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# Accidental Incest: Drawing the Line - Or the Curtain? - For Reproductive Technology

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ACCIDENTAL INCEST: DRAWING THE LINE – OR THE CURTAIN? –  
FOR REPRODUCTIVE TECHNOLOGY

*Naomi Cahn*\*

This article calls for setting limits on the number of offspring born from any one individual's gametes, and for continuing to sanction incest, even when it comes to adult, inter-sibling consensual behaviour. The article examines the issues of inadvertent consanguinity raised by third-party gamete use through a feminist lens on both incest and reproductive technology. The central questions concern regulation of reproductive technology, such as whether legal restrictions on the fertility market might diminish the possibilities of accidental incest, as well as whether criminal and civil sanctions of intrafamilial sexual behavior should apply to relationships created through reproductive technology; these, in turn, require examinations of the fertility business itself as well as broader justifications for incest prohibitions.

INTRODUCTION

Incest is an increasing concern in the brave new world of test tube families. In 1980, Martin Curie-Cohen raised the possibility of “inadvertent inbreeding” from donor sperm. Others have called this “accidental incest, where the offspring of donated sperm or ova meet and are unknowingly attracted.”<sup>1</sup> The fear is pervasive, but fundamental questions remain: Is this really incest? Should the law treat it as incest?<sup>2</sup> In other countries, the

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<sup>1</sup> Libby Purves, *Whose Body is it Anyway?*, Times Online, Jan. 15, 2008, available at [http://www.timesonline.co.uk/tol/comment/columnists/libby\\_purves/article3187337.ece](http://www.timesonline.co.uk/tol/comment/columnists/libby_purves/article3187337.ece); Steven Kotler, *In an Industry Veiled in Secrecy, a Powerful L.A. sperm peddler Shapes the Nation's Rules on Disease, Genetics – and Accidental Incest*, LA Weekly (Sept. 27, 2007).

<sup>2</sup> All states criminalize sexual relationships between genetically related parents and children as well as full-blooded siblings, and the civil system voids any marriages between these family members. States vary on the civil and criminal sanctions for relationships based on affinity, such as marriage or adoption. See generally Model Penal Code § 230.2 (Official Draft and Revised Comments 1980).

In the reproductive technology area, Guido Pennings has suggested that, in certain contexts, such as when one sibling uses another sibling's gametes, that incest is a problematic concept; the traditional definition of incest involves a sexual relationship between family members, and the technology enables reproduction *without* any type of interpersonal sexual relationship Guido Pennings, *Incest, Gamete Donation by Siblings and the Importance of the Genetic Link*, 4 *Reproductive Biomedicine Online* 13, 14(2002), available at

fears of accidental incest have resulted in precautionary legislation that place limits on the number of offspring any given donor can produce. The Netherlands restricts the number of children from any individual donor to 25; in England and Australia, no more than 10 families can use the same donor, although the number of children per family is unlimited. In the United States, there are no legal limits on the number of offspring, but with more than 40,000 children born from donor eggs and sperm last year,<sup>3</sup> concerns about what is now called “inadvertent consanguinity” are quite real.

Outside of the reproductive technology context, incest is in the air – and on the air. The ABC Sunday evening soap opera, *Brothers and Sisters*, has both symbolic and actual overtones of incest. The highest courts in Germany and England have each upheld their criminal incest prohibitions within the past year.<sup>4</sup> Legal commentators are suggesting that prohibitions on incest, at least when defined as private consensual sexual behavior between adults, may go the same way as private consensual sexual behavior between same-sex partners.<sup>5</sup>

This article examines the issues of inadvertent consanguinity raised by third-party gamete use through a feminist lens on both incest and reproductive technology. The central questions concern regulation of reproductive technology, such as whether legal restrictions on the fertility market might diminish the possibilities of accidental incest, as well as whether criminal and civil sanctions of intrafamilial sexual behavior should apply to relationships created through reproductive technology; these, in turn, require

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<http://users.ugent.be/~gpenning/> OR

<http://www.rbmonline.com/4DCGI/Article/Detail?38%091%09=%20340%09>.

This article does not address the legal or ethical issues involved in this use of the reproductive technology.

<sup>3</sup> See Naomi Cahn, *Test Tube Families: Why the Fertility Market Needs Regulation* (forthcoming 2009). The Centers for Disease Control collects statistics on the number of children born from donor eggs and embryos, but not from donor sperm. Estimates vary, with numbers ranging from 20,000-30,000, and approximately 10,000 children born from donor eggs or embryos. Sperm banks constitute \$75 million of the more than \$3 billion annually spent in the fertility market. Kotler, *supra* note \_\_\_.

A note about language: throughout this area, language misrepresents actual practices. Some have suggested, for example, that artificial insemination be labeled “alternative insemination.” And sperm and egg donors are, in most cases, sperm and egg *sellers*, although some gamete providers are not paid for their contributions. Nonetheless, the practice is controlled by the image of charitable gametic contributions, see Rene Almeling, . *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material.*, 72 *Am. Soc. Rev.* 319 (2007); “Why do you want to be a donor?": Gender and the Production of Altruism in Egg and Sperm Donation.” 25 *New Genetics and Soc.* 143 (2006) -- notwithstanding the size of the fertility market. Consider the mixed messages on charity and commodification in the following news article, Stephanie Smith, *Dim Economy Moves Women to Donate Eggs for Profit* (Aug. 6, 2008), avail. at <http://www.cnn.com/2008/HEALTH/08/05/selling.eggs/index.html>. Donor-conceived offspring who share a gamete provider may consider themselves to be “half-siblings.”

<sup>4</sup> Fiona Barton, *Shock for the Married Couple Who Discover They Are Twins*, DAILY MAIL, Jan. 12, 2008, 1<sup>st</sup> §, at 5; *Incest Remains a Crime—Mum’s Your Aunt*, SYDNEY MX, Mar. 14, 2008, at 10.

<sup>5</sup> *Lawrence v. Texas*; see, e.g., Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U.L. Rev.* 1543, 1609 (2005)(questioning the bases for the incest taboo). William Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *Fla. L. Rev.* 1011, 1057 (2005)(“In large part because the social and normative stakes of adult incest among cousins or siblings by affinity are so low, Lawrence and its (or my) jurisprudence of tolerance do not clearly require that even these statutes violate the Fourteenth Amendment”).

examinations of the fertility business itself as well as broader justifications for incest prohibitions. That is, if there is nothing wrong with adult siblings (or half-siblings) engaging in sexual relationships, then one of the primary bases for offspring-based limits on donors is moot.

Incest lies at the intersection of family law and criminal law – the crime depends on the definition of family; it criminalizes what would otherwise be legal, consensual acts because of the family relationship between the parties.<sup>6</sup> It is defined as involving family members, and it criminalizes behavior between individuals because they are family members, regardless of whether the underlying behavior would itself be subject to sanction.<sup>7</sup> Incest also has civil implications: an incestuous marriage is void from the outset, without any action by either spouse.<sup>8</sup> As courts and legislatures expand the definition of what should be included in the private and protected sphere of consensual relationships, incest should continue to be excluded. Calls for relaxing the prohibition on incest come from two directions, one constitutional and the other jurisprudential. First, there is the claim that the Supreme Court’s recent decision in *Lawrence v. Texas* calls into question incest bans because of the private nature of the behavior; second, there is the claim that incest inherently serves to reinforce the traditional nuclear, heterosexual family, and is thus a patriarchal, hierarchical construct.<sup>9</sup> Few, however, question the basic incest ban on relationships between genetically-related parents and children. Moreover, as this article argues, from both a constitutional and jurisprudential standpoint, incest is distinctly different from same-sex sexual behavior.

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<sup>6</sup> See generally Jennifer M. Collins, Ethan J. Leib, and Dan Markel, Punishing Family Status, \_\_ B.U.L. Rev. \_\_ (forthcoming 2008). Many states have criminalized incestuous relationships based both on consanguinity and affinity. But see *Commonwealth v. Rahim*, 805 N.E.2d 13 (Mass. 2004)(incest indictment dismissed in case involving sexual relationship between 60 year-old stepfather and his 16 year-old stepdaughter because of lack of blood relationship)(of the three dissenters, only one also dissented in *Goodridge*). In the adoption context, for example, many states bar siblings who are related by adoption rather than blood, from marrying. See Naomi Cahn, Perfect Substitutes or the Real Thing?, 2003 Duke LJ 1073. As discussed *infra*, genetic half-siblings often do seek connection with one another.

<sup>7</sup> Literary critic Fran Bartkowski explains that “Kinship is the place where lines of affiliation, consanguinity and affinity come together. And incest is that site where law intervenes in these arrangements of intimacy. Frances Bartkowski, *Kissing Cousins: A New Kinship Bestiary* (forthcoming 2008)(manuscript at 10).

<sup>8</sup> See Douglas Abrams et al., *Contemporary Family Law* (2006); Joan Meier, The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests, 70 Wash. U. L.Q. 85 (1992).

<sup>9</sup> See Brett H. McDonnell, *Is Incest Next?*, 10 CARD. WOMEN’S L.J. 337, 359 (2004); Note: *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family”*, 119 HARV. L. REV. 2464, 2465 (2006)(“incest law currently ignore or obscure issues of consent”); etc.. While some advocate decriminalizing incest between consenting adults, there is no debate over the need to criminalize parent-child sexual relationships. See, e.g., Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 145-149 (2007)(suggesting that, where it is available, prosecutors may file criminal charges under the lesser penalties applicable to incest than to child sexual abuse); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim’s Siblings*, 51 Emory L.J. 241 (2002). In discussing father-daughter incest, Wilson notes that, when one child is molested, there is a high risk of additional siblings being sexually abused. Robin Fretwell Wilson, *Removing Violent Parents from the Home: A Test Case for the Public Health Approach*, 12 Va. J. Soc. Pol’y and L. 638, 665 (2005).

Ultimately, the article calls for setting limits on the number of offspring born from any one individual's gametes, and for continuing to sanction incest, even when it comes to adult, inter-sibling consensual behaviour. These sanctions on adult behaviour need not necessarily be criminal, so long as they continue to express strong antipathy and disapproval. I must confess that I feel uncomfortable in differing from many other thoughtful commentators in this area who have challenged the existence of a criminal incest ban.<sup>10</sup> For example, Professors Collins, Leib, and Markel argue that consensual sexual relationships between adults, which might otherwise be subject to incest laws, should be decriminalized and, to the extent that there is abuse in these relationships, there are non-family based criminal laws that would apply.<sup>11</sup> They would, however, "agree that when sexual misconduct occurs in a relationship of asymmetrical dependency, a sentencing enhancement is warranted for the breach of trust created by that asymmetrical dependency."<sup>12</sup>

While I agree with their concerns that incest laws can reinforce the traditional nuclear family form<sup>13</sup> and infringe on private relationships, I remain concerned about the "breach of trust" between family members, even when the family members are adults. This breach of trust occurs whether family is defined by function, affinity, or genetics. Moreover, given that incest typically occurs between a younger woman and an older man, generally of a different generation (but sometimes not), I remain concerned about power asymmetries in these relationships based on the intersection of family and gender. On the other hand, applying this rationale to half-sibling who share the same donor but grew up in different families is far trickier; consequently, the article explores the traditional bases of the incest ban before suggesting that, for multiple reasons, the incest ban apply to such half-sibling relationships, even though these power imbalances probably do not exist. The article also calls for restrictions on the number of offspring produced by any individual gamete donor for multiple reasons, not just because this serves as a limit on the number of potential cases of "accidental incest" but also because of concerns about the health of the donors, about donors' willingness to disclose their identities to potentially 100 "offspring."

As an initial matter, to show the culturally contested significance of reproductive technology, Part I briefly explores feminist approaches to the topic. Developing a feminist approach to use of the reproductive technologies requires recognizing their promises and limits, promises of liberation ranging from freedom from the biological clock to new perspectives on male bodies, and limits on women's autonomy, ranging from the mothering mandate to selling eggs. Moreover, feminism provides insight into the debates over whether one man can "father" too many children. Part II turns to a discussion of existing practices on recruiting and limiting donors in the reprototech world. It then suggests reasons for enacting limits on donors, including the rationales that other

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<sup>10</sup> See, e.g., Collins, Leib, and Markel, *supra* note \_\_; Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 758-765 (2002)(questioning marital incest prohibitions).

<sup>11</sup> Collins, Leib, and Markel, *supra* note \_\_ (draft at 67).

<sup>12</sup> *Id.* at 66.

<sup>13</sup> For example, incest laws would not protect a child with gay or lesbian parents, where the state does not allow the second parent to establish a legal relationship with the child. Draft at 65.

countries have used. For egg donors, the equation is much simpler than sperm donors; there are health concerns for women who donate too often. Sperm, however, is a constantly renewable resource, and there is little concern about the long-term health of frequent donors. Instead, the issues implicate broader concerns of incest and anonymity, from genetics to disease transmission to moral repugnance. An exploration of how the gamete market is currently structured and managed provides the context for discussing the difficulties of further regulation.

