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

Naomi Cahn*

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 fraudulent. 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, 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 donor.

TABLE OF CONTENTS

I.	INTRODUCTION	1444
II.	CURRENT LAW	1447
	A. <i>Donors and Anonymity</i>	1447
	1. <i>Caselaw</i>	1447
	2. <i>Statutes</i>	1447
	B. <i>Half-Siblings and Anonymity</i>	1449
	1. <i>Perry-Rogers v. Fasano</i>	1449
	2. <i>Bobbie Jo R. v. Traci W.</i>	1450

* 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. Special thanks to Robin Fretwell Wilson for making this possible.

3. Pasik v. Russell	1450
III. PRAGMATIC ISSUES	1451
A. <i>Supply</i>	1451
B. <i>Technology and Anonymity</i>	1452
1. <i>Will We Still Need Donors?</i>	1453
2. <i>The Technology of Knowing</i>	1454
IV. RESPECTING DONOR-CONCEIVED OFFSPRING: ENDING ANONYMITY	1454
A. <i>Disclosure of Donor Conception</i>	1455
B. <i>Disclosure of the Donor’s Identity</i>	1456
V. THE “ART” OF SURROGACY	1457
A. <i>Statistics</i>	1457
B. <i>Regulation</i>	1458
C. <i>Surrogacy Relationships</i>	1459
VI. RESERVATIONS	1460
A. <i>Biology, Genes, and Family, Sameness and Different</i>	1461
B. <i>Decreasing Donors?</i>	1463
C. <i>Privacy</i>	1466
1. <i>Privacy and Information</i>	1467
2. <i>Family Issues</i>	1468
VII. CONCLUSION.....	1470

I. 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.² The Court’s opinion rests on its holding in *Obergefell*³ 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 an egg.⁴ 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

1. *Pavan v. Smith*, 137 S. Ct. 2075, 2080 (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, 1019 (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*, 566 U.S. 541, 552 (2012).

2. *Pavan*, 137 S. Ct. at 2080.

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

4. As discussed *infra*, the development of *in vitro gametogenesis* may render this obsolete. See *infra* Subsection III.B.1.

the couple but also the rights of inheritance to their child.⁵ While this paradigm has never fit all families, it has been under increasing challenge and scrutiny over the past fifty 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 are neither cohabiting nor married; or (3) a parent (or parents) who intentionally use(s) an unknown donor⁶ to contribute the gametes resulting in the child’s birth, potentially to a surrogate.⁷

The technology of assisted reproduction, along with the reality of modern families,⁸ has fostered law reforms that address how to establish parentage,⁹ the number of potential parents,¹⁰ and the rights of those involved in creating a child through assisted reproduction.¹¹ 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.¹² The Supreme Court has held that parents deserve “special weight” when it comes to decisions about their children.¹³ Cases that have considered the rights of donor-conceived offspring to establish a relationship with one another have rejected any such rights.¹⁴ And no state yet gives donor-conceived offspring the right to know the

5. See Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 309–10 (2007).

6. 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*, DONOR CONCEPTION NETWORK, <http://www.dcnetwork.org/story/issue-language> (last visited June 2, 2018).

7. 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., Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435, 435 (2016) (approximately 3,500 gestational carrier cycles in the United States in 2013). In 2014, more than 20,000 ART cycles involved donor eggs or embryos. CDC, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 45–49 (2016), <http://www.cdc.gov/art/pdf/2014-report/art-2014-national-summary-report.pdf>.

8. On the realities of modern families, see, for example, Naomi Cahn & June Carbone, *Three-Plus Parent Families*, FAM. CT. REV. (forthcoming 2018) [hereinafter Cahn & Carbone, *Three-Plus Parent*]; June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 13 (2017) [hereinafter Carbone & Cahn, *Parents*].

9. Carbone & Cahn, *Parents*, *supra* note 8, at 20–34.

10. See *id.* at 13.

11. See, e.g., Jody Meyer Yazici et al., *Parentage of Child of Assisted Reproduction*, 12 ILL. PRAC. FAM. L. 750 46/703 (2018).

12. The 2002 Uniform Parentage Act maintains and expands the same appropriate protections against granting donors parental rights as the 1973 version, but it 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, 338 (2003).

13. *Troxel v. Granville*, 530 U.S. 57, 70 (2000); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004).

14. See *infra* note 63 (discussing sibling cases).

identity of their donor.¹⁵ Instead, donor-conceived offspring have formed relationships with one another, or learned the identity of their donor, through more nongovernmental means, such as registering on the Donor Sibling Registry.¹⁶

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 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 their siblings and their donor—and to find out that they themselves were 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 offspring’s rights under international law.¹⁷ Finally, recent legislation and proposed legislation, such as provisions in the Uniform Parentage Act (2017),¹⁸ directly address identity disclosure, although this legislation does 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. Part II briefly describes current law on the rights of donor-conceived offspring. Part III 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 calls into question the future of anonymity, and empirical evidence on donor-conceived families. Part IV discusses ending anonymity to respect the rights of donor-conceived offspring. Part V 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 gamete but do provide gestation. Surrogacy has received a disproportion-

15. Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1077 (2014).

16. The Donor Sibling Registry is a private nonprofit with a goal of connecting, supporting, and educating. DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited June 2, 2018).

17. E.g., Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT’L & COMP. L. 619, 623 (2012); Martin Hevia & Carlos Herrera Vacaflor, *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).

18. UNIF. PARENTAGE ACT § 905 (UNIF. LAW COMM’N 2017).

ate amount of attention compared to the number of children actually born through the process;¹⁹ 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. Part VI addresses objections to ending anonymity. Part VII concludes.

II. 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 a child born through surrogacy. This Part 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 offspring’s liberty claims; so far, no court has ordered disclosure.²⁰ In one of the few such cases to consider these issues, *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.²¹ The court held that, under certain circumstances, records relating to insemination, “including a sperm donor’s identity and related information contained in those records” could be subject to disclosure.²² Because it was the parents who were seeking the records, the court was not required to decide whether offspring could sue for disclosure. Nonetheless, the court left open the possibility of such disclosure.²³

2. Statutes

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

19. See, e.g., HEATHER JACOBSON, *LABOR OF LOVE* (2016).

20. See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 879 (Ct. App. 2000); *Doe v. XYZ Co., Inc.*, 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; Cahn, *supra* note 15, at 1124. 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 FAM. MATTERS 43 (2016).

