



GW Law Faculty Publications & Other Works

Faculty Scholarship

2012

The New Kinship

Naomi R. Cahn

George Washington University Law School, ncahn@law.gwu.edu

Follow this and additional works at: http://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

Naomi Cahn, *The New Kinship*, 100 *Geo. L.J.* 367 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

The New Kinship

NAOMI CAHN*

Over the past century, the Supreme Court has articulated numerous doctrines that protect family privacy. These doctrines are not, however, well-suited to the brave new world of families formed through donor eggs, sperm, and embryos. As the number of donor-conceived children born to same-sex and heterosexual couples and to single parents increases, and as these families develop connections to one another, the law has not yet adjusted. This Article provides an extensive mapping of these “donor-conceived family communities,” and it reaches two major conclusions that support the development of these new families. First, relational interests, the traditional focus in family law, should govern the regulation of the donor world. Second, legal recognition should be given to the emotional and psychological ties between donor families in order to provide guidance to the development of donor-conceived family communities. These two principles point the way to integrating changing social realities into a new legal framework for donor families, allowing children from the same donor to connect to one another. While further regulation of relationships has its dangers, this paradigm shift in the donor world could prompt broader beneficial changes, creating options beyond framing all families within the dyadic nuclear-family model.

TABLE OF CONTENTS

INTRODUCTION	368
I. THE WORLD OF DONOR GAMETES	374
A. THE POPULATION OF THE DONOR WORLD	374
B. THE LANGUAGE OF THE DONOR WORLD	379
C. DONOR-CONCEIVED FAMILY COMMUNITIES	382
II. THE LAWS OF THE DONOR WORLD	386
A. THE REAL PARENTS	387
B. PRACTICES OF SECRECY AND DISCLOSURE	391

* John Theodore Fey Research Professor of Law, The George Washington University Law School. © 2012, Naomi Cahn. My gratitude to John Appleby, Susan Frelich Appleton, Judy Areen, Gaia Bernstein, June Carbone, Glenn Cohen, John Duffy, Max Eichner, Martha Ertman, David Fontana, Tony Gambino, Clare Huntington, Nancy Levit, and Molly Shanley for their comments and encouragement, and to Wendy Kramer for her advocacy and support; thanks to Mary Kate Hunter, Alissa Marque, Jose Recio, and Alisa Yasin for research assistance; and my appreciation to Sean Kellem for his sensitive editing.

C.	CHANGING AGREEMENTS	392
III.	THE JURISPRUDENCE OF DONOR FAMILIES	394
A.	STRAND 1: CONSTITUTIONAL JURISPRUDENCE ON THE FAMILY AS ENTITY OR SEPARATE PARTS	395
B.	STRAND 2: THE CRITIQUE OF THE FAMILY AS ENSHRINED DOMESTICITY	398
C.	STRAND 3: ACCORDING RIGHTS TO MULTIPLE PARENTS	401
IV.	THE POTENTIAL FOR LAW	403
A.	REASONS TO REGULATE	404
B.	HOW TO REGULATE	407
1.	Regulation for Health, Safety, and Welfare	411
2.	Identity Interests	413
3.	Legal Status	416
C.	IMPORTANT OBJECTIONS	417
1.	Donor-Conceived Family Communities Are Not Families	418
2.	But What About Donors?	419
3.	Privacy and Unwanted Contact	425
	CONCLUSION	428

INTRODUCTION

The future of the family is one of the central cultural and legal obsessions of our time. As the courts struggle with the rights to be accorded to same-sex and transgendered couples, as potential parents hire surrogates to carry their children, as divorcing couples fight over “their” embryos, and as cohabitants successfully claim rights against each other, traditional constructions of the family have become increasingly subject to challenge.¹

The newest challenge to the traditional family comes from the world of technology. Approximately one million families have been created over the past

1. See, e.g., Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

half-century through the use of donor sperm or eggs,² yet legal doctrine has adjusted slowly to donor-created families. Instead, donor gametes have been subject to limited regulation within a health law framework, where they are treated as technological innovations, or within a commercial context, where they are treated as market transactions rather than as creators of intimacy, family, and children. Even within family law, the focus is on determining parentage, focusing on adults' interests in becoming parents. The law is slow at adapting to the implications of the technology of assisted reproduction, particularly when donor-conceived offspring look outside of their families to find others who have used the same donor, forming family communities that are connected through use of the same donor. The children share genes, but the families do not share either homes or dependencies. They do often, however, share intense emotions. As one donor-conceived person reported: "At 27 years old, finding a brother has been both exciting and a little scary at first. . . . I'm just so thrilled and anxious for the wonderful times we'll have together now, the wonderful family gatherings that have now grown with the inclusion of each other's families and friends"³

This Article proposes a legal basis for the development of these new communities, exploring what it would mean for the law to consider and support these different sites for forming familial relationships. There are two different kinds of new families that are created. First, using third-party gametes creates a new family member and creates ties between partners, what I label "donor-conceived families." Second, using third-party gametes creates genetic relationships between: (a) the donor and resulting offspring; and (b) all of the offspring resulting from that donor's gametes. I label this second category "donor-conceived and connected family communities" (abbreviated as "donor-conceived family communities"), and they are the primary focus of this Article. A series of profound legal changes, ranging from recognition of rights for alternative families that do not share the same household, to limits on the anonymity of donor gametes, will result in an approach that is more coherent, predictable, and defensible than the existing haphazard approach to the regulation of families and communities formed through assisted reproductive technol-

2. No one actually knows how many children have been born through donor sperm and eggs because of the lack of record-keeping. The estimate used in this Article appears in a variety of sources. *See, e.g.*, Colleen Carroll Campbell, Editorial, *Children's Rights Often Overlooked in Today's Brave New World*, ST. LOUIS POST-DISPATCH, Apr. 16, 2009, at A15 ("[There are an] estimated 1 million American children conceived with the help of sperm donors."); Ross Douthat, Op-Ed., *The Birds and the Bees (via the Fertility Clinic)*, N.Y. TIMES, May 30, 2010, <http://www.nytimes.com/2010/05/31/opinion/31douthat.html> ("About a million American adults, if not more, are the biological children of sperm donors.")

3. A "Twin" Brother!, DONOR SIBLING REGISTRY (Nov. 26, 2007), <http://www.donorsiblingregistry.com/members/ViewSuccess.php?ssID=54&seed=28244&PHPSESSID=dkjq4bjkb1ihmqn40dqf937823>; *see also* Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care To Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1 (2011) (exploring laws respecting sibling relationships).

ogy (ART).⁴

Although the Supreme Court has repeatedly addressed family law issues and enunciated a robust doctrine of family privacy,⁵ donor-conceived family communities are outside the parameters of this doctrine.⁶ Recognition of connections between different donor-conceived families does not involve sexual intimacy between adults as in the line of cases culminating in *Lawrence v. Texas*, nor authority within the parent-child relationship as in *Troxel v. Granville*, nor the type of traditional family recognized in *Michael H. v. Gerald D.*, which upheld the marital presumption notwithstanding strong evidence that the husband was not the biological father.⁷ Indeed, donor-conceived family communities contest traditional assumptions about the state's role in family law, the goods that the state should seek to further, and the very definition of family.

Accordingly, this Article sets out a new paradigm for American legal regulation of donor-conceived families and the communities they create by sharing the same donor. These families and communities might be regulated pursuant to a

4. ART is a general term that refers to a variety of methods for achieving pregnancy by assisted means. It includes fertility treatments that involve some form of outside intervention, ranging from the placement of fertilized eggs from the gametes of the intended parents into the mother's uterus (in vitro fertilization, or IVF), to using sperm, eggs (gametes), and embryos created by others. See CTNS FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3–4 (2010), http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf. Although the Centers for Disease Control and Prevention (CDC) does not include sperm donation in its definition of ART, this Article will include the practice.

5. See *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (holding that father possesses a right of custody under international law); *Lawrence v. Texas*, 539 U.S. 558, 564, 578–79 (2003) (striking down sodomy law based on individual's liberty interests); *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion) (requiring that "special weight" be given to parents' preferences); *Michael H. v. Gerald D.*, 491 U.S. 110, 115, 131–32 (1989) (plurality opinion) (upholding constitutionality of marital presumption of paternity); *Wisconsin v. Yoder*, 406 U.S. 205, 207, 234–36 (1972) (allowing Amish parents to withdraw children from school after eighth grade); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (extending right to contraception to unmarried individuals); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (upholding fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (protecting use of contraceptives by married people); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (protecting, in dicta, parents' rights to educate their children); *Meyer v. Nebraska*, 262 U.S. 390, 399, 402–03 (1923) (reversing conviction of teacher who had instructed child in foreign language, in violation of Nebraska statute, because Fourteenth Amendment protects teacher's liberty to provide such instruction).

6. Scholars have addressed some related issues. For example, some scholarship has addressed parenthood determinations in the reproductive-technology context. See, e.g., I. Glenn Cohen, *The Constitution and the Rights Not To Procreate*, 60 STAN. L. REV. 1135 (2008); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2052–74 (2003). Others have addressed regulation of the industry. See, e.g., Gaia Bernstein, *Essay, Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189 (2010) (reviewing NAOMI R. CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* (2009)); June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509 (2006); Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844 (2009).

7. See *supra* notes 5–6.

“medical approach” that focuses on the patients (parents) and the fertility clinics that help them; a contract-based approach that focuses on the intent of the parents and the donor; or a nuclear-family approach, which might minimize any deviations from the model of the “standard” family involving one or two parents and children. Each of these approaches fits well within the existing *laissez-faire* system, which contemplates that donors will not want to meet the children to whom they are genetically related, that intending parents want to form their own families of choice, and that the children will not want to meet donors or their “half-siblings,” others who share the same donor. Instead, the legal regime developed in this Article is based on a holistic family law approach: intending parents would create families, donors would have the opportunity to meet their children, and offspring would be able to connect with one another.

The goal of this Article is to map how the protections of constitutional and family law can be applied to donor family networks specifically. The broader goal of this Article is to imagine how the traditional rules governing families should—and should not—translate into rules governing newly developing family forms. This Article explores a world in which individuals create affinity relationships based on shared genes but with few of the other characteristics that typify the traditional family. By appreciating the differences between family forms and by recognizing how existing concepts of family neglect quasi-familial relationships, it becomes possible to see how the constitutional principles established for a traditional family might apply in this new environment to develop respect for new forms of family ties. Considering potential regulation provides an extraordinary opportunity for scholars and policy makers to create a family law regime where one does not currently exist.

The Article proceeds as follows. Part I draws upon social-science literature to describe the realm of people involved in ART, focusing on those in the donor-conceived world. The social-science literature confirms that donor-conceived families are a fast-growing segment of the population, but it also shows how we, as a society, do not know how to approach these families on social, linguistic, and legal levels. Many offspring may never learn that they are donor-conceived nor find out any information about their donors. Part I then examines how ART creates relationships between families who have used the same donor, even though the state provides no formal recognition of these donor-formed “familial” relationships, and, indeed, when it reinforces anonymity, the law hinders the creation of these relationships. Part I uses narratives from members of these newly formed relationships to show the complexity of the meaning of “family” and to show the expressed need on the part of some of these families for guidance.

Part II surveys the few laws that exist in the donor world, turning first to the varying state approaches to establishing parenthood when third-party gametes are used, then to laws applicable to the donor. The current scope of law is confused, and confusing, when it comes to legal rights and obligations in the

donor-conceived world. While most states have considered the rights of anonymous sperm donors, the rights and obligations of “known” donors are not as clear; moreover, many states have not adapted their laws to consider the rights of egg donors.

To be sure, the creation of families through assisted reproductive technology is not entirely *sui generis*. It has much in common with the creation of families through adoption,⁸ and the highly developed legal structure of adoption can provide some guidance for developing the law of donor families and their connections.⁹ Adoption and ART allow families to be created outside of the traditional biogenetically-related-married-parent-and-child model; the child is not related to at least one of the legal parents. Moreover, the potentially conflicting interests between members of the adoption “triad” of birthparents, adoptive parents, and adopted persons is paralleled by the interests of those who belong to the ART triad of gamete providers, recipients, and donor-conceived offspring. Yet the adoption analogy is imprecise. At least rhetorically, adoption is focused on children and finding families for them; ART is focused on patients, and on finding treatments for them in a medicalized, consumer-based model. One donor might create dozens of offspring without ever knowing of their existence, an unlikely result from one set of birth parents who relinquish a child for adoption. Donor-conceived individuals have only one birth certificate; adopted individuals have an original birth certificate, reflecting the names of their biological parents, and a second, legal birth certificate with the names of their adoptive parents. And adoption is highly regulated; ART is not. Nonetheless, particularly given the amount of planning necessary in the donor parents’ context, the system can bear more regulation, and specifically can bear the sort of regulation that is imposed on the production of children generally. Society has long required centralized public records about marriages and births, among other family events.

In Part III, the Article analyzes, and builds on, three different jurisprudential strands that create space for legal recognition of donor-conceived family communities. As the first strand shows, Supreme Court jurisprudence on the family neither forecloses nor requires recognition of donor-conceived family communities. A second legal strand challenges the identification of the family with domesticity; the Article expands this critique to include vertical relationships between adults and children. It draws on new research in social science concerning the importance of social communities and friendship. The social-science literature refutes any belief that the law has no role to play in the development of these families, explaining how the law could facilitate these connections. A

8. For further discussion, see, for example, Naomi Cahn & Evan B. Donaldson Adoption Inst., *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIMONIAL L. 1 (2011).

9. Historically, the adoption area has struggled with the equivalence of families formed outside of biology and families formed through biology. See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003).

final legal strand concerns the slowly expanding legal categories of who might qualify as a parent and demonstrates that changes in conceptions of parenthood provide an opportunity to recognize alternative parent–offspring relationships.

Next, Part IV analyzes the costs and benefits of different forms of regulation. First, it considers the application of administrative laws focused on health and consumer protection. Part IV further considers the utility of existing constitutional jurisprudence on the family. It rejects existing approaches, and then posits the beginnings of an alternative normative approach by articulating two principles to guide the law’s development. First, relational concerns must be integrated into the existing health-based regulatory system for the donor world. This challenges both the medical model of donor families and the traditional family model of domesticated individuals, changing the focus from patient and home to emotional relationships. New regulation should require keeping track of the children who result from any particular egg or sperm donor through government-mandated record-keeping.

Second, in further acknowledgment of the relational issues, the Article advocates legal recognition of these potential families in a nuanced way based on the various interests of donor-conceived people, their parents, their donors, and the surrounding culture. The law can implement the patently obvious truth that families come in different forms, and should be regulated in different ways. State recognition means creating space for these families to develop. Regardless of the precise legal basis for such recognition, there are sound policy reasons to develop new approaches. Although the simple biological relationship need not entitle members to privileges or state support of the relationships, and though the Constitution does not necessarily mandate particular kinds of support, members of these families deserve state regulation for justice and fairness. This involves facilitating connection between donor-related half-siblings and their parents where both (or all) persons seek the connection, with more support where some deeper emotional or caretaking relationship has been established.

Consequently, children must be allowed to find out the identity of their donors and their biologically related “siblings.” To facilitate this recommendation, the Article argues for the importance of clarifying, and definitively resolving, the relationship between donors and the families they help create, a resolution that will replace the swampy landscape of ambiguous obligations that currently exists, in which donors cannot be certain that they will have no legal duties to offspring.¹⁰ The Conclusion illustrates how a new jurisprudence of family connections might affect various foundational normative and jurispruden-

10. Courts have taken inconsistent approaches to the statuses of donors and parents. *See, e.g.*, J.F. v. W.M. (*In re Paternity of M.F. and C.F.*), 938 N.E.2d 1256, 1264 (Ind. Ct. App. 2010) (Crone, J., concurring in part and dissenting in part) (arguing that donor agreements, to be enforceable, should require that sperm be provided to a licensed physician); *Ferguson v. McKiernan*, 940 A.2d 1236, 1238, 1248 (Pa. 2007) (upholding oral agreement between sperm donor and mother, under which donor relinquished rights to visitation and mother agreed not to seek child support from the donor); Joslin, *supra* note 1, at 1184–87 (discussing judicial and statutory approaches); Nancy D. Polikoff, *A Mother*

tial positions of family law more broadly.

I. THE WORLD OF DONOR GAMETES

Reproductive technology changes the formation of families, but it need not challenge laws governing families.¹¹ Families might still consist of intimate partners, their children, or both, and still need privacy and protection. Nonetheless, reproductive technology *has* enhanced the formation of families that do not consist of two heterosexual parents and their children, providing opportunities for single men and women and gay and lesbian couples to bear children. This Part provides the context for considering further regulation of the donor world. It describes donor-conceived families and donor-created family communities, first exploring the population and language of the donor world. It then turns to research on the meaning of connections within this world.

A. THE POPULATION OF THE DONOR WORLD

When people try to create families using other people's genetic material, they can access donor eggs, sperm, or embryos.¹² Both donor eggs and embryos require the involvement of a fertility doctor or clinic, and the patients typically undergo in vitro fertilization (IVF).¹³ Infertility has become a huge business, and the entire ART–donor-gamete industry may top out at nearly \$3 billion.¹⁴

Sperm donation has been around for centuries, but it has been a fairly secret practice—the first sperm donors were often medical students, who gave sperm anonymously.¹⁵ In the earliest documented case of sperm donation, the mother apparently did not even know that her husband's sperm had not been used.¹⁶ Sperm banking today has become a big business, with approximately thirty sperm banks in the United States.¹⁷ California Cryobank, which claims to offer the largest selection of donors in the sperm industry, has sales of \$5–10 million

Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century, 5 STAN. J. C.R. & C.L. 201, 240–44 (2009) (same).

11. See Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race To Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 241 (noting that “not every technology generates litigation and legal scholarship,” although “technological change is often the occasion for legal problems” (footnote omitted)).

12. See, e.g., June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1015–16 (2010); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 19–20 (2008).

13. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 4, at 3–4, 16.

14. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 3 (2006).

15. RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 25–27 (2011); DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* 165 (2005).

16. See PLOTZ, *supra* note 15, at 159–60 (describing Dr. William Pancoast's 1884 case); Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 533 n.29 (1994) (same).

17. Jeff Stryker, *Regulation or Free Markets? An Uncomfortable Question for Sperm Banks*, SCI. PROGRESS (Nov. 7, 2007), <http://www.scienceprogress.org/2007/11/regulation-or-free-markets/>.

per year nationally and internationally.¹⁸ Egg donation is far more recent and needed the birth of the first test-tube baby, Louise Brown, before becoming, excuse the expression, viable in 1978, but it is a growing practice with an increasing number of egg-donor agencies.¹⁹

In 2008, the latest year for which data are available, there were more than 18,000 cycles using donor eggs or embryos, approximately twelve percent of all ART procedures performed that year.²⁰ As a result of these procedures, more than 5,000 babies were born from donations of fresh eggs,²¹ and perhaps more than 10,000 donor-egg babies were born in total.²² Far less precise numbers on sperm-donor babies exist because no entity is responsible for collecting information. Although the federal government requires clinics that offer IVF to report on their use of donor eggs and embryos, no comparable mandate exists for clinics that use donor sperm; sperm banks are not required to maintain any records, except those related to safety.²³ But it is estimated that 30,000–40,000 children are born each year from donated sperm.²⁴

Indeed, the recruitment of sperm and egg donors is a sophisticated process.²⁵

18. Fox, *supra* note 6, at 1849.

19. See Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 212, 220–23 (2009). The sperm business and the egg business are similar in that they are both selling gametes, but each industry is structured differently. Almeling, *supra* note 15.

20. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 4, at 60. The CDC explains that “ART consists of several steps over an interval of approximately 2 weeks,” so “an ART procedure is more appropriately considered a cycle of treatment rather than a procedure at a single point in time.” *Id.* at 4 (emphasis omitted).

21. *Id.* at 63 & fig.49.

22. See *id.* at 61 fig.47. This estimate is necessarily rough, based on a reading of Figure 47 showing that perhaps between fifty to seventy percent of the more than 18,000 ART cycles using donor eggs—fresh or frozen—resulted in live births in 2008.

23. Federal law regulates two aspects of the reproductive technology field: safety of gametes and clinic success reporting data. NAOMI R. CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* 53–59 (2009).

24. Tamara Audi, *Giving Life: Donor Dads Reach Out to Kids*, DETROIT FREE PRESS, May 21, 2006, at A1.

25. See, e.g., Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, LAW & CONTEMP. PROBS., Summer 2009, at 37, 40, 42–56 (analyzing the “organizational procedures at contemporary [egg and sperm] donation programs, [and] finding significant variation in how women’s bodies and men’s bodies are valued”); Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 320 (2007) [hereinafter Almeling, *Selling Genes*] (comparing “how staff at commercial fertility agencies organize the process of egg and sperm donation”); Rene Almeling, “*Why Do You Want To Be a Donor?*”: *Gender and the Production of Altruism in Egg and Sperm Donation*, 25 NEW GENETICS & SOC’Y 143, 155 (2006) [hereinafter Almeling, “*Why Do You Want To Be a Donor?*”] (“Donor profiles are packaged representations, shaped by the donor’s interest in being selected and the agency’s interest in recruiting clients, and these interests are structured in part by gendered social norms.”); Krawiec, *supra* note 19, at 206–07 (arguing that “[o]ne of the defining characteristics of the baby market is . . . the legal regime’s formal exclusion of [egg donors] from the full profits of exchange,” while “a wide array of fertility specialists, agents, brokers, facilitators, and other middlemen . . . legally profit handsomely from the baby market, without similar restrictions on their profit-making activities”); Fox, *supra* note 6 (noting and discussing the fact that most sperm banks offer information about donors’ racial characteristics); David Tuller, *Payment Offers to Egg Donors Prompt Scrutiny*, N.Y. TIMES, May

Potential purchasers can receive extensive information about the donors, although not all of this information is necessarily accurate.²⁶ Studies of egg donors have found that they are motivated both by altruism and by financial needs, although their stories are shaped by egg brokers to emphasize the altruism.²⁷ Egg donors may feel somewhat unprepared for the short- and long-term moral, physical, and psychological effects of donation, and a few former egg donors have called for greater regulation of donation.²⁸ The egg providers seeking further safeguards in the donor process may express concern about anonymity and never knowing any children born from their gametes, as well as the health risks and the lack of disclosure and care.²⁹

Apart from general informed consent to medical procedures, there is no law requiring that donors receive any specific information about the unknown risks of egg donation, nor that follow-up health care be provided.³⁰ Moreover, there are also no limits on the number of children who can be produced as the result of any individual donor's gametes. The American Society for Reproductive Medicine (ASRM), a trade group, has developed recommendations on the

10, 2010, <http://www.nytimes.com/2010/05/11/health/11eggs.html> (discussing compensation for egg donors, which "often exceed[s] industry guidelines").

