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# Test Tube Families: Why the Fertility Market Needs Legal Regulations

Naomi R. Cahn

*George Washington University Law School, [ncahn@law.gwu.edu](mailto:ncahn@law.gwu.edu)*

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# Test Tube Families

*Why the Fertility Market Needs Legal Regulation*

Naomi R. Cahn



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## The Treatment Plan for Legal Issues

### Sperm

In May 1995, when Brittany Johnson was seven years old, she was diagnosed with an unusual genetic disorder that affects her kidneys.<sup>1</sup> Neither of her parents, Ronald and Diane Johnson, had kidney disorders in their family history. Instead, Brittany inherited the kidney disease from Donor 276, who provided the sperm to California Cryobank that ultimately resulted in her birth.

California Cryobank opened in 1977. Like other early sperm banks, California Cryobank focused on freezing the sperm of men who were considering sterilization, ensuring that the men would be able to have biological children with their partners. But it soon expanded its services to include freezing sperm that could be sold to strangers for artificial insemination. Today, it advertises itself as a leader in sperm banking, offering one of the largest selections of donors; its online donor catalogue is updated hourly. Customers can purchase vials of sperm for \$315. The bank exercises strict quality control over its samples and provides a list of diseases for which donors are screened-on-its website.<sup>2</sup>

In his initial application to become a sperm provider in the mid-1980s, Donor 276 indicated that his mother and his aunt had kidney disease. He also signed an agreement with California Cryobank that stated that his identity would not be disclosed except with a court order based on good cause.<sup>3</sup> Over the next five years, Donor 276 provided 320 vials of sperm to California Cryobank and was paid \$35 per visit. Ronald and Diane purchased the sperm that resulted in Brittany's birth in April 1989. Although California Cryobank knew about Donor 276's family history, the bank (for unknown reasons) did not initially provide this information to Ronald and Diane. It was not until the couple tried to get another vial of Donor 276's sperm several years later in order to have a second child that they

found out about their donor's medical history. At that point, Cryobank told Ronald and Diane that sperm from Donor 276 was no longer available because of, according to the subsequent deposition of a Cryobank genetic counselor, "new medical information" about the donor.<sup>4</sup> Even after this disclosure, Ronald and Diane trusted California Cryobank enough to purchase sperm from another Cryobank donor, and Diane gave birth to a second child.

But then, Brittany was diagnosed with autosomal polycystic kidney disease. Ronald and Diane tried to get more medical information about Donor 276 to help them care for their daughter. They were able to obtain his initial application, but California Cryobank refused to provide enough information to enable them to get a more complete medical history. Indeed, California law supports the position of Cryobank, providing that any records relating to an insemination can be inspected only with a court order based on good cause for releasing the information.<sup>5</sup> And the Johnsons had agreed to an even stricter limitation when they first obtained the sperm by signing a form in which they acknowledged that the bank would destroy any records concerning the donor's identity, "it being the intention of all parties that the identity of said donor shall be and forever remain anonymous."<sup>6</sup>

Ultimately, the Johnsons sued California Cryobank for fraud, negligence, and breach of contract, claiming that the bank's initial failure to disclose that Donor 276 had a family history of kidney disease had caused their legal injury. During several years of legal proceedings, the Johnsons kept trying to learn the identity of Donor 276, but California Cryobank continued to refuse to disclose it. Finally, the lawyers for the Johnsons believed that they had found Donor 276 themselves, identifying him as "John Doe" in the court records. ("John Doe" often appears in legal proceedings as a fictitious name to protect the identity of the real person.) John Doe never admitted to being Donor 276, however. When the Johnsons' lawyers sought to depose him, asking him questions under oath in a meeting outside the courthouse, both John Doe and California Cryobank objected, claiming that a deposition would violate Doe's right to privacy. Donor 276 grounded his claims of privacy in the contract between the Johnsons and Cryobank, which stated that his identity would not be disclosed, as well as in the California and federal constitutions. California Cryobank also claimed that breaching the confidentiality that had been promised to a sperm provider would decrease the availability of sperm.