21. 95 Cal. Rptr. 2d at 876. The relevant law allows for “inspection” of records relating to the insemination “only upon an order of the court for good cause shown.” *Id.*

22. *Id.* at 874.

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

nymity.²⁴ In what is apparently the first domestic law to do so, a 2011 Washington statute requires disclosure of donor-identifying information and medical history when a child turns eighteen, but the donor can sign an affidavit of non-disclosure at the time of donation.²⁵ 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 eighteen years old.²⁶

In 2015, potentially far-reaching legislation was introduced in Utah that would have permitted a donor-conceived individual who was at least eighteen years old to access identifying information about the donor, unless the donor had submitted an affidavit denying such disclosure.²⁷ Shortly after its introduction, the original bill was replaced by a much more limited substitute bill permitting donor-conceived offspring access only to nonidentifying medical information.²⁸ The substitute bill was enacted.²⁹

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.³⁰ Even if the donor has not consented to disclosure, the clinic must make a "good faith" effort to provide the child with nonidentifying information and also to notify the donor of any request for information, allowing the donor to reconsider the disclosure declaration.³¹ It remains to be seen whether, and how quickly, states will adopt legis-

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

25. WASH. REV. CODE § 26.26.750 (2017); see Cahn, *supra* note 15, at 1077 n.3; 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." Memorandum from Susan Crockin, as Representative of Soc'y of Assisted Reprod. Med. & Am. Soc'y of Reprod. Med., to the Drafting Comm., UPA Revisions (Mar. 8, 2016), http://www.uniformlaws.org/shared/docs/parentage/2016mar8_AUPA_Comments_SART%20and%20ASRM_Crockin.pdf.

26. WASH. REV. CODE § 26.26.750(2)(b).

27. H.B. 249, 61st Leg., Gen. Sess. (Utah 2015).

28. Letter from Kay L. McIff, Comm. Chair for the Health and Human Servs. Comm., to Utah House of Representatives Speaker (Feb. 24, 2015), <https://le.utah.gov/~2015/comreport/HB249H10.pdf> (recommending adoption of H.B. 249); see also Utah H.B. 249.

29. Utah H.B. 249.

30. UNIF. PARENTAGE ACT § 903 (UNIF. LAW COMM'N 2017).

31. The accompanying memo explained that the Article:
addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. . . . [I]t 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 non-identifying medical history information regarding the gamete donor upon request.

lation based on the revised Uniform Parentage Act. 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, which is a government-supported mutual consent registry that allows siblings to share information.³²

In the United States, the Supreme Court has never held that there is a constitutionally protected associational right even for full siblings, although states may have their own laws to preserve such relationships.³³ While numerous minors who are half-siblings (because they share a donor) have established close relationships,³⁴ this occurs through mutual consent registries and generally involves parents who are supportive of such relationships.³⁵

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*³⁶

Perhaps the first case to consider the potential of sibling rights in the ART context was *Perry-Rogers*, where the two children did not share a donor.³⁷ Two couples, one white (Donna and Richard Fasano) and one black (Deborah Perry-Rogers and Robert Rogers), were patients at the same fertility facility.³⁸ Embryos from both couples were transferred to Donna Fasano, and, because of the fertility clinic’s mistake, Fasano effectively became the gestational carrier for the Perry-Rogers.³⁹ When Fasano subsequently gave birth to two children, one was her biological child and the other was the biological child of the Perry-

Memorandum from the Unif. Parentage Act Drafting Comm. to Unif. Law Comm’n 5 (June 9, 2017), http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_IssuesMemo.pdf (emphasis removed).

32. *Donor Sibling Link*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, <https://www.hfea.gov.uk/donation/donor-conceived-people-and-their-parents/donor-sibling-link-dsl/> (last visited June 2, 2018). For further information about the United Kingdom’s system, see *Welcome to the HFEA*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, <https://www.hfea.gov.uk/> (last visited June 2, 2018).

33. See Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 396 (2012); Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 902–03 (2012).

34. See, e.g., DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited June 2, 2018).

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

36. 715 N.Y.S.2d 19 (App. Div. 2000).

37. *Id.* at 22.

38. *Id.* at 21.

39. *Id.*

Rogers.⁴⁰ 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.⁴¹ Although the Perry-Rogers subsequently opposed the visitation provision, the lower court granted visitation.⁴² On appeal, the court interpreted New York law, which entitles “siblings related by whole or half-blood”⁴³ to petition for visitation, not to include the Fasano child, who was related only through gestation to the Perry-Rogers child.⁴⁴

2. *Bobbie Jo R. v. Traci W.*⁴⁵

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.⁴⁶ In that case, Bobbie Jo sought visitation rights with a half-sibling on behalf of her son.⁴⁷ Bobbie Jo had been involved with the birth mother of each child and also claimed custody rights for herself.⁴⁸ 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.⁴⁹

3. *Pasik v. Russell*⁵⁰

I became involved as an amicus in the Florida case of *Pasik v. Russell*.⁵¹ Susan Russell and Elizabeth Pasik, who became romantically involved in 1998, decided to start a family together.⁵² Pasik purchased donor sperm, and, using that sperm, Pasik and Russell each gave birth to two children.⁵³ The four children shared the same donor sperm, and the women raised the four children together.⁵⁴ When the mothers’ relationship ended in April 2011, each woman assumed custody of the two children to whom she had given birth.⁵⁵ For the next

40. *Id.* at 22.

41. *Id.*

42. *Id.* at 23.

43. *Id.* at 24–25.

44. *Id.* at 25.

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

46. *Bobbie Jo R. v. Traci W.*, No. 11-1753, 2013 WL 2462173, at *3 (W. Va. 2013). The court stated: “[I]t 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 *2 n.4.

47. *Id.* at *1.

48. *Id.* at *1–2.

49. See Naomi Cahn, *The Uncertain Legal Basis for the New Kinship*, 36 J. FAM. ISSUES 501, 509 (2014).

50. *Russell v. Pasik*, 178 So. 3d 55 (Fla. Dist. Ct. App. 2015).