26. See PLOTZ, *supra* note 15, at 40–42 (reporting on actual donors, who were not Nobel Prize recipients, to a reputed Nobel Prize-winner sperm bank); M. Cho & F. Licciardi, *Egg Donors Significantly Under-Report Their Weights*, 86 FERTILITY & STERILITY S138 (2006).

27. See A.L. Kalfoglou & J. Gittelsohn, *A Qualitative Follow-Up Study of Women's Experiences with Oocyte Donation*, 15 HUM. REPROD. 798, 800 (2000); Nancy J. Kenney & Michelle L. McGowan, *Looking Back: Egg Donors' Retrospective Evaluations of Their Motivations, Expectations, and Experiences During Their First Donation Cycle*, 93 FERTILITY & STERILITY 455, 456 (2010); Steven R. Lindheim, Jennie Chase & Mark V. Sauer, *Assessing the Influence of Payment on Motivations of Women Participating as Oocyte Donors*, 52 GYNECOLOGIC & OBSTETRIC INVESTIGATION 89, 89, 91 (2001). The language of altruism is, however, particularly important in the egg world. See, e.g., ALMELING, *supra* note 15, at 137, 167–68; Krawiec, *supra* note 19, at 241–42.

28. See, e.g., *Interview with Author Julia Derek*, CHICK LIT BOOKS, <http://chicklitbooks.com/author-interviews/interview-with-author-julia-derek/> (last visited Oct. 8, 2011); see also JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004) (portraying the limitations of the current system, from the perspective of an egg donor); Kenney & McGowan, *supra* note 27, at 464 (reporting on donors' lack of awareness of the physical risks involved in donation).

29. See DEREK, *supra* note 28; Kenney & McGowan, *supra* note 27, at 464 ("Additional research is needed on the efficacy of various means of communicating to donors the short-term physical side effects that may accompany ovarian stimulation and egg retrieval."); Alana S., *Debt and Donation*, FAMILY SCHOLARS.ORG (May 13, 2010, 5:38 PM), <http://familyscholars.org/2010/05/13/debt-and-donation/> (listing "some things" an egg donor is "angry about"). The American Society for Reproductive Medicine has developed guidelines for informed consent. See Practice Comm. of the Am. Soc'y for Reprod. Med. & Practice Comm. of the Soc'y for Assisted Reprod. Tech., *2008 Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 90 FERTILITY & STERILITY S30, S40 (2008). But see Aaron D. Levine, *Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors*, 40 HASTINGS CENTER REP. 25, 35 (2010) (finding that "[t]he majority of advertisements identified in a unique national sample of oocyte donor recruitment advertisements complied with ASRM guidelines [on the compensation of oocyte donors], but a substantial minority did not").

30. See, e.g., Justine Durrell, *Women's Eggs: Exceptional Endings*, 22 HASTINGS WOMEN'S L.J. 187, 189–90 (2011); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 916 (1994); Sonia M. Suter, *Giving In to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 244 (2009).

number of babies born with one donor's gametes, but these are not binding,³¹ and there are stories of men who have contributed their sperm to produce dozens of children.³²

Embryo donation involves a much smaller group, producing only about 400 live births per year.³³ Studies of those who donate their embryos show a variety of considerations influence their decisions, with patients who ascribe a high moral status to embryos more likely to donate to others.³⁴

More information is available on the people who use donor gametes. About eight percent of women will seek some type of infertility services during their lifetimes.³⁵ Couples may need donor gametes when one of them is medically infertile and unable to produce viable eggs or sperm; single people and gay and lesbian couples need donor gametes because they are socially infertile and have no other source for the gamete. The vast majority of donated eggs are provided to older women;³⁶ fewer than ten percent of all IVF cycles in women younger than thirty-nine use donor eggs, with the percentages increasing until more than fifty percent of all cycles in women ages forty-five and older involve donor eggs.³⁷ Advances in reproductive technology concerning the manipulation of sperm have resulted in a decrease of male-factor infertility.³⁸ Although no

31. See Practice Comm. of the Am. Soc'y for Reprod. Med., *Repetitive Oocyte Donation*, 90 FERTILITY & STERILITY S194, S194-95 (2008); Practice Comm. of the Am. Soc'y for Reprod. Med. & Practice Comm. of the Soc'y for Assisted Reprod. Tech., *supra* note 29, at S35-36. The ASRM suggests "an arbitrary limit of no more than 25 pregnancies per sperm or oocyte donor, in a population of 800,000." Practice Comm. of the Am. Soc'y for Reprod. Med., *supra*, at S194.

32. E.g., Susan Donaldson James, *Confessions of a Sperm Donor: Hundreds of Kids*, ABC NEWS (Aug. 19, 2010), <http://abcnews.go.com/Health/sperm-donors-admit-fathering-hundreds-children-call-regulation/story?id=11431918>; Rick Montgomery, *Through the Web, Kids of Sperm-Donor Dads Connect with Siblings*, DESERET NEWS, Mar. 27, 2009, <http://www.deseretnews.com/article/705293478/Through-the-Web-kids-of-sperm-donor-dads-connect-with-siblings.html>; Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, <http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all>; Ginger Adams Otis, *Pro Creators: Sperm Donors Dads to Dozens*, N.Y. POST, June 19, 2011, http://www.nypost.com/p/news/local/sperm_donors_dads_to_dozens_BPI3xZiOl4sQMpaqcolLkN.

33. See Cheryl Wetzstein, *Extra Embryos Pose Dilemma*, WASH. TIMES, Apr. 6, 2010, <http://www.washingtontimes.com/news/2010/apr/06/wetzstein-extra-embryos-pose-dilemma/>. For discussions of patients' approaches to their excess embryos, see, for example, Robert D. Nachtigall et al., *What Do Patients Want? Expectations and Perceptions of IVF Clinic Information and Support Regarding Frozen Embryo Disposition*, 94 FERTILITY & STERILITY 2069 (2010).

34. Anne Drapkin Lyerly et al., *Fertility Patients' Views About Frozen Embryo Disposition: Results of a Multi-institutional U.S. Survey*, 93 FERTILITY & STERILITY 499, 503, 506 (2010).

35. ANJANI CHANDRA ET AL., NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 137 tbl.98 (2005), http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

36. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 4, at 60 & fig.46.

37. *Id.*

38. See, e.g., LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 61-74 (2007). Male factor infertility is due to male fertility problems, such as too few sperm or misshapen sperm. AM. SOC'Y FOR REPROD. MED., PATIENT FACT SHEET: DIAGNOSTIC TESTING FOR MALE FACTOR INFERTILITY (2008), http://www.sart.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/Testing_Male-Fact.pdf; *Infertility FAQ's*,

reliable records exist on the use of donor sperm, estimates are that single women or lesbians constitute the majority of those who purchase sperm,³⁹ although heterosexual men continue to need access to donor sperm.⁴⁰

Several reasons account for the growth of the fertility industry and the increasing use of infertility services. First, the reproductive technology industry is becoming more sophisticated, offering expanded services.⁴¹ Second, the growth is also due to higher demand. The average age of first birth is rising for the country as a whole.⁴² At the same time, women's fertility declines with age: by age thirty, most women retain only twelve percent of their original egg reserves, and by age forty just three percent.⁴³ Three percent may still be on average 9,000 eggs—more than enough to get pregnant—but the odds definitely change.⁴⁴

The deferral of childbearing is one aspect of a changing family structure that is part of the second demographic transition.⁴⁵ Women—and men—are adjusting to a new family model geared for the postindustrial economy.⁴⁶ This new culture, what June Carbone and I have labeled the “Blue Family” model, emphasizes the importance of women's as well as men's workforce participation, more egalitarian gender roles, and delay of marriage and childbearing until both parents reach emotional maturity and financial self-sufficiency. With fertility rates dropping and the average age of marriage moving into the late twenties, this culture deregulates sexuality, identifies responsibility with financial independence, respects equality and autonomy, and safeguards access to contraception and abortion for teens and adults. The “Red Family” model, or more accurately, the politicians and ministers who have pushed a “moral values” agenda, rejects the new culture. As a result of this model's emphasis on

CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/Infertility/index.htm> (last updated June 28, 2011).

39. Cheryl Miller, *Donated Generation*, NEW ATLANTIS, Summer 2008, at 27, 32 (estimating fifty-five percent).

40. There is a healthy Internet community of dads who are raising donor-inseminated offspring. *See, e.g., DI Dads, Yahoo! Groups*, http://groups.yahoo.com/group/di_dads/ (last visited May 31, 2011) (group for fathers); LIFE AS DAD TO DONOR INSEMINATION (DI) KIDS, <http://di-dad.blogspot.com/> (last visited Feb. 4, 2011) (blog by father).

41. *See, e.g.,* PLOTZ, *supra* note 15 (discussing the development of increasingly sophisticated sperm banks); SPAR, *supra* note 14, at 17–67 (discussing the historical development of various fertility techniques ranging from hormones to egg donation).

42. T.J. MATHEWS & BRADY E. HAMILTON, NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., DELAYED CHILDBEARING: MORE WOMEN ARE HAVING THEIR FIRST CHILD LATER IN LIFE 1–4 (2009), <http://www.cdc.gov/nchs/data/databriefs/db21.pdf>.

43. Carolyn Butler, *Ovaries Have Not Adjusted to Many Women's Decision To Delay Having Children*, WASH. POST, Feb. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/22/AR2010022203639.html>.

44. *See* Comm. on Gynecologic Practice of the Am. Coll. of Obstetricians & Gynecologists & Practice Comm. of the Am. Soc'y for Reprod. Med., *Age-Related Fertility Decline: A Committee Opinion*, 90 FERTILITY & STERILITY S154, S154 (2008).

45. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 34–37 (2010).

46. *See id.* The Red–Blue paradigm is an ideological construct that helps explain behavioral patterns.

chastity and due to the lesser availability of contraception and abortion, however, the red culture is typified by higher teen pregnancy rates, more shotgun marriages, and lower average ages of marriage and first births.

In those parts of the country where the most fertility clinics are located, women are more likely to be part of the Blue Family model: they marry and have children at older ages.⁴⁷ While infertility is actually higher among women without a college education,⁴⁸ they are less likely and able to seek higher tech interventions because of the cost.⁴⁹ Even in Massachusetts, a state with mandated insurance coverage, the majority of women accessing such care are white, highly educated, and wealthier.⁵⁰ A state's income predicts the availability of infertility services; availability is correlated with utilization of those services; and a state's educational levels directly predict utilization.⁵¹

B. THE LANGUAGE OF THE DONOR WORLD

The donor world is also characterized by its own language, where words have distinct meanings. The language serves as a cultural clue (and cue) to our interpretation and understanding of these transactions; our beliefs about what is legally appropriate are affected by our cultural framing of these activities.⁵² These linguistic tropes show just what is at stake in considering how the state

47. See Ajay K. Nangia, Donald S. Likosky & Dongmei Wang, *Access to Assisted Reproductive Technology Centers in the United States*, 93 FERTILITY & STERILITY 745, 747–54 (2010).

48. Tarun Jain, *Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care*, 85 FERTILITY & STERILITY 876, 879 (2006) (“[W]omen with and without a high school diploma had a higher prevalence of infertility than women with a bachelor’s degree or higher (8.1%, 8.5%, and 5.6%, respectively).”). Infertility is typically defined as the failure to become pregnant within a year of ceasing to use contraceptives. *E.g.*, CHANDRA ET AL., *supra* note 35, at 22.

49. See Jain, *supra* note 48, at 876–78.

50. Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 222 (2005). The pattern is similar in states that require insurance plans to cover IVF treatment. Mark P. Connolly, Stijn Hoorens & Georgina M. Chambers, *The Costs and Consequences of Assisted Reproductive Technology: An Economic Perspective*, 16 HUM. REPROD. UPDATE 603, 607 (2010); Jain, *supra* note 48, at 876–78; Mary Lyndon Shanley & Adrienne Asch, *Involuntary Childlessness, Reproductive Technology, and Social Justice: The Medical Mask on Social Illness*, 34 SIGNS 851, 856–57, 860 (2009); see also Fox, *supra* note 6, at 1853 (explaining that the underrepresentation of African-American sperm donors is a result of the higher proportion of whites who use assisted reproduction).

51. Ahmad O. Hammoud et al., *In Vitro Fertilization Availability and Utilization in the United States: A Study of Demographic, Social, and Economic Factors*, 91 FERTILITY & STERILITY 1630, 1633–34 (2009).

52. See, e.g., Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1388–1404 (2010) (describing how “intuitions . . . are . . . largely responsible for ongoing decisions to sustain legal distinctions based on sexual orientation”); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 153–54 (2007) (“[W]e cannot, as a cognitive matter, justify laws on grounds that are genuinely free of our attachments to competing understandings of the good life.”); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 155–56 (2006) (explaining how “[p]erceptions of how harmful activities are . . . informed by the visceral reactions those activities trigger,” reactions which are “determined largely by cultural values”); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 802–04 (2010) (discussing “the contribution

should approach these relationships.

First, consider how to describe the family members involved with donor gametes. Are the children “donor-conceived offspring”? “Donor adoptees”?⁵³ Are the parents “donor-conceived parents”? Are people born from the same donor’s gametes strangers or siblings? Are the donors parents?⁵⁴ Donor-conceived offspring who share a gamete provider are often referred to as “half-siblings,” rather than (the more awkward) “individuals who share genetic material.”⁵⁵ Phrasing a connection in familial terms, such as sibling, rather than biological terms, such as shared genetic material, already suggests the appropriate legal and cultural frameworks.⁵⁶

Second, ART covers a variety of techniques that do not necessarily involve donor gametes; in vitro fertilization is most commonly performed using the patients’ own gametes. Should the donor world instead be referred to as third-party reproduction and subject to separate regulations? And perhaps artificial insemination might better be labeled as “alternative insemination,” recognizing that many consumers are lesbians.⁵⁷

Third, consider the use of the word “donor.” What has the donor actually *donated*? Goods or services?⁵⁸ More importantly, sperm and egg donors are, in most cases, actually sperm and egg *sellers*, although some gamete providers are

that cultural cognition makes to the controversy over how the law should respond to acquaintance rape”).

53. See, e.g., ROBIN L. BENNETT, *THE PRACTICAL GUIDE TO THE GENETIC FAMILY HISTORY* 245 (2d ed. 2010); CAROLINE LORBACH, *EXPERIENCES OF DONOR CONCEPTION: PARENTS, OFFSPRING AND DONORS THROUGH THE YEARS* 167 (2003).

54. See Lawrie McFarlane, *Donor Case Strikes at Basic Family Foundations*, *TIMES COLONIST* (Victoria), July 15, 2011, <http://www2.canada.com/victoriatimescolonist/news/comment/story.html?id=7074bc86-6d1a-41b5-b6e2-e3da99ec38d3&p=1> (“The contemporary fixation with searching for a ‘biological parent’ . . . gives the animal act of reproduction equal standing with human values like devotion and caring.”).

55. E.g., *A Guide to the World of Donor Conception: Information for Donors, Parents and Donor-Conceived People*, DONOR SIBLING REGISTRY 9–10, http://www.donorsiblingregistry.com/files/6612/9183/5956/DSR_Brochure_Final.pdf (last visited Oct. 3, 2011) (recounting one donor-conceived person’s “Story of Half-Siblings”).

56. See, e.g., GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE*, at xv (2004) (“Frames are mental structures that shape the way we see the world. As a result, they shape the goals we seek . . . and what counts as a good or bad outcome of our actions. In politics our frames shape our social policies and the institutions we form to carry out policies.”); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L.J.* 804, 814 (2008) (“Each frame is socially mediated, which is to say, each act of framing represents a process of interpretation that takes place between rather than strictly within individuals.”).

57. See Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 *N.C. L. REV.* 1, 3 n.5 (2003).

58. See MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* 160–61 (2006). There is also a robust scholarly discussion of seller liability. E.g., J. Brad Reich & Dawn Swink, *You Can’t Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 *ALB. L.J. SCI. & TECH.* 1, 43–64 (2010) (analyzing the applicability of contract and tort principles to the egg market); Fox, *supra* note 6, at 1895–97 (suggesting the possibility of sperm banks’ liability under antidiscrimination statutes for classifying donors according to race). Although this Article generally uses the term “donor” to refer to the individual who has provided the third-party gametes, this label reflects convenience, rather than conviction. More accurate terminology

not paid for their contributions. As in many other areas of family law, commercialization and commodification exist here,⁵⁹ even though, like baby selling or, perhaps, prostitution, a relationship is being created.⁶⁰ It may certainly be appropriate to sell gametes, but the language should reflect what actually happens, rather than trying to shape perceptions.⁶¹

Indeed, the practice is controlled by the image of charitable gametic contributions.⁶² Consider the mixed messages on charity and commodification in the following advertisement for a donor: “‘21-year-old Chinese MIT student with A grade-point average, 1500 SAT score, several awards in high school and university,’ and with a desire to ‘help bring a child into the world with the same special gifts she has.’”⁶³ The woman meeting these criteria would be paid \$35,000.⁶⁴

Finally, perhaps the most problematic issue concerns the meaning of “family” in this context. The word “family” connotes certain culturally-iconic images: interdependence, emotional intimacy, sharing a home, and kinship based on blood or legally recognized affinities, with the law keeping its distance by respecting the private nature of these relationships. The law is, nonetheless, integrally involved in constructing families by defining who can marry whom (from same-sex couples to sixteen-year-olds), assigning parenthood and identifying the father and mother, determining who can make decisions on behalf of a child, establishing when parental rights can and should be terminated, as well as by providing legal protections for the privacy of relationships defined as families,⁶⁵ protections for family members based on their status,⁶⁶ and a structure to allocate decision making with respect to the parent, child, and state.

would reflect the differing roles that the third-party-gamete provider plays in the lives of the intending parents and donor-conceived people.

59. See Ertman, *supra* note 57, at 11–12; Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, LAW & CONTEMP. PROBS., Summer 2009, at 59, 84–85; Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J.L. SCI. & TECH. 41, 60–62 (2009).

60. See Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 845–47 (2010) (“[T]here are . . . often emotional connections between sex workers and their clients.”).

61. Sociologist Rene Almeling discusses how the language influences the perceptions of the donors themselves. ALMELING, *supra* note 15, at 110–41.

62. See Almeling, *Selling Genes*, *supra* note 25, at 326; Almeling, “*Why Do You Want To Be a Donor?*,” *supra* note 25, at 154–55.

63. Laura Crimaldi, *Cali. Couple Seeks Egg-ceptional Donor*, BOS. HERALD, Jan. 25, 2009, available at 2009 WLNR 1516873.

64. *Id.* The language of altruism may also be gendered. While both sperm and egg donors are initially interested in the financial compensation, agencies reinforce altruism for egg donors, and the work aspects for sperm donors. See ALMELING, *supra* note 15, at 112, 125. Almeling notes that “in egg agencies donation means giving a gift while in sperm banks donation means performing a job.” *Id.* at 53.

65. See Laura T. Kessler, *New Frontiers in Family Law: Introduction*, 2009 UTAH L. REV. 275, 275, 11 J.L. & FAM. STUD. 227, 227 (2009) (noting “the state[s] . . . role in privileging certain families over others”); Rosenbury & Rothman, *supra* note 60, at 826 n.98 (noting the constitutional protection afforded to “family-like relationships”).

66. See DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 3 (2009).

Even familial relationships that seem to be “outside” of the law are defined by reference to the law.

Janet Dolgin has marvelously provided a preliminary legal exploration of “donor families,” arguing that these families show that assumptions concerning the formation of families by choice are problematic in this era of biologically determined families.⁶⁷ Indeed, one of the many fascinating things about donor-conceived families is the complexity and intertwined “nature” of biology and choice: individuals choose to become parents by selecting someone whose biological background they feel comfortable with by engaging in extensive investigation of potential donors,⁶⁸ and then they, and their offspring, choose (or not) to track down others who share the same biological background.

Ultimately, using the language of family and altruism as framing devices suggests the applicability of existing family laws. The notion of a donor implies some kind of connection;⁶⁹ contrast the connotation with “gamete provider” and “product.” But this may simply be the tail wagging the dog. If family law applies, then this leads to a series of additional issues concerning the role of law, such as whether the law should define the family or let the ascribed meanings that individuals make control, without specific laws addressing the situation; whether individuals should be able to decide on the rights to accord a donor or whether there should be an override law; and how to account for the multiple, potentially conflicting relational interests of all members of the differing families. These are issues raised by the donor world, but not yet resolved, and they provide the framework for subsequent sections of the Article.

C. DONOR-CONCEIVED FAMILY COMMUNITIES

The increasing use of donor sperm and eggs has created hundreds of thousands of families. As parents explain the facts of conception to their children, as the children understand that they may be related—biologically—to numerous potential half-siblings, donor offspring and their parents have begun to search for those with shared gametes and to advocate for disclosure of donor identities. Thousands of people have begun to “use the Internet to expand their kinship circle” and to create what they often think of as a “unique extended family” in which they are “raising children who are far-flung and yet intimately related.”⁷⁰ Wendy Kramer and Ryan Kramer, her donor-conceived son, who together started the Donor Sibling Registry (DSR) in 2000, have facilitated contact

67. Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 396–97 (2008) (“[F]orms of family that have emerged in the last several decades are generally seen as having discarded or downplayed the notion that biological relationship is or should be central to definitions of family. The presumptive form of the modern family in the U.S.—the family of choice—has received significant attention . . .”).

