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## Children's Interests And Information Disclosure: Who Provided The Egg and Sperm? Or Mommy, Where ( And Whom) Do I Come From?

Naomi R. Cahn

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

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# CHILDREN'S INTERESTS AND INFORMATION DISCLOSURE: WHO PROVIDED THE EGG AND SPERM? OR MOMMY, WHERE (AND WHOM) DO I COME FROM?

NAOMI CAHN<sup>1</sup>

## INTRODUCTION

As we celebrate the possibilities of reproductive technology and adoption in allowing some lesbian, gay, bisexual, and transgender (LGBT) families<sup>2</sup> to raise children, I want to look at one particular angle of children's interests in these intentional families: the ability to receive information about their genetic background. Many LGBT families are intentionally formed through either adoption or through the provision of sperm or eggs from known or unknown providers.<sup>3</sup> In adoption, there are generally only three or four "parents": the adoptive parent(s) and the biological parents. The adoptive parents raise and nurture the child, and over the past 40 years, there has generally been little contact between the biological parents and the child. In contrast, children created through the new reproductive technologies, could conceivably have at least eight different "parents": two intending parents; a sperm provider (with a partner); an egg provider (with a partner); and a surrogate (with a partner) who carries the egg.<sup>4</sup> Assuming that all goes as planned (not a safe assumption in all cases, of

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\* Professor of Law, George Washington University Law School. I thank Tony Gambino, Patricia King, Nancy Polikoff, Joan Schaffner, Sonia Suter, and Bob Tuttle for their comments, and to Michelle Wu and Zeena Abdi for research assistance. Special thanks to Helen Colebrook, Law Commission of New Zealand. And thanks to the organizers of *The Georgetown Journal of Gender and the Law's* Third Annual Gender, Sexuality and the Law Symposium, *Beyond Biology: Adoption, Reproductive Technology, and Intentional Families*, where this talk was originally presented.

<sup>2</sup> For a class-based analysis of who in the LGBT community can raise children, see Terry Boggis, *First Class: Economics and Queer Families*, in HOME FRONTS: CONTROVERSIES IN NONTRADITIONAL PARENTING 117, 119-20 (Jess Wells ed., 2000); see also Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 160-62 (2000) (discussing economic barriers). Although the term family can mean many things, I will generally use it in this article to refer to intergenerational relationships.

<sup>3</sup> Other families, of course, are formed when a lesbian or gay parent leaves a heterosexual relationship. Kate Kendall suggests that it is only during the past decade that lesbians have begun to see themselves as both lesbians and as parents outside of heterosexual familial relationships. Sarah Schulman, *Kate Kendall Wants Lesbians to Keep Their Promises*, in HOME FRONTS: CONTROVERSIES IN NONTRADITIONAL PARENTING 69, 70 (Jess Wells ed., 2000).

<sup>4</sup> Dr. Mabelle Seibel has identified 16 ways to create a baby, depending on how fertilization occurs, who contributes the gametic material, and who carries the child. MACHELLE M. SEIBEL, *FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES*, xiii, xiii-xiv (Mabelle M. Seibel & Susan Crockin, eds., 1996). Professor Vivienne Adair has developed a useful chart on the

course), the intending parents raise the child, and the sperm and egg providers, together with the surrogate, disappear without interfering in the parent/child relationship.<sup>5</sup>

What happens, though, when the child – now an adult – wants information about birth parents or gamete providers? We are painfully aware of the dangers in this country of using “known” sperm donors: they may return and assert paternal rights to the child notwithstanding an agreement not to do so.<sup>6</sup> I do not know of any such cases involving egg donors, but I am sure they are out there. The surrogacy cases present a somewhat different situation because the surrogate becomes pregnant. Nonetheless, given the well-publicized examples of breakdowns in these cases, egg donor cases are certain to occur. Thus, information disclosure seemingly affects families created by both known and unknown donors.

Without some means of terminating the parental rights of sperm or egg providers, problems can arise with identified donors.<sup>7</sup> For example, in a few states, it may be possible for a known gamete donor to waive parental rights through contract, but the long-term enforceability of such an agreement remains

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different possible social and biological relationships with the intending parents who use donor gametes. Vivenne Adair, *Redefining Family: Issues in Parenting Assisted by Reproduction Technology*, at <http://www.aifs.org.au/external/institute/afrc6papers/adair.html> (last visited Feb. 21, 2001). Lesbian and gay families may have four intending parents: two lesbian moms and two gay dads. See Kimberly Mistsyn, *Brave New Family*, in HOME FRONTS: CONTROVERSIES IN NONTRADITIONAL PARENTING 185 (Jess Wells ed., 2000) (describing her family with one biological mom and her partner, and one sperm-donor dad and his partner).

<sup>5</sup> For discussion of the use of the new technologies, see Kyle C. Velte, *Egging on Lesbian Maternity: The legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 436 n. 24 (1998/99).

<sup>6</sup> See, e.g., *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1994); see also Nancy Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers*, 2 GEO. J. GENDER & L. \_\_ (forthcoming 2001); Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 REV. L. & SOC. CHANGE 1 (1996); MOLLY SHANLEY, MAKING BABIES, MAKING FAMILIES; WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGY, SURROGACY, ADOPTION, AND SAME-SEX AND SINGLE PARENTS' RIGHTS (forthcoming 2001) (discussing general framework for thinking about the rights of known sperm providers).

In a recent case, a sperm donor sought additional visitation rights beyond those to which he had previously agreed in writing. In re Matter of William “TT” v. Siobhon “HH”, NYLJ, Oct. 2, 2000 (Albany Fam. Ct). The court awarded him additional rights because the children “were fortunate to have two biological parents [the mother and the father] who love and care for them.” Courts have a tendency to try to find two parents of the opposite sex for children. See Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1 (1997).

<sup>7</sup> See Polikoff, *supra* note 5, at \_\_\_\_.

doubtful.<sup>8</sup> Where there is an anonymous donor, on the other hand, given the collection practices of many sperm and egg banks, there may be little information available about the potential gamete provider. There are a few sperm banks, such as the Rainbow Flag Health Services Bank, which recruits gay and bisexual sperm donors and calls itself “A Known Sperm Bank.”<sup>9</sup> But, as part of its services, it 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.<sup>10</sup> Indeed, many sperm providers want to be involved with the resulting children.<sup>11</sup> 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>12</sup> This allows couples (or a single parent) to raise a child together, without the specter of a man claiming paternal rights suddenly appearing.<sup>13</sup> Similarly, Pacific Reproductive Services, which describes itself as “lesbian and single-women friendly,”<sup>14</sup> indicates in its donor profiles whether the donor is willing to be known when the child turns eighteen, or at least allow the child to see a video of him.<sup>15</sup>

In the overwhelming majority of cases involving an unknown donor, when children begin searching for genetic information, they will be unable to receive any. While some banks, such as the California Cryobank, allow for the

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<sup>8</sup> See Velte, *supra* note 4, at 445, 449; Martha A. McCarthy & Joanna L. Radbord, *Family Law for Same Sex Couples: Chart(er)ing the Course*, 15 CAN. J. FAM. L. 101, 130, 131 n. 83 (1998).

<sup>9</sup>Rainbow Flag Health Services, *Known Donor Insemination* at [www.gayspermbank.com](http://www.gayspermbank.com) (last visited February 12, 2001).

<sup>10</sup> For example, the sperm provider may want to establish a relationship with the child. See Polikoff, *Breaking the Link Between Biology and parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers*, \_\_ GEO. J. GENDER & L. \_\_ (forthcoming 2000);

<sup>11</sup> See Tzivia Gover, *Two Years and Counting: Sperm Banks Prepare to Face the Test of Time*, in HOME FRONTS: CONTROVERSIES IN NONTRADITIONAL PARENTING 165, 172 (Jess Wells ed., 2000) (“Director Leland Traiman’s one-man operation [Rainbow Sperm Bank] . . . collects sperm from donors—mostly gay men—who want to play an uncle-like role in their offspring’s life.”).

<sup>12</sup> See Susan Seligson, *Seeds of Doubt: A Successful Donor-Insemination Service Catering to Heterosexual Single Women and Lesbians Raise Some Difficult Questions*, ATLANTIC MONTHLY, Mar., 1995, at 28. “About 60 percent of the 3,000 or so vials of sperm released each year come from “Yes” donors.” *Id.* “Forty percent of the bank’s donors sign up for the program. Eighty percent of clients request one of them.” *20/20: Faceless, Nameless Fathers – Donor Offspring Seek Clues About Their Dads*, (ABC television broadcast, Dec. 25, 1998).

<sup>13</sup> See Ilene Chaykin, *Babes in Arms: Gay Parents Gain Acceptance*, L.A. MAG, July 1, 2000 at pg # (commenting on the choice of one lesbian couple to use this alternative).

<sup>14</sup> *Donor Sperm, Donor Egg, Surrogacy & Embryo Adoption Resources*, at <http://www.fertilityplus.org/faq/donor.html> (last visited Feb. 12, 2001). Offers “Willing-to-be-Known” donors, and is billed as “Lesbian and single-women friendly.”

