frith & Abigail Farrand, *Is it Possible to Recruit Gamete Donors Who Are Both Altruistic and Identifiable?*, 84 FERTILITY & STERILITY S21, (Supp. 2005).

¹³² F. Shenfield, "Privacy Versus Disclosure in Gamete Donation: A Clash of Interest, of Duties, or an Exercise in Responsibility?," 14 J. ASSISTED REPROD. AND GENETICS 371 (1997); A. Lalos, K. Daniels, C. Gottlieb, and O. Lalos, "Recruitment and Motivation of Semen Providers in Sweden," 18 HUMAN REPROD. 212 (2003).

¹³³ Shenfield, *supra* note __; U. Shukla et al., *Sperm Donor Recruitment, Attitudes and Provider Practices – 5 Years after the Removal of Donor Anonymity*, 28 HUMAN REP. 676 (2013), <https://academic.oup.com/humrep/article/28/3/676/939162/Sperm-donor-recruitment-attitudes-and-provider>

¹³⁴ E.g., Sara Kamouni, *Sperm Stocks Running Low*, Nov. 1, 2016, <https://www.thesun.co.uk/living/2092394/sperm-donors-should-be-given-right-to-remain-anonymous-to-halt-chronic-shortage-of-donations-expert-says/>

¹³⁵ See HFEA, *HFEA Publishes Egg and Sperm Donor Statistics Report* (2014), <http://hfeaarchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/9386.html>; HFEA, *New Donor Registrations* (2014), <http://hfeaarchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/3411.html> (reporting on

The research studies and actual country experiences show that, while requiring the release of information may indeed affect the supply of donors, it does not necessarily result in a long-term decline. Part of this is due to efforts to develop alternative methods for recruiting donors; a British clinic recruited men with “super” sperm,¹³⁶ and the publicity associated with new laws may encourage different types of donors to come forward.¹³⁷ In a situation where identity disclosure is expected rather than novel, additional donors may come forward.¹³⁸ Assuming that identity disclosure would not result in abolishing compensation, then this may have little long-term impact on donors; by contrast, when Canada did the opposite, precluding payment but retaining anonymity, the sperm supply decreased dramatically.¹³⁹

Even granting a potential impact on the number of donors, an objection based solely on potential supply remains problematic because it is rooted in a medical or health model, where the focus is on the patient. This differs from a family-focused model, where the child and relationships are at the center.¹⁴⁰

A related objection to banning anonymity, for those concerned about supply issues, is that regulation would start the slide down a slippery slope towards regulating not just *what* gametes are available but *who* has access to those gametes.¹⁴¹ Indeed, the access of gay, lesbian, or single people to reproductive technology is curtailed in some countries, so this is certainly a rational fear; indeed, at least prior to *Obergefell*, a state could distinguish between fertility treatment access for heterosexual and same-

new sperm and egg donor registrations from 1992-2010); Liza Mundy, *Shortage? What Shortage? How the Sperm Donor Debate Missed its Mark*, Sept. 19, 2010, <http://www.guardian.co.uk/commentisfree/2010/sep/19/sperm-donors-shortage-market-forces>; see Fiona Kelly, *Is it Time to Tell? Abolishing Donor Anonymity in Canada*, 30 CANADIAN J. FAM. L. (forthcoming 2017)(draft at 34).

¹³⁶ See Joanne Webb, *Free IVF for anyone with 'super sperm' as fertility clinic aims to solve shortage of donations*, Mar. 9, 2016, <http://www.mirror.co.uk/news/uk-news/free-ivf-anyone-super-sperm-7524427>; Blyth, Frith, & Farrand, *supra* note ____.

¹³⁷ See, e.g., Ken Daniels, *Anonymity and Openness and the Recruitment of Gamete Donors: Part I*, 10 HUMAN FERTILITY 151 (2007); Lucy Frith, Eric Blyth & Abigail Farrand, *UK Gamete Donors' Reflections on the Removal of Anonymity: Implications for Recruitment*, 22 HUMAN REP. 1675 (2007).

¹³⁸ Sheib & Ruby, *supra* note __, at 18.