To many people, incest just seems wrong,<sup>14</sup> and this fear of incest is fundamental to many of the justifications for incest and then to numerical limits on gamete donors. Part III explores the various possible sources for this fear of incest; rationales for justifying the incest ban come from diverse sectors, including anthropology, genetics, religion and evolutionary biology. As part of the survey of perspectives on incest, it also discusses the conflicting approaches within feminism to incest. Next, Part IV analyzes the existing legal literature on incest, ranging from Justice Scalia's hand-wringing fears about the limited longevity of incest bans to scholars' arguments against the incest ban, which, presumably unintentionally, provide support for Scalia's concerns. Finally, Part V offers preliminary suggestions rooted in feminist theory for a justification for regulating incest. This article advocates limits on the numbers of children born with the use of any one donor's gametes. It may be possible to limit the number of children born with the use of any one donor's gametes without a full-scale examination of incest.

In the context of the new reproductive technologies, Jurgen Habermas has suggested that there is a need to "moralize human nature" and assert "an ethical self-understanding of the species."<sup>15</sup> In responding to this challenge and examining the morality of our current approaches to the new reproductive technologies, my intent is to promote an ethical approach to developing new laws that respects human dignity. My intent is also to examine the points of intersection of various feminist approaches to issues within reproductive technology. Feminism appears repeatedly in considerations of the utility of the technologies, providing an appreciation of what it means (for the provider, the recipients, and the child) to use other-provided gametes. Feminism also offers a framework for articulating a coherent, sensitive, and contextual approach to regulation. Developing this framework includes both an examination of the differing feminist approaches to use of the technology (see Part I) as well as an analysis of whether incest provides a meaningful construct (see Part III).

## I. FEMINISM, REPRODUCTIVE TECHNOLOGY, AND THE MARKET

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<sup>14</sup> See Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psych. Rev.* 814 (2001); David A. Pizarro and Paul Bloom, *The Intelligence of the Moral Intuitions: Comment on Haidt (2001)*, 110 *Psych. Rev.* 193 (2003); see also Paul H. Robinson, Robert Kurzban, and Owen Jones, *The Origins of Shared Intuitions of Justice*, 60 *Vand. L. Rev.* 1633, 1645 (2007).

<sup>15</sup> Jurgen Habermas, *The Future of Human Nature* 25 (2003). Although I disagree with his argument that this then should result in "ensur[ing] the contingency or naturalness of procreation," *Ibid.*, 25-26, I agree on the significance of "modernity having become reflective." *Ibid.*, 26. For me, this book is reflecting on what modernity has wrought.

The promise of the reproductive technologies – producing babies – now goes beyond curing infertility and challenges our conception of natural families as families that are static and unchanging.<sup>16</sup> Creating a family, regardless of whether you are an infertile husband/wife couple, a same-sex couple, or a single person, now often involves (although does not require!) deliberate choice. Indeed, approximately two-thirds, or four million, of all pregnancies in the United States are “wanted”<sup>17</sup> (although only a very small portion of these are to the millions of people defined as infertile). Of course, use of the technologies is not equally available to all, regardless of sexual orientation, class, or race. Moreover, the possibility of purchasing eggs, sperm, or embryos from another person has engendered its own controversies.

The politics of reproductive technology are deeply intertwined with the politics of reproductive rights.<sup>18</sup> This is a message that conservatives understand profoundly, and that accounts for many of the legal and policy debates swirling around the technologies, debates ranging from abortion to fertility treatment for poor women. On the other hand, many feminists have not connected the two movements, and, although the reproductive rights issue has a long feminist genealogy, infertility does not. This section first provides a feminist framework for understanding reproductive technology, before describing the infertility business and its regulation. Feminist ambivalence to reproductive technology [Fragment?]

#### A. Feminisms and Reproductive Technologies

Much of the feminist history of reproductive politics involves an examination of attempts to control fertility and sexuality by women, such as through contraception or the power to say no to sex, and by others, such as through eugenics. While this history has typically included relatively little inquiry into the need to enhance fertility, nor an examination of the laws surrounding conception support, there is a developing literature as feminists explore the multiple legal and policy issues posed by the new reproductive technologies. Reproductive technologies promise to rescue women from two different sets of dilemmas: 1) coerced baby vessel v. voluntary motherhood; or 2) baby v. career.<sup>19</sup> Yet, as some feminists have alleged, these promises may be an illusion; the technology might simply reinforce the importance of motherhood in women’s lives and the difficulty of women “having it all.”

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<sup>16</sup> See, e.g., Janet Dolgin, *Defining the Family: Law, Technology, and Reproduction in an Uneasy Age*, (New York: New York University Press, 1999), 246.

<sup>17</sup> <http://www.thenationalcampaign.org/resources/pdf/FactSheet-KeyData.pdf> (2007).

<sup>18</sup> For insightful commentary on reproductive rights, see, e.g., Roe Rage, Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 384 (2007); Reva Siegel, *SEX EQUALITY ARGUMENTS FOR REPRODUCTIVE RIGHTS: THEIR CRITICAL BASIS AND EVOLVING CONSTITUTIONAL EXPRESSION*, 56 Emory L.J. 815 (2007).

<sup>19</sup> E.g., Ready, *supra* note \_\_; ; Goodwin, \_\_ G.W. L. Rev. (forthcoming 2009); June Carbone, \_\_ G.W. L. Rev. \_\_ (forthcoming 2009). On the issue of childfree living, see, e.g., Elinor Burkett, *The Baby Boon: How Family-Friendly America Cheats the Childless* (2000); *Maybe Baby: 28 Writers Tell the Truth About Skepticism, Infertility, Baby Lust, Childlessness, Ambivalence, and How they Made the Biggest Decisions of their Lives* (Lori Leibovich ed. 2006); Nicki Defago, *Child-Free and Loving It* (2005).

## 1. The Mothering Mandate

In its starkest terms, the basic debate goes like this: for those who have access to it, reproductive technology exploits women because it reinforces a pronatalist ideology; for those who do not have access to it, reproductive technology provides evidence of privilege, allowing wealthy white women to reproduce themselves; and the mere concept of reproductive technology encourages women to live men's lives.<sup>20</sup> With donor eggs or surrogacy, this involves the transfer of money from wealthier couples to poor women, who do not freely choose their participation. It is a market transaction that resembles a sale. Indeed, as one student note alleges, it is difficult to control the "rapaciousness of U.S. baby consumers."<sup>21</sup> The money and energy spent chasing reproductive technology could better be spent on reforming the child welfare system both here and abroad and paying for basic access to reproductive services for all women.

The related critique, a "patriarchal reproduction" position, fears that women are unable to choose the new technologies voluntarily and that instead, male doctors or male partners have indoctrinated women to produce children. Because of the mothering mandate, women do not really have a choice concerning whether or not to use the technologies; moreover, they have little understanding of the technologies themselves.<sup>22</sup> Women are taught to value their lives based on whether they have produced children, and are culturally coerced onto a never-ending treadmill of infertility. Catharine MacKinnon has made similar arguments with respect to the authenticity of women's voices, emphasizing that women are unable to make valid choices under patriarchy.<sup>23</sup> In other words, infertile women are socialized into wanting biological children and, therefore, the law should foreclose the possibility of choosing the new technologies so that women are not victimized. Professor Michele Goodwin critiques the "seductive appeal" of these technologies because they appear to allow women to defer childbearing so that they can advance in their careers – yet the health and emotional risks of using reproductive technology is minimized.<sup>24</sup>

While this "patriarchal reproduction" analysis presents a significant and cautionary perspective, it nonetheless both denies women any agency and also reinforces the restrictions on options by income and class. Within feminism, there are numerous other approaches to the possibility of reproductive technology, and other feminists might claim that this radical feminist approach<sup>25</sup> denies the possibility of choice under existing

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<sup>20</sup> For an articulation of these conflicting positions, see Karey Harwood, *The Infertility Treadmill: Feminist Ethics, Personal Choice, and the Use of Reproductive Technologies* (Chapel Hill: University of North Carolina Press, 2007).

<sup>21</sup> Nicole Bartner Graff, Note: "Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?," 27 *Syr. J. Int'l L. & Com.* 405, 430 (2000).

<sup>22</sup> Gena Corea, *The Mother Machine* 166-69 (1985).

<sup>23</sup> Catherine MacKinnon, *Towards a Feminist Theory of the State* 126-54 (1989)

<sup>24</sup> Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 *J. Gender Race & Just.* 1, 4-5 (2005).

<sup>25</sup> Just as there are a diversity of views among feminists generally, each of the different strands of feminism has a multiplicity of views; some radical feminists have celebrated the ability to separate sex



social conditions, this view treats women as passive victims, disempowered from making their own legal choices concerning the reproductive technologies. Religious ethicist and philosopher Karey Harwood, who is concerned about the “overconsumption” of the new reproductive technologies and how ART encourages women to delay their childbearing, has nonetheless suggested that “the charge of pronatalism is overly simplistic,”<sup>26</sup> and that the focus should shift to how our culture can support caregiving. She supports the treatment of infertility through reproductive technology, but suggests that women consider having children at a younger age, rather than waiting until it becomes more difficult.

Instead, this narrative can be turned around to become more celebratory, focusing on how reproductive technology allows alternative opportunities to create children, and may serve to disrupt the vision of the traditional married heterosexual family. Indeed, many believe that the technologies are threatening because of this potential to allow alternative family forms that do not involve one mother and one father.<sup>27</sup> Moreover, an alternative, more celebratory perspective suggests that women may have helped to shape the new technologies, or that women have, at least in some sense, chosen to undergo the risks associated with them. It may even be, as Professor Martha Ertman argues, that women and men change roles when it comes to consumption of donor sperm.<sup>28</sup> That is, men are the mere sperm providers, women the discerning consumers who want men only for their bodies.<sup>29</sup> Indeed, while women’s experiences are mediated through a culture that reinforces biological motherhood, they may still look to technology as means of empowerment for choosing with whom and when to have children.

## 2. Having It All

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from reproduction. For one vision of this, see Shulamith Firestone, *The Dialectic of Sex* (1970). Debora Spar briefly considers the diverging early responses of feminists to IVF. Debora Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 26 (2006); see also Liza Mundy, *Everything Conceivable: How Assisted Reproduction is Changing Our World* (2007).

<sup>26</sup> Harwood, *supra* note \_\_, at 102, 160.

<sup>27</sup> Elizabeth Marquardt suggests: “Our culture needs a serious debate about the implications of technologies used to form many of today’s alternative families . . . Our culture also needs to face up to the importance of mothers and fathers in children’s lives.” Elizabeth Marquardt, “My Daddy’s Name is Donor,” *Chi. Trib.* May 15, 2005, avail. at <http://www.americanvalues.org/html/donor.html>. As Kay Hymowitz charged, “American fatherhood has yet another hostile force to contend with: artificial insemination.” Kay S. Hymowitz, *The Incredible Shrinking Father*, *Chi. Sun-Times*, April 29, 2007, available at [http://www.manhattan-institute.org/html/chicsuntimes-the\\_incredible\\_shrinking.htm](http://www.manhattan-institute.org/html/chicsuntimes-the_incredible_shrinking.htm). Some are opposed to creating life outside the womb. E.g., Nicole Klass, *Making Babies, For a Price*, available at [http://www.metroland.net/back\\_issues/vol29\\_no49/features.html](http://www.metroland.net/back_issues/vol29_no49/features.html) (discussing opposition of Citizens Concerned for Human Life).

<sup>28</sup> Martha Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 *N.C.L. Rev.* 1 (2003).

<sup>29</sup> *Id.* at 41.

When the American Society for Reproductive Medicine (ASRM)<sup>30</sup> decided to launch an infertility awareness campaign in 2001, emphasizing that a number of factors – ranging from smoking to age – affect infertility, it was concerned that a discussion of age might, on the one hand, be seen as encouraging adolescent pregnancy, and, on the other hand, as castigating women. And, once the ASRM rolled out these “Protect your Fertility” advertisements, the National Organization for Women viewed this as a “scare campaign.”<sup>31</sup> Advertisements, like those involving a baby bottle shaped like an hourglass, were viewed as giving the impression that younger women must “hurry up and have kids” or give up and never have them, claimed Kim Gandy, the head of the National Organization for Women.<sup>32</sup> Others saw the message as telling women that they should not be too ambitious, and should return to their homemaking roles.<sup>33</sup> Feminist health advocate Barbara Seaman accused the major drug companies which are engaged in selling hormones, of encouraging women “to feel guilty . . ., implying that infertility is on the rise because feminism tricked women into focusing on careers.”<sup>34</sup>

As feminists have alleged, it is possible to turn women’s age-related fertility decline into an admonition that women should have babies at a younger age, and to undercut women’s advances towards equality.<sup>35</sup> Indeed, the national average age of a woman’s first birth has risen from 21.4 in 1970 to 25.2 in 2004.<sup>36</sup> For college-educated women, the average age of first birth is 30.1.<sup>37</sup> “Within such a model, “responsible” reproduction follows financial independence and emotional maturity,”<sup>38</sup> leading women to have children after they have established themselves in their careers – but at a time of declining fertility. Assisted reproduction thus becomes a critical component of feminist support for gender equity, with reminders of age-based limits as spoilers.