<sup>15</sup>Pacific Reproductive Services, *December 2000 Donor Catalogue*, at <http://www.hellobaby.com/profiles.html> (last visited Feb. 21, 2001). All five donors in the December 2000 catalogue indicated a willingness to be known.

release of donor information with mutual consent,<sup>16</sup> even this process is difficult, because it requires the Bank to find the sperm providers many years later. A reporter who tried to track down California Cryobank Donor No. 5027, whose sperm resulted in children – one as young as two years old – was unable to find the Donor, even though the sperm providers are supposed to keep the bank apprised of their moves.<sup>17</sup> This mutual consent process has proven quite difficult in the adoption context too because neither party may be aware of the other’s consent.<sup>18</sup>

In the remainder of this essay, I focus on the relationship between children, unknown donors, and biological parents. My emphasis is on children and information, rather than on the possibility of birth parents or known gamete donors asserting parental rights. In both known and unknown situations, I argue that children deserve access to information. Although I agree that once an adoption has been finalized or once known gamete donors have agreed not to assert parental rights, they should be unable to assert parental rights, the finality of adoption or gamete provision should not prevent the disclosure of information about the identity of biological parents and gamete providers to a mature child.<sup>19</sup> The disclosure of this information is not equivalent to recognizing parental rights and responsibilities for the biological parents. Nor is disclosure solely for genetically based reasons. Rather, disclosure recognizes the potential relationship between the child and her biological forebears.

The argument for disclosure, while it may implicate constitutional interests, is ultimately based on public policy considerations.<sup>20</sup> Adoption and gamete provision are regulated by state and federal law, so the decisions on whether to allow disclosure is largely left to the legislative, or referenda<sup>21</sup> process. In the adoption area, legislatures have chosen whether to seal birth certificates and related adoption records based on a balancing of the different interests involved. In the gamete provision area, the few legislatures that have

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<sup>16</sup> The Bank’s “Openness Policy” emphasizes the importance of mutual consent before the release of any information. See California Cryobank, Inc., *Openness Policy*, at <http://206.117.149.143/openness.cfm?page=3&sub=4> (last visited Feb. 21, 2001).

<sup>17</sup> Jonathan Eig, *An American Family*, OFFSPRING MAG., Dec./Jan. 2001, at 92.

<sup>18</sup> See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CON. L. 150 (1999).

<sup>19</sup> For a discussion of children’s maturity, see Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. CON. L.J. 223 (1999). Children – particularly as they grow – may have interests that diverge profoundly from those of their parents. See *id.* at 225. See generally, Cahn & Singer, *supra* note 17; Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. CON.L.J. 53 (1999).

<sup>20</sup> See Cahn & Singer, *supra* note 17 (arguing that while the right to disclosure should, perhaps, be conceptualized as a fundamental right, it may not be so recognized under contemporary judicial formulations of constitutional law). As Catherine Ross notes, the constitution does protect a right to information in other contexts. See Ross, *supra* note 19, at 227-233. The right to receive information, however, “remains a relatively unexplored aspect of freedom of speech even when adults assert such a claim.” *Id.* at 230.

<sup>21</sup> In Oregon, the decision to allow adoptees access to their birth certificates was accomplished through a public referendum. Cite

acted, have similarly attempted to balance the different interests involved. My argument is that the balancing of the affected interests should result in making birth certificates readily available because the “child’s” interest becomes paramount when she becomes an adult.

#### I. INFORMATION DISCLOSURE AND FAMILIAL INTERESTS

The needs experienced by adoptees and children of gamete provision for identifying information are often similar,<sup>22</sup> as is the type of information sought. Adoptees generally seek access to their original birth certificates, which includes the names of their biological mother and perhaps, their biological father;<sup>23</sup> gamete offspring generally want identifying information about the gamete providers, which may also include names. For instance, under the identity-release policy of The Sperm Bank of California, the gamete offspring will receive the provider’s full name, driver’s license number, last known address and telephone number, and the date and place of the provider’s birth.<sup>24</sup>

While not all children will seek this information, it is important to many of them to be able to access it.<sup>25</sup> Not providing this information treats these children differently from children in traditional nuclear families. While non-disclosure recognizes that one’s parents are the individuals who function as parents, it denies that these children may be interested in other adults who contributed to their creation. Children want to know why they have a certain eye color, where their musical talent comes from, whose sense of humor they have.<sup>26</sup> In addition, non-disclosure implies that functional parents would be threatened if this additional information could be discovered, rather than recognizing the security and integrity of the functional parent/child bond. The exploration of these issues specifically in the context of lesbian and gay families is a relatively new topic, and it is unclear whether children in these families will experience the desire for information in a manner that is comparable to other adoptees. Nonetheless, based on the limited information available, it appears that at least some adoptees and gamete-created children will want to find out the identity of their birth parents or gamete providers.<sup>27</sup> This section discusses information issues in both adoptive and gametically formed families.

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<sup>22</sup> See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 899 (2000).

<sup>23</sup> For a discussion of the issuance of new birth certificates upon adoption, see Joan Heifetz Hollinger, *Aftermath of Adoption: Legal and Social Consequences*, in 2 ADOPTION LAW AND PRACTICE 13-1. (Joan Heifetz Hollinger, ed., 1998).

<sup>24</sup> The Sperm Bank of California Donor Insemination Services 6.

<sup>25</sup> See David Crary, *Many Adoptees Seeking Open Birth Records*, CHARLESTON GAZETTE, Nov. 13, 2000, at P4C.

<sup>26</sup> See Nina Burleigh, *Are You My Father? Donor-Inseminated Children*, 192 REDBOOK, Mar. 1999, at #. (discussing identity issues for children conceived through donor sperm). While not all of these questions are answered through meeting gamete providers or adoptive parents – does a sense of humor really come from biology? – these meetings can provide a sense of security, knowledge, and identity.

<sup>27</sup> See, e.g., D. MERILEE CLUNIS & G. DORSEY GREEN, *THE LESBIAN PARENTING BOOK: A GUIDE TO CREATING FAMILIES AND RAISING CHILDREN*, 55 (1995).

## A. ADOPTION

The issues of disclosure are perhaps easier to understand when it comes to adoption because the birth parents (or at least one of them) were involved for a longer period of time in the creation of the child than were the gamete providers. Consequently, the need expressed by adoptees to learn about their birth parents appears somewhat more comprehensible: there were people who explicitly relinquished their parental rights<sup>28</sup> rather than simply providing (or selling) gametic material.

When children are adopted, they are issued new birth certificates with the names of their adoptive parent – or parents (when there are second-parent adoptions), rather than their biological parents. Most states currently have laws that allow adopted children to access their original birth certificates after going to court and showing good cause, which has generally been interpreted strictly.<sup>29</sup> However, even such limited access has not always been permitted. While Alaska and Kansas never sealed their records, most other states did so, beginning in the early 1900s.<sup>30</sup> In the years surrounding World War II, most states began to deny adoptees access to their birth certificates.<sup>31</sup> In fact, in 1960, 60% of the states explicitly precluded adult adoptees from accessing their birth records.<sup>32</sup> Adoption professionals sought to prevent the stigma of illegitimacy from attaching to either the birth mother or the child,<sup>33</sup> an ironic justification today given the status of LGBT families. Currently, only Oregon, Tennessee, Delaware, and a few other states, have laws that allow adoptees to obtain their

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Felix's moms had used sperm from an unknown donor . . . Felix grew up simply knowing he had a biological father [sic] somewhere in the city and had not much bothered with that until he hit ten. Then he became desperate to know who his "father" was and began to pester his moms about finding him. When he found out they knew who he was, he wanted to meet him.

The authors also point out that there has been no "definitive research" on the question of whether "alternatively inseminated children reared by lesbian mothers really miss having a father." *Id.* at 54.

<sup>28</sup> On the requirements that both biological parents relinquish their rights, see Hollinger, *supra* note 24, at 13-1.

<sup>29</sup> *See id.* A birth mother recently petitioned a court to allow her to convey medical information to her child about the predisposition of the biological parents to a variety of potentially treatable medical conditions pursuant to the "good cause" exception, and the court allowed her to proceed. Matter of Baby Boy "SS" v. Rosemarie "TT", *discussed in John Caher, Court Backs Birth Mother's Bid to Unseal Adoption Records*, N.Y.L.J. (Jan. 5, 2001).

<sup>30</sup> *See* Elizabeth Samuels *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records* (manuscript at 5).

<sup>31</sup> *See* E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998); *see also* RICKIE SOLINGER, *WAKE UP LITTLE SUZIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* (1992).

<sup>32</sup> *See* Samuels, *supra* note 31, at 3.

<sup>33</sup> *See* Carp, *supra* note 32.

records when they become adults without going to court.<sup>34</sup> Thus, adoptees in these states have the same right as anyone else to obtain their original birth certificates.

Some adoption professionals think that adoptees benefit from openness.<sup>35</sup> It is important to distinguish two different meanings of the term openness. “Open adoption” refers to “adoption-with-contact” or an adoption with the potential for ongoing contact between the biological parent(s) and the adoptive parent(s).<sup>36</sup> “Open records” refers to the disclosure of information to members of the adoption triad of records relating to the child’s birth and adoption. Studies of adoptive parents, biological parents, and adoptees show strong support for allowing adoptees access to their birth certificates.<sup>37</sup>

Adult adoptees express health, medical and psychological reasons for wanting to know their birth parents.<sup>38</sup> Genetic essentialism (biogenetic fundamentalism) is not an accurate label for their interests. Many are searching to fill in missing parts of their identity,<sup>39</sup> for an explanation of why they were relinquished for adoption, or to reassure their birth parents that they are well.<sup>40</sup> Dissatisfaction with their adoptive lives rarely forms part of their motivation.<sup>41</sup>

Like other adoptees, lesbian adoptees generally have a variety of reasons for searching for their birth mothers:

Jill, a lesbian adoptee in her early twenties, believes that all female adoptees are looking for a mother . . . Theresa, who is also gay and in her twenties, says, “my emotional birth was when I met my mother and she

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<sup>34</sup> See Cahn & Singer, *supra* note 17, at #. New Zealand is considering legislation, which would provide for the issuance of two birth certificates upon adoption, one with the names of the birth parents, one with the names of the adoptive parents, and allow access to this information to all members of the adoption triad. Mary Longmore, *Gay Men Get Rights in Adoption Overhaul Plan*, EVENING POST (Wellington), Sept. 29, 2000, at 3; see also Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Framework* 171-173 (Sept. 2000) at <http://www.lawcom.govt.nz> (last visited March 28, 2001).