¹³⁹ “Sperm Donor Shortage Hits Canadian Fertility Clinics,” CBC News (Dec. 19, 2006), <http://www.cbc.ca/health/story/2006/12/19/sperm-shortage.html>; see Kelly, *supra* note __.

¹⁴⁰ See Debora L. Spar, *As You Like It: Exploring The Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 491 (2009).

¹⁴¹ *CF.*, Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 74 (2015).

sex couples.¹⁴² On the other hand, the politics of reproductive technology in the United States are quite complex, ranging those who oppose regulation of any kind (whether from a libertarian or progressive perspective) to pro-regulation (if not banning) from those who are conservative and anti-choice or who may be concerned with religious principles.¹⁴³

Yet the more general expansion of rights to same-sex couples may make restrictions based on sexual orientation less likely. In fact, the UK extended equality of treatment to same-sex couples after it abolished anonymity.¹⁴⁴ And the widespread usage of ART makes bans highly unlikely. A related argument suggests that banning anonymity leads to a change in the nature of donors, thereby restricting parents' options and preventing some children from being born.¹⁴⁵ As Glenn Cohen argues, any alteration of when, whether, or with whom individuals reproduce cannot necessarily be justified based on a focus on any resulting child's best interests.¹⁴⁶

Cohen has framed this as the Non-Identity Problem.¹⁴⁷ He argues that any justification for disclosure based on the best interest of the child 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."¹⁴⁸

¹⁴² Hawaii, for example, still does so, as of 2017. Robert Greene, *Could this be the first state to allow equal IVF treatment for gay couples?*, April 10, 2017, <http://www.pinknews.co.uk/2017/04/10/could-this-be-the-first-state-to-allow-equal-ivf-treatment-for-gay-couples/>; Cathy Bussewitz, *Hawaii LGBT Couples Seek Equal Access to Fertility Treatment*, April 9, 2017, <http://www.pbs.org/newshour/rundown/hawaii-lgbt-fertility-treatment/>

¹⁴³ <http://www.geneticsandsociety.org/downloads/ART.pdf>; see <http://www.americanvalues.org/pdfs/parenthood.pdf> (calling for a five-year moratorium).

¹⁴⁴ E.g., Emily Dugan, *NHS Fertility treatments allow two-mum families to reach record levels*, March 27, 2014, <http://www.independent.co.uk/news/uk/home-news/nhs-fertility-treatments-allow-two-mum-families-to-reach-record-levels-9219415.html>

¹⁴⁵ I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 Minn. L. Rev. 423 (2011); I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347 (2008).

¹⁴⁶ I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 435 (2012) [hereinafter Cohen, *Response*]; see I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1209 (2012).

¹⁴⁷ E.g., Cohen, *Beyond Best Interests*, *supra* note __; I. Glenn Cohen, *Prohibiting Anonymous Sperm Donation and the Child Welfare Error*, HASTINGS CTR. REP., Sept.-Oct. 2011, at 13, 13 (2011); Cohen, *Response*, *supra* note __.

¹⁴⁸ Cohen, *Regulating Reproduction*, *supra* note __, at 437.

Responding to this argument begins by looking at the direct impact of donor anonymity on the child who has been created.¹⁴⁹ That involves both the “consequentialist” aspect of a right to know (what is the impact of knowing) and the deontological aspect (is this “right”, regardless of the consequences).¹⁵⁰ As discussed earlier, each points to disclosure.

The Non-Identity Problem, by hypothetically considering the interests of a child who does not yet exist, grants rights to a non-existing child.¹⁵¹ Outside of the state of Louisiana, however, an embryo is not a juridical person. Some may believe that any barrier to the existence of a particular child is morally problematic, and that such a barrier should be illegal; but at its extreme, this argument means not only that abortion but also birth control and male masturbation should be banned because each prevents the creation of certain children. More than 99 percent of women in the United States have used contraception, and approximately two-thirds do so at any given point.¹⁵² The explicit goal is to ensure that at least some children do not come into existence, so the question of which children come into existence reflects policy and regulatory choices. Current policies focus on the rights, interests, and feelings of a child who actually comes into existence.¹⁵³ Once the child is born we should be concerned with the interests of that particular child, not the hypothetical interests of a child not yet born.