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<sup>30</sup> The ASRM has approximately 9,000 members, 7,000 of whom are physicians, and published a leading obstetrics/gynecology scholarly journal, *Fertility and Sterility*. See American Society for Reproductive Medicine, History and Purpose, <http://www.asrm.org/history.html>

<sup>31</sup> Liza Mundy, *Everything Conceivable: How Assisted Reproduction Is Changing Men, Women, and the World* (New York: Knopf, 2007), 43 (quoting Kim Gandy, then president of NOW); See Claudia Kalb, “Should you Have Your Baby Now,” *Newsweek*, Aug. 13, 2001, 40.

<sup>32</sup> Nancy Gibbs, “Making Time For A Baby; For years, women have been told they could wait until 40 or later to have babies. But a new book argues that’s way too late” *Time Magazine*, Apr. 15, 2002, Sec. Society, p. 48.

<sup>33</sup> *Ibid.*, p. 48.

<sup>34</sup> Barbara Seaman, *Treating Infertility: Amid a Confusing Array of Resources, How to Decide Which you can Trust*, Women’s Rev. Books (2004), available at <http://www.wellesley.edu/WomensReview/archive/2004/10/highlt.html#seaman>

<sup>35</sup> As one woman warns, this might “merely make women feel even more anxious and guilty about being in a situation not necessarily of their own making.” Jemima Lewis, *Infertility*, Sunday telegraph, June 8, 2008, at 20. For analysis of how becoming a mother affects women’s workplace equality, see, e.g., Joan C. Williams and Nancy Segal, *Beyond The Maternal Wall: Relief For Family Caregivers Who Are Discriminated Against On The Job*, 25 Harv. Women’s L.J. (2003); the journal’s forthcoming article on a related issue??; Naomi Cahn and Michael Selmi, *The Class Ceiling*, 65\_ Md. L. Rev. 435 (2006).

<sup>36</sup> Elizabeth Gregory, *Ready: Why Women are Embracing the New, Later Motherhood* 3 (2007).

<sup>37</sup> *Id.*

<sup>38</sup> See Naomi Cahn and June Carbone, *Lifting the Floor: Sex, Class, and Education*, \_\_ Balt. L. Forum \_\_ (forthcoming 2008).

Shunning information about the relationship of infertility and age ignores biological facts and, ultimately, not only inhibits women's understanding of their own fertility but also ignores the necessity of providing the legal structures necessary to give meaning to reproductive choice. Information about controlling fertility must range from means for preventing conception to means for promoting conception. It is only with this information that reproductive choice becomes a meaningful concept; choice cannot mean only legal control over the means NOT to have a baby, but must include legal control over the means to have a baby. This knowledge can enrich the work/family literature. Using a younger woman's eggs allows (for better or worse) a woman to extend her own fertility; using donor sperm facilitates the formation of families outside of the heterosexual, two-parent structure.

The dichotomy between women as victims of technology and women as agents in needing and demanding the technology is false. Instead, while women make choices constructed by and within a social ideology that values childbearing, they are still able to exercise some control over their options within these social constraints. Arguing that women are unable to make their own decisions about reproductive technology reflects an outmoded view of women as dependent, passive creatures, without a corresponding recognition of the context in which these choices are constructed. Instead of taking away options for women, the focus should be on reforming the surrounding social ideology: motherhood at any cost.

### 3. Connections

Feminism suggests that legal institutions should "protect and nurture the connections that sustain and enlarge us."<sup>39</sup> While this, of course, leads to respect for connections between family members, it also results in an acknowledgement of the connections that many donor siblings and parents feel to one another – and to their donors. Indeed, sperm banks increasingly allow their clients to choose either identified or anonymous donors.

Donor-conceived offspring often rue their lack of connection with at least one-half of their genetic heritages.<sup>40</sup> Because they want knowledge about their biological progenitors, and because of their emotional needs for this knowledge, donor offspring and their parents have begun to advocate for disclosure of their donor's identity.<sup>41</sup> Indeed, many women have begun to use the internet "to expand their kinship circle, to

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<sup>39</sup> E.g., ROBIN WEST, *CARING FOR JUSTICE* 4 (1997). Professor West continues, arguing that the law has not intervened in intimate relationships to protect against the dangers of connection; see generally, Linda McClain, *The Place for Familie* (2006); Naomi Cahn, *Birthing Relationships*, *Wis. Women's L.J.* \_\_\_ (200?).

<sup>40</sup> See generally Annette Appell, *The New Blended Families: Legal, Blood, and Fictive Kin Networks and Open Adoption* 14-16 (2008)(unpublished manuscript on file with author).

<sup>41</sup> See Naomi Cahn, Madelyn Freundlich, and Donaldson Adoption Institute, *Old Lessons for a New World: Applying Adoption Research and Experience to ART* (2008)(forthcoming).

create a unique extended family.”<sup>42</sup> Wendy Kramer and Ryan Kramer, her donor-conceived son, started the Donor Sibling Registry (DSR) in 2000 so that they could establish an internet meeting place for donor-created offspring and their genetically-related relatives. In 2007, almost 90,000 people visited the site, and the DSR has facilitated contact among more than 5000 genetically-related people.<sup>43</sup> Consider Gwennyth Jackaway, who found genetic half-siblings for her son, Dylan, because she wanted him to be “part of a larger community,” and refers to the other children she found as “Dylan’s siblings.”<sup>44</sup> Or think about Mike Rubino, Donor 929 at California Cryobank. Nine years after Donor 929 began providing sperm, Oprah Winfrey aired an episode about donor-conceived families. Rubino logged on to the Donor Sibling Registry web site, and ultimately discovered that Rachael McGhee had written a thank you message to Donor 929. He contacted her, the two of them talked, and she, along with her two children that resulted from his sperm, spent a week with him in California.<sup>45</sup> Ironically, some parents who have found offspring from the same donor through the Donor Sibling Registry have left the site because they have been overwhelmed by too many possible connections.<sup>46</sup>

Biological connection is, of course, only one way to form a family, yet the genetic ties between their children cause many women to feel to feel family-like connections with each other.

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As is clear, there is no one feminist approach to fertility nor, as discussed later in the article, to incest. The basics, examining the impact of gender, race, sexual orientation, and class of any particular approach or policy, are a given. Beyond that, however, how to measure those impacts, how to assess those impacts, how to accommodate those impacts, there is no agreement. Feminists are ambivalent over whether reproductive technology is a blessing because it facilitates reproduction and the formation of alternative families, or whether it is a curse because it facilitates “too much” biological mothering<sup>47</sup> and class and race distinctions concerning access. Similarly, as discussed in the next section, the reproductive technology world itself has developed with little consensus or regulation of these issues; fertility clinics may discriminate based on sexual orientation, for example, there are no binding standards on how many embryos to

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<sup>42</sup> Liza Mundy, *Everything Conceivable: How Assisted Reproduction is Changing Men, Women, and the World* 169 (2007)

<sup>43</sup><http://www.donorsiblingregistry.com/>; see Mundy, *supra* note -, at 168; Claudia Kalb, *A Sperm-Biz Overhaul*, *Newsweek*, June 2, 2008, p. 41

<sup>44</sup> Emily Bazelon, *The Children of Donor X*, *O Mag.*, p. 250, April 1, 2008.

<sup>45</sup> Michael Leahy, *Family Vacation*, *Wash. Post.* June 19, 2005; Page W12.

<sup>46</sup> See Cheryl Miller, *Parenthood at Any Price*, *The New Atlantis* (2007), avail. at <http://www.thenewatlantis.com/publications/parenthood-at-any-price>. She also points out that it is difficult for a sperm donor to “connect” with multiple offspring.

<sup>47</sup> That is, it puts pressure on women to become mothers; and it discourages mothering non-biological children by disfavoring adoption.

transfer, there is no requirement that anyone keep track of the numbers of children born from sperm donors.<sup>48</sup>

## **B. Unlimited Giving; The Donor World**

For anyone seeking sperm, there are thousands of possibilities. In the U.S. alone, there are dozens of sperm banks in a business that accounts for about \$75 million per year.<sup>49</sup> Consumers can let their fingers do the walking online, all in the privacy of their own home. Banks provide differing levels of screening, offer videos, ship frozen sperm in special canisters, or specialize in particular donor characteristics. There is even a site that will help with the shopping so that the consumer doesn't have to search each website. Although frozen egg banks are relatively new, there are countless means for finding egg providers, ranging from special matching services that are part of larger fertility clinics to stand-alone recruiting options. And the number of physicians offering assisted reproductive services has increased exponentially. The main trade group, the Society for Assisted Reproductive Technology, reports that it has 392 members practices within the United States that offer reproductive technology services, accounting for more than 95% of all fertility clinics.<sup>50</sup>

Yet there are few systems in place to monitor gamete providers. In one of the only studies to look at quality of sperm from commercial providers, Douglas Carrell and his co-authors found more than a quarter of the participating sperm banks could be providing "suboptimal" sperm.<sup>51</sup> Researchers at New York University found that egg donors frequently understated their weight. They looked at charts for more than 300 patients, and then compared the weight that donors reported when they first came to the clinic with the actual weights at their first physical exams, and concluded that "donors do not give accurate measurements of their body weight."<sup>52</sup> Yet there are no requirements that clinics verify the information submitted by donors; the only federal requirements concern the safety testing of the gametic material.

Although reproductive technology is today a multibillion dollar business, the amount of state and federal regulation over any of the participants is limited, as is the amount of self-regulation. The lack of market oversight has repeatedly been traced to the comparatively limited use of the technology until the 1980s, as well as the contested nature of the technology's relationship to parenthood and other social issues. The

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<sup>48</sup> Because fertility clinics must report success rates, however, they do report the use of donor eggs and embryos.

<sup>49</sup> Steven Kotler, *The God of Sperm: In an industry veiled in secrecy, a powerful L.A. sperm peddler shapes the nation's rules on disease, genetics - and accidental incest*, *LA Weekly*, Sept. 26, 2007, <http://www.laweekly.com/news/news/the-god-of-sperm/17290/>.

<sup>50</sup> Eric Surrey, "What is SART?," Society for Assisted Reproductive Technology, available at <http://www.sart.org/WhatIsSART.html>

<sup>51</sup> Douglas T. Carrell, et al., "Prospective, Randomized, Blinded Evaluation of Donor Semen Quality Provided by Seven Commercial Sperm Banks," *78 Fert. & Sterility* 16, 20 (July 2002).

<sup>52</sup> M. Cho and F. Licciardi, "Egg Donors Significantly Under-Report their Weights," *86 Fert. & Sterility (Supp. 1)* S138 (Sept. 2006).

technologies and their uses have radically changed over the past several decades, with, for example, commercial sperm banks supplanting doctor-chosen sperm and the increasingly successful use of donor eggs. Many of the controversies in this area have appeared, and have been temporarily resolved, outside of the law: in doctors' offices, in scientific advances, or in philosophical inquiries. It may well, as one legal scholar suggested, have been appropriate "to allow non-legal institutions such as 'science' or 'medicine' to be the primary forum for policy debate and resolution,"<sup>53</sup> particularly in light of the secrecy surrounding individuals' use of the technology and the legal consequences of coming forward.

Until the mid-1980s, the market for sperm was quite small. As infertility physician Barry Verkauf explained in 1966, the medical literature contemplated only three uses for donor sperm: when the "husband" was infertile, when children had died from Rh incompatibility, and when the husband had a heredity disease that should not be passed on to the children.<sup>54</sup> In the rare cases where donor sperm was used, it was typically provided by friends or family of the recipient, did not involve payment to the donor, and did not involve frequent donors. Issues involving limits on the number of children resulting from any individual donor were essentially moot; given the ever-changing composition of medical school classes, there was an enormous pool and relatively few solicitations.

### 1. Donating to History

The first recorded artificial insemination of a woman occurred in 1785 when Dr. John Hunter impregnated the wife of a London linen merchant with her husband's sperm.<sup>55</sup> Another hundred years passed before Dr. William Pancoast performed the first artificial insemination using donor sperm, the sperm of someone besides the patient's own husband, in 1884.<sup>56</sup> The woman never knew that she had been inseminated by a stranger's sperm. Even if the husband had consented, artificial insemination by a donor was somewhat scandalous, because it might expose the woman to a charge of adultery.

In 1948, the influential physician and lawyer Alfred Koerner, who was the Executive Secretary to the National Research Foundation for Fertility, Inc., wrote one of the first articles in a law journal addressing donor insemination. He observed that it was important for the recipient woman to trust her physician to choose the right donor as well as not to disclose her use of donor sperm.<sup>57</sup>

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<sup>53</sup> Larry Palmer, Book Reviews, 38 *Jurimetrics J.* 223, 234-35 (Winter 1998); see generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 *Wash. L. Rev.* 1035, 1039-1041 (2002).

<sup>54</sup> Barry Stephen Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion – An Appraisal of Current Medico-Legal Status*, 3 *Hous. L. Rev.* 277, 282 (1966).