51. *Id.*

52. *Id.* at 57.

53. *Id.*

54. *Id.*

55. See *id.*

two years, Pasik continued to be involved with the two children living with Russell and even provided financial support and health insurance.⁵⁶

After Russell cut off contact, Pasik petitioned the court for time-sharing with the children as the *de facto* or psychological parent.⁵⁷ Russell moved to dismiss Pasik’s petition, claiming that Pasik did not have standing to pursue visitation because Florida did not recognize *de facto* parenthood.⁵⁸ The trial court denied Russell’s motion to dismiss, and she then appealed.⁵⁹ 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.⁶⁰ 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.⁶¹

Federal legislation recognizes siblings’ associational claims in foster care,⁶² but it is rarely recognized in other contexts.⁶³ 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.⁶⁴

III. 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 U.S. baby markets system? To test how ending anonymity in the United States would affect men’s willingness to donate sperm, Glenn Cohen and his colleagues conducted a study with actual donors.⁶⁵ 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 sys-

56. *Id.*

57. *Id.* at 57–58.

58. *Id.*

59. *Id.* at 58.

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

61. *Pasik*, 178 So. 3d at 61.

62. 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, 9–11 (2011); Dawn J. Post et al., *Are You Still My Family? Post-Adoption Sibling Visitation*, 43 CAP. U. L. REV. 307, 329 (2015).

63. E.g., Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 902 (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, 124 (2015).

64. See Douglas Nejaime, *The Family’s Constitution*, 32 CONST. COMMENT. 413, 424 (2017).

65. Glenn Cohen et al., *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIENCES 468, 468 (2016).

tem, and, among those who would still donate, the average increase in payment to donate would be sixty dollars.⁶⁶

The authors' conclusions are, necessarily, somewhat speculative. The authors noted that a potential decrease of almost 30% in the number of donors "would arguably have economic implications for the market for sperm donation."⁶⁷ Yet, without knowing the size of the current donor supply—and the United States keeps no records on donor sperm, apart from those related to medical testing⁶⁸—there is no way of estimating these "arguable" financial implications, a point the authors acknowledged explicitly.⁶⁹ Indeed, the authors also noted that there is "considerable uncertainty . . . regarding the likely market reaction to mandatory donor identification rules and what this means for price."⁷⁰

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 2005,⁷¹ the supply dipped for a few years, but it has increased far beyond where it was prior to the beginning of identity disclosure.⁷² In other countries, supply dipped when donors could no longer be paid.⁷³

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.⁷⁴ The first issue 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.

66. *See id.* at 470, 482.

67. *Id.* at 482.

68. *See, e.g.,* WENDY KRAMER & NAOMI CAHN, FINDING OUR FAMILIES 244 (2013).

69. *See* Cohen et al., *supra* note 65, at 482, 486.

70. *Id.* at 486.

71. *Sperm Donor Anonymity Ends*, BBC (Mar. 31, 2005, 11:03 PM), <http://news.bbc.co.uk/2/hi/health/4397249.stm>.

72. HUMAN FERTILISATION & EMBRYOLOGY AUTH., EGG AND SPERM DONATION IN THE UK: 2012–2013, at 10 (2014), <https://ifqlive.blob.core.windows.net/umbraco-website/2026/egg-and-sperm-donation-in-the-uk-2012-2013.pdf>.

73. 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 1, 2 (2017).

74. *See* Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV. 963, 966, 982 (2004); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1035 (2002).

1. *Will We Still Need Donors?*

There are many potential technologies on the horizon that will largely, although perhaps not completely, eliminate the need for donor gametes. Consider that, with the development of intracytoplasmic sperm injection (“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,⁷⁵ 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.⁷⁶ 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.⁷⁷

And the development of *in vitro* gametogenesis (“IVG”) 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.⁷⁸ IVG is a technique that allows for the creation of gametes from pluripotent or other appropriate stem cells.⁷⁹ As Glenn Cohen and his coauthors 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.”⁸⁰ Future developments in IVG may eventually allow not just two men or two women to produce a child on their own, but may also allow 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.⁸¹ 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.

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

75. See O’Reilly et al., *supra* note 73, at 3–4.

76. See, e.g., *Surrogacy Fees & Costs*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/parents/surrogacy-cost> (last visited June 2, 2018).

77. See Cahn & Carbone, *Three-Plus Parent*, *supra* note 8.

78. HENRY T. GREELY, THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION 121 (2016); Glenn Cohen et al., *Disruptive Reproductive Technologies*, 9 SCI. TRANSLATIONAL MED. 1, 1 (2017); Sonia M. Suter, *In Vitro Gametogenesis: Just Another Way to Have a Baby?*, 3 J.L. & BIOSCIENCES 87, 103 (2015).

79. Cohen et al., *supra* note 65, at 1.

80. *Id.* at 3.

81. See JUDITH DAAR, THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES 11 (2017); KRAMER & CAHN, *supra* note 68, at 4.

2. *The Technology of Knowing*

Advances in DNA testing mean that the ability to maintain secrecy about donor involvement in conception is increasingly unlikely. The pervasiveness of DNA testing means that, even if banks use their best efforts to prevent disclosure,⁸² the donor's identity might be revealed through genetic testing; parents and donor must consider this risk as they choose anonymity. Indeed, people who were not even aware of their donor conception have used this "direct to consumer" testing to learn that they were donor-conceived, even though they did not have cause to question their origins.⁸³ 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.⁸⁴

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.⁸⁵ And, in its guidelines, the American Society for Reproductive Medicine should require that banks and agencies provide counseling to donors about this potential loss of anonymity.

IV. RESPECTING DONOR-CONCEIVED OFFSPRING: ENDING ANONYMITY

At the core of any issues concerning anonymity are donor-conceived individuals themselves. The parents purchase the donor gametes. The procurement of the gametes is an arrangement in which the children are—necessarily—not involved.⁸⁶ Parents are legally entrusted with their children's care, custody, and medical choices when their children are minors, but, certainly by the time the children reach adulthood, they have independent rights.⁸⁷

Families formed through donor conception raise two different sets of issues: (1) ensuring that children know they are donor-conceived and (2) learning the identity of the donor. Each is briefly discussed below.