The court split the baby. It decided that the absolute prohibition on disclosure in the contract was contrary to public policy, which allowed for

disclosure based on “good cause,” thereby trumping the anonymity promised in the Johnsons’ contract. Although the court recognized a limited constitutional right to privacy under the California constitution, it held that this right does not prohibit disclosure. Under the particular circumstances of the case, however, the court then crafted a compromise and directed that the donor be deposed without revealing his identity.

*Johnson* is the first case to allow for breach of the promise of confidentiality to a sperm provider. And, so far, it is the only reported case regarding the circumstances under which a sperm donor can be identified. But it is certainly not the last. Consider the following events reported in May 2006. Severe congenital neutropenia is a rare disease that affects one in five million births.<sup>7</sup> So, when five children, all born in Michigan, developed the same disease, physicians searched for what the children had in common. They found that all the children had been “fathered” by the same sperm provider. Mary Ann Brown, who was the director of the sperm bank, explained that there was no way of preventing this situation because, although sperm banks test for common genetic diseases, it is unrealistic to test for all genetically transmitted disorders.<sup>8</sup>

## Egg

E.G. and K.M. met in October 1992 and became involved in 1993. Although the two women could not marry each other, they registered as domestic partners in San Francisco the following year.<sup>9</sup> Even before E.G. began her relationship with K.M., she had considered motherhood and had applied for international adoption before deciding to try to become pregnant herself. She continued her efforts toward parenthood once she became involved with K.M. Despite using donor sperm a dozen times and trying in vitro fertilization, E.G. was childless and frustrated.<sup>10</sup>

E.G.’s physician suggested that she consider using K.M.’s eggs, but she was hesitant; she wanted to be the only legal parent, not forced to share any legal responsibilities with anyone else. After numerous discussions with K.M., however, E.G. asked her lover to donate eggs. In March 1995, K.M. signed a standard ovum donation agreement, in which she stated that E.G. “may regard the donated eggs and any offspring resulting therefrom as her own children” and that K.M. would “specifically disclaim and waive any right in or any child that may be conceived.”

E.G. gave birth to twins in late 1995. For the next five years, while E.G. and K.M. lived together, they shared parenting responsibilities. The twins even called K.M. “Momma.”<sup>11</sup> But when the couple split up, E.G. moved to Massachusetts and cut off K.M.’s relationship with the girls.

K.M. filed a lawsuit in the California courts to establish a parental relationship with the children. Although it was clear that K.M. and the children were emotionally attached, two lower courts found no enforceable legal relationship.<sup>12</sup> They relied on K.M.’s egg agreement form, in which she waived any rights as a parent; the courts analogized her relationship to that of a sperm donor, who would similarly have no parental rights under California law. California’s parentage law, which is based on model legislation that is in effect in several other states, provides that an anonymous donor who provides sperm to a physician is not the legal father.<sup>13</sup>

In August 2005, however, the California Supreme Court conferred the legal status of parent on K.M. K.M.’s genetic relationship to the twins was evidence of a mother-child relationship, and, as a parent, any agreement in which she waived parental rights could not be enforced against her. This was unlike the typical sperm-donor case involving an anonymous provider because, in the court’s language, “K.M. supplied ova to impregnate [*sic*] her lesbian partner in order to produce children who would be raised in their joint home.”<sup>14</sup>

The court ignored an explicit contract between two women, ultimately basing a parentage decision on actions, genetic relationship, and intent. Contract law typically upholds agreements unless they were the product of fraud or coercion. Nonetheless, the scrambled biological relationships between the two women and the twins resulted in the court’s respect for functional parentage over a written agreement. By using language such as “impregnate” to describe K.M.’s egg donation, the court also analogized two lesbians’ actions in creating a child to the actions of a man and a woman, coming close to labeling K.M. as the father.