<sup>55</sup> Wilfred J. Finegold, *Artificial Insemination* 6 (1964); "History 1500- 1900," Center for Reproductive Medicine available at [http://www.repromed.org.uk/history/history\\_1500.htm](http://www.repromed.org.uk/history/history_1500.htm)

<sup>56</sup> Andrew Chang, "Anonymous Sperm Donation in an Era of Technology, Bioethics, and Business," 3 *Yale. J. Pub. Health* 3 (2006), available at <http://www.yaleph.com/archive/vol3no3/article3.html>

<sup>57</sup> Alfred Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 *La. L. Rev.* 484, 490 (1948).

By the late 1980s, more than 400 sperm banks were in operation.<sup>58</sup> Yet banks still sold their wares primarily to doctors; in 1987, 60 percent of sperm banks in a federal survey would sell only to doctors, and none would sell only to recipients.<sup>59</sup> Sperm banking became increasingly patient-oriented throughout the 1980s. In a series of articles for *Slate* magazine, journalist David Plotz credits the Repository for Germinal Choice (also known as the “Nobel Sperm Bank”), created in the late 1970s’, with transforming the sperm banking business by requiring rigorous testing and providing increasing amounts of information to consumers.<sup>60</sup> Other banks began offering the same services, and the AIDS epidemic added more incentives for additional safety tests.<sup>61</sup>

While there are no reliable figures on who uses sperm banks, anecdotal evidence suggests that their usage by heterosexual couples is declining, but that usage by single women and lesbians is increasing.

## 2. The Incredible Egg

Egg provision has a far shorter history. The first documented egg donation occurred in 1983; by 2003, clinics used more than 14,000 eggs in fertility procedures.<sup>62</sup> Egg donation began with identified donors, who were often related to the recipients. Today, identified donors constitute a much smaller part of the donation pool and recipients are more likely to use specifically recruited donors. Eggs are typically available under two circumstances: first, women already undergoing an IVF cycle may agree to provide their eggs to other women in exchange for a reduced IVF fee; and second, women from outside of the clinic may be recruited specifically to provide eggs.<sup>63</sup>

Until recently, most donor eggs had to be “fresh.” Worldwide, there were only about two hundred children who had been born through the use of frozen eggs in 2006, and egg banks were just beginning to be established.<sup>64</sup> Frozen eggs, however, provide various opportunities for expanding the market in eggs, perhaps resulting in increasing numbers of banks – and increasing the opportunities for a woman to donate multiple times.

## 3. Clinically Speaking

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<sup>58</sup> Karen M. Ginsberg, Note: FDA approved?: A Critique of the Artificial Insemination Industry in the United States, 30 U. Mich. J.L. Reform 823, 826 (1997)(although the number of sperm banks used is not specified, “[b]y 1993, more than 80,000 women were undergoing AI each year, resulting in the conception of more than 30,000 babies”).

<sup>59</sup> “Artificial Insemination Practice in the United States,” OTA, p. 11.

<sup>60</sup> See David Plotz, Collected “Seed” (2005), <http://www.slate.com/id/2119808/>.

<sup>61</sup> E.g., Mundy, Everything Conceivable, supra note \_\_, at 112.

<sup>62</sup> Golden Eggs; Drowning in credit- card debt and Student Loans, Young Women are Selling their Eggs for Big Payoffs. But Can They Really Make the Right Medical and Moral Decisions When They’re Tempted With \$15,000, *The Boston Globe*, June 25, 2006, Sec. Magazine, p. 18.

<sup>63</sup> ASRM Ethics Committee Report, “Financial Compensation of Oocyte Donors,” p. 305.

<sup>64</sup> James W. Akin et al., Initial Experience with a Donor Egg Bank, 88Fert. & Sterility 497, 500 (2007).

According to UCLA sociologist Rene Almeling, both egg and sperm donation programs are structured similarly, with comparable stages for donors and recipients.<sup>65</sup> All programs must first recruit donors, and then screen them. The screening typically includes collection of both medical and personal history data.<sup>66</sup> Aside from the laws governing the various contractual relationships, few of which apply directly to reproductive technology, this is perhaps the only other stage where the law plays a direct role in the reproductive industry, mandating certain safety tests (discussed in the next section) of the donated gametic material.

Third, the agency helps the donor prepare a personal profile, and then advertises the profile. Clinics vary considerably as to how much information is included in this profile. While egg donors may be identified through a picture and a first name, sperm donors are more typically identified by number until the recipient requests (or pays for) additional information.<sup>67</sup> This difference in the initial introduction to gametes may be gendered<sup>68</sup>, or it may be due to the comparative number of sperm and egg donors or the lengthier process for producing eggs than sperm.

Once the profile is publicly available, the next stage involves matching donors and recipients – and collecting fees. Programs are now required by federal law to do some minimal follow up with sperm donors, such as by making sure that they are tested for HIV once they have stopped providing samples altogether.<sup>69</sup>

#### 4. Inspecting Gametes

Over the past several decades, the federal government has taken a few tentative steps towards the regulation of reproductive technology. Today, it oversees clinical laboratory services, drugs and medical devices that are used in IVF treatments, has established standards for the use of human tissue, and provides monitoring of fertility clinic success rates.<sup>70</sup> Federal regulations covering the safety of “human cell, tissue, or cellular or tissue-based products,” which included donor gametes, were finalized in 2005.<sup>71</sup> All gamete providers must be screened, and all of their “products” must be tested by federal law.<sup>72</sup>

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<sup>65</sup> Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm banks, and the Medical Market in Genetic Material*, 72 *Am. Soc. Rev.* 319 (2007).

<sup>66</sup> ASRM, “Psychological Assessment of Gamete Donors and Recipients,” 77 *Fert. & Ster. Supp.* 5, 11 (2002)..

<sup>67</sup> This description draws on my own analysis of egg and sperm banks as well as that of Almeling, “Selling Genes, Selling Gender,” p. 319

<sup>68</sup> This set-up does appear much more revelatory and intimate for women, while more protective of the privacy of men; on the other hand, there are other reasons for this market development.

<sup>69</sup> Almeling, “Selling Genes, Selling Gender,” p. 334.

<sup>71</sup> cite to human tissue regs.

<sup>72</sup> Betsy Streisand, “Who’s Your Daddy? Sperm Donors Rely on Anonymity. New Donor Offspring (and Their Moms) are Breaking Down the Walls of Privacy,” *U.S. News & World Report*, February 13, 2006, *Sec. Health & Medicine*, p. 53.



In addition to implementing standards for testing donors, the federal regulations require that donation facilities maintain sufficient staff to ensure that they can comply with the federal regulations, and personnel must be competent based on measures of education, experience, and training.<sup>73</sup> Clinics must establish their own internal quality control program to make sure that any corrective actions are documented, personnel receive proper training and education, periodic audits are performed, and computer software is validated for its appropriate use.<sup>74</sup> Clinics must also set up procedures for all steps involved in the screening, testing, and determination of eligibility.<sup>75</sup>

Other than through these procedures for safety, federal law does not regulate the medical procedures involved in donation. Clinics are not required to meet additional standards (other than, perhaps, with respect to “tissue”), by preventing discrimination against certain potential recipients or donors, by mandating any ongoing obligation for donors to report health information, by regulating the disclosure of information to any subsequently-born children, or by limiting the numbers of embryos transferred per cycle, or even the number of times that one person can provide sperm or eggs to another. As one journalist accurately charged after a thorough report in 2007 on California Cryobank, the largest sperm bank in the world, “the industry has operated almost completely unmolested. Outside of a mostly inept series of somewhat bizarre FDA rulings, there is no top-down governance in the field. It is, as it has always been, self-policing.”<sup>76</sup> For its part, the industry often resists further regulation, claiming that it restricts patient choice by creating market constraints. On the other hand, as discussed in the next section, there are industry, non-binding guidelines on these issues.

## 5. The State of Industry Regulation

Long before the federal standards became effective, the reproductive technology industry had undertaken self-regulation. This process is still ongoing, and the industry has established its own voluntary standards and processes of accreditation that co-exist with the federal and state regulations. The industry has also developed a series of ethical guidelines that, again, are not binding, but that contain advice and standards on a variety of topics that go beyond basic ART medical practice.

The ASRM Practice Committee has developed recommendations on the number of babies born with one donor’s gametes. These recommendations are explicitly based on concerns about genetically related donor offspring having children together (rather than, for example, risks of widespread transmission of genetic disease or health issues for donors):<sup>77</sup>

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<sup>73</sup> 21 C.F.R. § 1271.170.

<sup>74</sup> 21 C.F.R. § 1271.160.

<sup>75</sup> 21 C.F.R. § 1271.47.

<sup>76</sup> Kotler, *supra* note \_\_.

<sup>77</sup> See Practice Committee of the American Soc. for Reprod. Med., Repetitive Oocyte Donation, 86 (Supp. 4) Fert. & Ster. S216 (2006).

Institutions, clinics and sperm banks should maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible. It is difficult to provide a precise number of times that a given donor can be used because one must take into consideration the population base from which the donor is selected and the geographic area that may be served by a given donor. It has been suggested that in a population of 800,000, limiting a single donor to no more than 25 births would avoid any significant increase of inadvertent consanguineous conception.<sup>78</sup>

These standards are highly influential, but there is no regulatory agency that oversees individual donors nor that monitors gamete banks on a routine basis. Banks and clinics are not required to verify the personal information or much of the medical information that donors provide them, nor is there a mechanism for monitoring limits on the number of times that one individual can provide gametic material to another. Nor must banks monitor what happens to the gametic material once it leaves their offices, and there is no tracking of donors' nor their offspring's genetic diseases or other problems. The occasional "mix-ups" that make their way into court remind consumers and the public of the lack of oversight<sup>79</sup>, but the existing legal framework for remedying and preventing these "mix-ups" is entirely inadequate. Moreover, given the mobility of many Americans (and overseas gamete purchasers), limits based on an area population of 800,000 may not be adequate. Donors, those who use their gametic material, and donor-conceived offspring are beginning to understand the limits of current oversight and to advocate for change.<sup>80</sup> Laws must mandate better practices, rather than relying on industry internal guidelines and voluntary compliance.

### C. Are We Alone Out There? Practices in Other Countries

Many other countries have imposed limits on the numbers of offspring produced by any individual donor. In its landmark report in 1984, England's Warnock Commission recommended that no more than 10 children be born from any individual donor.<sup>81</sup> The Commission explained its concern about "the remote possibility of unwitting incest between children of the same donor, and because of risks of transmission of inherited disease," but noted that "there was no conclusive argument for any particular

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<sup>78</sup> Practice Committee of the American Society for Reproductive Medicine and the Practice Committee of the Society for Assisted Reproductive Technology, 2006 Guidelines for Gamete and Embryo Donation, 86 (Supp. 4) *Fert. & Ster.* S38, S43 (2006). Although this recommendation is focused on sperm donors, the ASRM has made the same recommendation for egg donors. See *Repetitive Oocyte Donation*, supra note \_\_\_, at S217.

<sup>79</sup> There have been several reported cases of embryos that were wrongly implanted in the wrong woman, for example. See Cahn, *Test Tube Families*.

<sup>80</sup> The DonorSibling Registry, which, as discussed earlier, connects donor-conceived individuals, has various discussion groups where participants discuss the number of children who should be born from each donor and argue for changing the current system. See <http://www.donorsiblingregistry.com/DSRblog/?cat=4>

<sup>81</sup> Report of the Committee of Inquiry into Human Fertilisation and Embryology 26-27 (1984).

figure.”<sup>82</sup> Subsequently, the British Human Fertilisation and Embryology Authority did not limit the number of *children* born with any particular donor’s gametes, but limited the number of *families* who could use one donor’s gametes to ten (each family could have more than 10 children, of course).<sup>83</sup> Austria allows donors to provide gametes to only one clinic, with a limit of three couples.<sup>84</sup> Other countries have focused on the number of children. For example, in Hong Kong, legislation was enacted in 2007 to limit the number of children born from any single donor to three.<sup>85</sup> Spain limits the number of children born with any one donor’s gametes to 6.<sup>86</sup>

A second means of preventing “accidental incest” involves ensuring that offspring know they are donor-conceived. In the United Kingdom, legislation has been introduced requiring special notations on birth certificates for the donor conceived. And the state of Victoria, in Australia, has launched a “Time to Tell” campaign, encouraging parents to tell their children of their origins in an effort to ensure honesty as well as to prevent potentially consanguineous unions.<sup>87</sup>

### III. Why Ban Incest?

The traditional justifications for incest bans have centered on religion, genetics, and anthropology; newer accounts have brought in insights from evolutionary biology to support “kinship avoidance” behaviour. Freud, of course, opined that incest was natural, that girls inevitably felt sexual desire for their fathers.<sup>88</sup> Although the veracity of this analysis has been repeatedly questioned, it is essentially irrelevant to any explanation or reasons for the ban (although it does provide support for ensuring that it a ban exists). My goal in this section is to provide a brief review of other explanations and justifications for the prohibition.