82. See, e.g., *California Cryobank's Commitment to Donor Privacy*, CALIF. CRYOBANK, <http://www.spermbank.com/about/sperm-donor-confidentiality> (last visited June 2, 2018) ("California Cryobank . . . will always exercise our most strenuous efforts to assure donor anonymity.").

83. See Marilyn Crawshaw, *Direct-to-Consumer DNA Testing: The Fallout for Individuals and Their Families Unexpectedly Learning of Their Donor Conception Origins*, HUM. FERTILITY 1, 1 (2017); Libby Copeland, *Who Was She? A DNA Test Only Opened New Mysteries*, WASH. 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/>.

84. See KRAMER & CAHN, *supra* note 68, at 29–31.

85. Pascal Borry et al., *Genetic Testing: Anonymity of Sperm Donors Under Threat*, 496 NATURE 196, 196 (2013).

86. 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*, in THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS 499 (Leslie Francis ed., 2017).

87. *Id.* at 516–17 (discussing the nonidentity problem).

A. Disclosure of Donor Conception

For decades, the assumption was that parents would not tell anyone they used donor eggs or sperm.⁸⁸ Up to half of parents may never tell their children they are donor conceived.⁸⁹ 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. Moreover, the increasing number of single-parent and LGBT families means that disclosure of the child’s origins may become more common.⁹⁰ By contrast, for different-sex couples, the decision may continue to be more difficult as such families can “pass” without disclosing their 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;⁹¹ of course, the empirical evidence for promoting nondisclosure is similarly limited.⁹² Because of the types 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.⁹³ Indeed, adopted children are much more likely to be told of their origins.

Adoptive parents are not legally required to tell their children that they were adopted. And it would be constitutionally suspect to require parents to tell their children they are donor conceived.⁹⁴ On the other hand, legal regulation can provide alternative means for offspring to learn of their donor conception.

Other countries have begun to address this first level of disclosure, developing such alternative means. In its 2008 legislation, the Australian state of Victoria provided that when a donor-conceived individual applies for a birth certificate, the individual will be informed of the existence of an annotated

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

89. Nancy Hass, *To Tell, or Not to Tell, Your Egg Donor Baby?*, ELLE (Aug. 20, 2015), <https://www.elle.com/life-love/sex-relationships/news/a29904/whose-life-is-it-anyway/>.

90. 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.

91. Guido Pennings, *Disclosure of Donor Conception, Age of Disclosure and the Well-Being of Donor Offspring*, 32 HUM. REPROD. 969, 969–70 (2017); Guido Pennings, *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.

92. Marilyn Crawshaw et al., *Disclosure and Donor-Conceived Children*, 32 HUM. FERTILITY 1, 1 (2017).

93. E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 87–88 (1998) (“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’ . . .”).

94. See *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

birth certificate and be able to view it upon request.⁹⁵ Legislation adopted in Ireland in 2015 mandates that children be informed whether they are donor conceived when they ask for their birth certificates.⁹⁶ If parents know that their children may learn this information through these alternative mechanisms, then such regulation might have a channeling effect that promotes disclosure. To ensure their understanding of this issue, parents could be required, at the time of using donor gametes, to fill out a government-prescribed consent form—to be filed with a registry of some type—on what they intend to tell their child.⁹⁷

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 once they learn of their origins.⁹⁸ As studies have shown, access to identifying information may help offspring socially, emotionally, psychologically, and physically by, for example, offering them a better understanding of their social, cultural, and biographical heritage; satisfying their curiosity; completing their identity; and learning about medical risks.⁹⁹

Of course, many offspring will decide not to access their original birth certificates, and they will be under no pressure to do so. What is important is the opportunity to do so—the capacity for “self-authorship.”¹⁰⁰

Families do not depend on genetics, but the genetic connection is of complicated and sometimes paradoxical importance in donor-conceived families.¹⁰¹ Parents who choose to use donor gametes may want a child to whom they are genetically related and may also choose donors based on the donor's perceived genetic characteristics.¹⁰² 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.¹⁰³ Denying access to the donor's information perpetuates a double standard which acknowl-

95. Donna Lyons, *Extending the “Right to Identity” to Donor-Conceived Children in Ireland: A Jurisdictional Case Study*, 7 IRISH J. LEGAL STUD. 1, 32 (2017).

96. Joyce C. Harper et al., *The End of Donor Anonymity: How Genetic Testing Is Likely to Drive Anonymous Gamete Donation out of Business*, 31 HUM. REPROD. 1135, 1136 (2016).

97. See Adrienne Asch, *Licensing Parents: Regulating Assisted Reproduction*, in FAMILIES: BEYOND THE NUCLEAR IDEAL 123, 137 (2012); Sabatello, *supra* note 25, at 61.

98. Blyth et al., *infra* note 161, at 85.

99. Marilyn Crawshaw et al., *Can the UK's Birth Registration System Better Serve the Interests of Those Born Following Collaborative Assisted Reproduction?*, 4 REPROD. BIOMEDICINE & SOC'Y ONLINE 1, 2 (2017), [http://www.rbmsociety.com/article/S2405-6618\(17\)30003-5/pdf](http://www.rbmsociety.com/article/S2405-6618(17)30003-5/pdf).

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

101. Tabitha Freeman, *Gamete Donation, Information Sharing and the Best Interests of the Child: An Overview of the Psychosocial Evidence*, 33 MONASH BIOETHICS REV. 45, 48 (2015).

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

103. 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”).

edges that genes are important to parents, but should be irrelevant to their children.¹⁰⁴

V. THE “ART” OF SURROGACY

Surrogacy presents somewhat different issues from families created solely through donor gametes.¹⁰⁵ First, the surrogate is known to the parents; there is no issue of anonymity at the time of conception. 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 U.S. clinics report annual data on their assisted reproductive technology cycles to the Centers for Disease Control and Prevention (“CDC”), and the CDC estimates that it is able to collect information on more than 95% of all such cycles.¹⁰⁶ 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.¹⁰⁷ The number of gestational carrier cycles increased by a factor of almost five, from 727 in 1999 to 3,432 in 2013, and, in 2013, these cycles constituted 2.5% of all assisted reproductive technology cycles.¹⁰⁸ The CDC does not appear to collect information on nongestational carrier surrogacy cycles, and researchers suggest that most surrogate births involve gestational arrangements.¹⁰⁹ Just more than half of these cycles were performed in four states: California, Connecticut, Texas, and Illinois.¹¹⁰ Almost 20% of all cycles involved foreign intending parents, meaning the parents involved in the cycle did

104. Issues of genetic essentialism are discussed *infra* Section VI.A.

105. 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).