<sup>35</sup> See generally Patrick McMahon, *Adoptees Demand Right to Past*, USA TODAY, June 25, 1999 at #; David Brodzinsky, et al., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF (1993); David Brodzinsky, et al., THE PSYCHOLOGY OF ADOPTION (1993); BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS 234 (1994).

<sup>36</sup> See, e.g., Annette Appell, *Increasing Options to Improve Permanency Considerations in Drafting an Adoption with Contact Statute*, 18 CHILD. LEGAL RT. J. 24, 36-42 (1998).

<sup>37</sup> See, e.g., Hollinger, *supra* note 24, at 13-38-39 (reporting on birth parents).

<sup>38</sup> Lisa Belkin, *What the Jumans Didn't Know About Michael*, N.Y. TIMES, Mar. 14, 1999, at 42 (providing a compelling account of one adoptee’s need to learn about his biological mother’s past).

<sup>39</sup> See, e.g., Paul Sachdev, *Adoption Reunion and After: A Study of the Search Process and Experience of Adoptees*, 71 CHILD WELFARE 53, 58-59 (1992). In this study of 124 adoptees who had searched and found their biological parents, most adoptees explained that they were looking for a missing part of their lives to develop a “more cohesive identity.” *Id.* at 58.

<sup>40</sup> See Sachdev, *supra* note 42, at 59.

<sup>41</sup> See *id.*; see also Frances Pacheco & Robert Eme, *An Outcome Study of the Reunion Between Adoptees and Biological Parents*, 72 CHILD WELFARE 53, 58 (1993).

didn't reject me. It was the first day I felt like a human being. Every other relationship I had fell off the face of the earth."<sup>42</sup>

#### B. CHILDREN FORMED THROUGH GAMETE PROVISION

As in adoption, the question in gamete provision is: should a child ever be able to discover the identity of her gamete provider?<sup>43</sup> For at least 100 years, women have become pregnant through insemination of donor sperm.<sup>44</sup> The first known use of artificial insemination with donor sperm (AID) was performed in the United States in 1884, although some research suggests it occurred more than 1600 years ago in parts of the Jewish Talmud.<sup>45</sup> The donors are often promised anonymity by the sperm bank, clinic, or under state statute;<sup>46</sup> but, of course, so were many biological parents of adoptees. The standard for disclosure under the

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<sup>42</sup> See LIFTON, *supra* note 37. Surprisingly, there is comparatively little information on lesbian and gay adoptees and their biological parents. The focus of much of the adoption literature within the lesbian and gay community is on the basic ability of LGBT parents to adopt in the first place.

<sup>43</sup> See Jeanne Marie Laskas, *Left Unsaid*, WASH. POST, Mar. 29, 1998, at W35 (reporting on friend who had agreed never to tell anyone about an egg donation, and who then promptly told her friend, a journalist). It may be difficult to keep the secret regardless of the parents' intentions. Moreover, many children who do not look like their parents or any of their relatives guess that they are not biologically related to their fathers.

In Sweden, children conceived after 1985 have the right to receive information about the identity of their sperm donors. In a major study of whether parents told their children that they had been conceived in this manner, only 52% of the parents either had told, or intended to tell, their children this information. Claes Gottlieb et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, 15 HUM. REP. 2052 (Sept. 2000).

Elizabeth Gibson identifies two issues involved in the secrecy of artificial insemination: who should be told about the fact of the sperm provider, and what should be told about the identity of the provider. See Gibson, *supra* note 45, at 3 (recommending disclosure).

<sup>44</sup> Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 2 (1991-92). The use of "donor" in the gamete area is problematic. Men who produce sperm are paid for their efforts, and while egg donors used to be relatives of the donee, egg donors are generally paid at least several thousand dollars today. See Barbara Vobejda, *Egg Donation: A Growing Business: Fertility Successes Raise Demand*, WASH. POST, March 7, 1999, at A1; Kathryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 739 (1994).

<sup>45</sup> Mabelle M. Seibel, *Therapeutic Donor Insemination*, in FAMILY BUILDING, *supra* note 3, at 33-34.

<sup>46</sup> For example, the Uniform Parentage Act provides that all documents relating to an insemination are "subject to inspection only upon an order of the court for good cause shown." Uniform Parentage Act § 5(a), 9b U.L.A.(1987); see CA. CODE §7613(a)(2001)("good cause"); COL. REV. STAT. ANN. §19-4-107 (2000)("good cause"); N.J. STAT. ANN. §9:17-44a (2000) ("compelling reasons clearly and convincingly shown"); O. REV. STATE § 677.365 (1999)("may be opened only upon an order of a court of competent jurisdiction"); WYO. STAT. § 14-2-103(a)(2000)("good cause).

Uniform Parentage Act of information concerning sperm donors is “good cause,” the same standard applicable in the adoption area. However, some state legislatures have permitted disclosure of the identity of biological parents without the requirement of a court order. Courts have explained that the state is free to make this change based on public policy considerations.<sup>47</sup>

Because of the new reproductive technologies, women can donate eggs to other women or for surrogates. In 1996, there were more than 5,000 cases of egg donation.<sup>48</sup> Egg donation provides a workable option for gay men who want to raise a child. For example, Nadine Scott donated an egg to be carried by a surrogate mother on behalf of a gay male couple who had been trying to acquire children for more than nine years.<sup>49</sup> There has been a proliferation of genetic and gestational arrangements,<sup>50</sup> and an emergence of legal issues regarding access to information.

The issue of secrecy and gamete provision is highly problematic. There are both similarities and differences to issues surrounding secrecy and adoption, and, there are a series of special issues for LGBT families. The history of secrecy surrounding gamete provision is perhaps more complicated than that concerning adoption: sperm providers are often promised anonymity<sup>51</sup> and may have relied on that promise in agreeing to provide sperm. Similarly, while the identity of egg providers was often well-known in early cases, there is now more anonymity and secrecy attached to this process as well. Moreover, the intending parents in gamete provision cases have generally been subject to much less pressure to disclose the biological background of their children than have adoptive parents, who have been counseled to tell their children that they are adopted.

For the child, the interests in finding out more information about her gamete providers may be similar to those of adoptees’ needs for information.<sup>52</sup> Not all children will want access to this information, but many want to know where they came from. Indeed, while the children may not want a long-term relationship with their gamete providers, many experience curiosity.<sup>53</sup> One guide to lesbian parenting explains that children may “grieve never knowing their biological father.”<sup>54</sup> The book encourages the mother(s) to “hang in there” while

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<sup>47</sup> See, e.g., *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999) (“We have held, however, that the confidentiality of records is a statutory matter left to the legislature.”).

<sup>48</sup> Vobejda, *supra* note 45, at A1 (citing Centers for Disease Control statistics).

<sup>49</sup> Meghan Daum, *Baby Gift*, HARPER’S BAZAAR, Apr. 1, 2000, at 22.

<sup>50</sup> See Velte, *supra* note 4.

<sup>51</sup> It appears that state law did not actually regulate this promise of nondisclosure; similarly, in the adoption context, state law never guaranteed complete anonymity to the biological parents.

<sup>52</sup> See Garrison, *supra* note 13, at 899; Burleigh, *supra* note 27, at #. (discussing identity issues for children conceived through donor sperm).

<sup>53</sup> Susan Kastner, *How Do You Tell Kids “Daddy” is Donor Sperm?*, TORONTO STAR, May 30, 1998, at pg. #. (discussing the difficulties faced by mothers and fathers dealing with children’s curiosity).

<sup>54</sup> See CLUNIS & GREEN, *supra* note 28 at 55.

the child works through her feelings, and analogizes their situation to those in which children have lost a parent through divorce.<sup>55</sup>

Several studies have examined whether donor offspring experience identity problems that are similar to those of adopted children, and while the studies often conflict, they do indicate that at least some donor children experience a sense of loss for not having information about their biological pasts or being able to establish a relationship with their gamete providers.<sup>56</sup> In fact, a number of groups are forming to work on the issues that the children and their parents confront.<sup>57</sup> In one study of children who were not told until they were adults that they were born through donor insemination, the (now adult) children explained that they were experiencing problems of personal identity in conjunction with some hostility towards their families for not disclosing their origins.<sup>58</sup>

On the other hand, issues of “relinquishment” or “abandonment” seem far less complex because a child may find it easier to understand someone who simply provided sperm or eggs in exchange for money, rather having “given up” a baby for adoption. Thus, “donor” children may face easier psychological issues surrounding their origins, and knowing the identity of their genetic parents may be less central to their sense of self. Even these children, however, sometimes express strong interest in meeting their biological relatives.<sup>59</sup> An article in *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, “[I]t still bothers me. There are a lot of identity issues. Who am I? Who do I take after?”<sup>60</sup> Another woman expressed uncertainty at what language to use to describe herself: “I’m unsure about what words to use. Do we refer to ourselves as DI adoptees: do we say conceived or produced? There is an element of being produced.”<sup>61</sup> Some search crowds, looking for half-siblings, knowing that the same sperm donor could have helped in the birth of many children.<sup>62</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> See A.J. Turner & A. Coyle, *What Does it Mean to be a Donor Offspring? The Identity Experience of Adults Conceived by Donor Insemination and the Implication for Counseling and Therapy*, 15 HUM. REP. 2041, 2050 (2000) (contrasting their study, which did find such psychological issues, with other studies that did not); *Law Commission, Adoption and its Alternatives*, *supra* note \_\_, at 210-11 (“It is too early to know whether the children born as a result of [donor insemination] will experience similar issues to adopted persons, although early research suggests that they might.”).