#### 1. Traditional and Modern Justifications

Traditional and more contemporary justifications for the incest ban include: genetics, anthropology, evolutionary biology, and morality. The genetic justification points to the increased probability of inherited diseases resulting from consanguineous relationships.<sup>89</sup> When it comes to gamete donation, there is also the possibility of

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<sup>82</sup> Id. at 26. The Commission recommended ongoing review of whether 10 was the appropriate number. Id. at 27.

<sup>83</sup> See HFEA, *Infertility: The HFEA Guide 31* (2007), avail. at <http://www.hfea.gov.uk/docs/Guide2.pdf>

<sup>84</sup> Howard Jones, et al., *IFFS Surveillance 07*, 87 *Fert. & Ster. S28*, S28 (2007).

<sup>85</sup> Ella Lee, *Database to Track Sperm and Offspring: records kept to Avoid Incest, Unethical Acts*, *South China Morning Post*, Feb. 13, 2008, p. 3.

<sup>86</sup> Jones, et al., *supra* note \_\_, at 28, 31.

<sup>87</sup> Evonne Barry, *Who’s Your Daddy? Donor Kids “Must be Told,”* *Sunday Herald Sun*, Aug. 10, 2008, at p. 24.

<sup>88</sup> See Sigmund Freud, *Three Essays on the Theory of Sexuality* (James Strachey trans., Basic Books 1975) (1905); Amy Adler, *The Perverse Law of Child Pornography*, 101 *Col. L. Rev.* 209, 221-222 (2001); Rebecca J. Whitcombe, *Child Sexual Abuse: Adult Survivors, Repressed Memories, and Stories Finally Told*, 11 *UCLA Women’s LJ* 255, 267 (2001).

<sup>89</sup> Robin Bennet et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, *J. Genetic Counseling* 11, 97-119 (2002)

dispersing one person's diseases widely. The American laws on incest are derived from British ecclesiastical laws on prohibited marriages, and by the beginning of the twentieth century, as states developed their marriage laws, all states banned some types of incestuous marriages.<sup>90</sup> As mentioned earlier, incestuous relationship may subject both parties to prosecution under criminal law and also result in marriages that are void. That is, incest is a "double wrong" against the public, with both a criminal and a civil component; unlike many other criminal acts, the civil wrong does not result in a private remedy but in public non-recognition of the relationship.<sup>91</sup>

*Genetics:* In any given non-consanguineous relationship, the rate of severe abnormalities in offspring is 2-3.5 percent.<sup>92</sup> Between first cousins, the risk increases to between 3-7 percent, while children of siblings or a parent-child coupling have a risk between 32-44 percent<sup>93</sup>. While it is difficult to study the impact on humans over numerous generations, studies of other animals show the genetic costs of inbreeding. When sibling birds are paired over successive generations, the offspring line dies out because "some damaging genes are more likely to be expressed in inbred animals. Some potentially harmful genes are recessive and therefore harmless when they are paired with a dissimilar gene, but they become damaging in their effects when combined with an identical gene."<sup>94</sup>

The higher rate of genetic abnormalities in consanguineous relationships provides a partial justification for the incest prohibition. Yet it does not entirely explain the strength of the prohibition, given that we do not require genetic testing "even when there is a strong likelihood that each parent carries a recessive trait, as in the case of Tay-Sachs disease in the Ashkenazi Jewish community."<sup>95</sup> Moreover, the incest ban arose prior to our contemporary understanding of the relationship between genes and consanguinity. On the other hand, early incest bans may have resulted from the anecdotal observations of abnormal children who resulted from sexual relationships between closely-related family members.<sup>96</sup> The genetic justification does not, however, explain the ban on sexual

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<sup>90</sup> Grossberg, *Governing the Hearth*, at 111, 145.

<sup>91</sup> Indeed, the remedy of a void marriage from the outset appears contrary to the wishes of the individuals involved (who consented to the marriage in the first place, and so would appear unlikely to want to invalidate their own marriage).

<sup>92</sup> See Robin L. Bennett, Louanne Hudgins, Corrinne O. Smith, and Arno Motulsky, *Inconsistencies in Genetic Counseling and Screening for Consanguineous Couples and Their Offspring: The need for Practice Guidelines*, 1 *Genetics in Medicine* 286, 286-87 (1999).

<sup>93</sup> See Helen V. Virth, Jane A. Hurst, and Judith G. Hall, *Oxford Desk Reference: Clinical Genetics* 370 (2005). They point out that the estimated risk is actually lower than the observed, empirical risks; the estimated risk is 12.5% for recessive disorders, while the observed risk is 30%. Apart from physical abnormalities, the empiric risk for mental disability is closer to 50% in sibling/sibling and parent/child unions. *Id.* The estimated rate for half-siblings is approximately one-half that of full-blooded siblings. *Id.* Other studies vary dramatically on the actual genetic risks.

<sup>94</sup> Patrick Bateson, *Inbreeding Avoidance and Incest Taboos*, in *Inbreeding*, *supra* note \_\_, at 24, 25.

<sup>95</sup> Cahill, *supra* note \_\_, at 1570.

<sup>96</sup> Certainly, by 1872, one of the leading family law treatises, noted: "Marriages between persons closely allied in blood are apt to produce an offspring feeble in body, and tending to insanity in mind." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* 145 (1985) (quoting Joel Bishop, *Commentaries on Marriage and Divorce*, 5<sup>th</sup> ed. 273 (1874).

relationships between affinity-related family members, such as adoptees or step-relatives.<sup>97</sup>

Given our knowledge about genetics, we might decide it is appropriate, based on potential harm, to police certain relationships because of the statistically significant increased risk of genetic abnormalities. The risk of harm to future offspring is palpable and certain (although most such offspring will not experience these abnormalities)<sup>98</sup>. Modern understandings of genetics provide a strong basis for making such an assessment, regardless of whether this justification provided an historical explanation for the incest ban. It may even be possible that, through the process of evolution (discussed below), natural selection favored behaviours of kin avoidance; offspring of consanguineous matings were less likely to survive. Ultimately, the genetics explanation separates into two arguments: higher risk of birth defects, and an inherited tendency toward taboo.

To alleviate the concern over birth defects, in light of advances in genetic understandings, it would be possible to allow incestuous relationships between relatives who are incapable of procreating, or to require genetic testing in the case of pregnancy. Although this might raise privacy concerns, it might be a constitutionally sustainable compromise. Nonetheless, it would not address the other potential justifications for maintaining an incest ban

*Anthropology:* A discussion of taboo brings us to the classic anthropological formulation, which belongs to Claude Lévi-Strauss. He explained that the incest prohibition forced families to marry outside of their closed, biological units by creating bonds with other groups, thereby overcoming “the isolating influence of consanguinity.”<sup>99</sup> These bonds assured more harmonious group relations by assuring kinship with potential enemies. A second, and equally familiar, explanation from the anthropology literature, which addresses parent-child incest, focuses on the harmony of intrafamilial relationships.<sup>100</sup> Later anthropologists have suggested that the incest taboo was not just a cultural artifact, but also biologically-based.<sup>101</sup> The issue of whether the taboo, as a natural phenomenon should give basis to criminal liability may be a tough question. .

*Evolutionary biology:* Evolutionary biology may provide understanding of the origins and maintenance of the incest ban, although it does not provide a justification per se.<sup>102</sup>

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<sup>97</sup> See Bratt, supra note \_\_, at 352-53; Cahn, Perfect Substitutes, supra note \_\_.

<sup>98</sup> The increasing use of screening tests before and during pregnancy can help in reducing this risk.

<sup>99</sup> Claude Lévi-Strauss, *The Family*, 278, in *Man, Culture, and Society* (Henry Shapiro ed. 1956); see Claude Lévi-Strauss, *THE ELEMENTARY STRUCTURES OF KINSHIP* 479 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans. 1949 (1969)); Susan McKinnon, *The Economies in Kinship and the Paternity of Culture: Origin Stories in Kinship Theory*, in *Relative Values: Reconfiguring Kinship Studies* 277, 288-298 (Sarah Franklin and Susan McKinnon eds. 2001).

<sup>100</sup> See Jack Goody, *A Comparative Approach to Incest and Adultery*, 7 *Brit. J. Soc.* 286, 301 (1956).

<sup>101</sup>

<sup>102</sup> As June Carbone and I have argued, just because a particular behaviour has evolved in a certain way, this does not mean that we as a legal society must legislate to reinforce that behaviour.

Evolutionary biologists have found a kinship avoidance behaviour, but believe that it is associated with familiarity rather than genetics.

In his 1894 book, Edward Westermarck suggested that sexual aversion develops between family members who are raised together.<sup>103</sup> Subsequent experiments have confirmed and refined his initial hypothesis, suggesting a strong psychological mechanism against sexual relationships with intimate family members that does not necessarily depend on shared genes but on behaviours most likely to detect shared genes. While it is difficult to perform a controlled experiment on the Westermarck hypothesis, evidence from Israeli kibbutzim and Taiwanese marriages provide support for an evolutionarily-based incest avoidance behaviour. In his study of 14,000 Taiwanese women and their fertility, Arthur Wolf found that early cohabitation (beginning during infancy or at a young age) with a later “mate” resulted in lower fertility and a higher divorce rate than did marriages between mates who were not raised together.<sup>104</sup> Although the individuals were not genetically linked so this lack of sexual interest might be the result of cultural messages, this appears unlikely; it would require both that culturally-imposed inhibitions against incest “are somehow transmitted from elders to offspring with exceedingly high reliability; and second, such messages [must] affect the development of sexual attraction with exceedingly high reliability.”<sup>105</sup> In a test involving 600 subjects, researchers found that childhood observations of a mother’s interactions with another child and coresidence with a sibling provide a strong basis for a “kinship estimator.”<sup>106</sup> The subjects were asked about family composition and coresidence, and then answered questions about their altruistic behaviour towards their siblings (for example, how they had helped siblings in the past and whether they would donate a kidney for a sibling) or their attitudes towards a series of sexual acts, including some with family members. Older children observing their mothers’ interaction with a younger sibling was the strongest cue for predicting kinship estimation. While Freud believed that the incestuous impulse was natural and that cultural factors prevented its full expression, contemporary evolutionary biologists and psychologist believe just the opposite: incest avoidance is unnatural, and incest occurs because of a disruption in normal relationships.<sup>107</sup>

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<sup>103</sup> Edward Westermarck, *The History of Human Marriage* (1894). For one application of the hypothesis in the legal literature, see David J. Herring, *Foster Care Placement: Reducing the Risk of Sibling Incest*, 37 *Mich. J.L. Ref.* 1145, 1147-1162 (2004)(discussing Westermarck’s thesis and two studies of Irene Bevc and Irwin Silverman showing that opposite sex siblings who live together before the age of 3 develop a strong aversion to incest).

<sup>104</sup> Arthur Wolf, *Sexual Attraction and Child Association: A Chinese Brief for Edward Westermarck* (1995).

<sup>105</sup> Debra Lieberman and Donald Symons, *Commentary, Sibling Incest Avoidance: From Westermarck to Wolf*, 73 *Q. Rev. Bio.* 463, 465 (1998).

<sup>106</sup> Debra Lieberman, John Tooby, & Leda Cosmides, *The Architecture of Human Kin Detection*, 445 *Nature* 727,730 (2007); see also Debra Lieberman, John Tooby and Leda Cosmides, *Does Morality have a Biological Basis? An Empirical Test of the Factors Governing Moral Sentiments Relating to Incest*, 270 *Proc. R. Soc. Lond.* 819 (2003).

<sup>107</sup> See, e.g., Mark Erickson, *Rethinking Oedipus: An Evolutionary Perspective of Incest Avoidance*, 150 *Am. J. Psych.* 411 (1993); Lieberman and Symonds, *supra* note \_\_\_.

Evolutionary behaviours can also help explain the parent-child taboo. Because such behaviour distorts a child's long-term mating strategies, researchers have suggested that the incest taboo provides a generally effective prevention mechanism<sup>108</sup> against

psychopathologies, which, in turn, reduce the affected individuals' chances for normative marriage and parenting profiles. In addition, a similar dynamic would hypothetically result from adult-male to boy incest. It is suggested that to minimize the chances of adult-child sexual intercourse, incest taboos have historically been reinforced and extended to nonparental adults, especially men, beyond the immediate nuclear family.<sup>109</sup>

Indeed, some have suggested that the process of human evolution has actually “selected for genes that cause organisms to develop behavioral systems that lead them away from mating with close genetic relatives,” particularly given the strong association of incest with visceral reactions of disgust.<sup>110</sup>

*Morality:* Moral repugnance and disgust have served as traditional bases for the incest ban (and, indeed, a full discussion of the significance of emotion to legal reasoning is well beyond the scope of this article, although it is an issue that must be recognized<sup>111</sup>). “Many states legislate against a lot of activities [such as] . . . incest . . . just because those activities are wrong.”<sup>112</sup> Disgust is a cluster of approaches based in human emotional reactions to various acts, involving extreme aversion typically based on a fear of contamination.<sup>113</sup> It is inherently connected with underlying cultural values, although some behaviours appear to elicit disgust across cultures.<sup>114</sup> Disgust can provide a useful basis for judging the legality of certain acts; for example, disgust might help in distinguishing various kinds of murders, with more disgusting ones more deserving of harsher sanctions.<sup>115</sup> It might be possible to develop appropriately structured disgust responses within the law “so that we come to value what is *genuinely* high and to despise what is *genuinely* low.”<sup>116</sup>

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<sup>108</sup> See Ronald S. Immerman and Wade C. Mackey, An Additional Facet of the Incest Taboo: A Protection of the Mating-Strategy template, 158 J. Genetic Psychol. 151 (1997).