106. *ART Success Rates*, CDC, <http://www.cdc.gov/art/reports/> (last updated May 16, 2018); Perkins et al., *supra* note 7, at 436.

107. Perkins et al., *supra* note 7, at 436–37.

108. *Id.* at 437.

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

110. Kiran M. Perkins et al., *State Differences in Gestational Surrogacy, United States, 2009–2013*, 127 OBSTETRICS & GYNECOLOGY 62S (2016).

not intend to reside in the state in which the cycle took place.¹¹¹ In just over half of the cycles, a donor egg was used.¹¹²

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.¹¹³

As the Uniform Law Commission recognized when it updated the Uniform Parentage Act in 2017, surrogacy is “controversial,”¹¹⁴ even though litigation is comparatively rare.¹¹⁵ The states that have addressed surrogacy operate on a continuum that ranges from outright prohibition to liberal enforcement of surrogacy contracts.¹¹⁶ A few states ban surrogacy, so surrogacy contracts are invalid and are unenforceable.¹¹⁷ In more than a dozen states, statutes explicitly regulate surrogacy in some form.¹¹⁸

The majority of states lack statutes on surrogacy,¹¹⁹ 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-

111. Perkins et al., *supra* note 7, at 438.

112. Kiran M. Perkins et al., *Differences in the Utilization of Gestational Surrogacy Between States in the USA*, 5 REPROD. BIOMEDICINE & SOC'Y ONLINE 1, 2 (2018).

113. *Id.*

114. UNIFORM PARENTAGE ACT § 8 cmt. (UNIF. LAW COMM'N, Proposed Draft 2017).

115. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1230 (2013) (quoting DiFonzo & Stern, *supra* note 109, at 357) (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, *These Two Dads Almost Lost Their Son in a Bizarre Surrogacy Case*, BUZZFEED (Aug. 27, 2016, 9:56 AM), https://www.buzzfeed.com/tamarlewin/wisconsin-surrogacy-case?utm_term=.nnnXrv167#.hcMK5ObwV.

116. 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).

117. ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 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.

118. FINKELSTEIN ET AL., *supra* note 117, at 9.

119. 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) (seventeen 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).

birth parentage orders,¹²⁰ 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.¹²¹ In contrast to the increasing advocacy for disclosure of donor gametes, there is virtually no discussion of this issue in 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 intending parents, and one-half of gestational surrogacies involve the intending parents’ gametes).¹²²

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.”¹²³ 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.¹²⁴ This echoes studies of embryo donation.¹²⁵

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%).¹²⁶ 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.¹²⁷ And the contact was typically face-to-face, although there was some Facebook or e-mail contact as well.¹²⁸ Surrogates reported that they were generally happy with the level of contact.¹²⁹ 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 identity release donors, and

120. FINKELSTEIN ET AL., *supra* note 117, at 11 (listing Oregon).

121. *Id.* at 8; JACOBSON, *supra* note 19, at 16.

122. See Susan Golombok et al., *Families Created Through Surrogacy: Mother-Child Relationships and Children’s Psychological Adjustment at Age 7*, 47 DEVELOPMENTAL PSYCHOL. 1579 (Nov. 2011).

123. JACOBSON, *supra* note 19, at 58 (“Surrogates merely ‘take care’ of the IPs’ babies during the prebirth period and ‘return them’ to their rightful parents after birth . . .”).

124. Laufer-Ukeles, *supra* note 115, at 1232.

125. E.g., Jenni Millbank et al., *Embryo Donation and Understanding of Kinship: The Impact of Law and Policy*, 32 HUM. REPROD. 133, 136 (2017).

126. Imrie & Jadv, *supra* note 109, at 428.

127. *Id.* at 429.

128. *Id.*

129. *Id.*

many of them had met with the egg donor.¹³⁰ Although they were generally positive about the level of contact, some would have preferred greater contact.¹³¹ In terms of disclosure, when they talked to their children, they were twice as likely to mention the use of the surrogate as the use of a donated egg.¹³² There are few studies on the children of surrogacy, perhaps due to the difficulty of finding research subjects,¹³³ although the few studies that exist show that children of surrogacy are not negatively affected by their origins.¹³⁴ And there is growing attention being paid to the rights of these children in international law.¹³⁵

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. Issues involving the disclosure of the use of the surrogate's use of donor eggs present the same issues discussed earlier with respect to donor conception itself.¹³⁶

VI. RESERVATIONS

Proposals to end anonymity are controversial; scholars and the ART business community have raised numerous objections. First is a concern for equality for donor-conceived offspring. 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 paterni-

130. Lucy Blake et al., *Gay Father Surrogacy Families: Relationships with Surrogates and Egg Donors and Parental Disclosure of Children's Origins*, 106 FERTILITY & STERILITY 1503, 1506 (2016).

131. *Id.* at 1508.

132. *Id.* at 1507; see JACOBSON, *supra* note 19, at 106 (reporting on types of contacts based on interviews with thirty-one surrogates).

133. There is, of course, information about Baby M. See Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html> (at that point, she was twenty-eight, married, and living in London). And, focusing on parental decision-making 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 HUM. REPROD. 3008 (2012).

134. SITAL KALANTRY ET AL., CORNELL INT'L HUMAN RIGHTS: POLICY ADVOCACY CLINIC & NAT'L LAW UNIV.-DELHI, SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED? 20 (2017), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2685&context=facpub>.

135. 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).

136. See *supra* Part I. Gaia Bernstein warns that “surrogacy in the United States is particularly vulnerable to prohibitions on gamete donor anonymity because most states that permit surrogacy recognize and accord legal certainty only to gestational surrogacy, which is highly dependent on donor eggs.” Bernstein, *supra* note 105, at 323.

ty—on those who might want to define family in less-traditional ways”¹³⁷ 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 infringing on parents’ reproductive choices¹³⁸ and even harming children yet to be born, without sufficient countervailing benefits. A final set of concerns relates to the potential for privacy breaches of arguably constitutionally protected interests by invading the privacy rights of donors and donor-conceived families.