68. See Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, <http://www.nytimes.com/2006/03/19/magazine/319dad.html>. For a pop-culture commentary on this phenomenon, see *THE BACK-UP PLAN* (CBS Films 2010).

69. See ALMELING, *supra* note 15, at 12–13.

70. MUNDY, *supra* note 38, at 169.

among more than 8,500 genetically related people, including donors and half-siblings.⁷¹ The sperm banks themselves have recognized this growing interest in connection. For example, California Cryobank has established a “Sibling Registry” that is designed “for clients and their adult children who are interested in extending their ‘family circle,’” to help in identifying “potential siblings.”⁷² Moreover, sperm banks are increasingly offering the option of open-identity donation to allow for donor identification once offspring reach the age of eighteen.⁷³

Parents and offspring, as well as donors, may all search for one another.⁷⁴ While comparatively little research has been done in this area, as the secrecy surrounding use of donor gametes dissolves and as genetic testing becomes more sophisticated, more will become possible. The studies that do exist indicate a variety of reasons that members of donor-conceived families search for donors and for other offspring with the same genetic heritage, and that donors search for their offspring.⁷⁵ For example, one survey of almost 600 people who were members of the Single Mothers by Choice organization found that slightly less than two-thirds wanted their “child to have the possibility of a larger extended family,” and half were interested in developing a relationship with other children who shared the donor’s genes.⁷⁶ Higher levels of searching seem to be associated with households without fathers,⁷⁷ perhaps because not only are children in those families more likely to know of their donor-conceived

71. DONOR SIBLING REGISTRY, <http://www.donorsiblingregistry.com> (last visited June 14, 2011).

72. *California Cryobank Fact Sheet*, CALIFORNIA CRYOBANK, <http://www.cryobank.com/About-Us/Media-Inquiries/Online-Media-Kit/Fact-Sheet/> (last visited Aug. 24, 2011).

73. See Andrea Mechanick Braverman, *How the Internet Is Reshaping Assisted Reproduction: From Donor Offspring Registries to Direct-to-Consumer Genetic Testing*, 11 MINN. J. L. SCI. & TECH. 477, 485 (2010).

74. There are numerous Internet sites with entries from parents, offspring, and donors, see *supra* notes 40, 70–71 and accompanying text, as well as an active Facebook group with postings from members of the donor-conceived community and media inquiries, *Donor Conceived Offspring, Siblings, Parents—(Sperm or Egg)*, FACEBOOK, <http://www.facebook.com/groups/6686905255/> (last visited Aug. 24, 2011) (log-in required).

75. One small study found that the main reasons that parents searched was curiosity about similarities in appearance and personality, and because they wanted to give their child a better sense of identity. See Joanna E. Scheib & Alice Ruby, *Contact Among Families Who Share the Same Sperm Donor*, 90 FERTILITY & STERILITY 33, 36–37 (2008) (finding that one of parents’ primary motivations for seeking donor siblings was to “create family—not for them, but for their children”). Some parents also indicated that they were interested in finding people who were in a similar situation as themselves. *Id.* at 37. While heterosexual couples were the least likely to participate in the option of matching, single mothers were disproportionately more likely to be involved. *Id.* at 38. The authors hypothesized that, for this latter group, contact was a way of creating family. *Id.* For further discussion of these studies, see, for example, Naomi Cahn, *No Secrets: Openness and Donor-Conceived “Half-Siblings,”* 39 CAP. U. L. REV. 313, 329–39 (2011).

76. Rosanna Hertz & Jane Mattes, *Donor-Shared Siblings or Genetic Strangers: New Families, Clans, and the Internet*, 20 J. FAM. ISSUES 1, 5–7 & tbl.1 (2011).

77. See Tabitha Freeman, Vasanti Jadva, Wendy Kramer & Susan Golombok, *Gamete Donation: Parents’ Experiences of Searching for Their Child’s Donor Siblings and Donor*, 24 HUM. REPROD. 505, 514 (2009).

status, but also because of the parents' openness⁷⁸ and desire to create larger communities for their children.⁷⁹

Donor offspring may feel that part of their heritage is missing. Donor children may experience a sense of loss for not having information about their biological pasts or being able to establish a relationship with their gamete provider, analogous to the experience of "genetic bewilderment" reported by some adopted children.⁸⁰ In one of the first studies to compare donor-conceived offspring to adoptees to biological children, the researchers found that approximately one-third of the respondents "strongly" agreed, and another one-third "somewhat" agreed that "[m]y sperm donor is half of who I am."⁸¹ Similar percentages wondered about their donor's family.⁸² And many were interested in knowing about their ethnic or national backgrounds.⁸³ Compared to adoptees and offspring biologically related to both parents, the donor-conceived were disproportionately likely to feel confused when it came to identifying members of their families and to feel that they could "depend on" their friends more than

78. While heterosexual families can create an "as-if" family, single parents and lesbians clearly do not comply with traditional cultural expectations of what constitutes a family. For example, in 1968, in his study of social attitudes towards the family, the famed anthropologist David Schneider was able to proclaim that Americans define "my family" as "a unit which contains a husband and wife and their child or children." DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 30 (1968).

79. See Freeman et al., *supra* note 77; Scheib & Ruby, *supra* note 75.

80. E.g., Amanda J. Turner & Adrian Coyle, *What Does It Mean To Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy*, 15 *HUM. REPROD.* 2041, 2050 (2000). More recently, in the largest study to date of donor offspring (741 in total), with about half of the respondents coming from the general public, eighty-two percent of respondents indicated the desire to someday be in contact with their donor. Top reasons for searching were "[c]urious about donors' looks" and "[t]o learn about [my] ancestry." Diane Beeson, Patricia Jennings & Wendy Kramer, *Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process*, 26 *HUM. REPROD.* 2415, 2417-20 & tbl.4 (2011).

81. ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, *MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION* 21, 88 (2010), http://www.familyscholars.org/assets/Donor_FINAL.pdf. Data were collected through web interviews from 1687 respondents, with equal numbers of individuals who were (or believed they were) donor-conceived (n = 562), adopted (n = 562), or raised by their biological parents (n = 563). *Id.* at 119. The study has received some criticism. See, e.g., Eric Blyth & Wendy Kramer, "My Daddy's Name is Donor": Read with Caution! (July 9, 2010), http://www.bionews.org.uk/page_65970.asp; Julie Shapiro, *Choosing Studies: Eenie Meenie or Something More?*, *RELATED TOPICS* (June 7, 2010), <http://julieshapiro.wordpress.com/2010/06/07/choosing-studies-eenie-meenie-or-something-more/>. Indeed, two of the study's authors stated that their "findings suggest that openness alone does not resolve the complex risks to which children are exposed when they are deliberately conceived not to know and be known by their biological fathers." Karen Clark & Elizabeth Marquardt, *The Sperm-Donor Kids Are Not Really All Right*, *SLATE* (June 14, 2010, 11:23 AM), http://www.slate.com/articles/double_x/doublex/2010/06/the_spermdonor_kids_are_not_really_all_right.html. It should also be noted that one of the principal goals of the organization that holds the copyright to the study is "[t]o increase the proportion of children growing up with their two married parents." *Introduction*, *INST. FOR AM. VALUES*, <http://www.americanvalues.org/intro/> (last visited May 31, 2011). Nonetheless, the study provides useful information.

82. MARQUARDT, GLENN & CLARK, *supra* note 81, at 88. Among respondents, thirty-three percent "strongly" agreed, and thirty-seven percent "somewhat" agreed with the statement, "I find myself wondering what my sperm donor's family is like." *Id.*

83. *Id.* at 90.

their families.⁸⁴ Nonetheless, most were positive about donor conception itself, and much more likely than children raised in other types of families to consider becoming donors themselves.⁸⁵

The most common reported main reason for children's searching for donor siblings was curiosity about things like similarities in appearance and personality (ninety-four percent cited this as one of the reasons for searching, and forty-four percent cited this as the main reason),⁸⁶ followed by "[t]o know and understand a 'missing' part of me" (sixteen percent cited this as their main reason).⁸⁷ Other popular reasons involved getting to know genetic and ancestral history.⁸⁸ Interestingly, there was a strong association between the family type of the respondent and the explanation of "find[ing] a new family member" as a reason for searching for donor siblings, with more children from single mother families citing this as a main reason.⁸⁹ These children are clearly looking for family-type connections.

When offspring search, they are also curious about the characteristics of the donor.⁹⁰ Some oft-cited reasons included "[t]o have a better understanding of my ancestral history and family background" (79%), "[t]o have a better understanding of my genetic make-up" (79%), and "[t]o have a better understanding of why I am who I am" (75%).⁹¹

When it comes to relationships with biological half-siblings, the situation is, again, quite complicated, involving the offspring as well as their parents. While the offspring might choose contact, their parents may not.⁹² On the other hand, most people feel "'overwhelmingly positive' after some ticklish starts."⁹³ Contact might be occasional, at the level of sending holiday greetings, or much

84. *Id.* at 95, 104. Forty-three percent of the donors conceived either strongly or somewhat agreed with the statement, "I feel confused about who is a member of my family and who is not," compared to fifteen percent of adoptees and six percent of the biological children. *Id.* at 95.

85. *Id.* at 97–99.

86. Vasanti Jadva, Tabitha Freeman, Wendy Kramer & Susan Golombok, *Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor*, 20 REPROD. BIOMED. ONLINE 523, 527–28 & tbl.4 (2010).

87. *Id.* at 528 & tbl.4.

88. *See id.*

89. *Id.*

90. *Id.* at 528–29.

91. *Id.* at 529 tbl.5. In terms of what triggered searching for donor siblings and/or donors, the most popular reason selected by participants was a change in personal circumstances or a life event, specifically, "becoming a teenager," "becoming an adult," "getting married or forming a long-term relationship," having a "personal crisis," "an illness or other medical condition," and "planning to have children or having children." *Id.* at 529.

92. *See Q & A with Wendy Kramer*, in BEHIND CLOSED DOORS: MOVING BEYOND SECRECY AND SHAME 25, 30–31 (Mikki Morrisette ed., 2006).

93. Carey Goldberg, *The Search for DGM 2598*, BOS. GLOBE, NOV. 23, 2008, http://www.boston.com/news/science/articles/2008/11/23/the_search_for_dgm_2598/ (quoting Wendy Kramer from the Donor Sibling Registry). The situation is not necessarily easy to navigate; Wendy Kramer reports that, "Once people connect, . . . it's a delicate dance figuring out, 'Who are we to each other?'" *Id.*; *see also* Jadva, Freeman, Kramer & Golombok, *supra* note 86; Scheib & Ruby, *supra* note 75, at 35–36 (reporting that "the most common theme was that the families 'clicked'").

closer, with the children growing up together⁹⁴ and the parents bonding. Indeed, for many donor-conceived offspring and their parents, they want contact, rather than simply written information, and these contacts to lead them to some kind of “family feeling.”⁹⁵ Many people who have connected feel as though they are starting to create a family,⁹⁶ albeit not necessarily a “close” relationship.⁹⁷ Wendy Kramer has corresponded with many parents of donor-conceived children who are seeking advice “on how to navigate their new relationships. Some parents in the newly formed donor groups simply want to trade basic information, while others want to form groups that spend holidays together, forming familial-type relationships.”⁹⁸

These are all “new relationships,” and they are developing outside of how the law has traditionally defined family—as including married biological parents with children—while using genetic connection, a well-recognized basis for creating family, as the starting point for the relationship.

II. THE LAWS OF THE DONOR WORLD

Gamete donation remains a largely private transaction that is handled through contract and intention with virtually no substantive regulation. The federal government has undertaken some limited regulation of donor-gamete safety as well as marketing practices.⁹⁹ A minority of states currently addresses some aspects of the gamete-provision process, typically requiring additional screening for donors or record keeping by clinics, and fourteen states require insurance coverage for some aspects of infertility treatment and diagnosis.¹⁰⁰ The rules that do exist in this field focus on the medical and consumer protection aspects

94. As one eight-year-old said of his donor-conceived half-sibling, “I call him brother We kind of got along right away.” Rick Montgomery, *Donor-Conceived Siblings Connect: Online Registry Matches Relatives*, SAN JOSE MERCURY NEWS, Apr. 19, 2009, at 9D.

95. Pim M.W. Janssens, Commentary, *Colouring the Different Phases in Gamete and Embryo Donation*, 24 HUM. REPROD. 502, 502 (2009); see also *All Things Considered: Donor-Conceived Kids Connect with Half Siblings* (NPR radio broadcast Feb. 26, 2009) (“It’s a new form of family. It’s not, perhaps, what people traditionally understand by families, sort of mum, dad, child. And yes, they do describe each other as brothers and sisters.” (voice of sociologist Tabitha Freeman)).

96. See, e.g., CHERYL SHULER, SPERM DONOR = DAD: A SINGLE WOMAN’S STORY OF CREATING A FAMILY WITH AN UNKNOWN DONOR 81 (2010) (describing the time when “we truly started to become a family,” and “[t]he kids acted like siblings”).

97. See, e.g., Hertz & Mattes, *supra* note 76, at 21.

98. Telephone Interview with Wendy Kramer, Dir., Donor Sibling Registry (Sept. 15, 2011).

99. See, e.g., CAHN, *supra* note 23; Bernstein, *supra* note 6, at 1195.

100. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/IssuesResearch/Health/InsuranceCoverageforInfertilityLaws/tabid/14391/Default.aspx> (last updated Apr. 2011); see also I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 537–40 (2010) (identifying the different existing mandates based on how generous they are, and whether they require full coverage); Yaniv Heled, *The Regulation of Genetic Aspects of Donated Reproductive Tissue—The Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243, 255–58 (2010) (discussing the paucity of state regulation).

of donor-conceived families.¹⁰¹

The donor world has become medicalized, which is the process that occurs when a human condition or a human problem is transformed into a medical issue.¹⁰² Even efforts to arrange for the transfer of parental rights from the donor to the recipients have historically required a physician's involvement, with minimal attention to the potential relationships or offspring that result from gamete provision.¹⁰³ While the parentage laws are moving away from this medical model, there remains no recognition of the interests of offspring or the familial entity.¹⁰⁴ This Part explores the laws that frame the donor world, addressing those applicable to parentage in donor families, the differing types of secrecy, and the enforcement of agreements relating to donation.

A. THE REAL PARENTS

As for legalization of the resulting relationships, states have adopted varying approaches that generally attempt to facilitate transactions in gametes and embryos by allocating parental rights to the intending parents, not the gamete providers. Nonetheless, and perhaps surprisingly, there is no universal answer to the question of the legal relationship between donor and offspring. In some states, the designation of parenthood turns on whether a doctor was involved in the insemination process, and the absence of physician involvement may convert a donor into a father.¹⁰⁵ In other states, the law is clear that a donor has no

101. See, e.g., Carbone & Gottheim, *supra* note 6, at 511 (arguing that “ethical understandings in the fertility context, to the extent they can be successfully forged at all, must occur within the interstices of market mechanisms”).

102. PETER CONRAD, *THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS* 4 (2007); see also Peter Conrad, *Medicalization and Social Control*, 18 ANN. REV. SOC. 209, 223–24 (1992) (noting that a downside of medicalization is “the sociological concern with how the medical model decontextualizes social problems, and collaterally, puts them under medical control”). Although insemination by donor could be deemed to have been “demedicalized,” see, e.g., Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991), and indeed, the Centers for Disease Control and Prevention does not define it as part of “assisted reproductive technology,” see *supra* note 4, it still occurs within the larger context of medicalization.

103. See, e.g., ALA. CODE § 26-17-702 (LexisNexis 2009); *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005) (holding that physician involvement deprives donor of parental rights); see also *J.F. v. W.M. (In re Paternity of M.F. and C.F.)*, 938 N.E.2d 1256, 1264 (Ind. Ct. App. 2010) (Crone, J., concurring in part and dissenting in part) (arguing that donor agreements, to be enforceable, must require that sperm be provided to a licensed physician).

104. But, as discussed *infra* notes 249–50 and accompanying text, the State of Washington in 2011 enacted the first law in the United States recognizing that donor-conceived people have rights to access medical and, under some circumstances, identifying information.

105. See, e.g., *Steven S.*, 25 Cal. Rptr. 3d at 487 (holding that physician involvement deprives donor of parental rights); *In re K.M.H.*, 169 P.3d 1025, 1042 (Kan. 2007) (same); *C.M. v. C.C.*, 377 A.2d 821, 821–22, 824 (N.J. Cumberland Cnty. Juv. & Dom. Rel. Ct. 1977) (awarding rights to known donor when no doctor was involved); *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 11–13 (Ohio Cuyahoga Cnty. Ct. Com. Pl. 1994) (faulting failure to comply with physician involvement requirement and denying defendant's attempt to invoke protection of artificial insemination law); Polikoff, *supra* note 10, at 241–46 (discussing state laws).

Primarily, it is known donors—those with whom the mother has some kind of prior relationship, such

parental rights, regardless of physician involvement.¹⁰⁶ Gaps in existing state regulations are vast; although virtually all states have laws on some aspects of sperm donation, not all states address circumstances involving unmarried parents.¹⁰⁷ States are increasingly likely to address donor eggs, although only about sixteen states address embryos.¹⁰⁸

No uniformity exists among states concerning the legal relationships established through collaborative reproduction,¹⁰⁹ although the National Conference of Commissioners on Uniform State Laws (NCCUSL) has twice attempted to develop model parenthood legislation: the 1973 and the 2002 Uniform Parentage Acts (UPAs).¹¹⁰ States have taken three general approaches to parenting issues when donor gametes are involved. Approximately twenty states have laws modeled on either the 1973 or 2002 version of the UPA, while the remaining states either have no statute or have statutes diverging significantly from both UPAs.¹¹¹

The 1973 UPA owes much of its approach to an April 1966 article by

as a relative, close friend, or boyfriend—who may be labeled as “father.” In this context, it is important to distinguish the following: (a) the assumptions of the Uniform Parentage Act of 1973, discussed *infra* notes 110–23 and accompanying text, which assumes a heterosexual infertile couple model, with “donors” contributing without intercourse; (b) practical differences between known and unknown donors, such as the likelihood that a known donor may want some involvement, even if not a father role; and (c) incentives to use anonymous donors because of the lack of legal certainty about donor status.

106. See, e.g., FLA. STAT. ANN. § 742.14 (West 2010) (donor relinquishes all parental rights).

107. See Ami S. Jaeger, *Assisted Reproductive Technologies, Collaborative Reproduction, and Adoption*, in 2 ADOPTION LAW & PRACTICE §§ 14.05, 14.20 (Joan Heifetz Hollinger ed., 2010).

108. See *Embryo and Gamete Disposition Laws*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/programs/health/embryodisposition.htm> (last updated July 2007) (listing state laws and legislation regarding the use and storage of frozen embryos).

109. See, e.g., Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 49 (2000); Joslin, *supra* note 1, at 1184–88; Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else’s Basket: Inserting Uniformity into the Uniform Parentage Act’s Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 684–90 (2007).

110. See John J. Sampson, *Uniform Parentage Act (2000), with Prefatory Note and Comments (and with Unofficial Annotations)*, 35 FAM. L.Q. 83 (2001); John J. Sampson, *Amendments to the Uniform Parentage Act as Last Amended in 2002 with Prefatory Note and Comments*, 37 FAM. L.Q. 5 (2003). The Commissioners (now the Uniform Law Commission) also promulgated the Uniform Status of Children of Assisted Conception and the Uniform Putative and Unknown Fathers Acts in 1988 for more limited circumstances. See UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002).

111. See, e.g., ALA. CODE §§ 26-17-101 to 26-17-905 (LexisNexis 2009); CAL. FAM. CODE §§ 7600–7730 (Deering 2006 & Supp. 2011); COLO. REV. STAT. ANN. §§ 19-4-101 to -130 (West 2005 & Supp. 2010); DEL. CODE ANN. tit. 13, §§ 8-101 to -904 (2009 & Supp. 2010); HAW. REV. STAT. ANN. §§ 584-1 to -26 (LexisNexis 2010); 750 ILL. COMP. STAT. ANN. 40/1 to /3, 45/1 to /28 (West 2009 & Supp. 2011); KAN. STAT. ANN. §§ 38-1110 to -1138 (2000 & Supp. 2010); MINN. STAT. ANN. §§ 257.51–.74 (West 2007 & Supp. 2011); MO. ANN. STAT. §§ 210.817–.852 (West 2010); MONT. CODE ANN. §§ 40-6-101 to -123, 40-6-131 (2011); NEV. REV. STAT. §§ 126.011–.371 (2009); N.J. STAT. ANN. §§ 9:17-38 to -59 (West 2002 & Supp. 2011); N.M. STAT. ANN. §§ 40-11A-101 to -903 (2006 & Supp. 2011); N.D. CENT. CODE §§ 14-20-01 to -66 (2009); OHIO REV. CODE ANN. §§ 3111.01–.97 (West 2005 & Supp. 2011); OKLA. STAT. tit. 10, §§ 7700-101 to -902 (2009); R.I. GEN. LAWS §§ 15-8-1 to -28 (2003 & Supp. 2010); TEX. FAM. CODE ANN. §§ 160.701–.763 (West 2008); UTAH CODE ANN. §§ 78B-15-101 to -902 (LexisNexis 2008); 2011 Wash. Legis. Serv. ch. 283 (West); WYO. STAT. ANN. §§ 14-2-901 to -907 (2011).