## State of ART

For at least one hundred years, women have become pregnant through insemination by “donor” sperm. The sperm donor may be someone known to the woman, or she may have gone to a sperm bank and selected the perfect donor. Sperm bank donors are often promised anonymity by the sperm bank or under state statute.

Artificial insemination is the oldest of the alternative reproductive technologies (ART). Under newer reproductive technologies, women can donate eggs so that other women may become pregnant, and couples can donate embryos. In 2004, the most recent year for which data is available, there were more than fifteen thousand cases of egg embryo donation and more than five thousand babies. As with sperm, recipients can choose donors based on a series of characteristics, ranging from hair color to body build to interests and hobbies. Children created through the new reproductive technologies now have the option of at least eight different “parents”: two intending parents; a sperm provider (with a partner); an egg provider (with a partner); and a surrogate (who may have a partner) who carries the egg.

Enhanced by the development of IVF, the gamete provision industry has grown dramatically over the past thirty years. Because the new ARTs enable clinics to transfer eggs and embryos created with both donor sperm and eggs, and because of improved infertility diagnostic techniques, the demand for donor gametes has increased significantly. The distinguishing characteristics of this rapidly developing industry have been secrecy and little regulation. There is only minimal legal oversight over much of these market practices. The economic forces supporting the current lack of regulation are strong and well entrenched. Infertility is an approximately \$3–4 billion-per-year business whose participants include surrogate mothers and major drug companies; families using donor gametes are so focused on having a child that their budgets are quite elastic.

Use of someone else’s genetic material raises complex legal and public policy issues that touch on technological anxiety, eugenics, reproductive autonomy, identity, and family structure. How should the use of gametic material be regulated? Should recipients be able to choose the “best” genetic material? Should a child ever be able to discover the identity of his or her gamete donor? Who can claim parental rights?

Although these issues are fundamental to the increasing use of alternative reproductive technologies, there are few definitive answers provided by the law, ethics, or cultural norms. Although the law helps in framing the questions to ask about the new reproductive technologies, the lack of legal answers makes these questions especially thorny. Indeed, there is a regulatory void outside of minimal requirements for gametic testing and limited protection against deceptive marketing.

The ethical issues that are intertwined with gamete provision provide context but do not answer fundamental policy questions about how to

regulate this area. What makes the use of gametic material so complex and difficult for formulating legal responses is not just its test of our contemporary scientific capabilities but the creation and preservation of life-producing material. Among the serious dilemmas for bioethics are the possibilities of engineering transhumans, humans whose abilities have been genetically enhanced—think Neanderthal v. Modern human. Bioethicists are also worried that we may become trapped by genetic essentialism, a concept that suggests that a person is merely the sum of his or her genes and that the parent-child relationship is primarily genetically, rather than functionally, based.<sup>15</sup>

The possibility of designing families is quite real. Gamete seekers can choose based on the appearance, profession, education, and even voice of the potential donor. The forms that gamete providers must fill out are extremely detailed with respect to their family health histories, and much of this information is disclosed to potential recipients. Sperm providers frequently undergo extensive screening as well as a complete physical examination.<sup>16</sup> Consequently, without fear of legal intervention, gamete seekers can specify race, ethnic ancestry, height, weight, physical build, hand coordination, vision, approximate IQ score, and college grade-point average for egg providers.<sup>17</sup> Cryogenic Laboratories offers the following: “Simply send us a photo of the individual you would hope for your offspring to resemble. Our staff will then rank the resemblance of the donors you’ve selected.”<sup>18</sup> The bank may even be able to offer an audio interview of the providers. Sperm banks report that many of their clients are looking for a good genetic match. According to a study of 148 couples that had used donor eggs or sperm to create their children, almost everyone observed that resemblance was an important consideration.<sup>19</sup> In an HBO television program, Ellen DeGeneres expressed frustration with the process of seeking a sperm donor who looks like her.<sup>20</sup>