A. Biology, Genes, and Family, Sameness and Different

The argument that identity disclosure treats donor-conceived offspring differently is multilayered. Allowing for identity disclosure, according to this argument, results in overemphasizing connections based on biology at the expense of the functional family by reinforcing “genetic essentialism,” the concept that a person is the sum of her genes,¹³⁹ and by giving donor-conceived children rights that other children do not have.

As discussed earlier, 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.¹⁴⁰ At the same time, many of these same parents support the increasing legal recognition that families involve adults related by emotional and sexual intimacy¹⁴¹ 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.¹⁴² For children born to married couples, there is approximate-

137. Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 656, 685 (2016).

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

139. See Kimberly Leighton, *The Right to Know Genetic Origins: A Harmful Value*, 4 HASTINGS CTR. REP., 5, 6 (2014) (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 United States Supreme 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. Cahn, *supra* note 33, at 418.

140. Astrid Indekeu, *Parent’s Expectations and Experiences of Resemblance Through Donor Conception*, 34 NEW GENETICS & SOC’Y 398, 409 (2015).

141. E.g., NeJaime, *supra* note 139, at 2334–35; Petra Nordqvist, *Genetic Thinking and Everyday Living: on Family Practices and Family Imaginaries*, 65 SOC. REV. 865, 878 (2017); Carbone & Cahn, *Parents*, *supra* note 8, at 14.

142. See Vardit Ravitsky, *Autonomous Choice and the Right to Know One’s Genetic Origins*, 44 HASTINGS CTR. REP. 36 (2014).

ly 97% certainty that their mother's husband is their biological father;¹⁴³ for donor-gamete-conceived children, of course, there is 100% certainty that they are not the biological child of at least one of their parents.

Identity disclosure is a process that is distinct from the recognition that family connections can be formed without genetic connection¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶

Concerns about genetic essentialism are certainly legitimate, given both the medical and cultural significance of genes and given their importance to the intending parents.¹⁴⁷ 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 judgment 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.¹⁴⁸ 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 nonsexual reproduction have similarities and differences; they each involve procreation and a resulting child,¹⁴⁹ but the process (and often, the intentionality) for producing that child differs. Donors are sub-

143. E.g., Rob Brooks, *What Are the Chances That Your Dad Isn't Really Your Father?*, CONVERSATION (Apr. 15, 2014, 4:37 PM), <http://theconversation.com/what-are-the-chances-that-your-dad-isnt-your-father-24802>.

144. See, e.g., NeJaime, *supra* note 139, at 2264; Cahn & Carbone, *Three-Plus Parent*, *supra* note 8, at 6–7.

145. 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 141, at 4.

146. *Obtaining Birth and/or Adoption Records*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/adoption/search/records/> (last visited June 2, 2018); Heather Jacobson, *Anonymity in Third Party Reproduction: An Old Dilemma in New Packaging*, 3 J.L. & BIOSCIENCES 660, 663 (2016).

147. E.g., *Seed Capital: The Business of Sperm Banks*, ECONOMIST (Sept. 14, 2017), <https://www.economist.com/news/business/21728982-modern-families-and-differing-national-laws-mean-opportunities-companies-business>; Indekeu, *supra* note 140, at 405–06.

148. 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. 8, 2016), https://www.nytimes.com/2016/04/12/science/extra-marital-paternity-less-common-than-assumed-scientists-find.html?mcu_bz=3.

149. See Cahill, *supra* note 137, at 620.

ject to regulation to ensure the health and safety of their gametes¹⁵⁰ (although there is a robust free sperm movement¹⁵¹); 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.¹⁵² By contrast, where sexual reproduction is involved, there are mandatory rights and obligations imposed on both parents.¹⁵³

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.¹⁵⁴ Allowing access, based on this argument, actually gives them the same rights as other offspring. Ultimately, it is the underlying identity interests of children that should guide the development of new approaches, with the recognition both that donor-conceived children are conceived differently and that 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, the identity release consent donors who are still willing to donate will probably increase the expense of using their gametes.¹⁵⁵ This, then, potentially implicates reproductive technology regulation¹⁵⁶ as well as procreative rights.¹⁵⁷ Mandated identity disclosure might also, based 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 has arisen on the nature of that impact.¹⁵⁸ Many banks have developed new recruiting practices in order to increase their supplies.¹⁵⁹

150. See, e.g., 21 C.F.R. § 1271 (2017).

151. See, e.g., Appleton, *supra* note 12, at 96; Lauren Gill, Note, *Who's Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1725 (2013).

152. Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 1002 (2009).

153. See Cahill, *supra* note 137, at 631–32.

154. See, e.g., Sabatello, *supra* note 138, at 361.

155. See, e.g., Cohen et al., *supra* note 65, at 482.

156. See, e.g., Appleton, *supra* note 12, at 109.

157. See Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 51–54 (2013). See generally John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490 (2008).

158. See, e.g., Eric Blyth & Lucy Frith, *The UK's Gamete Donor 'Crisis'—A Critical Analysis*, 28 CRITICAL SOC. POL'Y 74, 75 (2008); Neroli Sawyer, *Who's Keeping Count? The Need for Regulation Is a Relative Matter*, 92 FERTILITY & STERILITY 1811, 1812 (2009).