Rather than focus on the nonexistent rights of hypothetical embryos, what about procreative rights? That is, changing the regulation of donors affects parents. Contraceptive and abortion rights serve to facilitate parental choice concerning the circumstances under which they will conceive and the children who will exist, while opponents of donor disclosure argue that it does the opposite: it imposes governmental limits on those choices.

¹⁴⁹ See, e.g., Cahn, *Do tell*, *supra* note __; oliviasview, Respect, autonomy and the right to know one’s origins, July 5, 2017, <https://oliviasview.wordpress.com/2017/07/05/respect-autonomy-and-the-right-to-know-ones-origins/>.

¹⁵⁰ Vardit Ravitsky et al., *The Conceptual Foundation of the Right to Know One’s Genetic Origins*, June 5, 2017, http://www.bionews.org.uk/page_847313.asp.

¹⁵¹ See Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117, 119-20 (1999).

¹⁵² Jo Jones, William Mosher, & Kimberly Daniels, *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995* (2012), <https://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf>; Contraceptive Use in the United States (2016), [https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states;NCHS, Contraceptive Use \(2016\)\(detailing types of contraception used\), https://www.cdc.gov/nchs/fastats/contraceptive.htm](https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states;NCHS, Contraceptive Use (2016)(detailing types of contraception used), https://www.cdc.gov/nchs/fastats/contraceptive.htm).

¹⁵³ See Cohen, *Regulating Reproduction*, *supra* note __, at 3 (“the protection of existing children serves as a powerful organizing principle that justifies state intervention”). Lucy Frith, et al., *Searching for ‘relations’ using a DNA linking register by adults conceived following sperm donation*, - BIOSOCIETIES (forthcoming 2017).

Indeed, in light of the empirical evidence that the choice to donate is affected by the disclosure scheme, it is true that parental choice will be affected.

Yet, regardless of the constitutional foundations for a procreative right concerning assisted reproduction (which are somewhat ambiguous¹⁵⁴), disclosure rules do not affect the *right* per se, only the choice of potential donors. More pragmatically, it is unclear that moving away from anonymity would have any actual impact on demand (although that does suggest an avenue for future research).¹⁵⁵ It is true that ending anonymity would – presumably – result in different donors.¹⁵⁶ Yet so too would we have different donors if sperm banks and egg agencies did not impose such exacting tests on donors (there would be more), or if the banks and agencies imposed more stringent genetic testing (there would be fewer). What is important to – at least some -- donor-conceived offspring is *not* all of the people who did not become donors because of bank or government policies, but instead the identity of the donor who created them.

C. Privacy

“[G]amete donors . . . quite simply, wanted to protect themselves:

I did not know where I would be in twenty years, and did not consider it fair to me that this would come back to haunt me. For example, what if I were in politics?

*I wanted to help make happy and healthy families, but I did not want any ties to the family or responsibility.*¹⁵⁷

¹⁵⁴ Even some defenders of such a right note there may be some qualifications on a right to use assisted reproductive technology. See Mutcherson, *supra* note __. For more on the complexities of a right to procreation, see Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1520-27 (2008);

¹⁵⁵ For speculation on the relationship between the market and egg donor compensation, see Katherine M. Johnson, *The Price of an Egg: Oocyte Donor Compensation in the US Fertility Industry*, NEW GENETICS AND SOCIETY 1 (2017), <http://www.tandfonline.com/eprint/egTTtBibCXu9KUPcpAZK/full>. The study also reports that most clinics allow intending parents to receive photos of the donor.

¹⁵⁶ The next section provides further discussion of the supply issues.

¹⁵⁷ Margaret Nelson, Rosanna Hertz, & Wendy Kramer, *Gamete donor anonymity and limits on numbers of offspring: the views of three stakeholders*, 3 J.L. & BIOSCI. 39 (2016); see Kate Benson, *Fertility Law Change Puts Spotlight on Donors*, SYDNEY MORNING HERALD (AUSTRALIA), p. 9 (Feb. 25, 2009), available at