<sup>57</sup> See Celia Hall, *Torment of Children with Donors for Fathers*, DAILY TELEGRAPH, Aug. 31, 2000, at 5 (Donor Conception Network provides support for parents and some children); Roy Eccleston, *Dear Dad (whoever you are . . .)*, AUSTRALIAN MAG., Apr. 19, 1998 at #(providing contact information for The Donor Conception Support Group of Australia).

<sup>58</sup> *See id.*

<sup>59</sup> See Laskas, *supra* note 52, at W35; Vobejda, *supra* note 45, at A1.

<sup>60</sup> See Burleigh, *supra* note 27, at #.

<sup>61</sup> See Eccleston, *supra* note 59 at #.

<sup>62</sup> Mary Linton, *Donor Offspring Believe They Have a Right to Know Their Biological Identity*, TORONTO LIFE, Sept. 13, 2000, at #.

Gamete donors also face highly complex issues. Like birth parents after adoption, gamete donors lack a legal relationship with their “children.”<sup>63</sup> Under the current system, sperm donors generally expect anonymity. Moreover, sperm donation is not a particularly complex process that requires intensive involvement from the provider, although many sperm banks require repeat visits over a substantial period of time to ensure the quality of the sperm. While it has been assumed that sperm donors will have relatively little interest in meeting the resulting children, this is not accurate, especially given the growing number of banks that do allow for identifiability of donors. In a New Zealand study of thirty-nine sperm donors who had been guaranteed anonymity, almost two-thirds of the men were either “strongly interested” or “interested” in meeting children conceived with their sperm.<sup>64</sup> Newspapers similarly report that some sperm providers are interested in meeting their “offspring.”<sup>65</sup>

For women who provide eggs, the process of egg extraction is far less burdensome and relationship-building than is the process of being pregnant and carrying a child for nine months. Nonetheless, some egg donors, who have undergone more invasive procedures may have forged a bond with the recipient family.<sup>66</sup> Egg donors may even have contracts that require their permission for future disposition of the eggs.<sup>67</sup> Thus, the initial presumption in the medical community that egg donation would be treated like sperm donation is somewhat more problematic in the context of egg donation, which began by using identified donors. The identified donors were often related to the recipients, and programs referred to themselves as “BYOD,” which stood for “bring your own donor.”<sup>68</sup>

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<sup>63</sup> For a discussion of the curious and ambivalent legal relationships between adoptees and their biological parents, see Naomi Cahn, *Thicker than What?* (1999) (unpublished manuscript, on file with author).

<sup>64</sup> Adair, *supra* note 3 at 7.

<sup>65</sup> See Rita Rubin, *Who’s My Father? Progeny Seek Some Conception of Sperm Donors*, USA TODAY, Nov. 2, 2000, at 1D (one has even begun an e-mail list in the hope of meeting children created with his sperm); *but see* Hall, *supra* note 59 (describing support groups for parents and children who have little hope of meeting the sperm donor).

<sup>66</sup> Vobejda, *supra* note 45, at A1; *but see* Lisa Belkin, *Pregnant with Complications*, N.Y. TIMES, Oct. 26, 1997, at 34 (discussing the importance of egg donors not thinking about creating an “incipient person,” but thinking about their role as comparable to donating blood).

<sup>67</sup> See, e.g., *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. Ct. App. 2000). The contract provided:

All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg (s). In no event may the Intended Parents allow any other party the use of said eggs without express written permission of the Egg Donor.

*Id.* at 1093.

<sup>68</sup> Andrea Mechanik Braverman, *Understanding the Disclosure/Non-Disclosure Decision in Donor Eggs*, in THE ART OF DONOR OOCYTES pg. # (need editor names, 1999).

As the use of egg donation has increased, however, anonymity has become a part of the process.<sup>69</sup>

For the intending parents, issues involving anonymity are quite complex. For example, Tzivia Gover explained her decision to mother a child that was biologically related to her partner and to a sperm donor. She said:

When I was deciding to have a child in the '80s the idea of secrecy surrounding the donor suited me fine. . . . As far as I was concerned, our child would have two parents, my partner and me—and that was that.

Now that my daughter is nearing 11, time and experience have complicated my vision of the donor's role in her life, and I am relieved that we chose a route that will allow us to help point her in the right direction should she one day want to find him.

Still, I can't help wonder at the plethora of options these days. If it is true that a donor is, as so many of us tell our children, just a nice man who donated his seed so we could start a family, would we really need to gather round the television set to watch him on video?. . . Although sperm bank personnel—and even most lesbian moms I've spoken with—say more information helps curb fantasies about a Donor Dad in *Shining Armor*, I wonder.<sup>70</sup>

Some intending mothers may choose to contact others who have used the same sperm provider, thus allowing children who are genetically related to meet each other, and providing some sort of extended family for both the parents and the children. Indeed, after five women who used the same donor recently introduced themselves and their seven children to each other, their children asked if they would be able to see their “new relatives” again and the mothers liked “the idea of building a communal extended family.”<sup>71</sup>

As adoption law changes, so too may the laws surrounding the secrecy of gamete providers.<sup>72</sup> I think it is easier to see the connection between a birth mother and her child than between gamete providers and their children. Birth mothers have begun to speak up about their strong interests in knowing their children, and their feelings of attachment, and they now have more control over the adoption process (rather than in bygone days when some women were even blindfolded in the birthing room to prevent the formation of any attachment).<sup>73</sup> In contrast, there has been no corresponding movement among gamete providers, reflecting, perhaps, their lack of emotional investment in their genetic contributions. The casualness with which gamete providers go about their business is unsettling. While they should not be saddled with parental rights and obligations when they so clearly intend not to become parents and there are

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<sup>69</sup> See Seibel, *supra* note \_\_, at # (disclosure forms complete cite).

<sup>70</sup> Gover, *supra* note 10, at 174.

<sup>71</sup> See Eig, *supra* note 16, at 97, 101.

<sup>72</sup> See Teri Finesmith Horwich, *Legal Aspects of Egg Donation*, in *THE ART OF DONOR OOCYTES*, *supra* note 34, at pg #. (need year and publisher)

<sup>73</sup> See SOLINGER, *supra* note 32 at #.

others who so clearly intend to become parents, the “products”<sup>74</sup> of their business may not see their creation in quite so businesslike a manner. Some participants of gamete provision have even attempted to engineer an absence of relationship between the gamete providers and the resulting child – some gay male couples, for example, have separate egg providers and surrogates to attenuate the connections with the resulting child – but this may not work for the child, the intending parent, or even for the gamete provider. Based on current medical technology, an egg provider and the recipient must synchronize their reproductive schedules, a hormonally-intensive procedure.<sup>75</sup>

On the other hand, “open” gamete donation, where the providers and the intending parents are known and would like continued contact, remains an option. For instance, both Nadine Scott, the egg provider, and the surrogate, have become friendly with the gay male couple who are the intending parents, and the couple has encouraged Ms. Scott to be as involved as she chooses.<sup>76</sup> This parallels developments in the adoption context, where adoption-with-contact has become an increasingly popular option.<sup>77</sup>

Finally, the issues of state involvement in gamete provision differ. Only nine states currently protect the anonymity of gamete donors,<sup>78</sup> while virtually all states protect the secrecy of biological parents.<sup>79</sup> Adoption is also a state-created legal process, while gamete donation remains a largely private transaction that is handled through contract and intention<sup>80</sup> with virtually no uniform regulation.<sup>81</sup>

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<sup>74</sup> See *infra* nn. \_\_\_ for further discussion of the concept of “products.”

<sup>75</sup> See Monica Muzzi, *Synchronization of Donor and Recipient Cycles*, in *THE ART OF DONOR OOCYTES*, pg. # [and need year] (“The challenge of optimizing egg donor outcome entails synchronization.”).

<sup>76</sup> See Daum, *supra* note 50, at 22. Although this article focuses on families formed through adoption or gamete provision, the same disclosure issues arise in the context of surrogacy. Without addressing more generally the desirability or legality of surrogacy, I believe that children of surrogates should have access to the same information as adoptees or gamete offspring.

<sup>77</sup> See, e.g., Appell, *supra* note 38; see also Annette Appell, *Enforceable Post-Adoption Contact Statutes, Part I: Adoption with Contact*, 4 *ADOPTION Q.* 81 (2000).

<sup>78</sup> Source.

<sup>79</sup> See Carp, *supra* note 32, at #; Hollinger, *supra* note 24, at #.

<sup>80</sup> See Katz, *supra* note 21, at 774. Professor Katz proposes that children of gamete donors receive identifying information; she argues that “gamete donors [who] are unwilling to have their sons and daughters meet them face to face one day should not participate in the creation of children.” *Id.* at 780.

<sup>81</sup> See Lori B. Andrews & Nanette Elster, *Adoption, Reproductive Technologies, and Genetic Information*, 8 *HEALTH MATRIX* 125, 138 (1998) (eighteen states have enacted statutes that allow children conceived through sperm provision to obtain information if they can show “good cause” to do so); see also Rick Weiss, *Babies in Limbo: Laws Outpaced by Fertility Advances; Multiple Parties to Conception Muddle Issues of Parentage*, *WASH. POST*, Feb. 8, 1998, at A1 (listing hodge-podge of state laws).