Bioethicists provide differing answers to these dilemmas of choosing children’s genetics heritage. Many are concerned about interfering with nature. Choosing characteristics in this way has “undertones of eugenics,” in the words of Jennifer Lahl, who is the national director of the Center for Bioethics and Culture.<sup>21</sup>

The law provides no definitive answers concerning the ethics of choosing characteristics. Federal law regulates the health of donated tissue, which includes sperm and eggs, by requiring that donors undergo certain tests for diseases such as AIDS, and it requires fertility clinics to report their success rates. Federal law does not otherwise regulate the process in



any significant way. It does not preclude the sale of eggs, sperm, or embryos, nor does it even require that clinics minimally verify the veracity of donors' statements concerning their characteristics. Even observers who believe that there are "numerous" legal mandates concerning ART acknowledge the fragmentary nature of the regulation.<sup>22</sup>

A minority of states currently addresses some aspects of the gamete provision process, typically requiring additional donor screening or clinic reporting data, and about fifteen states require insurance coverage for some aspects of infertility treatment and diagnosis. Consequently, gamete donation remains a largely private transaction that is handled through contract and intention with virtually no uniform regulation.

As for legalization of the resulting relationships among donors, parents, and children, states have adopted varying approaches that generally attempt to facilitate transactions in gametes and embryos by allocating parental rights to the intending parents, rather than the gamete providers. However, there are gaps in existing state regulations; not all states address circumstances involving unmarried parents or the use of donor eggs or embryos.<sup>23</sup> Moreover, there is no uniformity among states concerning the laws of gamete donation or surrogacy or concerning the application of parentage statutes to define family relationships established through the reproductive technologies.<sup>24</sup> Thirty-five states have addressed, albeit not fully, the parental rights and responsibilities when gamete provision is involved.<sup>25</sup>

Disputes over gametes can be resolved through either private agreements or public regulation by courts or legislatures. The providers may draft a document setting out their intentions (e.g., a contract) with respect to their interests in gametic material. States may enact legislation establishing either override rules that mandate certain outcomes, such as a prohibition on destruction of the material, or default rules that control in the absence of an expression of contrary intent. Generally, as in the *Johnson* and *E.G.* cases, donors sign an agreement waiving all parental rights and responsibilities with respect to any child conceived from their eggs or sperm,<sup>26</sup> yet as of 2003, only five states had enacted specific legislation assuring the validity of those agreements by assigning parental status after egg donation. Statutes typically provide that a married recipient and her husband are the parents of a child from an egg donation but fail to address legal paternity for children conceived by single women using egg donation.<sup>27</sup> Legally, then, as discussed in chapters 4 and 5, single women may be uncertain about the potential claims of sperm donors.

Donors, recipients, banks, clinics, and physicians have little incentive to push for public regulation that might result in additional restrictions on their activities. Buyers want to buy, donors want to sell, banks want to market—and, as Arthur Caplan, a bioethicist at the University of Pennsylvania, explains, “The doctors don’t want regulations. The couples who want the treatments don’t want regulations. And politicians don’t want to go in and regulate because it puts them right smack in the middle of discussions of things like embryos.”<sup>28</sup> Even the occasional highly publicized reproductive snafu involving switched embryos or genetically questionable gametes<sup>29</sup> has not inspired the public to push for legislation. Although there is much more oversight of the industry in other countries, many of them (England, Australia, and France) have government-provided medical care, so the population may be more accustomed to government regulation of its health care. In the United States, unlike those other countries, individual states, rather than the federal government, are primarily responsible for regulating the medical profession and the family law issues posed by ART.<sup>30</sup>