A third objection is that simply allowing for identifying information about the donor (and other genetic offspring) will violate various privacy rights. In turn, this leads to two separate concerns. First, disclosure might result in unwanted contacts and efforts to establish a relationship, violating the constitutionally protected privacy rights¹⁵⁸ of all involved and perhaps even constituting criminal acts, such as harassment and stalking. Moreover, identity disclosure might, according to this argument, disrupt relationships in the donor's family. The donor may never have told her family about the potential existence of these children. And, donors may be reluctant to find out that they have helped conceive dozens of offspring, they may be concerned about legal liability, or they may be worried about offspring who are emotionally needy. Second, identity disclosure may disrupt the donor-conceived family. Contact may feel threatening to the parents as they worry about the strength of their connections (particularly the non-biologically-related parent) or even "sharing" their child.¹⁵⁹

Learning about, and the possibility of contacting, the donor does have the potential to change existing relationships and affect new ones. But, granting donor-conceived offspring the right to access identifying information does not create an obligation (on behalf of the donor or of the offspring's family) to nurture, or even form, a relationship. And donor-conceived families might well be strengthened by the openness in a disclosure regime.

a. Privacy and information

Laws permitting disclosure recognize that donor-conceived offspring may have an interest in accessing this information, but nothing further; they do not mandate that offspring actually access this information, try to find and contact their donor, or engage in any type of ongoing relationship. Donor communications depend on mutuality and reciprocity.¹⁶⁰ Of course, while many families and donors will welcome the contact, some may not want any kind of relationship. But, when Oregon opened its adoption records, providing for contact preference forms, of the first 9,000-plus original birth certificates that had been released, only 83 birth mothers indicated a preference for no contact.¹⁶¹ And in other states that have opened adoption records, there have been few complaints about

<http://www.smh.com.au/national/fertility-law-change-puts-spotlight-on-donors-20090224-8guk.html> (noting reservations of donors to contacts with multiple offspring).

¹⁵⁸ E.g., Abigail Hoglund-Shen, *Direct-to-Consumer Genetic Testing, Gamete Donation, and the Law*, 55 FAM. CT. REV. 472, 476 (2017)

¹⁵⁹ See Shuler, *supra* note __. This was an argument in the adoption context as well. See Donaldson Adoption Institute, *For the Records II*,

¹⁶⁰ See, e.g., KRAMER & CAHN, *supra* note __.

¹⁶¹ SONIA ALLAN, DONOR CONCEPTION AND THE SEARCH FOR INFORMATION: FROM SECRECY AND ANONYMITY TO OPENNESS 228-29 (2016).

unwelcome contacts.¹⁶² Claims about unwanted intrusions suggest that those interested in searching will be unable to set limits and that the law will be unable to stop any such unwanted comments. To be sure, some offspring will be rejected when they find their donors, some donors may be overwhelmed by the number of offspring they have helped create.

There are three responses. First, most contacts are positive.¹⁶³ But second, given the rate of technological change in the ability of genetic tracing, as discussed above, practices of anonymity may simply collapse, so the new normal will be expectations that the donor's identity will not remain a secret. While these practical realities do not answer jurisprudential concerns about privacy, they do show the urgency of addressing the jurisprudential issues. One solution, which would mirror the adoption world, permits the filing of contact preference forms, so that a donor or donor-conceived family could indicate no interest in contact.¹⁶⁴ While difficult to enforce outside of stalking laws, such a form provides useful information about the willingness of the gamete provider to engage with offspring. If a contact preference form had been filed, then the affected donor-conceived offspring might also be required to receive counseling. The 2017 Uniform Parentage Act, which allows for a veto of any identity disclosure (even though the donor can change this preference at any point), goes too far beyond a contact preference, as it would permit an absolute bar.¹⁶⁵

Finally, the very arguments for privacy suggest its complexity; the donor has privacy interests but so too do donor-conceived offspring. As we

¹⁶² MADELYN FREUNDLICH, FOR THE RECORDS 18-19 (2007), available at http://www.adoptioninstitute.org/publications/2007_11_For_Records.pdf; *For the Records II*, *supra* note __. E.D. Blyth, M. Crawshaw, L. Frith, O. van den Akker, *Gamete donors' motivations for, expectations and experiences of registration with a voluntary donor linking register*, HUMAN FERTILITY __ (forthcoming 2017), <http://dx.doi.org/10.1080/14647273.2017.1292005>

¹⁶³ *See supra* TAN __. This has certainly been true in the adoption context, where similar fears have been expressed. *See* EVAN B. DONALDSON ADOPTION INSTITUTE, FOR THE RECORDS (2010). And, in adoptions that have allowed contact between the birth parents and the adoptive family, there are few regrets. *E.g.*, Deborah H. Siegel & Susan Livingston Smith, *Openness in Adoption From Secrecy and Stigma to Knowledge and Connections* (2012), https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2012_03_OpennessInAdoption.pdf.