While at least thirty-five states have enacted legislation regulating parenthood in the context of artificial insemination by donor, only five states have enacted legislation defining parental rights in the context of egg provision. Andrews & Elster, *Regulating Reproductive Technologies*, *supra* note [this one is not cited previously. we need a cite for it], at 48.

The anonymity of gamete donors is more likely to be protected through private contracts. State-imposed disclosure requirements that impair these contracts may raise additional legal issues. States have just begun to think about issues involving egg provision because the process is so new.<sup>82</sup> Few states, however, have addressed issues regarding the rights and responsibilities of egg providers.<sup>83</sup> On the other hand, thirty-five states have at least partially addressed the parental rights and responsibilities where gamete provision is involved.<sup>84</sup> For example, the Uniform Parentage Act, which has been adopted by 19 states, provides: “If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.”<sup>85</sup> Obviously, donor insemination of any woman not married to a “husband” is left uncovered by this law.<sup>86</sup>

## II. DISCLOSURE AND LGBT FAMILIES

There are some issues specific to same-sex relationships that make disclosure of gamete donation very different from the situation opposite-sex couples face, and suggest that disclosure of a child's biological origins may not be as divisive an issue within the community or for individual parents. First, when children learn that men make sperm and women make eggs, they realize that two men or two women (or a single woman or a single man) cannot make a baby themselves.<sup>87</sup> Thus, given that the initial secrecy over the process itself is already dissolved,<sup>88</sup> that makes it easier for children to ask questions about the identity of the gamete provider. In addition, one study of lesbian couples and single women using donor insemination found that all of the women intended to tell their children their status, and that 57% wanted either to meet with donor themselves or have their child meet the donor.<sup>89</sup> Moreover, unlike the situation of many heterosexual parents, lesbian and gay parents must generally engage in

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<sup>82</sup> See, e.g., Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995).

<sup>83</sup> See John A. Robertson & Susan L. Crockin, *Legal Issues in Egg Donation, in FORMING FAMILIES*, *supra* note \_\_, at 144, 145. (No previous cite – need full cite) Add additional support.

<sup>84</sup> See Polikoff, manuscript at 8 n. 29. Most of these statutes address situations involving the obligations of married parents and unknown donors.

<sup>85</sup> See UPA Sec. 5 at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.html](http://www.law.upenn.edu/bll/ulc/ulc_frame.html) (last visited March 28, 2001).

<sup>86</sup> See Polikoff, *supra* note \_\_, at 9.

<sup>87</sup> See Shanley, *supra* note 5, at #.

<sup>88</sup> See Susan C. Klock, *The Controversy Surrounding Privacy or Disclosure Among Donor Gamete Recipients*, 14 J. ASSISTED REPROD. & GENETICS 378, 379 (1997) (“Data regarding single women and lesbian couples who have children via DI indicate that virtually 100% of these parents will tell the child that he/she was conceived via DI.”).

<sup>89</sup> Joanna E. Scheib et al., *Choosing Between Anonymous and Identity-Release Sperm Donors: Recipient and Donor Characteristics*, 10 REPROD. TECH. 50, 51 (2000) (reporting on study by Leiblum).

extensive planning before they are able to acquire children.<sup>90</sup> Given that their families already differ from the generic heterosexual nuclear family, lesbian and gay parents may find it easier to disclose not just the fact of gamete provision but also the identity of the provider. In its study of sperm sample recipients, the Sperm Bank of California found that many women used its identity release program to make their children's lives easier with respect to their identity issues and the situation of having two mothers.<sup>91</sup> The mothers wanted their children to have the option of learning this information. secrecy is not a viable option in these cases.

Interestingly enough, women are more likely to disclose than are men, regardless of what type of gamete has been provided.<sup>92</sup> One mother, counseled not to disclose that her child was the result of sperm provision, asserts that the secrecy norm is “the work of male doctors colluding with infertile males to protect male donors.”<sup>93</sup> Indeed, one physician recently explained: “Anonymity is a tool that protects the social and psychological construct of the family resulting from gamete donation, especially enhancing the social paternal role of the male in the recipient couples in the case of sperm donation.”<sup>94</sup>

By contrast, for opposite-sex intending parents, there may be even more secrecy surrounding gamete donation than adoption. While many heterosexual parents disclose that their children are adopted, parents are much less likely to disclose, first, that their children were conceived through gamete donation, and second, any information about the gamete provider. Physicians involved in the gamete donation process believe that many parents do not plan to tell their children that they are not biologically related to both parents.<sup>95</sup> In a recent study of parents who conceived children through gamete donation, more than one-half of the parents surveyed did not intend to disclose this information to their children, while slightly more than one-third expected to do so.<sup>96</sup> Similarly,

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<sup>90</sup> See Ilene Chaykin, *Babes in Arms: Gay Parents Gain Acceptance*, L.A. MAG., July 1, 2000, at 45 (“unlike the occasional surprises that can lead to heterosexual conception, there are no accidents in gay and lesbian families”).

<sup>91</sup> 6 The Sperm Bank of California (reporting on study published in *Reproductive Technologies*). See Scheib, *supra* note 101, at 50.

<sup>92</sup> Braverman, *supra* note 72, at #.

<sup>93</sup> Kastner, *supra* note 55, at # (quoting the founder of Canada's first support group for parents who have used sperm providers).

<sup>94</sup> F. Shenfield, *Privacy Versus Disclosure in Gamete Donation: A Clash of Interest, of Duties, or an Exercise in Responsibility?*, 14 J. ASSISTED REPROD. AND GENETICS 371, 372 (1997). For comparable arguments about the institution of marriage, see Ann Shalleck, *Foundational Myths and the Reality of Dependency: The Role of Marriage*, 8 AM. U.J. GENDER SOC. POL'Y & L. 197, 202 (2000).

<sup>95</sup> See John Geddes, *Making Babies*, MACLEAN'S, Dec. 6, 1999, at 53; Leslie Brody, *That Old Facts of Life Talk Won't Do for Children Born of Technology*, HOUS. CHRON., Nov. 24, 1998, at 2 (“Infertility specialists and therapists estimate 30 percent to 75 percent of persons using donor eggs plan to tell the children; they speculate only about 20 percent or 25 percent of those using donor sperm will tell.”); see also Laskas, *supra* note 52, at W35; Burleigh, *supra* note 27, at #.

<sup>96</sup> See Richard D. Nachtigall et al., *Stigma, Disclosure, and Family Functioning Among Parents of Children Conceived Through Donor Insemination*, 68 FERTILITY AND

another study that surveyed the attitudes of reproductive endocrinologists found that 56% of the doctors did not believe that children should be informed of their biological origins.<sup>97</sup> The secrecy often stems from efforts to protect family members from the stigma of male infertility and the general difficulty of discussing sperm itself, although there are additional explanations for the secrecy as well.<sup>98</sup>

Another issue unique to children born into a same-sex family deals with the fact that their families are non-traditional. The concept that the gamete donor might be important to the child could seem to be an attempt to reify the opposite-sex family; a child's family is not really complete unless she has not just two moms (or two dads) but also a "parent" of the opposite sex from her parents. However, some dangers of disclosure exist for same-sex couples that are not relevant for opposite-sex couples. For example, if a lesbian couple uses a non-gay identified sperm provider, the provider may be homophobic.<sup>99</sup> Other significant issues surrounding the concept of revealing the donor's identity concern fears that this is an attempt to assimilate the family into the stereotypical nuclear family. This is part of what happens when courts award visitation or paternal rights to men who have donated sperm and explicitly agreed not to seek further contact with the child — courts are saying that each child needs a mom and a dad, at the least.<sup>100</sup>

### III. GENETIC ESSENTIALISM

Focusing on biological identity raises the danger of genetic essentialism, or genetic determinism, a concept which suggests that a person is merely the sum of her genes, and behavior can be predicted based on genetic information.<sup>101</sup> As Professor Dorothy Nelkin and Susan Lindee explain, "DNA in popular culture functions, in many respects, as a secular equivalent of the Christian soul . . .

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STERILITY 83 (1997). Indeed, Fairfax Cryobank reports that 80% of married couples want a donor who resembles the husband. Leslie Milk, *Looking for Mr. Good Genes*, WASHINGTONIAN, May 1999, at 65. While this does not necessarily indicate that there will be no disclosure, it certainly facilitates non-disclosure because a child will be less likely to ask questions.

<sup>97</sup> S.R. Leiblum & S.E. Hamkin, *To Tell or Not to Tell: Attitudes of Reproductive Endocrinologists Concerning Disclosure of DI to Offspring*, 13 PSYCHOSOMATIC OBSTETRICS AND GYNECOLOGY 267 (1992); see also Milk, *supra* note 93, at # ("Many physicians advise couples never to reveal the circumstances of their children's conception.").

<sup>98</sup> See Turner & Coyle, *supra* note 58, at 2042; Elizabeth L. Gibson, *Artificial Insemination by Donor: Information, Communication and Regulation*, 30 J. FAM. L. 1, 7-12 (1991-92)(protect children); Burleigh, *supra* note 27; Nachtigall, *supra* note 93 at #.

<sup>99</sup> See Milk, *supra* note 93, at # (noting this concern for one lesbian couple).

<sup>100</sup> See also Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1408 (1994) ("In arguing that their status as sperm donors entitled them to the privilege of parenthood, [plaintiffs] relied upon dyadic notions of parenthood, which would . . . install themselves within the requisite heterosexually composed dyadic formation that is parenthood.").