Professor Harry D. Krause published in the *Texas Law Review*, titled *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*.¹¹² Although his primary concern was children born outside of marriage, Krause included provisions in his Proposed Uniform Act concerning the status of a child born through artificial insemination.¹¹³ Indeed, like Krause's 1966 article, the Uniform Parentage Act addressed issues involving artificial insemination.¹¹⁴ It applied only to married couples, providing that if (1) the husband's consent was given in writing, and (2) the insemination was done under the supervision of a licensed physician, then the husband would be the legal father.¹¹⁵ The UPA did not address nonmarital children conceived through artificial insemination, and it left the parental status of the sperm provider unclear not only when the woman was not married but also, even if she were married, when a physician was not involved in the insemination process.¹¹⁶

In an effort to respond to the enormous changes in the reproductive technology field, in government regulation, and in the construction of families, NCCUSL

112. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966). His approach was written against a background legal context in which some states had held that a married woman who had used artificial insemination, even with the consent of her husband, had committed adultery. Indeed, cases involving artificial insemination had reached conflicting conclusions on whether a child born to a married woman, who had been inseminated with a third party's sperm, albeit with the husband's consent, was legitimate, or whether the wife had committed adultery and thus made the child illegitimate because the marital presumption did not apply. For example, in the 1963 case involving Stanley and Annette Gursky, a New York judge held that even if Stanley had consented, artificial insemination by a donor was indeed "adultery" and any resulting child "illegitimate." *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. 1963). While the court acknowledged that the New York Sanitary Code regulated the practice of donor insemination, it held that this law was entirely separate from any parentage determination "and can in no wise be deemed to sanction the practice of artificial insemination or to render legitimate any issue thereof." *Id.* at 410–11 ("[T]he child in the instant case, which was indisputably the offspring of artificial insemination by a third-party donor with the consent of the mother's husband, is not the legitimate issue of the husband.")

Gursky echoed an earlier Canadian case, in which the court held that donor insemination of the wife without the consent of her husband is adultery, regardless of the fact that no act of sexual intercourse had occurred. *Orford v. Orford* (1921), 58 D.L.R. 251, 258 (Can. Ont. Sup. Ct.). Nonetheless, not all courts that considered this issue reached the same result. By contrast, in a 1945 Chicago case, the judge held that adultery did not include artificial insemination by donor. See Alfred Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 494 (1948). See generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1060–71 (2002) (describing the slow legal acceptance of the use of donor sperm).

113. He proposed that, if a husband had consented to artificial insemination of his wife, then the resulting child would conclusively be deemed legitimate, with the right to share the same name as the father. Krause, *supra* note 112, at 833. Krause ultimately served as the official reporter for the 1973 UPA. UNIF. PARENTAGE ACT prefatory note (1973).

114. UNIF. PARENTAGE ACT § 5 (1973).

115. *Id.* § 5(a). The records could be opened "only upon an order of the court for good cause shown." *Id.*

116. See, e.g., Polikoff, *supra* note 10, at 234–35. Even today, only four states and the District of Columbia explicitly address children born to nonmarital couples. Joslin, *supra* note 1, at 1186.

proposed a replacement Uniform Parentage Act in 2000.¹¹⁷ The new Act, which was amended in 2002, addressed a variety of legal problems that might result from egg or sperm donation as well as from the freezing of prezygotes.¹¹⁸ According to the final Act, an egg or sperm donor is not a parent when a child is conceived through “assisted reproduction,” meaning reproduction not involving sexual intercourse.¹¹⁹ Indeed, the 2002 UPA comments clarify that “[i]n sum, donors are eliminated from the parental equation.”¹²⁰

The drafters of the Act candidly admit, however, that the UPA does not deal with many of the other contentious issues involved in regulating the new reproductive technologies, including the status of embryos or oversight of fertility clinics.¹²¹ Moreover, it has not yet resulted in uniformity. While a number of states have statutes somewhat similar to the 2002 UPA,¹²² some of them have adopted significant modifications or limitations to the model language.¹²³

The “laboratory of states” allows for a multiplicity of approaches¹²⁴ to parenthood, but the resulting patchwork results in uncertainty for parents, children, and donors, and fosters an incoherent approach to fundamental issues of intimacy and identity. Many states have not addressed the complex issues of parenthood involving nonmarital reproduction, egg donation, lack of physician

117. *Parentage Act Summary*, UNIF. LAW COMM., <http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited Oct. 20, 2011); see also Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 886–89 (2011) (discussing state adoptions of the differing uniform acts).

118. UNIF. PARENTAGE ACT prefatory note to art. 7 (2000) (amended 2002).

119. *Id.* §§ 102(4), 702.

120. *Id.* § 702 cmt.

121. *Id.* The new UPA also incorporated the Uniform Status of Children of Assisted Conception Act, a 1988 proposal that had been enacted by only two states, North Dakota and Virginia. *Id.* at art. 8 cmt.

122. There are nine states that have officially adopted the UPA: Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Legislative Fact Sheet—Parentage Act*, UNIF. LAW COMM., <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act> (last visited Oct. 10, 2011).

123. While, for example, Alabama is listed as a 2000 UPA state by the Uniform Law Commission, see *id.*, it is actually a hybrid, with some statutory language similar to the 1973 UPA. For example, Alabama limits parental rights in artificial insemination to “married women.” See ALA. CODE § 26-17-702 (LexisNexis 2009) (“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction.”). Moreover, Alabama requires the use of a “licensed physician,” like the 1973 UPA. *Id.* Nonetheless, Alabama’s code defines “donor” and “assisted reproduction” in accordance with the 2002 UPA and effectively bestows the same rights to recipients, so long as they are married. Compare UNIF. PARENTAGE ACT §§ 102(4), (8) (2000) (amended 2002), with ALA. CODE §§ 26-17-102(4), (8) (LexisNexis 2009).

For general commentary on the existence of state laws with respect to parentage and donor gametes, see SUSAN L. CROCKIN & HOWARD W. JONES, JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 134, 194 (2010). The authors note that, “[i]n contrast to very common sperm donation statutes, only a handful of states (eight at last count) have enacted statutes that explicitly define parentage of children born through egg donation.” *Id.* at 193–94.

124. See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998); see also Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–23 (2010) (arguing for expanded visions of federalism including other decision-making entities beyond the states).

involvement, or known donors who do, or do not, seek rights.

The parentage statutes that are on the books generally attempt to erase donors by identifying the legal parents.¹²⁵ Donors are similarly absent in other areas of the law. Apart from what is required for safety regulation, there are few state laws that require any records from donors, that require clinics or banks to maintain records, or that establish any legal terms regarding confidentiality and disclosure.¹²⁶ Donors generally do not even know whether their gametes have become children. While the law is silent on contacts between donor-conceived families, law and practice are diverging substantially here, with donor-conceived family members trying to find both other biologically related people as well as donors.

B. PRACTICES OF SECRECY AND DISCLOSURE

There are multiple levels of secrecy and disclosure in the donor world. First, many donor-conceived offspring simply do not know that they are donor-conceived. A second level concerns the layers of secrecy between offspring, donors, and parents who have used donor gametes. The secrecy that pervades this world is the product of cultural norms and contracts, not constitutional principles or legislative decision making. While donors and parents may have signed agreements pertaining to anonymity, very few court opinions have interpreted the validity, and applicability, of these documents.

Infertility has traditionally been subject to stigma.¹²⁷ This stigma has helped keep the use of other-provided gametes an often furtive secret between an individual and a physician. Notwithstanding the increasing public attention to the potential use of donor gametes, most people do not reveal whether they have used their own eggs or sperm to create a baby.¹²⁸ When it was disclosed that Michael Jackson might be genetically unrelated to his children, this was major celebrity gossip; the question of donor eggs is unanswered about such well-known stars as Holly Hunter, who gave birth to twins at the age of 47, or Geena Davis, who also gave birth to twins at the age of 48.¹²⁹

Historically, donor-conceived offspring were unlikely to find out their origins

125. Of course, some states do allow the donor and intending parent to enter into enforceable agreements. See Polikoff, *supra* note 10, at 242.

126. This contrasts with the situation in other countries. See, e.g., Heled, *supra* note 100, at 282–87 (discussing regulations in Europe).

127. See, e.g., CHARIS THOMPSON, MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES 128–29 (2005); Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 822 (2001).

128. See, e.g., Suter, *supra* note 30, at 261 (“[T]he market favors anonymity. From the inception of artificial insemination, anonymity and secrecy have been the norm.”).

129. Elizabeth Cohen, *Pregnant at 47: Can I Do That?*, CNN (May 27, 2010), http://articles.cnn.com/2010-05-27/health/late.pregnancy.risks_1_donor-eggs-reproductive-biology-associates-age-limit?_s=PM:HEALTH; Mia Freedman, *Another Day, Another 47 Year Old Celebrity Pregnant with Twins*, MAMAMIA (May 31, 2007, 12:29 PM), <http://www.mamamia.com.au/entertainment/another-day-another-47-year-old-celebrity-pregnant-with-twins/>. When heterosexual friends learn that I am writing about donor-conceived families, they may surreptitiously whisper to me that they are very interested for

until one of their parents died, or until they went for genetic testing. As recently as a decade ago, most parents simply did not tell their children.¹³⁰ People who had used donor sperm during that time period were counseled that they should not think of the donor as a person, rather as a sperm provider, and their talk about donors reflects this erasure of the donor as they create their own families.¹³¹ Until the 1960s, an additional pressure for married women to preserve the secrecy of donor sperm was fear of legal charges of adultery.¹³²

While those in the adoption community typically tell children that they are adopted,¹³³ and the American Society for Reproductive Medicine recommends disclosing to children their donor-conceived status,¹³⁴ many parents still do not tell their children that they are donor-conceived. Researchers have found that heterosexual families are least likely to disclose.¹³⁵

C. CHANGING AGREEMENTS

As discussed earlier, the secrecy is dissolving, and gamete recipients and their children are starting to search for people who share the same biological heritage—and for the donors themselves. Nonetheless, most donors are promised secrecy.¹³⁶ No governmental (state or federal) registries exist where people can go for information (other than in Washington State);¹³⁷ by contrast, in adoption, there are state registries, and an increasing movement to allow for disclosure of identities of biological parents.¹³⁸ Indeed, the United States does

personal reasons, but that no one else knows about their use of donor gametes. Gay and lesbian friends, by contrast, are much more open.

130. Sheryl Gay Stolberg, *Quandary on Donor Eggs: What to Tell the Children*, N.Y. TIMES, Jan. 18, 1998, <http://www.nytimes.com/1998/01/18/us/quandary-on-donor-eggs-what-to-tell-the-children.html>; see Victoria M. Grace, Ken R. Daniels & Wayne Gillett, *The Donor, the Father, and the Imaginary Constitution of the Family: Parents' Constructions in the Case of Donor Insemination*, 66 SOC. SCI. & MED. 301, 311 (2008); see also ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING OUR FAMILIES—AND AMERICA* 186–96 (2d ed. 2011) (discussing how parents of adopted children handle their children's questions).

131. Grace, Daniels & Gillett, *supra* note 130, at 301–02.

132. See *supra* note 112 (discussing adultery cases).

133. See, e.g., PERTMAN, *supra* note 130, at 188–89.

134. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 530 (2004).

135. E.g., Beeson, Jennings & Kramer, *supra* note 80, at 2416; Freeman, Jadva, Kramer & Golombok, *supra* note 77; Ruth Landau & Ruth Weissenberg, *Disclosure of Donor Conception in Single-Mother Families: Views and Concerns*, 25 HUM. REPROD. 942, 943 (2010).

136. Sperm banks and egg donors are increasingly offering identity-release programs through which donors agree to allow their identities to be disclosed once their offspring reach the age of eighteen. MUNDY, *supra* note 38, at 113–14; SPAR, *supra* note 14, at 38–39; Joanna E. Scheib & Rachel A. Cushing, *Open-Identity Donor Insemination in the United States: Is It on the Rise?*, 88 FERTILITY & STERILITY 231, 231–32 (2007).

137. See 2011 Wash. Legis. Serv. ch. 283, § 53 (West) (adding new section to WASH. REV. CODE ch. 26.26).

138. NAOMI CAHN, EVAN B. DONALDSON ADOPTION INST., *OLD LESSONS FOR A NEW WORLD: APPLYING ADOPTION RESEARCH AND EXPERIENCE TO ASSISTED REPRODUCTIVE TECHNOLOGY* 11 (2009), http://www.adoptioninstitute.org/publications/2009_02_OldLessons.pdf.

not even regulate how many times an individual donor can contribute, thereby leading to the possibility of dozens, if not hundreds, of offspring from the same donor.¹³⁹ Donors are given numbers, and recipients know their donors by number.¹⁴⁰

Agreements in the donor world are tricky. Consider a few examples. K.M. was an egg donor who signed a four-page form in which she explicitly agreed to waive all rights towards any resulting child, and agreed “not to attempt to discover the identity of the recipient thereof.”¹⁴¹ The fertilized eggs were transferred to E.G., who gave birth to twins. K.M. and E.G. raised the twins together. When the two women dissolved their relationship, K.M. sued. The California Supreme Court held that the written waiver form was ineffective and found K.M. to be a second parent of the twins.¹⁴² The case is a landmark in the field of same-sex parental rights, and scholarly commentary has focused on its finding of two mothers¹⁴³—not on the anonymity and disclosure issues. Yet the case is also a landmark for making clear that a child’s interests may trump an agreement between a donor and a clinic.¹⁴⁴ Indeed, while there is longstanding doctrine that contracts will not be enforced if they violate public policy,¹⁴⁵ the California court did not even refer to this principle.

Or consider the rare cases in which a parent has sought the identity of a sperm donor.¹⁴⁶ Although few U.S. courts have ever had to consider the validity

139. See Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 82–83 (2009).

140. SHULER, *supra* note 96, at 18. The difficulties of collecting information about donor-conceived offspring begin with the fact that there is not even an official record of how many children are born each year as a result of donor sperm. See CAHN, *supra* note 23. Studies of the donor-conceived world can only draw on subjects who know they are donor-conceived as well as donors and gamete recipients who are willing to discuss their experiences, so there are certainly legitimate limitations on the data.

141. K.M. v. E.G., 117 P.3d 673, 676 (Cal. 2005) (internal quotation marks omitted).

142. *Id.* at 682.

143. *E.g.*, Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1277 n.133 (2008); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 442 n.204 (2008); Victoria Steely, . . . *But a Child Can Have Two Mothers*, 16 J. CONTEMP. LEGAL ISSUES 35, 38–42 (2007).

144. In the very different context of men who claim “tricked fatherhood,” or reliance on a woman’s claim of birth control, or even when there has been statutory rape of an adolescent male, children’s interests have trumped biological fathers’ lack of consent to procreative sex. See, *e.g.*, *Hermesmann v. Seyer*, 847 P.2d 1273, 1274, 1279–80 (Kan. 1993); *Wallis v. Smith*, 22 P.3d 682, 682–86 (N.M. Ct. App. 2001); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 664–66 (2008); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1128–29 (2008). Interestingly, for husbands who learn, upon divorce, that they are not the biological fathers of children born into the marriage, courts may not always examine the children’s best interests. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 224 (2011).

145. See *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988) (refusing to enforce surrogacy contract that “conflic[ed] with . . . public policies”). See generally U.C.C. § 2-302 (2003) (unconscionability provision for contracts for the sale of goods); *id.* § 2A-108 (unconscionability provision for lease contracts).

146. For further discussion of other cases, see Naomi Cahn, *Necessary Subjects: The Need for a Mandatory Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 211–12 (2009).

of agreements regarding confidentiality, they have articulated potential exceptions. In one of the only such cases, a Massachusetts court suggested that a written contract guaranteeing confidentiality might be modified subsequently by an oral representation that the donor was willing to have his identity disclosed.¹⁴⁷ Moreover, known donors may seek to assume responsibility, even against the preferences of the parents.¹⁴⁸

While the law appropriately values the certainty and validity of contracts, including those involving gamete donation, contract enforceability remains subject to potentially changing laws. Certainly, if offspring are granted rights in the future, then agreements to the contrary would be void; even retroactivity, however, might not be a problem given the strength of the interests involved and precedent. Allowing donor-conceived offspring access to information about genetic half-siblings or the donor, notwithstanding any agreements between the donor and the gamete bank, or understandings between the parents and the bank, raises similar issues about the priority of other interests (whether they are defined as the best interest of the child, the formation of alternative family forms, etc.) when it comes to contract enforcement.

III. THE JURISPRUDENCE OF DONOR FAMILIES

As we think about donor-conceived families and their communities, there is a profound irony that must be acknowledged. Family law is moving towards a more expansive view of how families are formed, moving away from biology and marriage as constitutive of family and instead becoming more accepting of relationships based on function, affection, and contract.¹⁴⁹ At the same time, it is biology, and biology alone, that provides the basis for a connection between donor-conceived family communities: their only link is an unknown donor's gametes.¹⁵⁰

Donor-conceived families and their networks confound the legal issues, even as these families construct emotional ties. They are the sites for several intersecting legal paradigms showing the possibilities for grounding the appropriate approach within existing law, and then adapting (perhaps even transcending) these paradigms.

147. *Doe v. XYZ Co.*, 914 N.E.2d 117, 122 (Mass. App. Ct. 2009).

148. *See, e.g.*, Joslin, *supra* note 1, at 1200; Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 *Geo. J. Gender & L.* 57, 87–88 (2000) [hereinafter Polikoff, *Breaking the Link*]; Polikoff, *supra* note 10; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *Geo. L.J.* 459, 468 & n.30 (1990) [hereinafter Polikoff, *Redefining Parenthood*].

149. *See* Laura T. Kessler, *Community Parenting*, 24 *Wash. U. J.L. & Pol'y* 47, 73 (2007) (discussing function and affection); Polikoff, *supra* note 10, at 216 (same); Rosenbury, *supra* note 1, at 193–95 (same); Jana B. Singer, *The Privatization of Family Law*, 1992 *Wis. L. Rev.* 1443, 1461 (discussing private agreements).

150. *See* Dolgin, *supra* note 67, at 349 (analyzing “the shifting uses of biology in the social construction of family”).

As discussed in this Part, three distinct strands of jurisprudence intersect here, providing space in which to adapt family law principles. First, and foundational, is Supreme Court jurisprudence on the recognition of familial relationships. The Court has analyzed horizontal relationships between adults and vertical ones between parents and children. Throughout, there is a tension in family law between recognition of the rights of individuals who choose to form families as opposed to the rights that flow from family status. The second jurisprudential strand focuses on horizontal relationships, challenging the identification of the family with domesticity.¹⁵¹ This critique underlies the “friends entitled to benefits” literature, and it has, until now, primarily focused on adult nonfamilial friendships. Finally, the “multiple parenthood” literature has primarily focused on the relationship of parents and children who have shared dependency, caretaking, and home.

A. STRAND 1: CONSTITUTIONAL JURISPRUDENCE ON THE FAMILY AS ENTITY OR SEPARATE PARTS

The challenges of donor-conceived families and their communities also take their place within one of the fundamental tensions in family law, a tension made explicit in *Griswold v. Connecticut* and *Eisenstadt v. Baird*: the family as an entity versus the family as composed of individuals.¹⁵² Constitutional protection for the family began as a relational and status-based concept applicable between parent and child and between wife and husband, recognizing a parent’s right to direct her child’s upbringing in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, and the privacy of the marital relationship in *Griswold* and *Loving v. Virginia*.¹⁵³ The Court used equal protection (not substantive due process and concepts of “liberty” or autonomy) in *Eisenstadt*, holding that whatever rights attached to the marital couple encompassed “the right of the individual, married or single, to be free from unwarranted governmental intrusion” in intimate life.¹⁵⁴ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O’Connor’s opinion recognized a wife’s right to terminate a pregnancy in opposition to her husband’s wishes.¹⁵⁵ *Lawrence v. Texas* takes its place in this canon, recognizing the right of “two adults” to “engage[] in sexual practices

151. For a discussion of domesticity, see *infra* section III.B.

152. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965).

153. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that Virginia’s antimiscegenation statute violated the Fourteenth Amendment); *Griswold*, 381 U.S. at 485–86 (protecting use of contraceptives by married couples); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (protecting, in dicta, parents’ rights to educate their children); *Meyer v. Nebraska*, 262 U.S. 390, 399, 403 (1923) (reversing conviction of teacher who had instructed child in foreign language in violation of Nebraska statute because Fourteenth Amendment protects teacher’s liberty to provide such instruction); see also *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (allowing Amish parents to withdraw children from school after eighth grade).

154. *Eisenstadt*, 405 U.S. at 453.

155. 505 U.S. 833, 893–95 (1992).

common to a homosexual lifestyle” and to be accorded “respect for their private lives,”¹⁵⁶ affirming the emotional intimacy of a couple.¹⁵⁷ *Gonzales v. Carhart*, which dealt explicitly with an abortion procedure, broadened the parameters in which the state could act to limit procreative freedom and interfere in the family.¹⁵⁸

Children’s rights, within this canon, differ from those of adults. The Court has largely reinforced the notion that the traditional family unit provides adequate constitutional protection for children. Particularly in the substantive due process context, the Court has tended to equate children’s interests with those of their parents and to protect children derivatively, through such doctrines as parental autonomy and familial privacy.¹⁵⁹ Parents are entitled, based on several Supreme Court decisions, to substantial deference on their choice of how to raise their children.¹⁶⁰ Even when it comes to children’s rights to receive adequate services to prevent abuse and neglect by family members, the Court has generally reinforced the state’s decision-making process rather than children’s rights.¹⁶¹ The failure to recognize sibling associational rights provides yet another example of the paucity of children’s rights.¹⁶²

Finally, the Supreme Court’s inconsistent jurisprudence on the rights created

156. 539 U.S. 558, 578 (2003).

157. See Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1298 (2009) (“In *Eisenstadt*, the Court appear[ed] to be floating the possibility of organizing intimate life in a more continuous way than previously seen. . . . [And in *Lawrence*.] the continuum towards which *Eisenstadt* gestures becomes more fully elaborated.”); Rosenbury & Rothman, *supra* note 60, at 810.

158. 550 U.S. 124, 163–64 (2007); see also Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 848–49 (2007) (noting that, in *Gonzales*, “[t]he Court emphasized the state’s legitimate interest in the fetus’s potential life”).

159. See, e.g., Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 862–63 (2007). In *Michael H. v. Gerald D.*, the Court refused to decide whether a child had “a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” 491 U.S. 110, 130 (1989) (plurality opinion). It has never recognized such an interest.

160. *Troxel v. Granville*, 530 U.S. 57, 65–66, 75 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

161. See, e.g., *Suter v. Artist M.*, 503 U.S. 347, 360 (1992); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–97 (1989) (holding that social workers had no obligation to prevent child abuse by removing child from father’s custody, despite receiving several complaints).