Jurisprudentially, we lack a coherent framework for addressing issues involving human gametic material that unites both the technological and relational aspects of using the material. Gametes differ from other body parts in that their function is to create human life, rather than to sustain it. Much of the existing legal analysis relies on the property/privacy framework, attempting to categorize the material as protected by a property or privacy or “quasi-property” framework.<sup>31</sup> In general terms, privacy protects identity interests and provides freedom from invasion, whereas property protects ownership interests. Reproductive autonomy, such as the right to an abortion, has been categorized within the legal right to privacy. Identifying a property interest in gametes might allow an individual to sell eggs and sperm, while privacy interests might recognize the intending parents’ right to familial autonomy, a donor’s right to be let alone, or a donor-conceived child’s right to know the identity of a donor. This analysis provides useful insights into the sale of gametic material and starts to uncouple genetic connection from parenthood; mere contribution to the creation of an embryo does not necessarily translate into parental rights and obligations.

The property/privacy distinction does not, however, resolve many issues concerning gametic material. There are, for example, conflicting privacy interests in the right of the donor who chooses anonymity, the rights of recipients to keep their use of the material confidential, and the rights

of any resulting child to know about his or her donor-conceived state and to discover identifying information about the donor. Indeed, the whole notion of privacy—the right to be let alone—has developed as protection for individuals from state interference. The right of privacy protects against government overreaching and against undue state interference with fundamental personal decisions and beliefs, but it is incidental to the multiple interests involved in gametic donation. Although using a property rubric protects the marketing of gametic material, the law imposes multiple restrictions on other property interests and on the operation of the market in the interests of equity, access, and nonexploitation.

An alternative perspective on families formed through the new reproductive technologies adds the need to focus not just on liberty and equality but also on “relationship and care” and connections among family members.<sup>32</sup> But what happens when a gamete provider’s privacy interest conflicts with a connection that a child, or a recipient, would like to establish?

## Reproducing Dilemmas

This book focuses on the dilemmas of applying conflicting values to egg and sperm donation, arguing that the law must develop an integrated approach to the otherwise distinct aspects of technology and family, market and relationship. The parameters and appropriateness of the state’s role in this context depends on a series of (overlapping) “conceptual categories,” to use George Lakoff’s terminology.<sup>33</sup> The metaphors that we use to describe these transactions in gametes reveal our actual attitudes and preferences. As an example, eggs and sperm are often sold, yet the most powerful and popular label refers to “donation,” a word that is also used for blood and organs provided by third parties. Nonetheless, the places where gametes are stored are “banks,” not “facilities” or “charities.”

Analyzing these conceptual categories as they apply to the gamete transfer process determines the mode of regulations. If we conceive of gamete donation as a sale, then we will use market-based concepts enforcing private contracts and applying cost-benefits economics analyses; if we consider gamete provision as an altruistic act, then we will use philanthropic concepts that emphasize charitable donations and that are anticommodification; and if we classify it as provision of identity, then we will use family law and constitutional law terminology. None of these conceptions is, in and

of itself, satisfactory. Later chapters in this book clarify how to coordinate these three categories to develop a system that respects both the market and the interests of the individuals involved. The book addresses two fundamental issues: market regulation and relational regulation of gamete provision.

As an example of how these two areas overlap, consider the use of “known” versus “anonymous” gamete donors; known donors may have been solicited by the recipients, and their identity is never concealed. The concept of anonymity is both a market and a relational marker. Known donors, who often donate their gametes without receiving any money, may come back and assert parental rights to the child despite an agreement not to do so.<sup>34</sup> In California, egg donors may be able to assert parental rights, regardless of their private contracts.