159. Cahn, *supra* note 33, at 421.

Countries that have abolished anonymity, such as Sweden, Canada, Switzerland, and the United Kingdom, experienced shortages when they did so; it is, however, hard to tease out whether these shortages were due solely to ending anonymity or whether they were also due to restrictions on payment.¹⁶⁰ 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—that still leaves the other half who would be willing to provide their sperm for more money.¹⁶¹

The research studies and other countries' actual 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.¹⁶² Part of this is due to efforts to develop alternative methods for recruiting donors. In a situation where identity disclosure is expected, rather than novel, additional donors may come forward, particularly if they continue to be paid.¹⁶³

The question remains of just whose interests to prioritize and how to develop alternative means of responding to parents' and donors' potential interests in anonymity and questioning the socially constructed nature of those preferences. A related objection to banning anonymity, for those concerned about supply issues, is that regulation would start the slide down a slippery slope toward regulating not just *what* gametes are available but *who* has access to those gametes.¹⁶⁴ Indeed, the access of gay, lesbian, or single people to reproductive technology is curtailed in some countries, so this is certainly a rational fear; at least prior to *Obergefell*, a state could distinguish between fertility treatment access for heterosexual and same-sex couples.¹⁶⁵ On the other hand, the politics of reproductive technology in the United States are quite complex, ranging from those who oppose regulation of any kind (whether from a libertarian or progressive perspective) to pro-regulation (if not banning) to those who are conservative and anti-choice or who may be concerned with religious principles.¹⁶⁶

160. Bernstein, *supra* note 105, at 291–92; Cahn, *supra* note 33, at 421 (discussing Canada).

161. Eric D. Blyth et al., *Is It Possible to Recruit Gamete Donors Who Are Both Altruistic and Identifiable?*, 84 FERTILITY & STERILITY S21, S21 (2005); see Cohen et al., *supra* note 65, at 485–86, 488.

162. See Fiona Kelly, *Is It Time to Tell? Abolishing Donor Anonymity in Canada*, 30 CANADIAN J.FAM.L. 173, 223–24 (2017).

163. Joanna E. Scheib & Alice Ruby, *Contact Among Families Who Share the Same Sperm Donor*, 90 FERTILITY & STERILITY 33 (2008).

164. Cf. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 74–75 (2015).

165. Hawaii, for example, still does so as of 2017. Cathy Bussewitz, *Hawaii LGBT Couples Seek Equal Access to Fertility Treatment*, PBS (Apr. 9, 2017, 10:40 AM), <http://www.pbs.org/newshour/rundown/hawaii-lgbt-fertility-treatment/>; Robert Greene, *Could This Be the First State to Allow Equal IVF Treatment for Gay Couples?*, PINK NEWS (Apr. 10, 2017, 1:04 PM), <http://www.pinknews.co.uk/2017/04/10/could-this-be-the-first-state-to-allow-equal-ivf-treatment-for-gay-couples/>.

166. See generally EMILY GALPERN, CENTER FOR GENETICS & SOC'Y, ASSISTED REPRODUCTIVE TECHNOLOGIES: OVERVIEW AND PERSPECTIVE USING A REPRODUCTIVE JUSTICE FRAMEWORK (2007), <https://www.geneticsandsociety.org/sites/default/files/ART.pdf>; ELIZABETH MARQUARDT, INSTITUTE FOR AM.

Yet the more general expansion of rights to same-sex couples may make restrictions based on sexual orientation less likely. In fact, the United Kingdom extended equality of treatment to same-sex couples after it abolished anonymity.¹⁶⁷ 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.¹⁶⁸

Responding to this argument begins by looking at the direct impact of donor anonymity on the child who has been created.¹⁶⁹ 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).¹⁷⁰ As discussed earlier, each points to disclosure.

The nonidentity problem, by hypothetically considering the interests of a child who does not yet exist, grants rights to a nonexistent child.¹⁷¹ Outside of the state of Louisiana, however, an embryo is not a juridical person.¹⁷² Current policies focus on the rights, interests, and feelings of a child who actually comes into existence.¹⁷³ 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. Contraception and abortion rights serve to facilitate parental choices 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. 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.

VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS (2006).

167. E.g., Emily Dugan, *NHS Fertility Treatments Allow Two-Mum Families to Reach Record Levels*, INDEPENDENT (Mar. 27, 2014, 4:21 PM), <http://www.independent.co.uk/news/uk/home-news/nhs-fertility-treatments-allow-two-mum-families-to-reach-record-levels-9219415.html>.

168. I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 362 (2008); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 432 (2011) [hereinafter Cohen, *Regulating Reproduction*].

169. See, e.g., Cahn, *supra* note 15, at 1109; *Respect, Autonomy and the Right to Know One’s Origins*, OLIVIASVIEW (July 5, 2017), <https://oliviasview.wordpress.com/2017/07/05/respect-autonomy-and-the-right-to-know-ones-origins/>.

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

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

172. See LA. STAT ANN. § 9:121 (2011); ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY (2013).

173. See Cohen, *Regulating Reproduction*, *supra* note 168, at 426 (“[T]he protection of . . . existing children serves as a powerful organizing principle that justifies state intervention.”) (emphasis removed); Lucy Frith, et al., *Searching for ‘Relations’ Using a DNA Linking Register by Adults Conceived Following Sperm Donation*, BIOSOCIETIES 170 (2017).

Yet, regardless of the constitutional foundations for a procreative right concerning assisted reproduction, which are somewhat ambiguous,¹⁷⁴ 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.¹⁷⁵ It is true that ending anonymity would—presumably—result in different donors.¹⁷⁶ 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.*¹⁷⁷

A third objection is that simply allowing access to 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 contact and efforts to establish a relationship, violating the constitutionally protected privacy rights¹⁷⁸ 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

174. 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 164, at 36. 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).

175. 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*, 36 NEW GENETICS & SOC'Y 354, 357, 365 (2017). The study also reported that most clinics allow intending parents to receive photos of the donor.

176. The previous Section provides further discussion of the supply issues. See *supra* Section VI.B.

177. Margaret K. Nelson et al., *Gamete Donor Anonymity and Limits on Numbers of Offspring: The Views of Three Stakeholders*, 3 J.L. & BIOSCIENCES 39, 55 (2015); see Kate Benson, *Fertility Law Change Puts Spotlight on Donors*, SYDNEY MORNING HERALD (Feb. 25, 2009), <http://www.smh.com.au/national/fertility-law-change-puts-spotlight-on-donors-20090224-8guk.html> (noting reservations of donors to contact with multiple offspring).

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

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 nonbiologically related parent) or even the possibility of “sharing” their child.¹⁷⁹

Learning about the donor, 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 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.

1. *Privacy and Information*

Laws permitting disclosure recognize that donor-conceived offspring may have an interest in accessing this information, but they do not go 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.¹⁸⁰ 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.¹⁸¹ And in other states that have opened adoption records, there have been few complaints about unwelcome contact.¹⁸² 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, and some donors may be overwhelmed by the number of offspring they have helped create.