162. The Supreme Court has never directly decided whether siblings enjoy constitutionally protected associational rights under the First or Fourteenth Amendments, even though the Court has recognized that the Bill of Rights “must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (citations omitted).

The circuits are not uniform when it comes to recognizing the constitutional rights of siblings. Compare *Sun v. Ashcroft*, 370 F.3d 932, 944 n.18 (9th Cir. 2004) (“[The petitioner] points to no authority supporting the proposition that there is a fundamental liberty interest for adults to remain in the United States because their parents and siblings are here.”), with *Trujillo v. Bd. of Cnty. Comm’rs*, 768 F.2d 1186, 1188–89 (10th Cir. 1985) (recognizing the possibility of granting traditionally filial rights to siblings); see also Mandelbaum, *supra* note 3, at 29–30 (“The United States Supreme Court has never specifically addressed the issue of the constitutional rights of siblings to the preservation of their relationship through contact, and most lower federal and state courts also have been reluctant to find a constitutional basis for the maintenance of these relationships.” (footnote omitted)).

by biological relationships provides one more context to evaluate donor-created families. In *Michael H.*, the most controversial aspect of the decision was the plurality's effort to define the liberty interest at stake in terms of those rights (whether of the parent or the child) that had historically received constitutional protection.¹⁶³ The plurality rejected the dissent's interpretation of the *Stanley* line of cases as staking recognition of a liberty interest to "biological fatherhood plus an established parental relationship," factors which Scalia conceded existed in *Michael H.* as well.¹⁶⁴ Insisting that such an interpretation distorted the rationale of those cases, he explained that they rested "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."¹⁶⁵ It is the unitary, traditional, marital family relationship, not the biological connection, which Scalia sees as entitled to constitutional protection.¹⁶⁶

The Supreme Court's privacy and family cases suggest different, and possibly conflicting, ways of analyzing donor family connections. We might think of each member of the donor triad as holding separate, potentially competing rights: offspring versus donor versus parents.¹⁶⁷ When they are young, an offspring's rights will have less strength than those of the donor or parents. Even when offspring are adults, however, framed in terms of privacy interests, the donor and the parents may have rights that could trump the interest of the offspring.¹⁶⁸ If we make children's best interests¹⁶⁹ central, then perhaps their

163. 491 U.S. at 127 n.6.

164. *Id.* at 123. In *Stanley v. Illinois*, the Court first accorded procedural due process protections to a nonmarital father. 405 U.S. 645, 649 (1972); see also *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (holding that an unwed father acquires due process protection only when the father is committed and responsible to the child); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (invalidating statute that distinguished between unwed fathers and unwed mothers); *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (holding that equal protection does not require unwed father to be treated identically with married father who separates or divorces).

165. *Michael H.*, 491 U.S. at 123.

166. Scalia insisted that:

The family unit accorded traditional respect in our society, which we have referred to as the "unitary family," is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

Id. at 123 n.3.

167. The notion of a donor "triad" is based on the related concept of an adoption triad. See, e.g., Elizabeth Siberry Chestney, Note, *The Right To Know One's Genetic Origin: Can, Should, or Must a State that Extends this Right to Adoptees Extend an Analogous Right to Children Conceived with Donor Gametes?*, 80 TEX. L. REV. 365, 367 n.17 (2001). For donor families, a three-dimensional figure (a pyramid, for example) might be more appropriate as a means of recognizing the central genetic role of the donor to a series of offspring and their families.

168. For one articulation of these potential conflicts, see Julie L. Sauer, Comment, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 939–47 (2009).

rights—however defined—might trump those of adults. On the other hand, this entire framework is predicated on potential conflicts among the different individuals involved,¹⁷⁰ and may itself threaten the connections that characterize these relationships. And it assumes that interests are unitary and unchanging, contrary to the reality of donor families. Parents often want contact with other donor-related families; donors often want contact with the families they have created.¹⁷¹ Assuming common interests, and facilitating contact, then, might be a more appropriate presumption than presuming potential conflict.

B. STRAND 2: THE CRITIQUE OF THE FAMILY AS ENSHRINED DOMESTICITY

A second jurisprudential strand in theorizing about the family is grounded in what I call the “critique of the family as enshrined domesticity.” This critique begins with the observation that families are typically viewed in law and in society as “domesticated,” that is, as establishing and maintaining interdependencies between adult partners and/or their children, living together. Under the conventional view, partners who do not live together are viewed as unconventional¹⁷² and present difficulties for legal doctrines of intimacy that presume cohabitation.¹⁷³ Yet the domesticated family, according to this critique, constitutes a narrow misdescription of actual familial relationships, and this image is problematic for several different reasons. As Laura Rosenbury notes, “few [legal] scholars have considered whether family law should recognize care provided outside of the home, and no scholar has considered whether family

169. The concept of the “child’s best interest” is central to family law, although, of course, multiple definitions of children’s best interests exist in this context. *See, e.g.*, Garrison, *supra* note 6, at 892–95. The complexity here results from acknowledging that “offspring” or “donor-conceived people” can be either children or adults and, accordingly, their interests may vary depending on their age.

170. There may be no actual conflict; offspring may have no desire for any information about donors, or donors, offspring, and parents may all prefer contact. Nonetheless, the process of evaluating and providing a specific accounting of each individual’s rights might create a conflict where none exists.

Of course, this particular framework is no more predicated upon potential conflict among different individuals than is any other situation that ends up in court. The presumption of conflict does not, however, emanate solely from the adversarial nature of the American legal system generally. We could instead imagine a framework that presupposes harmony among the interests of all involved, *see, e.g.*, Huntington, *supra* note 143, at 1287–1302 (advocating a de-emphasis on adversarial decision making in family law in favor of a model that recognizes connections between parties), or that does not privilege the interests of parents to make choices that will bind their children in perpetuity.

171. For example, Wendy Kramer supported her son’s efforts to find his donor-conceived family community. And donors may actually think of themselves as parents. In her study, Rene Almeling found that “most” of the men thought of themselves as fathers to their donor-conceived offspring, while “most” of the women did not consider themselves to be mothers. ALMELING, *supra* note 15, at 145, 149.

172. *See* SASHA ROSENEIL, SOCIABILITY, SEXUALITY, SELF: RELATIONALITY AND INDIVIDUALIZATION (2010); Sasha Roseneil, *On Not Living with a Partner: Unpicking Coupledness and Cohabitation*, 11 SOC. RES. ONLINE (Sept. 30, 2006), <http://www.socresonline.org.uk/11/3/roseneil.html>.

173. *See, e.g.*, *Devaney v. L’Esperance*, 949 A.2d 743, 744 (N.J. 2008) (holding that cohabitation is not a necessary element of a claim for palimony, though a “marital-type” relationship is still required). In its insistence that a nonmarital relationship resemble a marital relationship before the imposition of financial obligations, however, the court did not challenge the dominance of marriage as model.

law should recognize the care provided and received by friends.”¹⁷⁴ Families are rarely autonomous groupings, and require support not just from the state but also from their communities and friends.¹⁷⁵

Outside of the law, some of these relationships, which may involve intimacy or child rearing, are beginning to be identified and studied. Sociologists have labeled relationships involving intimate adult partners who do not live in the same household but who think of themselves as a couple as “living apart together relationships” (or LATs).¹⁷⁶ LATs may be more descriptive of status for approximately one-third of people identified as “single” in various demographic surveys.¹⁷⁷ In one of the few in-depth studies, the researchers found similarities and differences between LATs and other intimate partnerships. For example, although everyone could rely on their partners for support, “the predicted probability of [heterosexuals’] being able to rely on a partner ‘a lot’ for help with a serious problem is .87 for a married person, .82 for a cohabiter, and .59 for someone in a LAT union.”¹⁷⁸ This does not necessarily mean that LAT relationships should be excluded from the application of traditional family law, but it might suggest somewhat different presumptions on issues like property division or maintenance upon dissolution.

A second challenge to the family as domesticity is based on an analysis of relationships that exist on a continuum between family and friendship. They do not involve sexual intimacy nor are they based on shared genetics, but they do involve emotional intimacy. People may, on the one hand, clearly distinguish between their expectations of friends and family,¹⁷⁹ or, alternatively, friends and family may “play[] rather similar roles.”¹⁸⁰ It is this second category, where friends and family are comparable, that provides space for donor-conceived

174. Rosenbury, *supra* note 1, at 191; *see also* Ethan J. Leib, *Friendship & the Law*, 54 UCL A L. REV. 631, 632–33 (2007) (documenting the absence of legal regulation of friendship more generally).

175. *See* Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL’Y & L. 385, 395–96 (2009) (discussing the need for family law to recognize family support networks).

176. *E.g.*, Roseneil, *supra* note 172; Charles Q. Strohm et al., “*Living Apart Together*” *Relationships in the United States*, 21 DEMOGRAPHIC RES. 177, 178 (2009), *available at* <http://www.demographic-research.org/volumes/vol21/7/21-7.pdf>. Irene Levin traces the term to a 1978 Dutch newspaper article. Irene Levin, *Living Apart Together: A New Family Form*, 52 CURRENT SOC. 223, 227 (2004).

177. Strohm et al., *supra* note 176, at 200.

178. *Id.* at 199. Moreover, “heterosexuals in LAT unions place a higher value on independence and are more likely to expect both partners to contribute to paid work and family care giving, compared to married people.” *Id.* at 202.

179. Many people continue to live in families where the primary focus is interacting with other kin; that is, some families, especially in the working class world, live in communities that revolve around kin interaction. *See, e.g.*, ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 204–06 (2003); JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 165–70 (2010).

180. Ray Pahl & Liz Spencer, *Personal Communities: Not Simply Families of ‘Fate’ or ‘Choice,’* 52 CURRENT SOC. 199, 215 (2004). Pahl and Spencer define “personal communities” as those which “represent people’s significant personal relationships and include bonds which give both structure and meaning to their lives.” LIZ SPENCER & RAY PAHL, RETHINKING FRIENDSHIP: HIDDEN SOLIDARITIES TODAY 45

family communities.

The psychological and social support from friendship can provide tangible benefits.¹⁸¹ Friendship may also have negative consequences; for example, social influence based on friendship is one explanation for the obesity epidemic in the United States.¹⁸² In their in-depth study of friendships, sociologists Sasha Roseneil and Shelley Budgeon found that communities of friends may be more important to daily life than sexual partnerships, such that “[c]are and support flow between individuals with no biological, legal or social recognized ties to each other.”¹⁸³ They characterize some of the friendships as “ethical practice[s],” with a corresponding series of responsibilities towards one another.¹⁸⁴

The strength and power of such support might provide the basis for imposing fiduciary obligations on close friendships as recognition of the expectations of loyalty, good faith, and confidentiality.¹⁸⁵ The care that could become subject to such obligations might be between adults or between adults and children, and might, for example, involve contracts providing rights to a nonparent for ongoing caregiving to a child.¹⁸⁶ Indeed, recognition of friendship would mean “that marriage need not be the only site for emotional care and support,”¹⁸⁷ thereby opening up other possibilities.

A third challenge to the family as domesticity presumption involves establish-

(2006). They identify a continuum between simple and complex friendship, ranging from “useful contact” to “soulmate.” *Id.* at 60. A soulmate need not be a romantic partner.

181. For example, researchers asked study participants to estimate the steepness of a hill. Participants who were accompanied by a friend estimated the incline to be lower than participants who were alone. Simone Schnall et al., *Social Support and the Perception of Geographical Slant*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1246, 1252–53 (2008). Breast cancer survival rates appear to be enhanced by the existence of a network of social support. See Candyce H. Kroenke et al., *Social Networks, Social Support, and Survival After Breast Cancer Diagnosis*, 24 J. CLINICAL ONCOLOGY 1105 (2006). And friends help friends live longer. See Julianne Holt-Lunstad, Timothy B. Smith & J. Bradley Layton, *Social Relationships and Mortality Risk: A Meta-Analytic Review*, PLOS MED. (July 2010), <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000316;jsessionid=1FEB1AAF83E79A31811CBCA854B74636.ambra02>. Furthermore, an individual’s happiness is affected by the happiness of others in the same social network. See NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 90–91 (2010); James H. Fowler & Nicholas A. Christakis, *Dynamic Spread of Happiness in a Large Social Network: Longitudinal Analysis over 20 Years in the Framingham Heart Study*, 337 BRIT. MED. J. 2338 (2008).

182. See, e.g., Nicholas A. Christakis & James H. Fowler, *The Spread of Obesity in a Large Social Network over 32 Years*, 370 NEW ENG. J. MED. 370, 378 (2007). Friends can similarly impact depression; researchers have found that “not only may depressed mood spread across social ties, but also that depression depends on how connected individuals are and where they are located within social networks.” James N. Rosenquist, James H. Fowler & Nicholas A. Christakis, *Social Network Determinants of Depression*, 16 MOLECULAR PSYCHIATRY 273, 280 (2011).

183. Sasha Roseneil & Shelley Budgeon, *Cultures of Intimacy and Care Beyond ‘the Family’: Personal Life and Social Change in the Early 21st Century*, 52 CURRENT SOC. 135, 153 (2004).

184. *Id.* at 146–48.

185. See Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 703–05 (2010); Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665, 699 (2009); see also Leib, *supra* note 174, at 638–53 (exploring definitions of friends).

186. See, e.g., Murray, *supra* note 143, at 426–27.

187. Rosenbury, *supra* note 1, at 240.

ing paternity for men who have never lived with their children or the mother. If the parents were not married at the time of the child's conception or birth, then state laws allow for paternity to be established voluntarily or in other ways, such as if the father "held out" the child as his own and lived with the child for at least two years.¹⁸⁸ Cohabiting is thus an important element in establishing (or disestablishing) paternity. But instead of any requirement of living together, it could also be possible for a parent to live apart from a child and yet still hold out the child as his own, comparable to a living apart adult partnership.¹⁸⁹

These reconsiderations of the family as domesticity provide an opening for developing legal categories that recognize additional members of the family circle. While the domesticated family deserves protection, these other relationships, not based on cohabiting or dependency, may also merit protection. Although they take radically different forms, these alternative relationships may function in ways similar to the domesticated family. This, then, serves as one justification for legal attention. A second justification builds on their differences from the domesticated family by recognizing that these relationships may need protection in order to flourish.

C. STRAND 3: ACCORDING RIGHTS TO MULTIPLE PARENTS

A third jurisprudential strand similarly offers a useful analogy for how to think about donor-family connections because of its analysis and deconstruction of the meaning of parent. The "multiple parent" literature suggests expanding the category of those who can qualify as a "legal parent" to include other caregiving adults under certain carefully controlled circumstances.¹⁹⁰ Accordingly, it suggests that more than two individuals may be entitled to quasi-parental status, showing the possibility of recognizing different legal roles for caretaking adults.

188. See, e.g., UNIF. PARENTAGE ACT § 204(a)(5) (2000) (amended 2002); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 258 (2006); see also UNIF. PARENTAGE ACT § 607(b) (2000) (amended 2002) (allowing for paternity presumption to be challenged where, among other elements, the putative father was not cohabiting with the mother when the child was conceived).

189. The Supreme Court has developed a jurisprudence on the parental rights of men who have not lived with their children. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983).

190. See, e.g., Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 15–16 (2008); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 944 (1984) (suggesting that, if the nuclear family has dissolved, then "nonexclusive parenthood" would offer parental rights and entitlements to an individual who had developed a parent-child relationship with the child); Carbone & Cahn, *supra* note 144, at 238–39 (discussing courts' approaches to the idea of "multiple parents"); Kessler, *supra* note 149, at 49 (proposing the concept of "community parenting," or families with more than two parents); Polikoff, *Redefining Parenthood*, *supra* note 148, at 464 (arguing for an expansion of parenthood to recognize functional parents); Polikoff, *supra* note 10, at 206–07.

Courts have historically tried to find two—but only two—parents per child,¹⁹¹ and to diligently protect parental rights.¹⁹² Under the traditional view, parenthood is a unitary bundle of rights that is: (1) exclusive, meaning that there can be only one set of parents; and (2) a zero sum game, in that legal recognition of one set of parents, as in adoption, precludes any further relationship between the child and her biological parents.¹⁹³ Courts are tentatively starting to recognize the possibility of three parents,¹⁹⁴ and the multiple parent approach finds some expression in the American Law Institute’s (ALI) Principles of Family Dissolution. The ALI definition of parents identifies three different categories: legal parents, “parents by estoppel” (or equitable parents), and de facto parents.¹⁹⁵ Individuals who are not legal parents but who satisfy a strict set of criteria can qualify for a varying range of the rights and obligations of parenthood based on their commitments or obligations to children.¹⁹⁶ Nonetheless, the legal parent retains substantial control over the status of parents by estoppel and de facto parents, because of the requirement that she acquiesce or consent before individuals can qualify.¹⁹⁷

Recognition of these different classes facilitates the corresponding identification of more than two parents, albeit with varying rights. Indeed, it might be possible to construct a category that accords legal significance to caregiving without using the label “parent.”¹⁹⁸ Modern psychological theory also supports the recognition and protection of children’s relationships with multiple caretakers. Psychologists now believe that children can form and maintain attachments to multiple adult caretakers and that neither parental authority nor caretaking need be exclusive to be effective.¹⁹⁹ The concept of “uncleing” provides yet

191. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993). In *Johnson*, the court acknowledged that multiple parenting was becoming more common as a result of the increasing number of divorces, but refused to find a third parent.

192. See, e.g., *Abbott v. Abbott*, 130 S. Ct. 1983, 1991 (2010); *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000).

193. For example, in *Michael H.*, the Court emphatically refused to recognize the claims of the biological father against the two marital parents. 491 U.S. at 124–26; see also *Johnson*, 851 P.2d at 781 n.8; Carbone & Cahn, *supra* note 144, at 238–39 (discussing courts’ rejection of multiple-parent model).

194. See Murray, *supra* note 143, at 442–43 (discussing cases). Louisiana recognizes the possibility of two fathers. See, e.g., *Smith v. Cole*, 553 So. 2d 847, 854–55 (La. 1989); *Warren v. Richard*, 296 So. 2d 813, 817 (La. 1974); Rachel L. Kovach, Comment, *Sorry Daddy—Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 658 (2010).

195. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002).

196. *Id.*

197. *Id.* § 2.03(1)(b).

198. See Murray, *supra* note 143, at 447–52; see also Polikoff, *supra* note 10, at 246 (advocating recognition of two parents along with legal enforcement of a visitation agreement with, for example, a sperm donor).

199. See Eleanor Willemssen & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439, 472 (1996). There are proposals for allowing close friends to adopt children jointly, thereby tying together the “family as domesticity” and “multiple

another category for the recognition of significant adults in a child's life.²⁰⁰ In adoptions where the biological parents and the child retain contact even after an adoption has been finalized and the child becomes a legal member of the adoptive family, the uncles status would accord some rights to the biological parent-child relationship, such as inheritance.²⁰¹ Uncles status would not confer custodial, or even visitation, rights, however, and so differs from other multiple parent proposals.

The multiple parent literature does not necessarily provide a template for according rights to adults in donor-connected families because it may not be appropriate to grant parental, caretaking, or inheritance rights based solely on status, without an opt-in component. Nonetheless, the possibility of different legal categories of parent suggests changes in the "all-or-nothing" framework that has typified family law. Similarly, potential legal recognition for donor-conceived family communities challenges the traditional unitary parent-child relationship.

IV. THE POTENTIAL FOR LAW

Taken together, the constitutional claims between and among family members, the critique of the family as enshrined domesticity, and the recognition of multiple parents provide possible bases for establishing legal rights in the donor-conceived family context. They free up some space to expand our notions of, and protections for, a wider range of relationships. They do not, however, tell us why the law should provide direct protection to *these particular relationships* (that is, donor-conceived family communities). Indeed, the lack of explicit recognition of these relationships does not mean they are prohibited but may instead allow them to flourish. It may be that no explicit laws are needed, so developing and imposing a specific legal framework would not provide any benefits. The lack of direct regulation has a profound influence on what is not regulated, so state regulation might complicate, and slow, the development of these affective ties, as well as have undesired effects on other relationships. These matters might more appropriately be settled by contracts (albeit ones that would be legally enforceable). Particularly because these relationships seem, to many people, to exist as somewhat less essential relationships than other family law relationships, and because there is no social consensus on how to approach them, then they may not be ripe for legal regulation.²⁰² Accordingly, it is

parent" jurisprudential strands. See, e.g., Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 801-02 (2009).

200. See E. Gary Spitko, *Open Adoption, Inheritance, and the "Uncleing" Principle*, 48 SANTA CLARA L. REV. 765, 768 (2008).

201. *Id.* at 788.

202. See Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, ARIZ. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932743 (arguing that laws that appear limited to one group indirectly affect other groups). This is an important recognition, but distinct from the critical

important to acknowledge what might be lost in legal regulation, particularly at this early stage when the social ties are still being developed. Issues include whether the law should intervene now or allow some social consensus to develop, whether imposing law would promote or short-circuit a social experiment, and whether regulation might result in further development or would lead to unwelcome intervention into developing family forms with collateral effects on other families. Consequently, the second step of this analysis, undertaken in this Part, involves an exploration of *why* the law might step in to provide guidelines and protection for these relationships.

The state may want to protect friendships, for example, because important caretaking happens within them. Similarly, important caretaking and bonding occur within donor-conceived relationships. Of course, any potential regulation must account for the tremendous variation in the import that different people attach to these relationships, and the very different expectations and relationships that come out of them. Numerous analogies provide potential “homes” for legal regulation of donor-conceived family communities. The looming question is whether these families *should* be regulated under the law, and the next section provides reasons to move forward. As this Article discusses, new regulation should provide space and support for these relationships to develop by establishing a voluntary registry to allow for half-siblings and their families to connect, by supporting any resulting connections, by allowing offspring to learn the identity of their donors when they reach the age of eighteen, and by limiting the number of offspring from any particular donor.