Without some definitive means of terminating the parental rights of sperm or egg providers, in a contract-based system, there are problems with identified donors who may return to claim rights.<sup>35</sup> In a few states, it may be possible for a known gamete donor to waive parental rights through contract, though the long-term enforceability of these agreements remains doubtful in the absence of a broader legal structure regarding gamete donation.<sup>36</sup> For lesbian mothers, for example, if known sperm donors claim paternity, then the men are often successful, regardless of the existence of a written agreement providing otherwise.<sup>37</sup>

When there is an anonymous donor, by contrast, given the collection practices of many sperm and egg banks, there may be little information available about the potential gamete provider. Individuals may search for information on donors for many reasons, including critical medical information, as in *Johnson*, or for more profound psychological reasons. If and when gamete offspring search, they generally want identifying information about the gamete providers, which may include names. Although not all children will seek this information, it is important to many of them to have the option of accessing it.<sup>38</sup> Children want to know why they have a certain eye color, where their musical talent comes from, whose sense of humor they have. An article in the women’s magazine *Redbook* describes the search of one woman who tracked down her sperm-provider father to the OB/GYN office where he practiced medicine. He refused to talk about whether he might have provided the sperm. But, she explained, “it still bothers me. There are a lot of identity issues. Who am I? Who do I take after?”<sup>39</sup> One woman expressed uncertainty about what language to use to describe herself: “I’m unsure about what words to use. Do we refer to ourselves as DI [donor insemination] adoptees: do we say conceived

or produced? There is an element of being produced.”<sup>40</sup> When I participated on a panel to discuss legal comparisons between adoption and reproductive technology, Bill Cordray, a donor-conception activist, used the term “medically assisted adoptees” to describe his status. Some gamete offspring search crowds, looking for half siblings, knowing that the same sperm donor could have helped in the birth of many children.<sup>41</sup>

There are a few sperm banks, such as the Rainbow Flag Health Services bank, which recruits gay and bisexual sperm donors and which calls itself “A Known Sperm Bank,”<sup>42</sup> that have well-thought-out policies on anonymity. As part of its services, the bank asks that the mother contact the sperm donor by the time the child turns one year old; such a requirement may be onerous and cause legal problems, however, particularly if the sperm donor seeks to establish a relationship with the child. Indeed, many sperm providers want to be involved with the resulting children. The Sperm Bank of California has a known-donor/yes program through which donors agree to let any resulting children learn their identity when the children are eighteen years old.<sup>43</sup> Similarly, Pacific Reproductive Services, which describes itself as “lesbian and single-women friendly,”<sup>44</sup> includes in its donor profiles whether the donor has indicated an interest in willing to be known when the child turns eighteen, or at least allowing the child to see a video of him.<sup>45</sup>

In the overwhelming majority of cases involving an unknown donor, however, when children begin searching for genetic information, they will be unable to receive any. Although some banks, such as the California Cryobank, allow for the release of donor information with mutual consent,<sup>46</sup> even this process is difficult, as it requires the bank to find the sperm providers many years later. A reporter who tried to track down California Cryobank Donor 5027, whose sperm had been used within the past several years, was unable to find the donor, even though the bank requests that sperm providers keep the bank apprised of their moves.<sup>47</sup> Donors themselves may be interested in meeting “their children” but may be prevented from doing so because of seemingly legal guarantees of anonymity, or because they have not kept all the information about their donations or have received very little useful information.<sup>48</sup>

The anonymity issue presents a series of other dilemmas that concern the relationship between parenting, technology, and markets. In a 2003 Maine case, involving guardianship of a child named I.H., several courts struggled with whether they were required to notify an anonymous sperm donor of the proceeding. Typically, any “parent” must be informed before the court

can appoint a guardian, but here, the probate court found that the “biological father” was an unknown sperm donor. The Maine Supreme Court ultimately decided that nothing in Maine law prevented the sperm donor from being called a parent. Nonetheless, the court also decided it would be useless under these circumstances to try to notify “the child’s father” of the guardianship proceedings if he was an anonymous donor.<sup>49</sup> The linguistic construct of calling the sperm provider both the “donor” and the child’s “father” shows the awkwardness of current approaches to this situation.