<sup>101</sup> *Id.* at 320-321.

Fundamental to identity, DNA seems to explain individual differences, moral order, and human fate . . . relevant to the problems of personal authenticity.”<sup>102</sup> The gene has been seen as the “unifying concept” of the field of biology, with a virtually “iconic status” that makes it capable of explaining us to ourselves.<sup>103</sup> Critics have accused open records advocates of endorsing such essentialism and of asserting that blood kinship is superior to adoptive relationships.<sup>104</sup>

Although I advocate the disclosure of the biological parents’ identity, I do not justify it because of the genetic information that it will provide.<sup>105</sup> Genetic information, while potentially helpful, does not reveal everything about a person’s identity. What this information can do, however, is aid children who feel a connection to a biological past.

The mere knowledge of one’s genetic information is not, by itself, determinative of one’s identity, or even of one’s physical reality. “Genes play some role in all disease, but environment plays a role as well, even with genetic diseases.”<sup>106</sup> Knowing that a parent has developed cancer, heart disease, or depression does not definitively indicate that the child will also.<sup>107</sup> Genes do not tell us about a person’s culture, family, friends, or moral beliefs.<sup>108</sup> Acquiring genetic information does not allow an adoptee or a child of gamete provision to predict, or even to explain, all of her personal characteristics and traits. For example, studies of adoptees whose biological parents were alcoholics shows a much higher than normal risk that the adopted children will also become alcoholics.<sup>109</sup> On the other hand, 82% of these children did not become alcoholics. Moreover, studies of female adoptees of alcoholic birth parents do not indicate the same pattern.<sup>110</sup> Genes are complex and can only be understood in a larger biological and social context.<sup>111</sup> Nonetheless, a genetic history does contain useful information about potential medical conditions, and it may provide

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<sup>102</sup> DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON*, 2 (1995).

<sup>103</sup> See Anne Magurran, *Backseat Drivers*, N.Y. TIMES, Dec. 10, 2000, at 26 (reviewing Evelyn Fox Keller, *The Century of the Gene* (2000)).

<sup>104</sup> See Carp, *supra* note 32, at 229 (“One of the central tenets of the [Adoption Rights Movement]’s ideology rests on the superiority of blood ties and the denigration of adoptive kinship.”); ELIZABETH BARTHOLET, *FAMILY BONDS* 59 (1993) (add parenthetical). See also Nelkin & Lindee, *supra* note 108, at 70 (“The preoccupation with genetic relationships can stigmatize the experience of adoption.”)

<sup>105</sup> See also Andrews & Elster, *supra* note 42, at 150-51 (opposing the release of the identity of biological parents for the sole purpose of allowing adoptees to obtain current genetic information).

<sup>106</sup> Sonia Suter, draft at 13.

<sup>107</sup> See *id.* at 17.

<sup>108</sup> See *id.* at 21.

<sup>109</sup> RUTH HUBBARD & ELIJAH WALD, *EXPLODING THE GENE MYTH: HOW GENETIC INFORMATION IS PRODUCED AND MANIPULATED BY SCIENTISTS, PHYSICIANS, EMPLOYERS, INSURANCE COMPANIES, EDUCATORS, AND LAW ENFORCERS*, 100 (1993).

<sup>110</sup> *Id.* at 101.

<sup>111</sup> See Suter, *supra* note \_\_; EVELYN FOX KELLER, *THE CENTURY OF THE GENE* (2000) page #.

some grounding for those children who want to know, helping them shape future behavior.

Wanting to know about one's genetic history does not, then, mean that every aspect of one's life will suddenly be explained. Instead, having the same genetic heritage creates the opportunity for a connection between parent and adult child that the state must not foreclose. As Professor James Nelson points out, "Why . . . regard a biological connection to the future as a vital part of the identity of adults, but not see biological connectedness to the past as an equally vital part of the identity of children?"<sup>112</sup> Given the importance to many parents of having a genetic connection to their child, it should be unremarkable that children are themselves interested in learning about those to whom they have a genetic connection. In the case of gamete provision, where couples establish a genetic attachment between one of them and a child, it should not be surprising that children would want to know about other aspects of their genetic heritage.

If finding genetic information was the primary motivation for searching, then adoptees would seek equally both birth parents; in fact, however, adoptees are generally more interested in finding their birth mothers.<sup>113</sup> Thus, genetics provides only a partial explanation for the search process.

It is ironic that adoption law increasingly mandates extensive disclosure of non-identifying medical and related information but has largely ignored the calls for disclosure of identifying information. State statutes are quite broad in the type of information that must be disclosed in connection with an adoption.<sup>114</sup> Similarly, the forms 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>115</sup> Recipients can choose egg or sperm providers based on specified number of traits. For example, it is possible to choose race, ethnic ancestry, height, weight, physical build, hand coordination, vision, approximate IQ score, and college grade point average for egg providers.<sup>116</sup> Cryogenic Laboratories offers the following: "Simply send us a photo of the individual you would hope for your offspring to resemble. Our staff

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<sup>112</sup> James Lindemann Nelson, *Cloning, Families, and the Reproduction of Persons*, 32 VAL. U.L. REV. 715, 719 (1998); see also Joan H. Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM. 865, 874 (1985) ("Much of this demand [for noncoital reproduction] follows from the social and psychological importance people attach to the ideal of having children who are genetically theirs.").

<sup>113</sup> See Sachdev, *supra* note 41, at 58 (only 20% of adoptees ever thought about their birth fathers); cf. Pacheco and Eme, *supra* note 43, at 59 (less than half of the adoptees interviewed who had not found their biological fathers were interested in doing so).

<sup>114</sup> See, e.g., MADELYN FREUNDLICH & LISA PETERSON, *WRONGFUL ADOPTION: LAW, POLICY, & PRACTICE* 36-37 (1998)(providing sample statutes).

<sup>115</sup> See *The Sperm Bank of California*, at <http://thespermbankofca.org/screenng.html> (last visited March 28, 2001); *Sperm Donor Information*, at <http://206.117.149.143/donorinfo.cfm?page=3&sub=4> (last visited March 28, 2001).

<sup>116</sup> See *Creating Families, Inc.*, at <http://www.eggdonorfertilitybank.com/profiles/search.html> (last visited March 28, 2001).

will then rank the resemblance of the donors you've selected."<sup>117</sup> The bank may even collect an audiotape of the providers.<sup>118</sup>

This full disclosure of anonymous information at the time of gamete provision – information that goes well beyond simple genes – along with corresponding secrecy of the identity of the person to whom the information corresponds, seems itself to be a potential example of genetic essentialism on behalf of the intending parents. They do not want to know the actual person; they simply want to know her/his genes and a great deal of other information as well. A primary rationale for requiring disclosure of non-identifying genetic information is to allow prospective adoptive parents or gamete recipients to guard against any dangers that might be posed through “faulty” genes. As a secondary rationale, sperm banks report that many of their clients are looking for a good genetic match: “Sperm banks have found that most of their clients seek donors who share their ethnic background and personal interests.”<sup>119</sup> In a recent HBO television program, Ellen DeGeneres expresses frustration with the process of seeking a sperm donor who looks like her.<sup>120</sup> Indeed, lesbian couples seem to be as interested as heterosexual couples in attempting to match the sperm provider’s characteristics with those of the non-biologically-related partner.<sup>121</sup> By contrast, the purpose of disclosing the identity of biological relatives is to aid the adoptees and the various parents in their personal and emotional development, not solely to provide genetic information (although this may be an important by-product).<sup>122</sup> Indeed, a birth mother recently petitioned a court so that she inform the adoptive family of various predispositions towards medical conditions.<sup>123</sup>

Ultimately, the reasons that adoptees or gamete children seek information goes far beyond genetically-related rationales. The information provides additional background to their full identities –genetic, emotional, and even cultural. Regardless of how happy children are, and have been, in their

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<sup>117</sup> See *Cryogenic Laboratories, Inc.*, at <http://www.cryolab.com> (last visited March 28, 2001).

<sup>118</sup> See *Eig*, *supra* note 16 (noting that the donor submitted a tape recording that included much of the information provided in writing) at <http://206.117.149.143/profiles.cfm?toppage=3> (Reporting that the California Cryobank has audio tapes for many of its providers).

<sup>119</sup> See *Milk*, *supra* note 93, at 65. Until the widespread use of sperm banks, physicians performing AID matched the recipients and the providers. See also Seibel, THERAPEUTIC DONOR INSEMINATION, *supra* note 22, at 37. (parenthetical).

<sup>120</sup> IF THESE WALLS COULD TALK 2 (HBO television broadcast, Mar. 5, 2000).

<sup>121</sup> See Scheib, *supra* note 101, at 56-57. The authors of this study speculate that matching helps lesbian couples because:

matching the donor to one’s partner may increase the non-genetic parent’s involvement with the DI process, the recipient’s pregnancy, and eventually the child . . . it may be especially important to lesbian couple, in which the non-genetic mother’s role as a parent may be repeatedly questioned by some segments of society . . . *Id.* at 57.

<sup>122</sup> The information available at the time of adoption or gamete provision will also be outdated by the time the offspring reaches adulthood.