A. REASONS TO REGULATE

One reason to regulate is an expressed need on behalf of some of these families for guidance, as poignantly suggested by the confusion that many donor families feel on how to proceed to find connections with others, and then what to do once they are found.²⁰³ The law could provide parameters to foster and nurture donor-conceived family communities while also protecting against unwanted contact. Regulation need not mandate conformity, such as requiring contact between siblings, but instead might provide opportunities that do not currently exist. It could also provide recognition for the rights of those neglected under the current system. By not protecting those interests, the law affirmatively serves to reinforce a particular normative vision of whose rights are most important. A second reason to regulate is to provide certainty and predictability, unlike the current system, which only allows for extrajudicial means of connection through, for example, the Internet or policies of specific

understanding, discussed above, that the lack of direct regulation nonetheless affects relationships that seemingly exist outside regulation.

203. *See supra* text accompanying note 98.

gamete providers.²⁰⁴ The law could provide more clarity on the legal rights and obligations of all members of donor-conceived family communities. Moreover, as the donor-conceived begin advocacy efforts through the legislative process and court systems,²⁰⁵ and as other countries face advocacy efforts and implement radically different frameworks,²⁰⁶ the existing American system faces increasing pressure.²⁰⁷

Finally, explicit regulation that helps develop donor-conceived family communities can help families, and family law, constructively realize their goals of promoting intimacy and protection for emotional connections. The law's silence about these families provides space for only limited contact, perhaps reflecting a normative view that these are medicalized interactions rather than familial connections. Based on this perspective, it is sperm banks, egg agencies, and individuals interested in contact who establish the parameters of these communities, using frameworks established by contracts and health law. Indeed, as the former president of one of the leading fertility clinic trade associations explained, "when these decisions are made by donor and a parent, the child doesn't have a say."²⁰⁸

If this is a societal choice to make decisions without considering the child's interest, then it is useful to acknowledge such a perspective so that members of

204. Among other problems with the existing, ad hoc system, donor-conceived people may not know where to register, they may have inadequate information about their donor because no records were maintained, or banks may have gone out of existence.

205. See, e.g., DONOR SIBLING REGISTRY, *supra* note 71. Although no donor-conceived individual has yet brought suit in the United States to discover information about a donor or potential half-siblings, Olivia Pratten successfully brought a lawsuit in British Columbia, claiming that she was entitled to disclosure of the identity of her donor based on the Canadian Charter of Rights and Freedoms guarantee of personal equality and security. Pratten v. British Columbia (Att'y Gen.), 2011 BCSC 656 (Can. B.C. Sup. Ct.), available at <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf>; see also Writ of Summons and Statement of Claim ¶¶ 25, 30, Pratten v. British Columbia (Att'y Gen.), 2011 BCSC 656 (Can. B.C.), available at <http://www.arvayfinlay.com/news/Writ%20of%20Summons%20and%20Statement%20of%20Claim.pdf>. Joanna Rose, in the United Kingdom, argued that she was legally entitled to the name of her sperm donor "father." Rose v. Sec'y of State for Health, [2002] 2 F.L.R. 962, ¶¶ 38, 47 (U.K.); see also Joanna Rose, A Critical Analysis of Sperm Donation Practices: The Personal and Social Effects of Disrupting the Unity of Biological and Social Relatedness for the Offspring 235 (2009) (unpublished manuscript), available at <http://www.nla.gov.au/openpublish/index.php/aja/article/viewFile/1687/2048> (discussing author's court case). It was in part a response to her case that the U.K. enacted legislation allowing donor-conceived offspring access to identifying information. In the United States, donor gamete recipients, but not their children, have brought suit based on medical issues. Johnson v. Superior Court, 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000); Doe v. XYZ Co., 914 N.E.2d 117 (Mass. App. Ct. 2009).

206. The British system, for example, allows for disclosure once the offspring reach the age of eighteen. See *What You Can Find Out About Your Donor or Donor-Conceived Genetic Siblings*, HUM. FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/112.html> (last visited Aug. 25, 2011).

207. See Alison Motluk, *Canadian Court Bans Anonymous Sperm and Egg Donation*, NATURE NEWS (May 27, 2011), <http://www.nature.com/news/2011/110527/full/news.2011.329.html> ("[The Pratten decision] may galvanise the offspring of American donors to attempt a similar challenge.").

208. David Crary, *Sperm-Donors' Kids Seek More Rights and Respect*, BOS. GLOBE, Aug. 15, 2010, http://www.boston.com/news/nation/articles/2010/08/15/sperm_donors_kids_seek_more_rights_and_respect/ (quoting Dr. Jamie Grifo, former President of the Society for Assisted Reproductive Technologies) (internal quotation marks omitted).

the donor world understand that the law will not encourage them to develop connections. Nonetheless, the very different presumptions in adoption,²⁰⁹ the nascent development of pressure from members of the donor-conceived, the very different regulatory framework established in other countries, and the early stirrings of lawsuits putting pressure on the existing system, together challenge the normative framework pursuant to which these communities are best left to regulation by health law and contracts. Existing regulations of reproductive technology, focused on gamete safety or truth in advertising, cater only to the parents as patients, not to the families they are creating.

On the other hand, legal support for these families is not an entirely positive good and, particularly in areas involving the intersection of sex, family, and intimacy, there is healthy skepticism of state regulation, even well-intentioned state regulation.²¹⁰ These families may not be better off with a regulatory scheme and, indeed, may derive pleasure and benefit in being able to form relationships outside of the law. Families are finding each other and are developing affective ties, so there may be no need to put these ties into a legal framework and, indeed, these families may affirmatively benefit from resisting state regulation. Rather than “indulg[ing] the misplaced view that, if something important is at stake, law should regulate it,”²¹¹ we might instead not regulate, thereby allowing these new networks to develop on their own and helping to destabilize existing conceptions of the traditional family.

Indeed, the law clearly has an impact on behavior,²¹² and new laws (or the lack thereof) will affect people’s perceptions of donor-conceived family relationships and their actual experiences of them. If, for example, there are laws that accord these relationships some legal significance, this may encourage more people to find their donor-conceived family communities. Consider a law granting an offspring the right to know her donor; this makes donation less secretive because no one is able to choose anonymous donation. The legal parent may also find it more difficult to conceal the donation from the child in this new environment. If the parent does not disclose the fact of donor conception, then the child will be all the more angry if and when she finds out because the law accords her a right to know the actual donor, and yet her parent kept the existence of the donation a secret. Legal regulation changes the subject that is

209. See generally CAHN, *supra* note 138, at 14 (contrasting differing orientations of adoption and ART); Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010) (urging greater attention to children in adoption).

210. See, e.g., Cahill, *supra* note 202; Ertman, *supra* note 57, at 22; Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1419 (2004) [hereinafter Franke, *Domesticated Liberty*]; Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688 (2008) [hereinafter Franke, *Longing for Loving*].

211. Franke, *Longing for Loving*, *supra* note 210, at 2703.

212. In the adoption context, thousands of adopted adults file for access to their original birth certificates when states enact legislation allowing them access. See Cahn, *supra* note 75, at 321–22.

being regulated, establishing norms of appropriate behaviors.²¹³

Two responses to the risks of legal regulations show the importance of developing new approaches: first, even in the absence of explicit regulation, the law still defines the space for flourishing.²¹⁴ And second, the benefits from the normative vision articulated may justify the costs of the regulation. A normative vision of promoting affective ties, fairness, and other public goods²¹⁵ associated with respect for the dignity of donor-conceived families and their communities supports one type of regulation, while a normative vision associated with protecting patient autonomy, privacy, and the domesticated family supports a different type of regulation. This Article aspires to provide a basis for regulation based on recognition of the dignity of connection between donor families (as well as the dignity of those involved in creating these families).

B. HOW TO REGULATE

Accordingly, in recognition of the possibility of emotional connection,²¹⁶ the state should provide some protections for donor-conceived family communities. Conceptualizing these potential networks as relational entities with emotional interconnections provides a basis for developing a new legal framework. Even within traditional family law, there is a growing appreciation that relationships continue even after a family dissolves, that parents may still need to talk to each other once they are no longer married or living together, that children's relationships with both parents matter.²¹⁷ The increasing number of challenges to the binary nature of family law—parent/nonparental caregiver, spouse/nonspouse, sibling/nonsibling²¹⁸—indicate the need for a more nuanced approach that

213. See, e.g., Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1156–59 (2010); see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as informal social and cultural expectations with which people feel they must comply).

214. As Elizabeth Emens points out in a different context, “[e]ven when seemingly uninvolved in intimate discrimination, the state creates infrastructure and influences hierarchies in ways that determine whom we meet (accidents) and how we view those we meet (calculations).” Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1401 (2009).

215. See generally MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010) (discussing the relationship between supporting families and the public good); Huntington, *supra* note 143 (addressing the role of family law in healing families).

216. In a series of cases beginning in 1972, the Supreme Court held that biological, nonmarital fathers had a constitutionally protected interest in establishing a relationship with their children, and later cases have clarified that this right exists when the men had taken some steps to develop a relationship with the children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 658 (1972); Ristroph & Murray, *supra* note 1, at 1252–53; Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1400 (2010).

217. See Huntington, *supra* note 143, at 1287–94.

218. *Id.* at 1304 (noting, in the context of dissolved familial relationships, that “[r]ather than wishing that a clear legal name—spouse/legal stranger, parent/nonparent—will resolve the underlying psychological issues, the new legal status acknowledges the ongoing connection that exists and thus conceives of a place beyond rupture”). See generally Huntington, *supra* note 175 (exploring how the law can respect positive emotions within the family).

recognizes and allows various levels of connection. Focusing not on individual rights but on potential relationships and emotions among people might provide a space for fostering donor family communities. Families, both donor and nondonor, are inevitably embedded in larger structures of care and support,²¹⁹ and allowing one donor-conceived family to connect with another is consistent with this realization.²²⁰

The law should respond at two critical points: first, it should clarify the legal relationships between donors, recipients, and offspring; and second, it should facilitate connections between donor-conceived families who share the same genetic heritage along with the donors themselves. While most states have laws on the relationship between sperm donors and recipients, fewer states have enacted laws on egg donors, and even fewer on embryo donation.²²¹ Regardless of any other proposal in this Article, donors must be assured that they will have no parental rights or obligations unless they have arranged otherwise.²²² This certainty encourages contact based on the knowledge of all involved that donors will not become responsible for child support or able to assert custody and visitation with respect to any of their donor-conceived offspring.

Once these families are created, laws can facilitate and regulate these connections; a few areas for legal intervention show that donor-conceived family communities are different, but nonetheless entitled to some form of legal recognition and protection. Legal decision makers should take affirmative steps to facilitate the recognition of these families, according them privileges based simply on status. For example, the state accords multiple benefits to couples based on marriage, ranging from tax treatment to surrogate decision-making authority in the case of illness to intestacy preferences.²²³ The state might accord similar benefits to donor-conceived families, such as mandatory disclosure of identifying information to facilitate connections, delegation of surrogate

The ALI's articulation of different categories of parents, discussed *supra* notes 195–97 and accompanying text, provides an example of the potentially dissolving binaries in parenthood.

219. See EICHNER, *supra* note 215; Huntington, *supra* note 175, at 408; see also WILLIAMS, *supra* note 179 (discussing the importance of kinship ties to working-class families).

220. Of course, the recipient parents might think, “Why do I have to think about a third party when straight, married, fertile people don’t have to share their children with anyone?” The answer is that straight, married, fertile people have not created their children through the deliberate use of a third party. Moreover, the recipient parents remain the legal parents and are not required to share, nor relinquish, those rights.

221. See *supra* notes 105–08 and accompanying text. And, of course, the laws that do exist do not cover all contingencies.

222. See, e.g., *In re K.M.H.*, 169 P.3d 1025, 1042 (Kan. 2007); Polikoff, *supra* note 10, at 241–42.

223. For discussions of benefits based on marital status, see, for example, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 379–83 (D. Mass. 2010); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Honorable Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>. Surrogate decision making most commonly takes the form of substituted judgments when one partner is medically incapacitated.

authority for health care decision making,²²⁴ or inclusion in Family and Medical Leave Act (FMLA) protections.²²⁵ Under the existing system, donor-conceived families can already designate other community members as agents for health care and financial decision making. New laws could, however, expand the rights available even in the absence of these specific designations. One option might be to allow members of donor-conceived family communities to enter into a status comparable to designated beneficiaries under some state laws. For example, Colorado provides for a “designated beneficiary” agreement.²²⁶ The Colorado legislation is limited to same-sex couples, as well as other couples legally prohibited from marrying one another, but, once registered, the couples are eligible for such benefits as health insurance, inheritance rights, and retirement benefits. It is notable for the ease with which couples can enter and exit the legal status, and the freedom parties have to define the scope of the relationship and rights conferred to their partners; partners are free to choose which rights and protections they want to extend to one another and there is no requirement of reciprocity.

The purpose is not to create a new legal status that is identical or substantially similar to that of domestic partners, marriage, or even all of the rights and privileges accorded to family members.²²⁷ The state and federal governments should not accord legal recognition in a way that is even remotely comparable to the government’s recognition of the family, such as the automatic conferral of a series of rights, duties, and obligations. Instead, the goal is to allow members of donor-conceived family communities to opt in to these rights and duties through voluntary designation of a specified legal status.

Moreover, advocacy to expand benefits might cause the underlying laws to change. For example, the federal FMLA is limited in scope and application; its grudging support for families reflects a compromise in which employers had a significant voice. The Act only covers employers with fifty or more workers, and employees only become eligible after one year of work. They are then entitled to take up to twelve weeks of unpaid leave from work for medical reasons related to a *spouse, child, or parent*.²²⁸ It does not allow siblings to take leave (so would not, on its own terms, apply to half-siblings).

The most fundamental change requires a paradigm shift towards donor-

224. For a sample list of surrogate decision makers, see, for example, ALA. CODE § 22-8A-11(d)(7) (LexisNexis 2006); see also Ashley Bassel, Note, *Order at the End of Life: Establishing a Clear and Fair Mechanism for the Resolution of Futility Disputes*, 63 VAND. L. REV. 491, 501–02 (2010) (discussing surrogate decision-making statutes).

225. These are some of the benefits that might be accorded to legally recognized friendships. See, e.g., Leib, *supra* note 174, 694–705; Rosenbury, *supra* note 1, at 204–05.

226. COLO. REV. STAT. ANN. § 15-22-105 (West 2011); see also David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115 (2010).

227. For a nice accounting of how the state recognizes the rights accorded to family partners, see *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011), available at http://data.lambdalegal.org/in-court/downloads/appling_wi_20110620_decision-and-order.pdf.

228. See 29 U.S.C. § 2612(a)(1) (2006); 29 C.F.R. § 825.122(c)(3) (2011).

conceived family communities: they must take their place in the jurisprudence of family law and constitutional law, not solely in the administrative jurisprudence of technology, health, and safety regulation. They have been medicalized,²²⁹ rather than humanized. In the context of technology regulation, the law has focused on gametes and the fertility industry by, for example, developing standards that test gametes for various health risks.²³⁰ The focus of the health context is protecting patients.²³¹ Legal scholars have discussed the utility of breach of warranty concepts in the donor-gamete context.²³² These interventions are important, but they are technical, focused on the product itself, and not what the product creates.

This Part argues that future regulation must develop from the perspective of holistic family law. This grounding provides a more coherent and cohesive justification for moving forward towards recognition of these new relationships. Importantly, family law cannot be imported, full-scale, onto these new family networks.²³³ There remain critical distinctions. But the basic insight, that the focus must be on relationships and potentially differing interests as well as on products, points towards more human, and humane, legal approaches. Legal treatment of the donor-conceived family and community relationships in reproductive technology might draw on legal treatment of adoptive relationships, with its focus on children and other relational interests.²³⁴ Given a state goal to foster institutions that sustain family,²³⁵ various guiding principles help structure the framework for these new policies. First, the state must give explicit recognition to donor-conceived family communities, acknowledging the emotional and biological connections that exist between members of these communities. Second, beyond this recognition, the state must adopt a position that is either neutral towards, or that affirmatively facilitates, these communities.

This guidance provides the basis for the recommendations developed in this Part, which focus on additional regulation of the fertility industry and further facilitation of the integrity of the family networks. Specific recommendations

229. See ALMELING, *supra* note 15, at 3–4, 27; CONRAD, *supra* note 102.

230. CAHN, *supra* note 23, at 55–59.

231. See, e.g., William M. Sage, *Relational Duties, Regulatory Duties, and the Widening Gap Between Individual Health Law and Collective Health Policy*, 96 GEO. L.J. 497, 503–05 (2008) (discussing medical ethics); William D. White, *Market Forces, Competitive Strategies, and Health Care Regulation*, 2004 U. ILL. L. REV. 137 (discussing market competition); Stephanie N. Sivinski, Note, *Putting Too Many (Fertilized) Eggs in One Basket: Methods of Reducing Multifetal Pregnancies in the United States*, 88 TEX. L. REV. 897, 913 (2010) (discussing focus on patient autonomy).

232. E.g., Reich & Swink, *supra* note 58, at 43–49; Dawn R. Swink & J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 BYU L. REV. 857, 879–85.

233. See *infra* section IV.C (Important Objections) for further discussion.

234. Adoption law has moved towards increasing recognition of the child's right to learn about her biological parents, and towards enforcement of agreements for contact between the biological parents and the child. See, e.g., Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 290 (2008); Appell, *supra* note 209, at 7.

235. See, e.g., EICHNER, *supra* note 215.

include requiring the entire fertility industry to engage in better record-keeping; allowing donor-conceived offspring to learn their origins, the identity of the donor, and the existence of any siblings; setting limits on the number of children born from any gamete provider; and developing a new familial-type status that donor-conceived family communities might choose to assume. What is clear is that family law and health scholars and advocates should begin considering how to nurture these newly developing families.

1. Regulation for Health, Safety, and Welfare

The regulations that do exist for the fertility industry focus on safety and protecting consumers.²³⁶ Patients absolutely need assurances that gametes have been tested for various diseases, and that fertility clinics are not engaging in false advertising. Indeed, infertility is a medical condition, to be sure, but it is also a social condition.²³⁷ Regulations that are primarily concerned with informing patients, however, are limited in scope. They do not address any other aspect of the donor world.

Applying a new paradigm means that the fertility industry, including clinics, sperm banks, and egg donor brokers, needs further incentives to ensure the best interests of donor-conceived families and their communities. This principle leads to a reconsideration of existing approaches to ensure that relational interests are a critical factor in formulating law and policy. Legislatures must require improved record-keeping, limits on the numbers of children born per donor, and more thorough counseling and disclosure to parents and donors.²³⁸

More specifically, as a fundamental first step, clinics and banks must keep track of the children who result from any particular egg or sperm donor, and report this information to a central registry. Parents who had used gametes could be required to report to the fertility clinic or to the birthing hospital identifying details about the gamete provider and any resulting births, and the sperm banks and medical care providers could be responsible for ensuring accurate reporting. Only with improved data collection and retention can meaningful changes result. Additional information, such as genetic data, could also be collected about donors to support potential regulation on repetitious donations.²³⁹ Counsel-

236. See Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified as amended at 42 U.S.C. §§ 263a-1 to a-7 (2006)) (requiring ART programs to report “pregnancy success rates” to the Centers for Disease Control and for those rates to be published); 21 C.F.R. §§ 1271.1–1271.440 (2011) (concerning donor eligibility and testing); Heled, *supra* note 100, at 249–55.

237. See, e.g., KAREY HARWOOD, *THE INFERTILITY TREADMILL: FEMINIST ETHICS, PERSONAL CHOICE, AND THE USE OF REPRODUCTIVE TECHNOLOGIES* (2007).

238. Congress has served as the primary outside regulator for gamete donation. Similarly, a federal structure could more efficiently and effectively implement any large-scale collection of information and oversight of the process. See Cahn, *supra* note 146, at 218–19.

239. Given the purpose of collecting DNA records, whether any genetic data collected would thereafter be available to offspring presents entirely different issues; certainly, non-donor-conceived offspring do not have access to such data about their parents.

ing and informed consent procedures should ensure that all participants understand not just the medical procedures, but also the social and psychological consequences of the gamete donor process.²⁴⁰

Importantly, these steps are possible; the industry has, for example, already recommended voluntary limits on the number of offspring per donor.²⁴¹ Limits already exist in numerous other countries, and the industry's voluntary limits may be the most appropriate basis for legislation in the United States.²⁴² Although parents are not required to report the birth of a child using donor gametes, the Centers for Disease Control and Prevention already collect information on the success of ART procedures involving eggs and embryos; this collection could be expanded to include information about sperm as well as the number of children born. Other countries have required the specific regulatory body responsible for ART or an independent agency to maintain this information;²⁴³ the precise form of entity, its means for protecting confidentiality, and the length of time during which records must be kept will depend on political factors as well as other responsibilities that such an organization might acquire. Even those opposed to any further regulation or disclosure of identifying information should recognize the importance of ensuring that one donor does not populate the world nor that genetically related offspring do not marry each other.

While each of these steps could be justified based on health and safety concerns involved in using ART,²⁴⁴ they gain additional strength because of their interrelationship with a standard that focuses on the best interests of offspring.²⁴⁵ Indeed, a family law framework would focus not only on the offspring's interests, but on other public goods as well, such as the promotion of

240. For suggestions, see, for example, *American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 171, 178–79, 182–83 (2008) (proposing requirements of informed consent and types of potential counseling); Durrell, *supra* note 30, at 212–13 (discussing flaws in informed consent process); Suter, *supra* note 30, at 244–46 (same).

In Australia, for example, some jurisdictions recommend counseling for intending parents that includes the legal, social, and psychological implications of using a donor as well as the impact on the parents' relationship to each other. SENATE LEGAL & CONSTITUTIONAL AFFAIRS REFERENCES COMM., DONOR CONCEPTION PRACTICES IN AUSTRALIA 60–61 (2011), http://www.aph.gov.au/senate/committee/legcon_ctte/donor_conception/report/report.pdf.

241. Practice Comm. of the Am. Soc'y for Reprod. Med., *supra* note 31, at S195; Practice Comm. of the Am. Soc'y for Reprod. Med. & Practice Comm. of the Soc'y for Assisted Reprod. Tech., *supra* note 29, at S35–S36.