<sup>109</sup> Id.

<sup>110</sup> See Robinson, Kurzban, and Jones, supra note \_\_, at 1645.

<sup>111</sup> For some of the most useful commentary on this issue, see, e.g., The Passions of Law, supra note \_\_; Haidt, supra note \_\_.

<sup>112</sup> John Witte, Can America Still Ban Polygamy?, Christianity Today Magazine (May 2008), available at [http://www.christianitytoday.com/ct/article\\_print.html?id=55605](http://www.christianitytoday.com/ct/article_print.html?id=55605).

<sup>113</sup> See William Ian Miller, The Anatomy of Disgust 2 (1997). Miller provides a social history and defense of disgust. For insightful discussion of the politics of disgust in conjunction with Lawrence and traditional religious approaches to same-sex relationships, see William Eskridge, Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion, 57 Fla. L. Rev. 1011 (2005).

<sup>114</sup> Miller, supra note \_\_, at 15. Miller hypothesizes that some elements of incest definitions, such as the prohibition on parent-child relationships, are in fact universal. Id. at 260 (n. 39).

<sup>115</sup> Dan Kahan, The Anatomy of Disgust in Criminal Law, 96 Mich. L. Rev. 1621 (1998); The Progressive Appropriation of Disgust, in Bandes, supra note \_\_, at 63.

<sup>116</sup> Kahan, The Progressive Appropriation, supra note \_\_, at 71.

On the other hand, disgust is an emotion that has, as *Lawrence* shows, typically been used as a way to ostracize and discriminate against acts that are culturally unpopular.<sup>117</sup> Those on the right are “most vulnerable” to these emotions, while people on the “left tend to be afraid of them;”<sup>118</sup> they establish a hierarchy of appropriate behaviour that attempts to limit not just public, but also intimate, actions.<sup>119</sup> While the acts themselves may not be harmful, culturally conditioned responses result in strong feelings of aversion that, without any other basis, are converted into law. The long history of anti-miscegenation laws provides an example of how one group’s feelings of disgust resulted in discriminatory legislation. For incest, disgust may be a comparably unstable basis. As Martha Nussbaum claims, not all incestuous relationships inspire the same amount of disgust; “if we want to find reasons to make [brother-sister or adult first cousin] incest illegal, disgust will not help us, and arguments about health issues are perhaps exactly what we need.”<sup>120</sup> The emotion of disgust is, on this view, an unstable basis for making legal decisions.

Within contemporary social psychology, there is a healthy debate on the nature (literally) of how we develop moral reasoning. Jonathan Haidt’s social intuitionist model suggests that moral reasoning follows moral judgment; we develop reasons to support our moral intuitions<sup>121</sup> and, within certain limitations, we do follow our intuitions.<sup>122</sup> Moral judgments, then, result from innate intuitions although, Haidt explains, they are also affected by social context and groupings.<sup>123</sup> By contrast, others argue that rational deliberation and reasoning are critical in the development of moral judgments.<sup>124</sup>

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<sup>117</sup> See Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* 125, 171 (2004). The philosopher Leon Kass has used repugnance as a means for limiting various new uses of reproductive technology, including cloning. E.g., Leon R. Kass, *Defending Human Dignity*, in *Human Ethics and Human Dignity* 297, 298 (President’s Council on Bioethics 2008), avail. at [http://www.bioethics.gov/reports/human\\_dignity/human\\_dignity\\_and\\_bioethics.pdf](http://www.bioethics.gov/reports/human_dignity/human_dignity_and_bioethics.pdf).

<sup>118</sup> Drew Westen, *The Political Brain* 380 (2007).

<sup>119</sup> Jonathan Haidt, *The moral emotions*, in *Handbook of affective sciences* 852 (J. Davidson, K. R. Scherer, & H. H. Goldsmith, ed. 2003), avail. at <http://faculty.virginia.edu/haidtlab/articles/haidt.the-moral-emotions.manuscript.html>.

<sup>120</sup> *Id.* at 81.

<sup>121</sup> Haidt, *The Emotional Dog*, *supra* note \_\_, at 814, 830; see generally Milton C. Regan, *Moral Intuitions and Organizational Structure*, 51 *St. Louis L.J.* 941, 955-962 (2007).

<sup>122</sup> Simone Schnall, Jonathan Haidt, Gerald L. Clore, and Alexander H. Jordan, 34 *Pers. Soc. Psychol. Bull.* 1096, 1106 (2008) (finding disgust particularly effective at affecting moral judgments).

<sup>123</sup> Jonathan Haidt and Fredrik Bjorklund, *Social intuitionists answer six questions about morality*, in *Moral Psychology*, vol. 2: *The Cognitive Science of Morality* 181 (W. Sinnott-Armstrong ed. 2007), avail. at [http://faculty.virginia.edu/haidtlab/articles/haidt\\_bjorklund\\_social-intuitionists-answer-6-questions.doc](http://faculty.virginia.edu/haidtlab/articles/haidt_bjorklund_social-intuitionists-answer-6-questions.doc) (pp. 8-10 of this version); see also Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 *Duke J. Gender L. & Poly* 127, 188-89 (2008) (discussing role of disgust in response to gay sex).

<sup>124</sup> E.g., Pizarro and Bloom, *supra* note \_\_, at 195. The separation of law and moral ideals, of course, has a long history in jurisprudence, in, for example, the nineteenth century work of John Austin.



Ultimately, the initial reaction of disgust may serve as a useful guide, so long as it is then challenged and subjected to more rigorous analysis, exploring its bases and engaging in discussion.<sup>125</sup>

## 2. Is There a Feminist Approach to Incest?

Feminists have considered a variety of issues relating to incest. Most feminists believe that father or mother/child incest is exploitative, at least when the child is a minor.<sup>126</sup> Indeed, these insights about power and family dynamics are confirmed by an analysis of the 28 criminal incest cases decided by state courts over the past decade (list attached). All [but 1-2] involved an older man, such as a stepfather, uncle, or father. Studies of father-daughter incest have shown that daughters do not initiate the sexual behaviour, and that daughters experience strongly negative emotions, such as disgust and fear.<sup>127</sup>

Other aspects of the incest ban are more contested and result in challenges to the traditional justifications as exploiting women. Theorist Judith Butler suggests that the anthropological justification for the taboo, the concept that the taboo requires marriage outside of one's kin group, functions to subjugate women, who are unable to remain within their own tribes, but must serve as reproductive vessels for other cultures.<sup>128</sup> Similarly, anthropologist Susan McKinnon has observed that the incest taboo maintains patriarchal control over women because it allows men to control women's reproduction.<sup>129</sup>

Numerous scholars argue for relaxing the incest ban on consensual sexual relationships between adults. Such bans cannot, they observe, be maintained given the Court's recognition of a liberty right in consensual sexual relationships: "we think it is straightforward that a respect for autonomy and limited government permits consenting adults to engage in the sexual relations they deem appropriate . . . we largely agree with [Justice Scalia that *Lawrence*] makes it difficult to resist the conclusion we draw."<sup>130</sup>

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<sup>125</sup> See, e.g., Gregory E. Kaebnick, Emotions, Rationality, and the "Wisdom of Repugnance," 38 *Hastings Ctr. Rep.* 36, 44 (2008); Regan, *supra* note \_\_, at 962-633 ("intuitions are not necessarily irreducible intractable phenomena, but may be amenable to deliberate revision and construction in some case . . . we need not regard oral intuitions as beyond our understanding or influence"). The interrelated role of emotions and reason, reminding us of, for example, David Hume, has also become popular in explanations of voting behaviours. See, e.g., George Lakoff, *The Politics of the Mind* (2008); Drew Westen, *The Politics of the Brain* (2007). Kass

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<sup>127</sup> Mark T. Erickson, Evolutionary Thought and the Current Clinical Understanding of Incest, in *INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY* 161, 167 (Arthur P. Wolf and William H. Durham eds. 2004).

<sup>128</sup> Judith Butler, Is Kinship Already Always Heterosexual?, 13 *differences* 14 (2002), avail. at <http://muse.jhu.edu/journals/differences/v013/13.1butler.html> Gerda Lerner makes a similar argument.

<sup>129</sup> Susan McKinnon, The Economies in Kinship and the paternity of Culture: Oriign Stories in Kinship Theory, in *Relative Values: Reconfiguring Kinship Studies* 277, 293, 297 (Sarah Franklin and Susan McKinnon eds. 2001); see also Cahill, *supra* note \_\_, at 610 (discussing McKinnon's theory).

<sup>130</sup> Jennifer Collins, Ethan Lieb, and Dan Markel, Punishing Family Status, 88 *B.U.L. Rev.* \_\_ (forthcoming 2008) (draft at 48 and n. 169), available on SSRN.

Although she does not advocate overturning incest laws, Professor Courtney Cahill urges “that the law reappraise the extent to which disgust motivates” these laws.<sup>131</sup> One student note writer argues that *Lawrence* requires courts to favor “liberty over loathing,” and thereby allow consensual incestuous relationships.<sup>132</sup>

By contrast, feminist theorists who concentrate on father/child incest are more likely to highlight the dangers of incest. Focusing on the power imbalances inherent in “an asymmetrical relationship of dependency” leads to prohibitions on certain relationships, regardless of whether they are established through blood, marriage, or caretaking.<sup>133</sup> Although uncle/niece is not generally a direct dependency relationship, inter-generational relationships involve comparable power dynamics, and should be included in the prohibition.

A final feminist insight revisits behavioral biology, suggesting that men's and women's different reproductive strategies raise the possibility that technology will magnify the reproductive advantages of dominant men. The feminist arguments identifying polygamy as a form of male dominance relate to these concerns. As Professor June Carbone notes:

Behavioral biology, with support from anthropology, suggests that a hunter gatherer society limited the possibilities of one man siring too many children. Once technology made an increase in wealth possible, it expanded the opportunities for differential reproduction . . . Many argue that monogamy then became a critical aspect of democracy not to increase the status of women, but to limit the reproductive advantages of powerful men for the benefit of other men. This system, of course, also linked individual women's status to their relationship to their husbands, and used legitimacy to privilege some offspring over others, and tie the well being of a given woman's children to her relationship with their father. Unlimited sperm donation threatens to set up a new status hierarchy, with big reproductive payoffs for those men who would be picked from the fertility clinic lineup. Some men would find that very attractive, while most of us are horrified.<sup>134</sup>

Feminism provides multiple understandings and potential justifications for limiting the number of offspring from any individual donor, including a profound appreciation for the complexities of an incest ban. Because this article uses incest as a primary – albeit not the only – justification for such limits, the next section turns to a legal analysis of the incest ban

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<sup>131</sup> Cahill, *supra* note \_\_\_, at 1611.

<sup>132</sup> Brenda J. Hammer, Note: Tainted Love: What the Seventh Circuit Got Wrong in *Muth v. Frank*, 56 *DePaul L. Rev.* 1065, 1097 (2007).

<sup>133</sup> Jennifer Collins, et al., *Punishing Family Status* (Draft at 47-48). As they define “asymmetrical dependency,” it is “relationships where one person possesses substantial authority and responsibility over another person who is largely dependent for his or her well-being on the authority-wielding person.” *Id.* at 48 n. 168.

<sup>134</sup> Email from Professor June Carbone (Aug. 11, 2008)(citations omitted).

#### IV. WHY IS INCEST OVER THE LEGAL LINE?

Although incest is the stuff of popular culture, it appears much more rarely in the legal world. A Lexis search for criminal incest cases in state courts over the past decade yielded comparatively few criminal cases. Leigh Bienen's landmark 1998 article, *Defining Incest*, has been cited fewer than 15 times in the Lexis or Westlaw databases.<sup>135</sup> Based on *Lawrence*, however, scholars have begun to reexamine the incest ban. Incest also figures in the litany of cultural and legal disasters that critics claim might result from recognizing a constitutional right to the "liberty" of sexual privacy. This part first examines Supreme Court doctrine on the relationship of incest to other issues of sexual privacy before turning to a discussion of the justifications for the incest ban.