¹⁶⁴ *See* ALLAN, *supra* note __, at 230. For examples in the adoption context, *see, e.g.*, ALA. CODE § 22-9A-12(c)-(d) (2017) (contact preference form); ME. REV. STAT. Tit. 22, §§ 2765; 2768 (2017); TENN. CODE ANN. § 36-1-128 (2017) (availability of no-contact form). The forms typically provide the opportunity to indicate a preference for contact, contact with an intermediary, or no contact.

¹⁶⁵ Unif. Parentage Act Sec. 903.

consider what will be disclosed, information must be considered in context, which means that “the relationships in which the information is transferred and the ways in which it is used become the central focus of inquiry.”¹⁶⁶ Analyzing whether privacy protection leads to anonymity or disclosure requires balancing the different rights and interests involved. A breach of privacy is disclosure of information beyond its intended audience; by contrast, it is not the mere act of disclosure that is itself harmful.¹⁶⁷ Even if the intending parents have waived access to identifying information about the donor, limiting access only to the donor-conceived person still protects against widespread dissemination. Laws that establish the basis for identity release¹⁶⁸ ensure that future donors are on notice that their identities are subject to limited disclosure, and provide notice to intending parents of the consequences of their choice to use donor gametes.

b. family issues

Finally, more jurisprudential and philosophical objections center on the relationship between parents’ and children’s rights. Outside of the abuse and neglect context, parents have broad decision-making ability in raising their children. Accordingly, based on this perspective, we should defer to the family’s private choice; the government should not “dictate how and when families make intimate decisions.”¹⁶⁹ Parents who have created families with donor gametes may feel threatened in their own parenting as their offspring search. For example, parents who do not disclose the fact of donation are often worried about the harm to their relationship to their children, particularly between the child and the non-biological parent.¹⁷⁰

¹⁶⁶ Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1065 (2003).

¹⁶⁷ See Solove, *supra* note __; Gregory J. Evans, *Regulating Data Practices: How State Laws Can Shore Up the FTC’s Authority to Regulate Data Breaches, Privacy, and More*, 67 ADMIN. L. REV. 187, 190 n.16 (2015). On the issue of harm, see Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885638;

¹⁶⁸ Prospective and retroactive release of identifying information raise some different issues, although in both situations, donor-conceived offspring should not be bound by their parents’ choices.

¹⁶⁹ Todd Essig, *Balancing the Rights of Donor Offspring with Those of Donors: But What about Parents?*, FORBES, June 30, 2011, <http://blogs.forbes.com/toddesig/2011/06/30/balancing-the-rights-of-donor-offspring-with-those-of-donors-but-what-about-parents/>.

¹⁷⁰ See, e.g., Dena Shehab et al., *How Parents Whose Children Have Been Conceived with Donor Gametes Make Their Disclosure Decision: Contexts, Influences, and Couple Dynamics*, 89 FERTILITY & STERILITY 189, 193 (2008) (fear of disrupting relationship); Dorothy A. Greenfield & Susan Caruso Klock, *Disclosure Decisions Among Known and Anonymous Oocyte Donation Recipients*, 81 FERTILITY & STERILITY 1565, 1567 (2004)

Moreover, when prospective parents decide to use anonymous donors, the parents are, according to this argument, not just looking after their own interests, but also protecting their future child's interests. Parents have the constitutionally-protected right to make certain choices that affect their children, including agreeing to confidentiality of the donor. On this view, even when the child turns 18, and the parents are no longer legally responsible, she should remain bound by certain decisions.

On closer analysis, however, the concerns for family privacy do not preclude a regime of donor disclosure. While we can still defer to parents' choices for their children at the time of conception, by the time the child reaches 18, she becomes legally independent, with her own constitutional interests.