242. See generally Cahn, *supra* note 139 (justifying the need for limits and discussing the experiences of other countries).

243. Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INT'L J.L. POL'Y & FAM. 174, 178–79 (2009).

244. See, e.g., Cahn, *supra* note 139.

245. But see I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. (forthcoming 2011) (draft on file with author) [hereinafter Cohen, *Beyond Best Interests*]; I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. (forthcoming 2011) (draft on file with author) [hereinafter Cohen, *Regulating Reproduction*]. For further discussion of the "best interest" argument, see *infra* text accompanying notes 296–97.

human capabilities and support for a family's communities.²⁴⁶ Moreover, further regulation provides a backdrop towards additional means for recognizing both children's interests and the familial relationships.

2. Identity Interests

Recognizing the development of donor-conceived family communities and children's interests in identity, the donor-conceived should be able to find out the identity of their donors and their biologically related "siblings." To acknowledge the potential connection between gamete providers, the recipients, and their children, federal and state law should provide for limited disclosure of the donor's identity once offspring turn eighteen.²⁴⁷ Laws guaranteeing the release of such information to mature adults 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. Although all states have addressed this issue for adoptees, albeit without necessarily accepting open records,²⁴⁸ few states have considered legislation on disclosure of the identity of gamete providers. Washington State enacted legislation in 2011 that is a first, albeit problematic, step towards this goal.²⁴⁹ While the new law allows the donor-conceived access to identifying information when they reach the age of eighteen, it also permits the donor to file a disclosure veto, thereby precluding access.²⁵⁰ This veto power, however, significantly undercuts any assertion of

246. See, e.g., EICHNER, *supra* note 215, at 68–70 (discussing the possibility of changing the state's role from neutral protector of individual rights to active supporter of "caretaking and human development").

247. See, e.g., Cahn, *supra* note 146, at 217–21; Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 24–27 (2008). But see Sauer, *supra* note 168, 939–43. It may even be appropriate to allow for disclosure at an earlier age. See Blyth & Frith, *supra* note 243, at 186–87 (discussing range of ages for disclosure internationally); cf. Vivian Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority* (unpublished manuscript), available at http://works.bepress.com/vivian_hamilton/4/ (arguing for moving voting age back to sixteen).

248. See JEANNE A. HOWARD ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, FOR THE RECORDS II: AN EXAMINATION OF THE HISTORY AND IMPACT OF ADULT ADOPTEE ACCESS TO ORIGINAL BIRTH CERTIFICATES (2010), http://www.adoptioninstitute.org/publications/7_14_2010_ForTheRecordsII.pdf; Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 162 (1999). Virtually all states allow adoptees access to their original birth certificates based on a showing in court of good cause, and a number of states allow access without requiring adoptees to go to court. See HOWARD ET AL., *supra*, at 31–32.

249. 2011 Wash. Legis. Serv. ch. 283, § 53 (West) (available online at Westlaw's tentative classification, WASH. REV. CODE ANN. § 26.26.0001).

250. *Id.* § 53(2)(a). For a history of the legislation, see H.B. 1267-2011-12: *Clarifying and Expanding the Rights and Obligations of State Registered Domestic Partners and Other Couples Related to Parentage*, WASH. STATE LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1267> (last visited Oct. 25, 2011). The bill's primary focus is the parentage of children conceived by assisted reproduction, but it also directs that anyone who provides sperm or eggs to a fertility clinic in the state must also provide identifying information and a medical history. While that is, in fact, a customary practice for most fertility clinics, another part of the law will allow children born from donated gametes to return to the fertility clinic when they reach the age of eighteen to request the identifying information and the medical history. 2011 Wash. Legis. Serv. ch. 283, § 53(a)–(b) (West).

offspring's right to know the identity of their donors, and is a critical flaw. A related proposal is the establishment of a national, federal voluntary registry that would allow for connections between family members prior to offspring reaching the age of eighteen.²⁵¹

One potential objection to the first proposal is that mandating the release of identifying information might be contrary to agreements between donors and sperm banks or fertility clinics.²⁵² Prospectively, of course, this would not present problems;²⁵³ retroactive application, however, might be problematic. Nonetheless, in other contexts, courts and legislatures have reformed or struck down agreements that are deemed to be contrary to public policy or in violation of constitutionally protected rights.²⁵⁴ In the adoption context, several states have provided that regardless of private agreements, adopted adults will receive access to information about their birth parents.²⁵⁵ When no-fault divorce was first enacted, disappointed spouses claimed that the state could not retroactively

Regardless of whether the donor files a disclosure veto that prevents the clinic from revealing the identifying information, the donor offspring will still be entitled to the medical information. *Id.* § 53(2)(b).

251. This has been done by some states for adoptees, allowing the biological parents and the adoptee to indicate their interest in contacting one another. *See* Cahn & Singer, *supra* note 248, at 162–63. Approximately thirty states have established these registries. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS., ACCESS TO ADOPTION RECORDS: SUMMARY OF STATE LAWS 4 (2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessapall.pdf. Although Senator Carl Levin has repeatedly introduced proposals for a national registry (and I testified in favor of such a registry), the legislation has never been enacted. Cahn & Singer, *supra* note 248, at 163 n.59.

252. A second objection relates to the privacy interests of all involved. *See infra* text accompanying notes 309–23 (discussing privacy interests).

253. Indeed, when Britain moved to full disclosure, it did so prospectively only. HUM. FERTILISATION & EMBRYOLOGY AUTH., *supra* note 206; Eric Blyth et al., *Wither the HFEA and the Fate of Donor Registers?*, BIONEWS (Aug. 23, 2010), http://www.bionews.org.uk/page_69470.asp. The judge in *Pratten* similarly limited her ruling to prospective application. *Pratten v. British Columbia* (Att'y Gen.), 2011 BCSC 656, ¶¶ 330–35 (Can. B.C. Sup. Ct.), available at <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf>.

254. *See supra* text accompanying notes 141–45 (discussing *K.M. v. E.G.*). As another example, surrogacy contracts have been struck down as contrary to public policy. *E.g.*, *In re Baby M*, 537 A.2d 1227, 1234, 1240–50 (N.J. 1988) (invalidating surrogacy agreement); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109. Similarly, where agreements violate legal rights, they are struck down; perhaps the best known example involves racially restrictive covenants. *See Shelley v. Kraemer*, 334 U.S. 1 (1948); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (2007). *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1229–30 (2003).

255. *See* HOWARD ET AL., *supra* note 248, at 13; Cahn & Singer, *supra* note 248, at 167–68; E. Wayne Carp, *Does Opening Adoption Records Have an Adverse Social Impact? Some Lessons from the U.S., Great Britain, and Australia, 1953–2007*, 10 ADOPTION Q., 29, 34–38 (2007); Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 380 (2001); Jennifer Butch, Note, *Finding Family: Why New Jersey Should Allow Adult Adoptees Access to Their Original Birth Certificates*, 34 SETON HALL LEGIS. J. 251, 262–65 (2010).

Although, as discussed above, adoption and ART have developed with different standards, some analogies can be useful, and the ART world can learn from the adoption world. *See, e.g.*, Cahn & Evan B. Donaldson Adoption Inst., *supra* note 8.

modify their marriage contracts; courts rejected these claims.²⁵⁶ The issue of retroactivity, which involves a conflict between expectations of donors at the time of donation and the needs of donor-conceived people, is complex, showing the importance of starting a new conversation.

Moving towards disclosure respects not only potential relational interests but also recognizes the autonomy claims of offspring. Moreover, donor-conceived offspring have also claimed that they are the objects of discrimination because they do not have access to the identities of their biological parents.²⁵⁷

Even under a system of full disclosure, there certainly remains a critical distinction between “parenting” a child and contributing gametes to the creation of the child.²⁵⁸ The legal parents have strong rights to make their own decisions concerning the control, care, and custody of their children,²⁵⁹ and these decisions may include disclosing details about the child’s origins. Allowing information disclosure to adult offspring respects parental rights to raise children as they see fit while the children are minors, but respects the “children’s” rights once they are mature.²⁶⁰

While the rights and interests of biological parents and gamete providers should be accorded respect, these parties have created a new family and a child. Regulation should also take account of these new entities by, for example, allowing the child to receive information about the people who helped to create her. Such a right should be established both retroactively and prospectively, such that adult offspring who today want information about their biological backgrounds should be able to obtain it. Additionally, prospective gamete provision arrangements should proceed in a legal context in which it is under-

256. See, e.g., Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REFORM 217, 252–54 (1990) (discussing cases and their rationales).

257. E.g., Writ of Summons and Statement of Claim ¶¶ 15–26, *Pratten v. British Columbia* (Att’y Gen.), 2011 BCSC 656 (Can. B.C. Sup. Ct.), available at <http://www.arvayfinlay.com/news/Writ%20of%20Summons%20and%20Statement%20of%20Claim.pdf>; see also Eric Blyth & Lucy Frith, *The UK’s Gamete Donor ‘Crisis’—A Critical Analysis*, 28 CRITICAL SOC. POL’Y 74, 87 (2008) (“[T]here is . . . an argument concerning parity and non-discrimination that can be advanced in favour of disclosure of donor identity: that donor-conceived people should not be the only group of people legally prevented from finding out their biological parentage.”). Indeed, illegal discrimination between the rights of adopted and donor-conceived individuals to access information about their biological parents was at the core of the British Columbia Supreme Court’s decision in *Pratten*. *Pratten v. British Columbia* (Att’y Gen.), 2011 BCSC 656, ¶¶ 230–34 (Can. B.C. Sup. Ct.). A few courts in the United States have considered requests to disclose a donor’s identity but never in the context of offsprings’ liberty claims; so far, no court has ordered disclosure. See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Cal. Ct. App. 2000); *Doe v. XYZ Co.*, 914 N.E.2d 117 (Mass. App. Ct. 2009); Cahn, *supra* note 146, at 211–12.

258. See Polikoff, *Redefining Parenthood*, *supra* note 148, at 472–73.

259. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225, 1235–37 (1999); cf. Barbara Bennett Woodhouse, “Who Owns the Child?” Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

260. See Cahn & Singer, *supra* note 248, at 172–75. The child’s right to an identity is protected internationally as well. See generally Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born from Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 120–21 (2007).

stood that offspring will have access to information once they become adults. 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.”²⁶¹ Applying this notion more generally in the gamete provision context, mature offspring in these families similarly need access to the ability to explore their biological families of origin. The new paradigm suggests that donor-conceived offspring be able to obtain information about others conceived through the same gametes. Already in the United Kingdom, New South Wales (Australia), and New Zealand, offspring are entitled to information about whether any other individuals share the same donor gametes and, based on mutual consent, to identifying information about each other.²⁶²

The release of identifying information requires legal clarity on the relationship between donors and the families they help create. In the absence of a written agreement, a donor should not be a parent.²⁶³ For all of the other recommendations to be realistic options, donors and recipient parents must be reassured that donors have no other kind of legal relationship to their offspring. Otherwise, contact between donors and offspring becomes highly problematic, raising potential issues of financial liability and enforceable custodial rights.²⁶⁴

3. Legal Status

Once connections have been made, the newly formed donor-conceived family communities may want more formal respect for their relationship. This does not mean according parental status or providing all of the affirmative legal

261. Barbara Bennett Woodhouse, “*Are You My Mother?*”: *Conceptualizing Children’s Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL’Y 107, 128 (1995); see also MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS* 40 (2001). 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 127–28. Maxine Eichner notes that the state has an obligation to ensure “the development of children’s civic virtues and autonomy.” EICHNER, *supra* note 215, at 133.

262. See Blyth & Frith, *supra* note 243, at 182–83; *HFEA To Help Donor-Conceived Siblings Contact Each Other*, HUM. FERTILISATION & EMBRYOLOGY AUTH. (Apr. 6, 2010), <http://www.hfea.gov.uk/5838.html>. If the government is collecting this information, there is a risk that genetic prescreening may be required in order to prevent against inadvertent incest. The government’s role here, however, should be as a registry, rather than an active intervenor.

263. See Polikoff, *Breaking the Link*, *supra* note 148.

264. Of course, even without any legal connection, a phone call from an offspring could easily open the door to all sorts of emotional complexities. Furthermore, despite the lack of a legal obligation to provide financial support, many people would be unable to turn down a request for help should one of their offspring come knocking, or would at least prefer not being drawn into a situation where they would have to decide whether to turn down a request from a suffering offspring. These emotionally complex moral issues can be partially addressed through the informed consent process when the donor provides gametes, with the understanding that attitudes change over time. Clarifying a donor’s status under the law at least ensures that these moral quandaries do not become legal obligations.

protections accorded to families under American law. Instead, this might mean, for example, that donor-conceived family communities could opt into a quasi-familial status that would provide them with a weaker form of protection.²⁶⁵ Their biological connections could give rise to some limited rights that depend on context and on choice. As family law increasingly moves towards privatization, towards customizing the meaning of family through mechanisms ranging from open adoption agreements to cohabitation and premarital contracts,²⁶⁶ donor-conceived family communities might be able to choose a weak form of legal recognition.

While my goal is not to set out a laundry list of policy prescriptions, this new status could (potentially) provide various privileges and obligations. Members of connected families might, for example, be eligible to take family and medical leave for one another,²⁶⁷ to inherit, to act as a surrogate decision maker in cases of illness, or to serve as a legal guardian in cases where the parents are incapacitated or have died.²⁶⁸ It might also involve some form of recognition for sibling associational rights, a step that would have a much broader impact on child welfare.²⁶⁹ To provide administrative ease, the default rule would remain that these rights are unavailable in the absence of explicit agreements otherwise.

C. IMPORTANT OBJECTIONS

These proposals are subject to a series of objections that have been raised in related contexts. The first argument is that donor-conceived family communities differ so fundamentally from more traditional families that they deserve different legal treatment. The second is that disclosure of identifying information will decrease the supply of donors without any countervailing benefits. A final set of concerns relate to the potential for imposition of unwanted relationships, for undermining the integrity of the donor-conceived family, and for invading the privacy rights of donors.

265. This discussion focuses on donor-conceived family *communities*. Once formed, donor-conceived families are no different from other families in American law (assuming that states resolve the status of the donor). In the future, it may turn out that donor-conceived family communities want the same parental-status options and affirmative legal protections accorded to other families. Nothing in this Article precludes such changes.

266. See MARKEL, COLLINS & LEIB, *supra* note 66; Singer, *supra* note 149.

267. See, e.g., Murray, *supra* note 143, at 451–52 (discussing the costs and benefits of such a proposal). Ethan Leib suggests a “Friends and Medical Leave Act.” Leib, *supra* note 174, at 682; see also ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT 99 (2011).

268. For issues involving surrogate decision making and guardianship, see SUSAN N. GARY, JEROME BORISON, NAOMI R. CAHN & PAULA A. MONOPOLI, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES, ch. 13 (2011).

269. See Mandelbaum, *supra* note 3, at 53–64 (suggesting reforms to recognize sibling associational rights); Angela Ferraris, Comment, *Sibling Visitation as a Fundamental Right in Herbst v. Swan*, 39 NEW ENG. L. REV. 715, 744–47 (2005) (noting that sibling association rights might affect child custody and visitation as well as the child welfare system).

1. Donor-Conceived Family Communities Are Not Families

Donor-conceived family networks take a very different form from families. While shared genes may be important in each context, the similarities end there. Families—even LAT couples—generally involve adults related by emotional and sexual intimacy, and they may include children related through biology or legally recognized adoption who share (or, in the case of divorce, have shared) lives together. Family networks do not involve any adult sexual intimacy, do not include any past sharing of lives, and involve children unrelated to any parents in the second family. Finally, such families raise the danger of overemphasizing one's genetic identity at the expense of the functional family, or “genetic essentialism,” the concept that a person is the sum of her genes.

This objection is useful in helping to craft the framework of rights to be accorded family networks, but otherwise unpersuasive in its effort to deny *any* type of familial-type rights. First, the lack of a shared life does count for something. It suggests, for example, that the range of cohabitants' rights is inapplicable in this context.²⁷⁰ There is no shared property that must be accounted for. Parents of one donor-conceived child would have no legal rights to custody of a child conceived through the same donor.

But second, even if the analogy is not perfect, it does provide a useful way of thinking about these networks. Gametes form families and create emotional and social connections. Given the need for administrable approaches, the family analogy is appropriate, even if it does not account ideally for all of the possible ways that the two structures differ.

Third, I am not convinced that technologically focused regulation always or even generally can account for the full range of needs displayed by these families. Changing the paradigm to family-focused regulation means that any new law must be analyzed based not just on its scientific justifications but also on its implications for the interests of gamete providers, recipients and, most importantly, donor offspring. Explicit reliance on the basic family law principle of “best interests of the child” provides guidance in developing these new laws. This principle justifies regulations to ensure gamete safety, but it also justifies the broader regulations discussed below.

Part of the difficulty is that the argument that donor-conceived family networks are different employs a somewhat limited concept of what family law covers. Families once linked by shared interdependencies and living space are still subject to family law once they dissolve. Although the adult partners may no longer be interdependent emotionally or financially, and although family members may occupy different living spaces, child custody, visitation, and support law continue to regulate family relationships. The image of the traditional family with married parents and children living in the same home is deeply ingrained, but modern families have rendered this image somewhat

270. For a discussion of these remedies, see, for example, Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Recognition of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565 (2009).

outdated. Forty percent of children are born outside of a marital family, and the divorce rate hovers around forty percent.²⁷¹ Contemporary families no longer look like traditional families and, as discussed earlier, the different strands of the family as domesticity critique help point towards future applications of family law. As a result, basic principles of family law are of some utility here.

I do not mean to dismiss the concerns about the types of differences between family networks and families. These are very real concerns and should be taken very seriously in crafting new approaches. But donor-conceived family communities exhibit many of the bonds of affinity that have characterized family, and there are shared consanguineous bonds as well. Concerns of the total transfer of family law into family networks should help structure which existing laws should be applicable.

2. But What About Donors?

A second objection to the approach developed in this Article of according more rights to donor-conceived families and communities is that it will affect the supply of donors.²⁷² More specifically, some have argued that, without a guarantee of anonymity, donor supply will decrease dramatically, and the United States will be forced to recruit new donors internationally. This then potentially implicates procreative rights, which are, on this argument, constitutionally protected.²⁷³ Decreases in the supply of donors limit options for reproduction.

Some evidence exists that, when countries have required identity disclosure, donors are less likely to come forward.²⁷⁴ If gamete providers know that they can be found, the argument goes, 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. There are, of course, numerous objections to allowing for limited disclosure. Gaia Bernstein eloquently connects disclosure to a decreasing sup-

271. See, e.g., CAHN & CARBONE, *supra* note 45 (discussing changes in the American family and calculation of the divorce rate).

272. The primary goal of this Article is to map and begin to develop a legal framework for donor-created family communities. Arguments about affecting the supply of donors are secondary to this goal, and are instead concerned primarily with how ending donor anonymity would affect supply. See I. Glenn Cohen, *Rethinking Sperm Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO L.J. 431 (2012). Indeed, one can easily imagine developing new legal frameworks for donor-created family communities based on a voluntary disclosure system that did not mandate identity release. Nonetheless, given the intertwined nature of these issues, this section briefly addresses concerns about the donor supply.

273. See Daar, *supra* note 12, at 51–54; Vanessa L. Pi, Note, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 380–81, 395 (2009); Sivinski, *supra* note 231, at 908–09. See generally John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490 (2008) (evaluating reproductive freedoms in the context of ART).

274. See, e.g., Bernstein, *supra* note 6, at 1207–13.

ply of donor gametes.²⁷⁵ Indeed, most observers agree that mandatory disclosure has at least some effect on supply, although disagreement arises on the precise impact.²⁷⁶ Many banks have developed new recruiting practices in order to increase their supplies.

A variety of countries, including Sweden, Switzerland, and the United Kingdom, have abolished anonymity and have experienced consequent shortages also due to restrictions on payment.²⁷⁷ Studies have repeatedly shown that about half of both egg and sperm donors would not participate if anonymity were removed—but that the other half would continue to provide gametes.²⁷⁸ Early studies from countries that have moved towards mandatory donor identification similarly showed that donors were less willing to provide gametes if they knew their identity would be disclosed.²⁷⁹ Even the future possibility that a law will require such disclosure may have a dampening effect.²⁸⁰ 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 severe decline in the number of sperm donors.²⁸¹ In the quarter-century since then, however, there appears to be an increase in the number of sperm providers, and fears that donor-identity release requirements would inhibit semen provision have been allayed.²⁸² In England, commentators raised similar concern over decreasing numbers of donors once national law precluded anonymous donation in April 2005, but the actual situation is more complicated. The number of men providing sperm and women providing eggs in Britain dipped during the first few years after anonymity ended, but is steadily increasing and is only about ten percent below its pre-abolition peak.²⁸³

275. *Id.*

276. *See, e.g.,* Blyth & Frith, *supra* note 257, at 79–82; Neroli Sawyer, *Who's Keeping Count? The Need for Regulation Is a Relative Matter*, 92 FERTILITY & STERILITY 1811, 1812 (2009).

277. *See* Bernstein, *supra* note 6, at 1207–13. Where payment is allowed, the sperm business functions like other market commodities. *See, e.g.,* Krawiec, *supra* note 59, at 61. Restricting anonymity, but not payment, might affect both supply and demand, but would probably result in higher prices for sperm.

278. *See, e.g.,* Eric D. Blyth, Lucy Frith & Abigail Farrand, *Is It Possible To Recruit Gamete Donors Who Are Both Altruistic and Identifiable?*, 84 FERTILITY & STERILITY S21 (2005).

279. *See* Ken Daniels & Othon Lalos, *The Swedish Insemination Act and the Availability of Donors*, 10 HUM. REPROD. 1871, 1872 (1995).

280. Carbone & Gottheim, *supra* note 6, at 541.

281. *See, e.g.,* Daniels & Lalos, *supra* note 279, at 1871; A. Lalos, K. Daniels, C. Gottlieb & O. Lalos, *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REPROD. 212, 212 (2003); F. Shenfield, *Privacy Versus Disclosure in Gamete Donation: A Clash of Interest, of Duties, or an Exercise in Responsibility?*, 14 J. ASSISTED REPROD. & GENETICS 371, 371 (1997).