##### A. Just What Is Private?

The Supreme Court has never opined directly on the constitutionality of the incest ban, although the word "incest" does occasionally appear (usually regarding a list of possible offenses other than the one of which the defendant was convicted), and the Court has considered criminal procedure issues in connection with incest convictions.<sup>136</sup> Incest appears as a more direct concern in a limited number of the Court's cases on the parameters of reproductive privacy. In *Planned Parenthood v. Casey*, the Supreme Court analyzed various challenges to a Pennsylvania statute setting limits on access to abortion.<sup>137</sup> The Court upheld limits applicable to minors seeking abortions, but struck down various limits for adult women, relying on the Due Process Clause and its protection of "liberty." In his dissent, Justice Scalia defended the criminalization of various private actions, including incest:

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that . . . the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. . . . But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court . . . has held are *not* entitled to constitutional protection -- because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult **incest**, and suicide, all of which are equally "intimate" and "deeply personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable.<sup>138</sup>

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<sup>136</sup> Plugging in the term "incest" for a search of Supreme Court cases on LEXIS resulted in 57 cases. In *Montana v. Hall*, 481 U.S. 400 (1987), the Court considered a Double Jeopardy challenge in the context of an incestuous act. In *Kentucky v. Hamilton*, 468 U.S. 1217 (1984), the Court

<sup>137</sup> [Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 \(1992\)](#)

<sup>138</sup> *Casey*, 505 U.S. 833, 983-84 (Scalia, J. dissenting); see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The dissent noted that a: "court could find simple, analytically sound distinctions between certain

And here he is in *Lawrence*, accusing the majority of undermining traditional prohibitions on a wide variety of sex crimes:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.<sup>139</sup>

The majority in *Lawrence*, however, did not mention incest at all, and did, in fact, “cabin” its holding. It explicitly clarified the “scope of its decision,” observing that the “case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”<sup>140</sup>

#### B. Is Disgust a Constitutional Justification?

If the dominant theme of abortion cases now concerns the jurisprudence of regret,<sup>141</sup> disgust is the corresponding theme in the reproductive privacy cases. Indeed, Courtney Cahill has written a fascinating article about the “slippery slope” that is so critical to Justice Scalia’s accusations in *Lawrence*, suggesting the importance of challenging “the extent to which incest-revulsion has substituted for national evaluation of the incest taboo (and anything to which incest has been compared).”<sup>142</sup> Like others, she calls attention to the role of repugnance in creating taboos, and the need to question the validity of this visceral, emotional reaction as a basis for law-making. Yet, as this article suggests, it

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private, consensual sexual conduct, on the one hand, and adultery and incest . . . With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted.” *Id.* at 199, 209 (Blackmun, J., dissenting).

<sup>139</sup> *Lawrence*, 539 U.S. 558, 586, 590 (Scalia, J. dissenting).

<sup>140</sup> *Id.* at 578. Indeed, mPage: 27

uch of the commentary on *Lawrence* mentions Kennedy’s efforts to acknowledge the value of same-sex intimacy, thus arguably distinguishing homosexuality from polygamy, and arguably incest.

<sup>141</sup> See *Carhart*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting), Neil Siegel, *Judicial Statesmanship*, 86 *Tex. L. Rev.* 959, 1025 (2008). Justice Ginsburg scathing observed that, “[u]ltimately, the Court admits that “moral concerns” are at work . . . [and that] the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational.” *Id.* at 1647, 1653. Thanks to Nancy Levit for this analogy.

<sup>142</sup> Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U.L. Rev.* 1543, 1609 (2005).

may be possible to distinguish incest from other consensual sexual relationships that have elicited moral revulsion, using rationales other than disgust.<sup>143</sup>

The role of morality and consensus within constitutional law jurisprudence defies any precise definition. In interpreting the meaning of the Eighth Amendment's ban on cruel and unusual punishment, for example, the Supreme Court has repeatedly referred to "evolving standards of decency."<sup>144</sup> As in *Lawrence* and *Roe*, the Court counts states with specific approaches to determine the parameters of "decency," another term with indefinite moral reach that depends on cultural concepts of appropriateness. While regret and disgust are emotional responses, their underlying content is inseparable from comparable cultural concepts that establish a baseline of socially acceptable conduct in the same way as decency. Of course, as the Court pointed out in *Kennedy* (a case involving rape by a stepfather), societal "[c]onsensus is not dispositive."<sup>145</sup> On the other hand, the Court used much of its *Kennedy* opinion to discuss the penalties for child rapists in various states, and the Court also attempted to distinguish the "moral depravity" of child rape from the depravity involved in murder.<sup>146</sup> The dissent challenged the majority's gradations of acts of moral depravity, observing that, to "ordinary Americans, the very worst child rapists . . . are the epitome of moral depravity."<sup>147</sup> The question, then, of what role morality, emotions, and evolving social norms should play in constitutional jurisprudence remain unresolved.

### C. Incest is Different

In light of the various criticisms of the incest ban, a justification for continuing the ban in any context must satisfy three tests to be coherent: 1) it must be segregable from incest's possible uses as a legal and cultural reinforcement of the marital family; 2) it must carefully craft an approach towards moral repugnance so that disgust is not determinative of our ban on incestuous relationships; and 3) it must not call into question the growing acceptance of same sex relationships.

In this context, consider the California Supreme Court's invocation of incest in its decision requiring the state to recognize same sex marriage. The court carefully distinguished its rationale on the equality of same-sex relationships from the rationales supporting other sexual matings, noting:

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<sup>143</sup> For differing perspectives on emotion and the law, see generally *The Passions of Law* (Susan Bandes ed. 1999).

<sup>144</sup> See *Roper v. Simmons*, [543 U.S. 551 \(2005\)](#); *Kennedy v. Louisiana*, <http://www.supremecourtus.gov/opinions/07pdf/07-343.pdf> Georgia (2008), Joanna H. D'Avella, NOTE: DEATH ROW FOR CHILD RAPE? CRUEL AND UNUSUAL PUNISHMENT UNDER THE ROPER-ATKINS "EVOLVING STANDARDS OF DECENCY" FRAMEWORK, 92 Cornell L. Rev. 129 (2006). Cynthia Lee notes that concepts of what the "reasonable man" might do is "problematic because views that are popularly held do not always correlate with notions of equality and fairness." Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* 4 (2003).

<sup>145</sup> Slip op. at 10.

<sup>146</sup> Id. at 27.

<sup>147</sup> Id. at 21 (Alito, J., dissenting)

We emphasize that our conclusion that the constitutional right to marry properly must be interpreted to apply to gay individuals and gay couples does not mean that this constitutional right similarly must be understood to extend to polygamous or incestuous relationships . . . *.because of their potentially detrimental effect on a sound family environment.*<sup>148</sup>

Constitutionally, then, there are several methods for upholding the incest ban. First, if consensual sexual relationships are part of a protected fundamental right, then the state may have a compelling interest in banning them.<sup>149</sup> Compelling interests, as discussed in the next section, may range from protecting children from abuse to protecting the family.<sup>150</sup> If the level of scrutiny is either intermediate or rational basis, then the state's compelling interest certainly justifies the ban.

Second, there is a more fundamental question (as it were) which relates to what types of consensual sexual relationships are included within the right. If the right to sexual privacy is defined to include only non-caretaking relationships, for example, then the level of scrutiny is irrelevant, and certain incestuous relationships fall outside the scope of the right. The right to sexual privacy could be defined to include relationships between: 1) adults who were never part of a caretaking relationship, and thus would exclude not just parent-child incest, but also stepparent-child incest, even in the absence of a legally recognized bond between the parent and the child;<sup>151</sup> 2) adults who are related through affinity or blood as second cousins or further (thus excluding uncle and aunt/niece and nephew) relationships.

Third, even if some incest laws – such as those between comparatively distantly related relatives<sup>152</sup> – might be suspect under a privacy analysis, a nuanced application of constitutional law can help in drawing the right lines both inside and outside of the reproductive technology world. While *Lawrence* may call into question some forms of consensual intrafamilial relationships, it still allows for carefully crafted laws banning some forms of incest.<sup>153</sup>

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<sup>148</sup> *In re Marriage Cases*, 2008 Cal. LEXIS 5247 \*170-171, n. 52 (emphasis added). The dissent, however, echoes Justice Scalia's admonition. *Id.* \*282.

<sup>149</sup> The state's interests – other than disgust -- are discussed *infra*. For further discussion of the constitutional implications, see Bratt, *Is Incest Next*, *supra* note \_\_, at 350-352.

<sup>150</sup> See *infra*. The definition of "family" is highly conflicted (see *Harv. L. Rev.* \_\_, *supra* note \_\_); here, I'm referring to inter-generational relationships of caretaking.

<sup>151</sup> Unless a stepparent has adopted a child, there is no legally recognized relationship.

<sup>152</sup> For one suggestion, see, e.g., Joanna L. Grossman, *The Consequences of Lawrence v. Texas*, *FindLaw's Writ*, July 8, 2003, at <http://writ.news.findlaw.com/grossman/20030708.html>

<sup>153</sup> For differing perspectives on the applicability of a privacy analysis to issues of restricting choices within the reproductive technology world, such as by limiting the freedom of donors to sell gametes as frequently as they would like, of numerous consumers to purchase the one "best" donor, and of fertility clinics and banks to buy and sell without limits, see, e.g., Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 *Stan. L. Rev.* 1135 (2008); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 *AM. J.L. & MED.* 439 (2003); Goodwin, *supra* note \_\_; Rhadika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, *Geo. Wash. L. Rev.* \_\_ (forthcoming 2008); *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 *UCLA L. Rev.* 1077, 1083-

Establishing the standard for measuring the constitutionality of an incest ban or the parameters of a right to sexual privacy depends on the question of what justifications exist for the prohibition. The risk of birth defects may provide a rationale for the ban on incest in itself, while gay and lesbian sex does not result in such palpable harms. This rationale is strongest between immediate family members and becomes more attenuated with cousins. Once the ban is recognized to require a compelling state interest, it doesn't necessarily follow that every aspect is subject to a compelling state interest scrutiny. The dividing line among different forms of incest may be arbitrary.

#### IV. Setting Limits in the Gamete World

Aside from concerns about incest, there may be reasons special to the reproductive technology world to limit gamete donations. This section explores the multiple reasons for establishing limits, ranging from incest concerns to protecting donors and donor-conceived families.

##### A. Protecting Donors and Donor-Conceived Families

All gamete donors face psychological issues involved in providing eggs or sperm to another person in order to create a child.<sup>154</sup> There are also similar to what? issues of exploitation; a man who provides sperm or a woman who provides eggs is commodifying body products.<sup>155</sup> While each of these must be considered when it comes to limits on donation, there are additional issues for each type of gamete provider. Awkward paragraph.

For egg donors, limits are much easier to justify based on health risks, and the feminist health community has mobilized to document the effects of fertility drugs on women. Judy Norsigian, the executive director of Our Bodies, Ourselves, has written about the “substantial risks to women’s health” from multiple egg extraction.<sup>156</sup> There is

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84 (1998); Cass Sunstein, *Is there a Constitutional Right to Clone?*, 53 *Hastings L.J.* 987, 994 (2002) (“none of this means that there is a presumptive right to do whatever might be done to increase the likelihood of having, or not having, a child”).

<sup>154</sup> Although there is relatively little literature on this in the reprotchnology world, there is a significant amount of comparable discussion in the adoption world. Anecdotal accounts in the reprotch world abound, however. See, e.g., *Making Babies*, Sperm Donor Confession, ABC Nightline, Aug. 30, 2006 (one sperm donor “realized that there might be some child some day that would want to find me and just to see what I looked like or where they came from and I hadn't given any thought to whether or not they'd be able to do that,” and decided to make his identity known to potential offspring).

<sup>155</sup> For further analysis of the commodification issues, see Ertman, *supra* note \_\_; Martha Ertman and Joan Williams, *Rethinking Commodification* (2005); *Baby Markets* (Michele Goodwin ed. forthcoming 2009).

<sup>156</sup> Judy Norsigian, *Risks to Women in Embryo Cloning*, Boston Globe, Feb. 25, 2005; *Egg Donation for IVF and Stem Cell Research: Time to Weigh the Risks to Women’s Health* (2005), avail. at <http://www.etopiamedia.net/empnn/pdfs/norsigian1.pdf>; see Barbara Seaman, *Is this Any Way to Have a Baby?*, O Mag., Feb. 2004, avail. at <http://www.gilliansanson.com/articles/infertility.htm>. Seaman was the co-founder of the National Women’s Health Network.

also a problem of disclosure: egg donors are often not provided with sufficient information concerning potential risks.<sup>157</sup>

Aside from the emotional issues,<sup>158</sup> egg donation poses both short and long-term risks. The first set of risks result from the impact of the hormones. The most common short-term complication for oocyte donors is ovarian hyperstimulation syndrome (OHSS). Indeed, the donation procedure itself is actually controlled oocyte hyperstimulation, designed to produce the maximum number of mature eggs, and a mild form of OHSS is considered almost inevitable.<sup>159</sup> Severe OHSS is rare but can be fatal, with symptoms that include kidney and liver dysfunction and respiratory distress. Some studies have shown that severe OHSS may be less common in donors than in women undergoing IVF, partially based on the fact that donors stop after the eggs have been retrieved, while IVF patients continue with additional procedures and hormones in their attempts to conceive.<sup>160</sup> On the other hand, the risk increases based on the number of donations.<sup>161</sup> To minimize OHSS, researchers are studying new drug protocols and possible genetic markers, although the risks remain.<sup>162</sup>

Finally, the long-term risks of the hormones involved in oocyte donation include various gynecological cancers, such as breast, ovarian, and uterine. Several medical studies have shown that women who repeatedly undergo treatment with fertility drugs, as do repeat oocyte donors, have an increased risk for these cancers. However, the evidence is based largely on infertile women undergoing IVF, and several causes of infertility are acknowledged to cause cancer as well.<sup>163</sup> Disentangling the data is difficult, but initial analysis suggests that healthy donors do not necessarily share the same increased risk for breast and ovarian cancer, although the extent to which fertility treatments do affect those cancers for healthy donors is uncertain. On the other hand, the data on the risk of uterine cancer for healthy donors is sparse but more concern.<sup>164</sup> Moreover, researchers do not know whether repeated donations can affect the donor's future fertility, and they are still uncertain about the psychological consequences.