In *Johnson, L.H.*, and *E.G.*, the courts had to identify the rights of gamete donors, balancing public policy, children’s rights, and privacy rights. In *Johnson*, the court concluded that a private contract could not protect a sperm donor’s identity; similarly, the *E.G.* court found that a private contract could not cut off parental rights. In *L.H.*, because of the lack of Maine law in this context, the court was required to apply parental rights notions to an unknown sperm donor.

If sperm is a marketable commodity, then, subject to public policy concerns, private contracts should be enforceable. If sperm is, instead, identity producing, then relationships and connection should be the primary considerations.

In this country, at least, a provider’s privacy claims are generally based on promises made in connection with a sale. There are actually two sales transactions: a sperm bank typically pays some money for each ejaculation and, in turn, sells that sperm to the intending parents. A woman can sell her eggs to an in vitro fertilization program for thousands of dollars, and some women may receive tens of thousands of dollars. By allowing the sale of sperm and eggs, we are, in a sense, treating them, and their ultimate “product,” as a commodity.<sup>50</sup> The *Johnson* court rejected the donor’s claim to a physician-patient privilege because there was no evidence, it asserted, that the donor ever consulted the Cryobank for medical diagnosis and treatment; the donor instead sought merely to make money from the sale of his sperm and was thus not subject to the protections offered by the privilege. Sale of the good did not entitle him to the same privacy rights.

## Children for Sale?

It is the thesis of this book that sperm and egg donors are not simply selling “spare” body parts but are instead providing hope to recipients, genetic identity to the resulting children, and profits within the

marketplace. Accordingly, this book argues that, notwithstanding the predictions of various law and economics scholars, private regulation has not responded to these competing demands and that the government, at the federal and state level, must regulate the gamete donor process. This regulation must ensure that donors are adequately protected against exploitation, that recipients receive their promised “goods,” that children are guaranteed access to their genetic information, and that the market functions efficiently. This does not mean a ban on the sale of gametic material, an issue that is quite contentious. On the one hand, the Ethics Committee of the American Society for Reproductive Medicine has defended payment for eggs, explaining that payment does not discourage the provider’s altruistic motivations and also promotes fairness to the providers.<sup>51</sup> On the other hand, the President’s Council on Bioethics advocated against the sale of human embryos and, although unwilling to recommend against the sale of eggs and sperm, did not indicate approval of the process.<sup>52</sup> There is, however, no federal legislation concerning the sale of gametic material.

The current lackadaisical approach to legal regulation of the gamete market derives from several sources unique to the reproductive context. First, the historical stigma of infertility—still with us today—has often helped keep the use of other-provided gametes a secret between an individual and her physician. Despite the increasing public attention to the potential use of donor gametes—women over the age of forty-five are highly unlikely to conceive using their own eggs, notwithstanding the births to celebrities over that age, such as Holly Hunter, who gave birth to twins at the age of forty-seven; Geena Davis, who gave birth to twins at the age of forty-eight; or model Cheryl Tiegs, who gave birth to twins at the age of fifty-two—there is virtually no disclosure of whether individuals have actually used their own eggs and sperm to create a baby.

Second, no one in the world of reproductive technology has any incentive to advocate for more openness and regulation, aside from the children, some disgruntled gamete providers, and the occasional unhappy patient. Reproductive technology is a multibillion-dollar business that is thriving on its own terms. Although the number of multiple births in the United States is increasing exponentially, and the industry’s self-regulatory organization has adopted guidelines on the number of embryos to be transferred, there is no binding limit on how many embryos can be transferred into a woman’s uterus, nor are there any limits on the number of times a man can provide sperm or a woman can provide eggs. Many

of us who have used reproductive technology do not want to disturb the machine that has given us our children.

Third, reproductive technology reflects our deepest emotional and biological desires to have a child and touches on highly politicized issues. As evolutionary biology has shown, our genes seek to replicate themselves; and our social and cultural norms reinforce a pronatalist ideology. Reproductive technology has now become enmeshed in highly controversial debates about abortion and stem-cell research, and it raises issues of access based on race and class and family form. Subsequent chapters explore the legal disputes over the parameters of reproductive rights for all.