<sup>123</sup> See *Baby Boy SS*, *supra* note \_\_.

families, they still may want and need additional information. Adoptees who have searched and found their birth mothers generally report a more positive self-perception together with a more holistic sense of identity.<sup>124</sup>

#### IV. PRIVACY INTERESTS

The primary arguments against information disclosure center on the privacy rights of everyone involved: the adoptive parents, the biological parents, the gamete providers, and the child. Elsewhere, I have extensively analyzed these rights,<sup>125</sup> so I will simply provide a brief summary. The argument against providing identifying information relies, in large part, on the history of nondisclosure, and on the use of nondisclosure to protect the interests of all involved in the process. For example, Jeremiah Gutman, who has represented birth mothers and is the former chair of the American Civil Liberties Union's privacy committee, argues that if birth mothers "cannot rely upon the adoption agency or attorney and the law to protect her privacy, and to conceal her identity for all time," she may decide not to place a child for adoption.<sup>126</sup>

First, the history of secrecy in adoption provides contrary evidence concerning the need to protect the privacy of all members of the adoption triad. Records were originally sealed in order to prevent a prying public from receiving information about a child's legitimacy, not to prevent members of the adoption triad from getting information about each other.<sup>127</sup> Moreover, the only two states that do not seal their adoption records have lower abortion rates and higher adoption rates than the national average.<sup>128</sup>

Second, the traditional articulation of the fundamental right to privacy does not comprehend the various interests at stake in the adoption cases. The cases' discussion of personhood and privacy provide conflicting notions of whose rights and interests merit protection at any one time.<sup>129</sup> The whole notion of privacy – the right to be let alone – has developed as protection for individuals from state interference; because adoption is a state-created status involving relationship within and between families, the traditional formulation of the doctrine is problematic. For gamete and egg donors, the privacy interests should be analyzed in a similar fashion,<sup>130</sup> that is, with a recognition that the state has been – or should be – involved in defining their status as parents or as non-parents as well as the secrecy of their identities.

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<sup>124</sup> Ulrich Mueller, need title , 3 ADOPTION Q. 99, 99 (1999) (reviewing Need Explanatory Parenthetical).

<sup>125</sup> See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CON. L. 150 (1999). This discussion is drawn from that article.

<sup>126</sup> Ira Carnahan, *The Rise of "Bastard Nation"; And the Threat to Adoption*, WEEKLY STANDARD, Sept. 11, 2000, at 22 (quoting Gutman); Susan Forrest, *Adopted & Kept in Dark*, DAILY NEWS, Jan. 4, 2000, at A1.

<sup>127</sup> See Carp, *supra* note 32, at #.

<sup>128</sup> See Cahn & Singer, *supra* note \_\_\_\_.

<sup>129</sup> For a discussion of the relevant cases, see Cahn & Singer, *supra* note \_\_\_\_; Samuels, *supra* note \_\_\_\_.

<sup>130</sup> See also Garrison, *supra* note 13, at 899-900 (parenthetical).

The term “privacy” includes a series of different “rights,” some of which have been recognized by the federal constitution, some of which have developed in other contexts.<sup>131</sup> In his new book, Jeffrey Rosen argues that in the reproductive rights area, the Supreme Court has labeled as privacy what is better conceived of as an individual’s right to make reproductive decisions, in contrast to a “more focused vision of privacy that has to do with our ability to control the conditions under which we make different aspects of ourselves accessible to others.”<sup>132</sup> Disclosure of the identity of sperm and egg providers implicates both aspects of “privacy,” the interests of the ultimate parent(s) in making intimate reproductive choices, and the interests of the gamete providers in controlling the circumstances under which they become – or do not become – known. In addition, disclosure implicates a third kind of privacy, the interests of the child in the choice of whether to learn more about herself.<sup>133</sup>

Some birth parent advocates have analogized the adoption/gamete provision decision to that made by women choosing to undergo an abortion, claiming the same right to privacy protects both.<sup>134</sup> The argument is that there is a fundamental right to make decisions regarding reproductive choices without intervention.

This argument works very well in the abortion context, when a woman is deciding what to do with her own body. It works much less well when, after a woman or a man has decided what to do with her or his body, there is now a child with separate and independent needs and interests who is deciding what to do with her body. Children have independently recognized rights that exist apart from, and sometimes in conflict with, those of their (different sets of) parents.<sup>135</sup>

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<sup>131</sup> See Naomi Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1999); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1210 (1999). Professor Rhadika Rao has recently suggested that the concepts of privacy and property, while safeguarding different interests, may become “confused with one another.” Rhadika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 443 (2000). She argues that privacy protects a person’s identity, while property “protects the autonomy of an owner over the object of ownership.” *Id.* at 444.

<sup>132</sup> JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 15 (2000).

<sup>133</sup> To use Professor Rosen’s language, it implicates the situations under which “we make different aspects of ourselves accessible to” ourselves. This echoes an earlier concept that was also claimed to be a form of privacy, the “right to personhood.” This shows the amorphous nature of privacy, the need to use a term with constitutional dimensions to cover a broad range of situations that have little in common.

This third type of privacy could also be called a right to self-expression, to individual fulfillment. *Cf.* Robert Tuttle, *Reviving Privacy*, \_\_\_ Geo. Wash. L. Rev. \_\_\_ (1999)(questioning whether self-expression is an ultimate good).

<sup>134</sup> Find in *Doe v. Sundquist* briefs;

<sup>135</sup> See, e.g., Ross, *supra* note \_\_; Buss, *supra* note \_\_;

In one of the first cases to deal with the disclosure of the identity of a sperm donor, the court crafted a compromise.<sup>136</sup> The parents of an 11-year-old girl with a rare kidney disorder sued California Cryobank, which the parents allege provided them with the defective sperm that led to the kidney disease. As part of their suit, the Johnsons sought to depose the donor himself, who has resisted, claiming that disclosure would infringe his privacy interests. The donor's privacy claims were grounded in the contract between the Johnsons and Cryobank, which states that his identity will not be disclosed, as well as in the California and federal constitutions.<sup>137</sup> The court held that the absolute prohibition in the contract was contrary to public policy, which allowed for disclosure based upon "good cause," and although the court recognized a limited constitutional right to privacy under the California constitution, it held that the identity could be disclosed. Given the particular circumstances of the case, however, the court directed that the donor be deposed without ever revealing his identity.

The analogies between the donor's claim to privacy and those claims asserted in the adoption context are quite strong. In both cases, there is a claim of a promise of confidentiality, and there is a claim that disclosing information violates privacy interests. With both cases, state statutes have typically specified that disclosure is available upon a showing of "good cause," and ultimately, courts have decided that good cause can sometimes trump these privacy interests.

In this country, 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 \$50 for each ejaculation,<sup>138</sup> and, in turn, sells that sperm to the intending parents.<sup>139</sup> A woman can sell her eggs to an in vitro fertilization program for \$2500-5000, although some programs offer much more money.<sup>140</sup> By allowing the sale of sperm and eggs, we are, in a sense, treating them and their ultimate "product" as a commodity.<sup>141</sup> The Johnson court

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<sup>136</sup> See *Johnson v. Superior Court*, 80 Cal. App. 4th 1050, *rev. denied*, 2000 Cal. LEXIS 6741 (2000); see also David Kravets, *Court Limits Sperm Donors' Rights*, AP ONLINE, Aug. 24, 2000.

<sup>137</sup> The contract between the provider and the Cryobank provided for confidentiality "unless a court orders disclosure for good cause." 80 Cal. App. 4th at 1057. The contract between the sperm recipients and the Cryobank stated that the Johnsons would "not now, nor at any time, require nor expect [Cryobank] to obtain or divulge . . . the name of said donor, nor any other information concerning characteristics, qualities, or any other information whatsoever concerning said donor' . . . ' it being the intention of all parties that the identity of said donor shall be and forever remain anonymous.'" *Id.* at 1064-65.

<sup>138</sup> See *Eig, supra* note 16, at 97; Rubin, *supra* note \_\_ (at least one bank pays a premium for providers with a doctorate).

<sup>139</sup> See The Sperm Bank of California, at <http://thespermbankofca.org/fees96.html> (last visited 1/3/01); California Cryobank, *Service and Fee Schedule*, at <http://206.117.149.143/fees.cfm?page=5&sub=20> (last visited Apr. 24, 2001).

<sup>140</sup> Ethics Committee of the American Society for Reproductive Medicine, *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERT. AND STER. 216, 216 (2000).

<sup>141</sup> See MARGARET RADIN, *CONTESTED COMMODITIES* 15 (1996); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

rejected the donor's claim to a physician-patient privilege because there was no evidence 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 subject him to the same privacy rights. While we might think differently about privacy in connection with a sale of "goods" than in connection with a sale of "personhood,"<sup>142</sup> treating sperm and eggs as the sale of goods might help allay concerns about the identity of the providers. This is an example of how the concept of commodification may be useful because it allows us to separate out the "good" from the privacy interests of the provider. If we view gametes as commodities, this should diminish privacy concerns. And, the mere ascription of financial value to these items, the mere use of commodification discourse, does not necessarily destroy all other values that they may contain.<sup>143</sup> 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>144</sup>

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 sale of these "goods." Just as in the surrogacy context, the providers may be devaluing themselves<sup>145</sup> (as well as their commodities). Not allowing sperm and eggs to be sold might be the appropriate response that prevents exploitation and also acknowledges the significance of providing gametes. While commodification may be useful conceptually in allaying privacy concerns, I remain concerned about allowing the sale of these particular commodities. Removing the financial incentive might cause donors to understand the significance of their actions to their "offspring."

As a policy matter, is this type of transaction entitled to secrecy? Perhaps the answer is yes, except to all of those involved in the transaction itself: the bank, the intending parents, and the child. Just as the initial move to secrecy in adoption records was not designed to protect against disclosure within the relationship, the protection accorded to gamete donors should not extend to disclosure to anyone not directly involved in the "transaction." The information could remain private, a secret shared only by the child, her parents, and the

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For arguments that sale of gametic material should be more closely analogized to organ donation than blood donation, see Schiff, *supra* note \_\_, at 292.