Moreover, the culture of anonymity developed because of the stigma of infertility, the shame in not producing biologically-related offspring. With the increasing number of single and gay and lesbian parents who are obviously unable to create biologically-related offspring, the stigma of using donor gametes may dissolve. Requiring disclosure can also help change the culture of secrecy by showing how "ordinary" (if not natural) and common donor-conceived people actually are, leading to even stronger families. According to one study of parents who intended to disclose, as the social connections grew stronger between parent and child, parents became more confident in their connections with their children.¹⁷¹ Indeed, an already existing and secure familial relationship in a donor-conceived family could be seen as a potential building block for supporting a child's identity quest,¹⁷² rather than as being challenged through this new information.

Finally, some parental interests could actually be *promoted* through these same regulations, interests such as making contact with genetically-related offspring and their parents and even the donor, ensuring the integrity of their own families, learning important medical information, and respecting their children's interests. Moreover, donors may change their minds, so blanket anonymity overlooks donors' interests in becoming known and possibly establishing a relationship with their offspring. In the

(women who chose anonymous donors did so to prevent the donor from interfering with their parenting decisions):

¹⁷¹ Astrid Indeku et al., *When 'sperm' becomes 'donor': transitions in parents' views of the sperm donor*, 17 HUMAN FERTIL. 269 (2014); *'Of course he's our child': transitions in social parenthood in donor sperm recipient families*. 26 REPROD BIOMED ONLINE. 106 (2014).

¹⁷² See Jenna Slutsky, et al., *Integrating Donor Conception into Identity Development: Adolescents in Fatherless Families*, 106 FERT. & STERIL. 202 (2016) "securely attached adolescents would be more willing to engage in the sometimes challenging task of exploring donor conception"), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4922596/>.

analogous adoption world, birth mothers, who relinquished children under a regime of secrecy, have sought out their biological children.¹⁷³

Of course, it is entirely unclear what will actually cause a shift in norms surrounding infertility and reproduction; the long-term effects of donor regulation are impossible to predict. Nonetheless, the law can play an expressive role in promoting change. Laws embody and reflect certain values, and they can promote the development of attitudes that provide even more support to those values

Conclusion

Ultimately, the focus of much of the existing analysis on anonymity is on the interests of the parent and the donor, such as the ability of parents to procreate and choose donors or the amount that donors must be paid to agree to be identified.¹⁷⁴ Consequently, that analysis does not explicitly address the interests of donor-conceived offspring as they grow up.¹⁷⁵ Thus, regardless of what the research shows with respect to the financial costs of known donors, and, unless the research shows actual harm to donor-conceived offspring from identity-release, questions surrounding disclosure reflect policy choices and rights priorities.

Moving towards disclosure respects not only potential relational interests but also recognizes the autonomy claims of offspring. Of course, under a system of full disclosure, there remains a critical distinction between “parenting” a child and contributing gametes to the creation of the child. The legal and functional parents have the right to make their own decisions concerning the control, care, and custody of their children, and these decisions – on their own behalf -- may include disclosing details about the child's origins. Regardless of any parental actions, however, the offspring have independent rights. An overall policy of only permitting known donors respects parental rights to raise children as they see fit while

¹⁷³ E.g., Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 MICH. J. GENDER & L. 33 (2013); Tony Gambino, *My Philomena*, Feb. 24, 2014, http://www.slate.com/articles/double_x/doublex/2014/02/a_philomena_story_of_a_man_who_searches_for_his_adoptive_mother_and_learns.html.

¹⁷⁴ Of course, parents may take advantage of the “free sperm” or “underground” markets available. See, e.g., Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93 (2015); Cohen, *supra* note __. at 474-75 n. 31.

¹⁷⁵ On the other hand, Margaret Radin has suggested, in the context of baby-selling, that “to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and to create in those people a commodified self-conception.” Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1925-26 (1987).

the children are minors, but respects the offsprings' rights once they are mature.

Prospective gamete provision arrangements should proceed in a legal market in which it is understood that offspring will have access to information once they become adults. As a pragmatic matter, promises of anonymity have become less credible; as a legal matter, the interests of donor-conceived offspring are becoming increasingly prominent and difficult to ignore.