The secrecy, the lack of incentive to open up the processes, and the fundamental nature of wanting a child provide compelling explanations for the status quo. Nonetheless, I argue that the law must assert more control over the fertility market and the resulting familial relationships in three ways. First, the industry itself needs regulations concerned with the sale of gametes and quality control. Second, although providers may choose to remain anonymous until a child reaches the age of eighteen, at that point, the anonymity should end. Third, the parenting issues need further resolution to ensure the enforceability of private relational contracts that establish who may claim the title of “legal parent.”

On the first issue of markets, federal law should regulate the sale of gametes, providing an incentive, but not a bonus, to the producers. Of course, even as we permit eggs and sperm to be sold, there remain additional concerns about the “purveyors” of these “goods” as well as the underlying validity of permitting their sale. Just as in the surrogacy context, the providers may be devaluing themselves<sup>53</sup> (as well as their commodities). Prohibiting the sale of sperm and eggs may be the appropriate response that prevents exploitation and that also acknowledges the significance of providing gametes. Although commodification may be useful conceptually in allaying privacy concerns, I remain concerned about allowing the unfettered sale of these particular commodities. Limiting or even removing the financial incentive may cause donors to embrace more fully the significance of their actions to their offspring.

Second, when it comes to anonymity, there are fundamental legal issues of identity and privacy that must be balanced against the background of ensuring adequate supply of gametic material. In recognition of the potential connection between gamete providers and the recipients and their children, federal and state law should ensure that the identity of each person can be disclosed once a child turns eighteen and that gamete donors



update their medical information every five years. States should guarantee the release of such information to mature adults through laws that would preempt private agreements to the contrary (such as between the gamete provider and the intending parents or between the gamete provider and a gamete bank). Although all states have addressed this issue for adoptees, few states have considered legislation on disclosure of the identity of gamete providers.

Even under a system of full disclosure, there remains a distinction between “parenting” a child and contributing to the creation of the child.<sup>54</sup> Parents have a fundamental right to the control, care, and custody of their children;<sup>55</sup> allowing information disclosure to adults respects parental rights to raise children as they see fit while the children are minors but respects the children’s rights once they are mature. The rights and interests of biological parents and gamete providers should be accorded respect, but a child should be entitled to receive information about the people who helped to create him or her. Such a right should be established both retroactively and prospectively, such that adult offspring who today want information about their biological backgrounds should be able to obtain it, and prospective adoptions and gamete provision arrangements should proceed in a legal context in which it is understood that offspring will have access to information once they become adults. States need to enact legislation, and courts need to establish precedent for allowing disclosure. Legal scholar Barbara Bennett Woodhouse has suggested, in the context of transracial adoption, the need for a child to be able to “claim her ‘identity of origin,’ defined as a right to know and explore, commensurate with her evolving capacity for autonomy, her identity as a member of the family and group into which she was born.”<sup>56</sup> Applying this notion more generally in the adoption and gamete-provision context, mature offspring in these families similarly need access to the ability to explore their biological families of origin.

Finally, states should adopt legislation specifying the relationships that result from gamete transfer. This means that contracts in which gamete donors waive parental rights must be enforceable. This does not preclude courts from finding that the gamete donor has established the functional relationship of parenthood with any resulting child, but this relationship exists apart from the genetic contribution. Moreover, the intending parent or parents of children produced from gamete transfer should be the only ones who can exercise parental rights.

In developing new legal approaches to the reproductive technology market, it is critical to examine both the technological and the relational aspects of donated eggs and sperm. Regulating the gamete providers, both the individuals and the businesses, is only one component; the relationships between sperm and egg providers, recipients, children, and the state is integrally connected to how we think about the technology.