There are three responses. First, most contact is positive.¹⁸³ Second, given the rate of technological change in the area of genetic tracing, as discussed above, practices of anonymity may simply collapse, so the new normal will be

179. See CHERYL SHULER, *SPERM DONOR = DAD: A SINGLE WOMAN’S STORY OF CREATING A FAMILY WITH AN UNKNOWN DONOR* (2010). This was an argument in the adoption context as well. See THE EVAN B. DONALDSON ADOPTION INST., FOR THE RECORDS II: AN EXAMINATION OF THE HISTORY AND IMPACT OF ADULT ADOPTEE ACCESS TO ORIGINAL BIRTH CERTIFICATES 17 (2010) [hereinafter FOR THE RECORDS II].

180. See, e.g., KRAMER & CAHN, *supra* note 68, at 34.

181. SONIA ALLAN, *DONOR CONCEPTION AND THE SEARCH FOR INFORMATION: FROM SECRECY AND ANONYMITY TO OPENNESS* 228 (2017).

182. THE EVAN B. DONALDSON ADOPTION INST., FOR THE RECORDS: RESTORING A LEGAL RIGHT FOR ADULT ADOPTees 16 (2007); FOR THE RECORDS II, *supra* note 179, at 29. See generally E.D. Blyth et al., *Gamete Donors’ Motivations for, Expectations and Experiences of Registration with a Voluntary Donor Linking Register*, 20 HUM. FERTILITY 268 (2017).

183. See Blake et al., *supra* note 130, at 1508. This has certainly been true in the adoption context, where similar fears have been expressed. See FOR THE RECORDS II, *supra* note 179, at 30. And, in adoptions that have allowed contact between the birth parents and the adoptive family, there are few regrets. E.g., DEBORAH H. SEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., *OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS* 18 (2012).

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, would permit the filing of contact preference forms so that a donor or donor-conceived family could indicate if they had no interest in contact.¹⁸⁴ While difficult to enforce outside of stalking laws, such a form would provide 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.¹⁸⁵

Finally, the very arguments for privacy suggest its complexity; the donor has privacy interests, but so too do donor-conceived offspring. 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.¹⁸⁶ Even if the intending parents have waived access to identifying information about the donor, limiting access only to the donor-conceived person would protect against widespread dissemination. Laws that establish the basis for identity release consent¹⁸⁷ would ensure that future donors are on notice that their identities are subject to limited disclosure and would provide notice to intending parents of the consequences of their choice to use donor gametes.

2. *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 rights 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

184. See ALLAN, *supra* note 181, at 230. For examples in the adoption context, see ALA. CODE § 22-9A-12(c)-(d) (2017) (contact preference form); ME. 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.

185. UNIF. PARENTAGE ACT § 904 (UNIF. LAW COMM'N 2017).

186. See 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); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1013 (2003) On the issue of harm, see generally Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737 (2018).

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

make intimate decisions.”¹⁸⁸ Parents who have created families with donor gametes may feel threatened in their own parenting as their offspring search.¹⁸⁹

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 eighteen 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 eighteen, she becomes legally independent and has her own constitutional interests.

Anonymity served to protect the family against the stigma of infertility, the shame in not producing biologically related offspring. With the increasing number of single parents and gay and lesbian parents, who are obviously unable to create biologically related offspring, and with the rising number of older women having children, 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 (as is both social and physical infertility), leading to even stronger families. According to one study of parents who intended to disclose, as the social connections grew stronger between the parent and the child, parents became more confident in their connections with their children.¹⁹⁰ 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,¹⁹¹ rather than viewing the relationship as being challenged by this new information.

Finally, some parental and donor interests could actually be *promoted* through these same regulations—interests such as making contact with genetically related offspring, their parents, and even the donor; ensuring the integrity of their own families; learning important medical information; and respecting their children’s interests. Donors may change their minds, so blanket anonymi-

188. Todd Essig, *Balancing the Rights of Donor Offspring with Those of Donors: But What About Parents?*, FORBES (June 30, 2011, 1:12 PM), <http://blogs.forbes.com/toddesig/2011/06/30/balancing-the-rights-of-donor-offspring-with-those-of-donors-but-what-about-parents/>.

189. See, e.g., Dorothy A. Greenfield & Susan Caruso Klock, *Disclosure Decisions Among Known and Anonymous Oocyte Donation Recipients*, 81 FERTILITY & STERILITY 1565, 1567 (2004) (finding some women who chose anonymous donors did so to prevent the donor from interfering with their parenting decisions); 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 179, 183 (2008) (discussing parents’ fear of disrupting the child’s relationships).

190. Astrid Indekeu et al., *When ‘Sperm’ Becomes ‘Donor’: Transitions in Parents’ Views of the Sperm Donor*, 17 HUM. FERTILITY 269, 274 (2014); Astrid Indekeu et al., *“Of Course He’s Our Child”: Transitions in Social Parenthood in Donor Sperm Recipient Families*, 26 REPROD. BIOMEDICINE ONLINE 106, 109 (2014).

191. See Jenna Slutsky et al., *Integrating Donor Conception into Identity Development: Adolescents in Fatherless Families*, 106 FERTILITY & STERILITY 202, 206 (2016) (“[S]ecurely attached adolescents would be more willing to engage in the sometimes challenging task of exploring donor conception . . .”).

ty overlooks donors' interests in becoming known and possibly establishing a relationship with their offspring. In the analogous adoption world, birth mothers, who relinquished children under a regime of secrecy, have sought out their biological children.¹⁹²

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.

VII. 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.¹⁹³ Consequently, that analysis does not explicitly address the interests of donor-conceived offspring as they grow up.¹⁹⁴ 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 consent donors, questions surrounding disclosure reflect policy choices and rights priorities.

Moving toward disclosure respects not only potential relational interests, but it 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 a 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 the children are minors, but respects the offspring's 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

192. E.g., Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 MICH. J. GENDER & L. 33, 39–43 (2013); Tony Gambino, *My Philomena*, SLATE (Feb. 24, 2014, 11:30 PM), 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.

193. 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, 110 (2015); Cohen et al., *supra* note 65, at 474–75 n.31.

194. 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).

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.