<sup>142</sup> See Rao, *supra* note \_\_, at 456-58. Professor Rao suggests that the right of privacy protects individuals' relationship to their frozen embryos where the individuals attempt to establish a personal relationship with the embryos, while the law of property applies more appropriately where individuals want to sell frozen embryos because they have no personal relationship to the embryos. *Id.* at 458.

<sup>143</sup> See VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994); Naomi Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, \_ IOWA J. GENDER, RACE & J. (forthcoming 2001).

<sup>144</sup> Ethics Committee Report, *supra* note \_\_, at 218.

<sup>145</sup> See, e.g., Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 63 S. CAL. L. REV. 623, 679-680 (1991); Schiff, *supra* note \_\_, at 292-93; Anita Allen, *the Black Surrogate Mother what is the rest of this cite?*; Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEG. MED. 35, 40 (2000).

provider. Identifying information could be released, upon request, once the gamete offspring reach 18, or through a confidential intermediary system that would allow for national searches. States should guarantee the release of such information to mature adults through laws that would preempt private agreements (such as between the gamete provider and the intending parents or between the gamete provider and a gamete bank) to the contrary.<sup>146</sup> Although all states have addressed this issue for adoptees,<sup>147</sup> few states have considered legislation on disclosure of the identity of gamete providers.

## V. SUPPLY AND DEMAND

One of the primary arguments against disclosure of the identity of gamete providers is that it will have a negative effect on the supply of sperm. If sperm providers know that they may be found, then they may be less likely to give gametic material out of fear that an unknown child will come knocking on their door twenty years later, while current practices appear to protect their ongoing anonymity. Such reluctance might make it even more difficult to obtain sperm. Indeed, after Sweden enacted legislation in 1985, which mandated the identification of gamete providers when the child reached the age of eighteen, there was some concern that the legislation had caused a decline in the number of sperm donors.<sup>148</sup> According to more recent data, however, there appears to be an increase in the number of sperm providers.<sup>149</sup>

It appears then, that the requirement that children receive access to donor information will not necessarily result in a dramatic decrease in donors.<sup>150</sup> In the adoption context, the two states that never sealed their birth certificates have adoption rates higher than the national average<sup>151</sup>; disclosure itself has not served as the deterrent that opponents fear. The same concern about supply

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<sup>146</sup> The federal government could also act to ensure national uniformity on this issue, but this seems unlikely given the difficulty of enacting even a national consent registry. Senator Carl Levin has advocated the enactment of legislation to establish a federal mutual consent registry since 1980. While the legislation has passed the Senate several times, it has never passed the House. The House Ways and Means Subcommittee did hold hearings to consider the registry. See Mutual Voluntary Adoption Registries: Hearings on S. 1487 Before the Subcomm. on

Hum. Res. of the House Comm. on Ways and Means, 105th Cong. (1998)

(statement of Naomi R. Cahn, Associate Professor of Law, George Washington University Law School).

<sup>147</sup> See, e.g., Samuels, *supra* note \_\_; Hollinger, *supra* note 24, at 13-1.

<sup>148</sup> See Ken Daniels & Othon Lalos, *The Swedish Insemination Act and the Availability of Donors*, 10 HUM. REPROD. 1871 (1995); F. Shenfield, *Privacy Versus Disclosure in Gamete Donation: A Clash of Interest, of Duties, or an Exercise in Responsibility?*, 14 J. ASSISTED REPROD. AND GENETICS 371, 371 (1997). In Sweden, there is only limited data on the immediate impact of the 1985 legislation. Daniels & Lalos, *supra*, at 1872.

<sup>149</sup> Shenfield, *supra* note 67, at 371 (parenthetical); Daniels & Lalos, *supra* note 67, at 1872-1873 (parenthetical).

<sup>150</sup> In the adoption context, the two states – Alaska and Kansas – that never prevented disclosure have experienced higher-than-average adoption rates, and lower-than-average abortion rates. See Cahn & Singer, *supra* note 10, at #.

<sup>151</sup> See Samuels, *supra* note \_\_.

has also been made in the context of banning payment for gametic material, but here again, the actual impact is uncertain.<sup>152</sup> Moreover, the risk of a temporary shortage in gametic material is amply balanced by the benefits to gamete donor children by having access to this information. While sale of gametes may be a commercial transaction for the seller, it has much broader implications for the children ultimately created; it is their interests, and, in many cases, the interests of their parents, which are respected through a disclosure regime.

#### CONCLUSION

Ultimately, and ironically, a failure to disclose the identity of birth parents or gamete providers reinforces the notion of the “exclusive”<sup>153</sup> and traditional family. It suggests that biological parents can and should play no role in their offspring’s lives. It suggests that recognizing a child’s need for disclosure threatens parental rights. And, it denies the possibilities for connection that biology can create. The secrecy surrounding adoption developed during a period of pronatalism, a celebration of the nuclear family and of heterosexual motherhood and a corresponding condemnation of single mothers.<sup>154</sup> It is emblematic of the attempt to make adoptive, or gamete, families “look like” other families, to create the family “as if” it had been biologically created.<sup>155</sup> LGBT families challenge his ideology simply through their existence. Allowing for the release of identifying information is a rejection of a system which reifies the traditional “as if” family.

Even under a system of full disclosure, there certainly remains a distinction between “parenting” a child, and contributing to the creation of the child.<sup>156</sup> The parents have a fundamental right to the control, care, and custody of their children;<sup>157</sup> allowing information disclosure to adults respects parental rights to raise children as they see fit while the children are minors, but

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<sup>152</sup> See Schiff, *supra* note \_\_, at 295; Garrison, *supra* note \_\_, at 900-901..

<sup>153</sup> See Alison Harvey Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 554-555 (1998); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 57 OHIO ST. L.J. 1 (1997) (arguing that it may be appropriate to recognize the caretaking rights of more than two adults). Recognizing multiple parents responds to the realities of many children’s lives who may have multiple parents through surrogacy and adoption, as well as through gay and lesbian parenting relationships and remarriage. For example, at least 15% of children in divorced families will have parents who remarry and redivorce. Susan Chira, *Fractured Families: Dealing with Multiple Divorce*, N.Y. TIMES, March 19, 1995, at 1; see also Bartlett, *Rethinking Parenthood*, *supra* note \_\_.

<sup>154</sup> See SOLINGER, *supra* note 32.

<sup>155</sup> The “as if” terminology is from Professor Molly Shanley’s discussion of new families. See Shanley, *supra* note \_\_, at Ch. 1, p. 2 (defining “as if” families to be those in which the children can appear to be the biological offspring of their parents).

<sup>156</sup> See Polikoff, *supra* note \_\_.

<sup>157</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000); Naomi Cahn, *Models of Family Privacy*, 67 GEO WASH. L. REV. 1225 (1999); cf. Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

respects the “children’s” rights once they are mature. While the rights and interests of biological parents and gamete providers should be accorded respect, a child should be entitled to receive information about the people who helped to create her, her birth parents or gamete providers. Such a right should be established both retroactively and prospectively,<sup>158</sup> so adult offspring who today want information about their biological backgrounds are 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. 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>159</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.

Failing to disclose this information also, and again ironically, values contract over connection.<sup>160</sup> We imagine that explicit contracts, between gamete providers and gamete banks, between biological parents and adoption agencies, and implicit contracts, between the ultimate parents, the biological parents, and the state, guaranteeing secrecy, are more important than the children’s needs for information, or the biological parent’s later needs for contact. We live in a culture that respects kinship based on blood ties.<sup>161</sup> It is perfectly possible and completely desirable to challenge conceptions of families based solely on blood by emphasizing intention and nurture. Yet, in recognizing the formation and continuity of LGBT families through practice and intent, it is also important to acknowledge that genetic ties are important for a variety of reasons that do not threaten the integrity of functional families.

This is an example, both literally and figuratively, of the “second generation” of issues involved in LGBT family formation. While the fight for recognition of LGBT families as families, with parents entitled to their full rights as parents is utterly critical because of their intent and their right to

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<sup>158</sup> For arguments on the propriety of “changing the rules mid-stream,” see Cahn & Singer, *supra* note \_\_. Given that adoption is a state-created relationship, and that the rights of all involved in gamete-transfer families are similarly state-regulated, courts have frequently accepted the state’s ability to change those regulations.

<sup>159</sup> Woodhouse, *Are You My Mother?*, *supra* note \_\_, at 128; *see also* Shanley, *supra* note \_\_, at 1-33 (discussing need to see child in context, as both individual and part of previous family unit). Professor Woodhouse speaks of the need for children to claim rights with respect to two aspects of their identity: one involves their identity in the context of their functional, social family, and the second is their “‘identity of origin.’” Woodhouse, *supra*, at 127-128.

<sup>160</sup> For sensitive discussions of contracts in family law, see Milton Regan, *The Pursuit of Intimacy* (1992); Shanley, *supra* note \_\_, at ch. 5.

<sup>161</sup> *See* JUDITH MODELL, *KINSHIP WITH STRANGERS* (1997); *cf.* Dorothy E. Roberts, *The Genetic Ties*, 62 U. CHI. L. REV. 209 (1995) (discussing the complicated relationship between race and blood ties).

become parents, we should also take account of the potential needs for children in these families to learn the identity of the people who contributed to their creation. As children grow older, not only do they more directly confront issues concerning their own personality development, but also their rights to information mature. Without essentializing the notion of genetic connection, children may still want to know where they came from.