A second set of risks, beyond simply taking hormones, concerns the oocyte retrieval process itself. This is a surgical procedure that requires repeated punctures of the vaginal wall and ovarian follicles. As with any other surgery, complications are

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<sup>157</sup> N. Adsuar, J. Zweifel, E. Pritts, M. Davidson, D. Olive and S. Lindheim, Assessment of Wishes Regarding Disposition of Oocytes and Embryo Management Among Ovum Donors in an Anonymous Egg Donation Program," *Fertility & Sterility Journal* 84 (2005): n. 8.

<sup>158</sup> See Julia Derek, Confessions of an Egg Donor (2004).

<sup>159</sup> Linda Guidice, Eileen Santa, Robert Pool, Eds., *Assessing the Medical Risks of Human Oocyte Donation for Stem Cell Research: Workshop Report* (Washington, DC: National Academies Press, 2007), 18.

<sup>160</sup> Ruth Farrell, Susannah Baruch, and Kathy Hudson, "IVF, Egg Donation, and Women's Health," *Genetics & Public Policy Center* (2006),

[http://www.dnapolicy.org/resources/IVF\\_Egg\\_Donation\\_Womens\\_Health\\_final.pdf](http://www.dnapolicy.org/resources/IVF_Egg_Donation_Womens_Health_final.pdf).

<sup>161</sup> See ASRM Guidelines, *supra* note \_\_\_\_.

<sup>162</sup> See Farrell, Baruch and Hudson, *supra* note \_\_\_\_: 2.

<sup>163</sup> L. Brinton, K. Moghissi, B. Scoccia, C. Westhoff, and E. Lamb, "Ovulation Induction and Cancer Risk," *Fertility & Sterility Journal* 83 (2005): 261-74.

<sup>164</sup> See Guidice, Santa, and Pool, *supra* note \_\_\_\_: 24-6.



possible, including vaginal bleeding and infection. While the procedure is generally done on an outpatient basis, physicians usually use some form of sedation.<sup>165</sup> Thus, the risks inherent in anesthesia, such as stroke and respiratory failure, are also present.<sup>166</sup>

The short and long-term health risks involved in oocyte donation are numerous and potentially serious, and most policy-makers believe that these risks require further research. Nonetheless, the ASRM concluded that “there are no clearly documented long-term risks” for egg donors, although, “because of the possible health risks . . . it would seem prudent to consider limiting the number of stimulated cycles for a given oocyte donor to approximately six.”<sup>167</sup> Although numerous eggs can be retrieved in each cycle, many of them will not be fertilized and develop into children. The recommendation thus provides an inherent limit on the number of children who might be born from the gametes of any individual oocyte donor. Indeed, many fertility clinics do limit donation cycles per donor to six and some to as few as three;<sup>168</sup> these limits are entirely self-imposed, and a donor with proven fecundity is valuable to these clinics. There are well-publicized stories of women who have donated at double the recommended limit.<sup>169</sup>

For sperm donors, the primary issue – aside from commodification -- is not the donor’s health or future fertility, but how many related children should result from one sperm donor. Any form of donation, either egg or sperm, involves the potential for “inadvertent consanguinity,” where a donor has provided gametes to different families and the resulting children do not know of their shared genetic heritage.<sup>170</sup> As one former donor explained his unease at having produced sperm that might have resulted in hundreds of offspring, “If you do the math again, there may be 100 young women out there that are basically my son’s age that are his half siblings. I have to tell him that’s how it is.”<sup>171</sup>

Many sperm banks impose a limit on the number of children who can be born from one person’s donated sperm. While the ASRM recommends taking into account the geographical area and population base for a particular donor, it suggests a limit of 25 births per donor.<sup>172</sup> This limitation makes sense, and it should be incorporated into the FDA’s rules for sperm donors. In an age of easy travel, donor secrecy, and limited understanding of genetics, reducing the number of children that can be born from each donor reduces the possibility of inadvertent consanguinity.

Limits also prevent the widespread dissemination of disease. For example five donor-conceived offspring – products of the same donor -- in Michigan all share the same extremely rare disease of congenital neutropenia.<sup>173</sup> Donation allows an individual to

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<sup>165</sup> Repetitive Oocyte Donation, *supra* note \_\_, at S216.

<sup>166</sup> See Guidice, Santa, and Pool, *supra* note \_\_, at 34-6.

<sup>167</sup> ASRM Guidelines, *supra* note \_\_: S159.

<sup>168</sup> See [http://ovatherainbow.com/FAQs egg donors.htm](http://ovatherainbow.com/FAQs%20egg%20donors.htm).

<sup>169</sup> See Julia Derek, *Confessions of a Serial Egg Donor* (2004).

<sup>170</sup> ASRM Guidelines, *supra* note \_\_: S158.

<sup>171</sup> Making Babies, Sperm Donor Confession, *supra* note \_\_.

<sup>172</sup> ASRM Guidelines, *supra* note \_\_: S42-43.

<sup>173</sup> Judy Graham, When a disease is donated; Mom’s quest to warn daughter’s offspring goes to the heart of a thorny debate on sperm, egg donors, *Chi. Trib.*, March 27, 2008, at C1; see Emily Bazelon, *The Children*

have multiple offspring – simultaneously – before the potential of disease transmission is realized. Setting limits cannot prevent against disease transmission, but can help in minimizing the number of people affected.

A final issue concerns informed consent and, its corollary, counseling. For both kinds of gamete donors and for embryo donors, the informed consent process should include issues relating to the ultimate disclosure of their identities, as well as medical risks. The informed consent process should begin early, to ensure that all involved understand the implications of the treatment. This may be a deliberate choice in order to maximize the potential donor pool, given the demand for eggs. The informed consent process could include a counseling component as well.

Various professional organizations, including both the Family Law Section of the American Bar Association and the ASRM have already developed guidelines for the informed consent process.<sup>174</sup> At the least, full disclosure should include a discussion of the known and potential health risks from donation, and the donor's choice of how to dispose of any unfertilized eggs. Clinics can implement various measures to minimize pressure that patients may feel by, for example, providing information early and allowing patients to ask questions, assuring patients that the informed consent process is confidential, and that decisions concerning the ultimate disposition of their gametic material will not be disclosed to anyone involved in their treatment.<sup>175</sup>

As a pragmatic manner, children are increasingly being told that they are donor-conceived, and prospective parents are increasingly choosing known donors.<sup>176</sup> With donor-conceived increasingly searching for their gamete providers, the providers themselves may be reluctant to be found by so many offspring.<sup>177</sup> On the other hand, increasingly openness may result in more investigation of possible consanguinity by donor-conceived offspring before they become sexually involved with a partner. In the alternative, marriage licenses might be conditioned upon a genetic screening to ensure that there is no genetic link between the intended spouses. While it may also be possible to condition marriage licenses on a voluntary agreement not to produce children (or to require, as is true in some states, that the parties both be over a certain age), this begs the issue of whether such relationships should ever be permissible.<sup>178</sup>

## B. But is Change Possible?

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of Donor X, *O Mag.*, April 1, 2008, p. 250 (autism); Denise Grady, As the Use of Donor Sperm Increases, Secrecy can be a Health Hazard, *N.Y. Times*, June 6, 2006, p. F6.

<sup>174</sup> ASRM Guidelines, *supra* note \_\_: S46; American Bar Association Family Law Section Committee, "Proposed Model Code Governing Assisted Reproduction," (2007), [http://www.abanet.org/family/committees/artmodelcode\\_november2007.pdf](http://www.abanet.org/family/committees/artmodelcode_november2007.pdf).

<sup>175</sup> See B. Lo, V. Chou, M. Cedars, E. Gates, R. Taylor, R. Wagner, L. Wolf and K. Yamamoto, "Informed Consent in Human Oocyte, Embryo, and Embryonic Stem Cell Research," *Fertility & Sterility Journal* 82 (2004): 559.

<sup>176</sup> Golombok, et al. See Jeff Stryker, An Uncomfortable Question for Sperm Banks (2007), <http://www.scienceprogress.org/2007/11/regulation-or-free-markets/scienceprogress.org>.

<sup>177</sup> See the Donor Sibling Registry website.

<sup>178</sup> How do the risks vary between half siblings and full siblings?

Unlike other countries, the United States has adopted a piecemeal approach to regulating the technologies, with oversight shared between the federal and state governments, the industry, and the market.<sup>179</sup> There is a tradition of federalism and industry self-regulation that characterizes the medical profession. On the other hand, Congress has enacted legislation that applies to the entire industry, and the FDA has adopted regulations that apply on a national level. Consequently, the federal procedures already in place could be adapted to protect against multiple donations by any individual. While the industry has already promulgated voluntary guidelines, they are not enforced, and clinics and banks are free to decide how to approach these issues themselves. The existing federal procedures thus provide an appropriate starting place.

Once a potential donor arrives at a clinic, the clinic must take certain steps to determine the donor's eligibility, including a review of the applicant's medical records for various communicable diseases, such as Chlamydia and HIV.<sup>180</sup> If the donor passes the medical records examination, then the clinic must test the actual specimen collected for communicable diseases.<sup>181</sup> All tests must be done using FDA-licensed or approved screening tests.<sup>182</sup> Further, anonymous sperm donors must be re-tested at least six months after the date of donation, which means that the specimens are collected, tested, quarantined for six months, and then tested again before use.<sup>183</sup> Interestingly, the same stipulation does not apply to donated oocytes, which are only required to be withheld until donor eligibility is established, without the comparable necessity of re-testing.<sup>184</sup> Only after both screening and testing (and quarantine, for anonymous donors), is a donor-eligibility determination made.

The federal government and the ASRM each require detailed records on every donor. Because donors will be given different identification numbers by each bank, there must be an effective means to ensure that the same person does not attempt to evade limits on the number of donations per provider by visiting different recruiters and giving different names. One solution would be for fertility clinics and sperm banks to collect a genetic sample that could be sent to a central repository for verification that the donor is not circumventing limits, and for ensuring a consistent identification number for any particular donor. If each donor-conceived offspring knew, with certainty, the specific donor gamete number, then a new dating ritual – perhaps even before the first kiss – might involve inquiring about the genetic origins of one's beloved potential sexual partner.

## CONCLUSION

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<sup>179</sup> See June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509 (2006). Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 434-35 (2005).\_\_\_\_

<sup>180</sup> 21 C.F.R. §1271.75 (2007).

<sup>181</sup> 21 C.F.R. §§ 1271.85(a) and (c).

<sup>182</sup> 21 C.F.R. § 1271.80(c).

<sup>183</sup> 21 C.F.R. § 1271.85(d).

<sup>184</sup> 21 C.F.R. § 1271.60 (a).

Ultimately, I'm not sure what to do about disgust in the reproductive technology area. Although one reaction to learning that one man has contributed sperm to create more than 100 offspring is disgust (perhaps awe for some), this is not necessarily a universal, or even a majority, response. Some may be troubled (perhaps not "disgusted") by the "unnaturalness" of so many offspring of one individual in our current culture of monogamy.<sup>185</sup> Fears of inadvertent consanguinity contribute to this feeling of concern. These feelings -- of disgust or concern -- do not mandate an automatic ban on the possibility of inadvertent consanguinity, but they are helpful in developing a response.<sup>186</sup> Disgust should not serve as the basis for drawing a line for constitutional or regulatory demarcation, but does provide an "inkling"<sup>187</sup> of the need to consider legal standards.

Most of the traditional explanations for the incest prohibition do not apply in the reprotch context when it comes to restrictions on gamete provision. The Westermarck hypothesis and its contemporary modifications do not apply to gamete donors; the children typically have not been raised together. While the parents may feel a bond at having used the same gamete donor, this does not translate into the prolonged contact associated with the evolution of kin avoidance. The anthropological explanation, which requires marrying out of one's kin group in order to forge alliances and create a larger society, similarly does not apply because the half-genetically related offspring have been raised in different kin groups – although it is important to recognize that recipients of gametes from the same donor do feel connection and kinship based on biology. What remains are health concerns for donors, a fear of genetic abnormalities, feminist fears of unequal reproductive advantage, and the emotion of disgust – or concern. These can help us in thinking about what it is we are seeking to regulate, and why.

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<sup>185</sup> See, e.g., *supra* n. \_\_ (conclusions of Professor Carbone).

<sup>186</sup> See Toni M. Massaro, *Show (Some) Emotion*, in *Bandes*, *supra* note \_\_, 80, 97, 101.

<sup>187</sup> The word "inkling" belongs to Nancy Levit. [need permission]