282. Daniels & Lalos, *supra* note 279, at 1872–73; Shenfield, *supra* note 281.

283. *See New Donor Registrations*, HUM. FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/3411.html> (last updated Mar. 23, 2011) (reporting on new sperm and egg donor registrations). Journalist Liza Mundy observed, “there has not been a decline in registered sperm donors following the 2005 change, and it’s arguable that there is not a shortage of donor sperm now. The number of sperm donors has risen in the UK since the identity-disclosure rule took effect.” Liza Mundy, *Shortage? What Shortage? How the Sperm Donor Debate Missed Its Mark*, THE GUARDIAN, Sept. 19, 2010, <http://www.guardian.co.uk/commentisfree/2010/sep/19/sperm-donors-shortage-market-forces>.

Thus, while requiring the release of information may have some initial impact on the number of donors, predictions of drastic long-term effects appear overblown. Moreover, such legislation may result in the development of new methods to recruit other donors; in Scotland, men were offered oats, the British National Health Service has targeted sports fans,²⁸⁴ and the publicity associated with new laws may encourage different types of donors to come forward.²⁸⁵ By changing advertising techniques to emphasize helping others rather than the amount of payment, sperm and egg banks may be able to recruit donors who care less about money and more about facilitating the creation of families. As one physician at a fertility center in England explained, “we need to change our strategies to target older men in established relationships. Since it appears they are likely to offer help for altruistic purposes, we must . . . increase public knowledge of the need for donors up to the age of 40.”²⁸⁶ If open-identity programs are mandated, then this will more likely attract men who are older than the current pool of donors, who already have children, who believe that donating sperm is an altruistic act, and who assume that open-identity programs are appropriate. But payment, rather than anonymity, does seem to remain a critical component; when Canada outlawed payment for sperm donors, the sperm supply decreased dramatically.²⁸⁷

Even granting that there would likely be an impact on the number of donors, this objection remains problematic. It fits nicely within a paradigm in which the donor world is regulated as a scientific or medical area, but not within a family law paradigm. As I explained earlier, recognizing relationships in addition to medical needs should serve as the basis going forward. This objection provides critical insights into tensions in the ART field. Unlike adoption, which has explicitly focused on the child’s best interests, ART has developed to serve (potential) parents’ interests in producing a child.²⁸⁸ And, as an industry has flourished in this environment, it too has strong interests in serving these potential parents. Donors supply a highly desirable commodity, and children are the highly desired outcome. While birth mothers have helped produce changes

284. Kate Foster, *Scots Giving Sperm . . . To Get Their Oats*, DAILY STAR (Scottish ed.), March 19, 2010, at 22; Marie Woolf, *Sperm Bank Asks Sports Fans To Lend a Hand*, SUNDAY TIMES (London), Jan. 10, 2010, http://www.timesonline.co.uk/tol/life_and_style/health/article6982300.ece; see also Lucy Frith, Eric Blyth & Abigail Farrand, *UK Gamete Donors’ Reflections on the Removal of Anonymity: Implications for Recruitment*, 22 HUM. REPROD. 1675, 1677–78 (2007).

285. See, e.g., Ken Daniels, *Anonymity and Openness and the Recruitment of Gamete Donors. Part I: Semen Donors*, 10 HUM. FERTILITY 151, 157 (2007); Frith, Blyth & Farrand, *supra* note 284.

286. Press Release, Sperm Donor Crisis—Researchers Find Sharp Fall Requires Urgent New Recruitment Strategies (Nov. 10, 2005), available at <http://www.oxfordjournals.org/eshre/press-release/nov051.pdf> (quoting Dr. Jane Stewart).

287. *Sperm Donor Shortage Hits Canadian Fertility Clinics*, CBC NEWS (Dec. 19, 2006, 2:19 PM), <http://www.cbc.ca/health/story/2006/12/19/sperm-shortage.html>.

288. See Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 491 (2009) (noting that adoption requires some entity to “deem[] that the parent is fit and that the proposed adoption is in the best interests of the child. . . . The underlying principle, however, could easily be extended into the realm of assisted reproduction . . .”).

in the adoption world, including somewhat more control for them, there is little such advocacy in the donor world.

The needs of infertile couples—regardless of whether the infertility is medical or social²⁸⁹—are complex, not simply based on the need for medical services or consumer protection. Many of them now search for donors willing to be identified in the future, many of them rue that they opted for anonymous donors, and many of them are aware that their children may want additional information about the donors.²⁹⁰

A more philosophical objection to a change in the nature of donors is raised by Professor Glenn Cohen.²⁹¹ He argues that any alteration of when, whether, or with whom we reproduce cannot necessarily be justified based on a focus on any resulting child's best interests.²⁹² Indeed, he finds most justifications of the regulation of reproduction to be "either implausible or unsettling."²⁹³

There are numerous responses to this philosophical concern.²⁹⁴ First, rather than focus on the "resulting child," the approach criticized by Professor Cohen, we should focus on the rights of a child who actually comes into existence.²⁹⁵ At that point, the test should not be: would this child have been better off not being born? Instead, as Amartya Sen and Martha Nussbaum have emphasized, there is a responsibility to maximize human capabilities.²⁹⁶ The capabilities

289. See Daar, *supra* note 12, at 23–24 (discussing "functional" and "structural" infertility).

290. As a board member of the Donor Sibling Registry, I am frequently privy to conversations involving precisely these issues. The Donor Sibling Registry's Yahoo! discussion group provides a forum for such discussions (conversations on file with author).

291. See Cohen, *Beyond Best Interests*, *supra* note 245; I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347 (2008); Cohen, *Regulating Reproduction*, *supra* note 245.

292. As he explains:

Whenever the proposed intervention will itself determine whether a *particular* child will come into existence, best interest arguments premised on *that* child's welfare are problematic.

This point is at the core of the "Non-Identity Problem" developed by Derek Parfit The punchline of the problem is that we cannot be said to harm children by creating them as long as we do not give them a life not worth living[, which is sometimes also referred to as 'a life worth *not* living']. A life not worth living is a life so full of pain and suffering and so devoid of anything good that the individual would prefer never to have come into existence. As I have demonstrated [elsewhere], this insight renders problematic any attempt to use BIRC [Best Interests of the Resulting Child] type reasons to justify a regulation of reproduction that will alter when, whether, or with whom individuals reproduce—such a regulation cannot be said to be in the best interests of the resulting child because a different child will result.

Cohen, *Beyond Best Interests*, *supra* note 245, draft at 14–15 & n.62 (footnotes omitted).

293. *Id.* draft at 3.

294. Indeed, Professor Cohen considers some of these objections. Cohen, *supra* note 272, at 433–39.

295. See Cohen, *Regulating Reproduction*, *supra* note 245, draft at 3 ("[T]he protection of the best interests of *existing* children serves as a powerful organizing principle that justifies state intervention.").

296. See AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 30–31 (1982); AMARTYA SEN, DEVELOPMENT AS FREEDOM 144 (First Edition Books 2000) (1999); Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 82–83 (Martha C. Nussbaum & Jonathan Glover eds., 1995); see also Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CALIF. L. REV. 1285, 1316 (2005) (book review) ("The state's responsibility to protect the well-being of dependents has a special

approach emphasizes the freedom of individuals to achieve the life that they would choose for themselves. As elaborated by Nussbaum, the capabilities include, “being able to be treated as a dignified being whose worth is equal to that of others.”²⁹⁷ While that statement is quite broad, many donor-conceived offspring seek the same opportunity as others to know their biological heritage. Or, to put it more bluntly:

To those who suggest donor offspring should shut up and be grateful because without this intervention they wouldn't “be here,” I say this: Ever had an issue with your mom? Your dad? Whoops, sorry, you can't talk about that! Without them, after all, you wouldn't *exist*.

Sure, we should all be grateful to be alive But donor offspring do not more than any one else among us owe a lifelong debt of gratitude to their bio/legal/social/donor parents simply for the opportunity to be alive.²⁹⁸

Cohen considers an argument that sperm donor anonymity is different from the other examples of reproductive regulation: intending parents can fix the “harm” they have done by providing the child access to the sperm donor's anonymity after the fact of conception.²⁹⁹ This approach, Cohen argues, will not work to ground a legally enforceable right, because it is “likely to alter donor and recipient behavior relating to when, whether, or with whom they reproduce. Thus, a legally enforceable ‘catch-up’ obligation ‘feeds back’ into the conception decision and thus is not immunized from the Non-Identity Problem.”³⁰⁰ The issue, however, once the child comes into being, is how to maximize the child's welfare; prospectively, at least, any donor who provides gametes will be aware of responsibilities to children created from those gametes.

Second, a child who does not yet exist is not harmed through its nonexistence.³⁰¹ That is, a nonexisting child has no rights to be born or not.³⁰² We may

corollary when it comes to children: an intrinsic part of ensuring their well-being involves ensuring that they have adequate conditions to develop their basic capabilities.”)

297. Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23 (2007).

298. Elizabeth Marquardt, *On Gratitude for One's Existence*, FAMILYSCHOLARS.ORG (May 22, 2010, 12:50 AM), <http://familyscholars.org/2010/05/22/on-gratitude-for-ones-existence/>.

299. Cohen, *Regulating Reproduction*, *supra* note 245, draft at 29–30 n.144 (addressing this in his discussion of the “Last Judgment Strategy”).

300. *Id.*

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

302. While the corollary—that no one is harmed if they are brought into existence with a life worth living—is also true, see Cohen, *Regulating Reproduction*, *supra* note 245, draft at 10, this returns us to the first argument of how to maximize the lives of people, including children, parents, and donors, currently in existence. The comparison, once they are living, is not with nonexistence, but with others who are living. See, e.g., *Pratten v. British Columbia (Att'y Gen.)*, 2011 BCSC 656 (Can. B.C. Sup. Ct.), available at <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf> (striking down distinction between donor-conceived and adoptees with respect to knowledge of their genetic background).

believe that any barrier to the existence of a particular child is morally problematic, and that the barrier cannot be justified. At its extreme, this argument means not only that abortion but also birth control and male masturbation should be banned because each prevents the creation of certain children. More than ninety percent of United States women will use contraception at some point in their lives, and even the Catholic Church permits the rhythm method.³⁰³ We thus must allow for some regulations impeding the existence of a child, and the question then becomes which ones we, as a culture, will choose to impose, and why and how we decide which regulations are appropriate. Abortion rights and the ability to use birth control are about empowering parental choice as to under what circumstances they will conceive. While any regulation requiring the use of an anonymous donor restricts rather than broadens parental choice, the fundamental concept of allowing some potential children not to come into existence remains comparable. Moreover, nondiscriminatory regulations on the types of contraceptive options available can be compared to nondiscriminatory regulations on the types of assisted reproductive technology available.³⁰⁴

As a constitutional matter, the parameters of a procreative right concerning assisted reproduction are less than clear.³⁰⁵ While rights to adult sexual intimacy and to bear and rear children are protected, these may—or may not—include the ability to use assisted reproductive technology.³⁰⁶ Even if they do, and the right to use reproductive technology is protected as fundamental, there may well be compelling state interests in promulgating certain narrowly tailored regulations. Consequently, the existence of a procreative right provides only the starting point for determining whether restrictions may be constitutional, and further analysis becomes necessary. A more pragmatic objection is that any type of restriction is the beginning of a slippery slope towards regulating not just *what* gametes are available but *who* has access to those gametes.³⁰⁷ In light of American politics, this is a legitimate fear, but, particularly in light of the strong

303. NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL AND PREVENTION, USE OF CONTRACEPTION IN THE UNITED STATES: 1982–2008, at 5 (2010), http://www.cdc.gov/nchs/data/series/sr_23/sr23_029.pdf; R.E.J. Ryder, "Natural Family Planning": *Effective Birth Control Supported by the Catholic Church*, 307 BRIT. MED. J. 723, 723 (1993).

304. The restrictions do not have a disproportionate impact on any protected group.

305. Indeed, the parameters of the right to procreation are less than clear. *See, e.g.*, Ariela R. Dubler, Essay, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1359 (2010) (suggesting how *Skinner* can be read as a case about "disentangling sex from reproduction and the social anxieties raised by that separation"); Cass R. Sunstein, *Is There a Constitutional Right To Clone?*, 53 HASTINGS L.J. 987, 993–94 (2002) (describing ambiguity in Supreme Court jurisprudence on procreational rights relating to reproductive technology); Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1520–27 (2008); Elyse Whitney Grant, Note, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 HASTINGS L.J. 997 (2010).

306. *See* Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008); Fox, *supra* note 6, at 1882. *But see* John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1441 (1998).

307. *See, e.g.*, Ertman, *supra* note 57, at 30–32.

social and financial interests supporting procreative freedom, this should ultimately be unjustified. In fact, the United Kingdom extended equality of treatment to same-sex couples after it abolished anonymity. Moreover, it is entirely unclear what actually causes a shift in norms in the infrastructure of donating. It is no more possible to calculate whether a mix of regulations will reduce childbearing in the long run than it is to tell whether stigmatizing nonmarital births will do so. The result of the latter was younger marriage and more children; the long-term effects of donor regulation may be impossible to predict.

Most fundamentally, however, what this Article proposes is shifting the terms of discussion from “regulation of reproduction” to a focus on respect for family-type interests. Protecting these interests, including limited disclosure of the donor’s identity, should not be viewed as an attempt to regulate reproduction, but instead as a movement to respect the family. Any analysis of potential connections between and within donor-conceived families and the donors should be considered outside of a health, or technological, focus on regulating the reproductive process.

Accordingly, a new paradigm for donor-conceived families considers not just the child, but also the interests of donors, parents, the donor family network, or the larger community. Some parental interests could be *furthered* through this new paradigm, interests such as making contact with genetically related offspring and even the donor, ensuring the integrity of their own families, and respecting their children’s interests. A focus only on regulation, rather than relationships, also overlooks donors’ interests in becoming known and possibly establishing connections with their offspring.³⁰⁸

Taken together, these arguments show the importance of focusing on the interests of the existing child and her web of relationships and support. Ensuring an adequate supply of donors is critical to a medical model of donor families, but the issue is less germane once the relational concerns of family law become a significant factor.

3. Privacy and Unwanted Contact

One man, who has been donating anonymously since 2004, said he was not opposed to his 13 offspring contacting him when they were adults but wanted “fair warning” before his phone number and address were handed out. “These people are strangers so of course I would be concerned if they were given my home number,” he said. “What if my own child was to answer the phone to someone who said ‘hello, I’m your sister’. I think the privacy of my fiancé

308. This objection might be resolved by allowing intending parents and donors to choose an open-identity option so that they retain the possibility of connection, by allowing a market in which both disclosure and nondisclosure are available. This does not, however, protect existing children who seek disclosure if they are born to parents who have opted against disclosure; it (somewhat paternalistically) denies that intent might change over time; and, critically, it suggests that, apart from perhaps a child’s interests, there is no other conceivable state interest in mandating disclosure. My thanks to Professor Cohen for helping me sharpen this argument.

and prospective children should be protected considering I did this anonymously.”³⁰⁹

A third objection is that simply allowing for identifying information about the donor and other genetic offspring will then result in unwanted contacts and efforts to establish a relationship, violating the constitutionally protected privacy rights of all involved. The strongest version of this argument also suggests that this will disrupt relationships in the donor-conceived families as well as in the donor’s family. This argument predicts that offspring or their parents will “force” themselves into other families where, for example, the offspring may not even know they were donor-conceived, or the donor may never have told her family about the potential existence of these children. Donors may be reluctant to find out that they have helped conceive dozens of offspring, they may be concerned about legal liability, or they may be worried about offspring who are emotionally needy. They might claim that recognizing identity rights could produce discord (regardless of whether there is an obligation to form a relationship) because any attempted contact could invade the privacy of donors. Indeed, the obligation to form a relationship aside, donor-conceived children or parents could still force themselves into other families without any party presuming the existence of an obligation to form such a relationship. Finally, as a corollary, contact may feel threatening to the parents as they wonder about “sharing” their child.³¹⁰

The primary problem with this argument is that it conflates the right to identity with the obligation to form a relationship. It also suggests a deep-seated insecurity in the donor-conceived family between parent and child, an insecurity which is unwarranted.³¹¹ Donor-conceived people could learn the identity of their donors, or even the identity of donor-conceived offspring, yet there might never be any contact. Laws permitting identity disclosure recognize the legitimate interest in obtaining this information, but do not require contact or further interaction by anyone involved; there are no mandated, legally recognized relationships. Donor family networks depend on mutuality and reciprocity.³¹² Of course, while many families and donors will welcome the contact, some may

309. Kate Benson, *Fertility Law Change Puts Spotlight on Donors*, SYDNEY MORNING HERALD (Austl.), Feb. 25, 2009, <http://www.smh.com.au/national/fertility-law-change-puts-spotlight-on-donors-20090224-8guk.html>.

310. See SHULER, *supra* note 96, at 6. This was an argument in the adoption context as well. See HOWARD ET AL., *supra* note 248, at 17.

311. Studies have repeatedly found that the primary reason that donor-conceived people search for their donors is curiosity, although many do also desire to form a relationship with the donor. See, e.g., Beeson et al., *supra* note 80, at 2420 tbl.4; see also Caroline Lorbach, *Information Needed on Donor Parents*, TIMES-COLONIST (Can.), July 17, 2011, <http://www.timescolonist.com/health/Information+needed+donor+parents/5115569/story.html#ixzz1SfXyKoZW> (mother of three donor-conceived children observing that “[d]onor-conceived people are not looking for parents What they are looking for is the missing pieces to complete their sense of self.”).

312. This is another aspect of their difference from other types of families; while you typically choose your adult partner, you do not choose your children—or your parents.

not want any kind of relationship. Even if they are under no legal obligation to respond, donors may find the attempted contact would still be bothersome or invasive. Consequently, it is critical to ensure the legal clarity of donor's rights. Allowing for limited identity disclosure does not become a basis for arguing that donors have any legal obligations. Donors should have neither legal rights nor duties in the absence of an enforceable contract providing otherwise.³¹³

Claims that unwanted intrusions will result suggest that those interested in searching will be unable to set limits. Indeed, when states have opened records to adopted individuals, there have been few complaints about unwelcome contacts.³¹⁴ Some donors may be overwhelmed by the number of offspring they have helped create, and respond only to the first twenty, but then stop. They are, of course, under no legal obligation to respond to the remaining eighty.

Parents who have created families with donor gametes may not welcome contact from half-siblings, and may feel threatened in their own parenting as their offspring search. For example, parents who do not disclose the fact of donation are often worried about the harm to their relationship with their children, particularly between the child and the nonbiological parent.³¹⁵ A nonbiological parent may fear rejection if a child finds the genetically related donor, or lesbian families may hesitate about reaching out to straight donors.

There are three responses. First, most contacts are positive.³¹⁶ But second, given the rate of technological change in the ability of genetic tracing, practices of anonymity may simply collapse as science allows for increasingly accurate genetic identifications.³¹⁷ While these practical realities do not answer jurispru-

313. See Cahn, *supra* note 146, at 221–22.

314. MADELYN FREUNDLICH, EVAN B. DONALDSON ADOPTION INST., FOR THE RECORDS: RESTORING A LEGAL RIGHT FOR ADULT ADOPTEEES 18–19 (2007), http://www.adoptioninstitute.org/publications/2007_11_For_Records.pdf; HOWARD ET AL., *supra* note 248, at 33–34. This is another example of how the ART world can learn from the adoption world. See, e.g., CAHN, *supra* note 138.

315. See, e.g., MUNDY, *supra* note 38, at 183 (discussing fathers' discomfort with telling child about donor conception); Dorothy A. Greenfeld & Susan Caruso Klock, *Disclosure Decisions Among Known and Anonymous Oocyte Donation Recipients*, 81 FERTILITY & STERILITY 1565, 1567 (2004) (noting that some women who chose anonymous donors did so to prevent the donor from interfering with their parenting decisions); Susan Caruso Klock & Dorothy A. Greenfeld, *Parents' Knowledge About the Donors and Their Attitudes Toward Disclosure in Oocyte Donation*, 19 HUM. REPROD. 1575, 1578 (2004) (discussing parental concerns that child will become alienated from nongenetic parent); Dena Shehab et al., *How Parents Whose Children Have Been Conceived with Donor Gametes Make Their Disclosure Decision: Contexts, Influences, and Couple Dynamics*, 89 FERTILITY & STERILITY 179, 182–83 (2008) (fear of disrupting relationship).

316. See *supra* text accompanying notes 93–97. This has certainly been true in the adoption context, where similar fears have been expressed. See HOWARD ET AL., *supra* note 248, at 33–34. And, in adoptions that have allowed contact between the birth parents and the adoptive family, there are few regrets. E.g., Harold D. Grotevant et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 ADOPTION Q. 79 (2008).

317. See, e.g., Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, NEW SCIENTIST (Nov. 3, 2005), <http://www.newscientist.com/article/mg18825244.200>; Alison Smith Squire, *A Generation of Sperm Donor Children Are Discovering the Father They Know and Love Is NOT Their Father at All*, DAILY MAIL (U.K.), Mar. 19, 2009, <http://www.dailymail.co.uk/femail/article-1163032/A-generation-sperm-donor-children-discovering-father-know-love-NOT-father-all.html> (writing that as a result of

dential concerns about privacy, they do show the urgency of addressing the jurisprudential issues. One solution, which would mirror the adoption world, permits the filing of contact preference forms, so that a donor or donor-conceived family could indicate no interest in contact.³¹⁸ While difficult to enforce outside of stalking laws, these forms would provide useful information about the willingness of the gamete provider to engage with offspring. Those receiving information might also be required to receive counseling³¹⁹—particularly important where a no-contact form is on file—to help them handle their emotions.³²⁰

Finally, privacy is a relational concept. As we consider what will be disclosed, information must be considered in context, which means that “the relationships in which the information is transferred and the ways in which it is used become the central focus of inquiry.”³²¹ Disclosure, then, is harmful when information is disseminated beyond its intended audience, but the mere act of disclosure is not intrinsically harmful.³²² While retroactive release of identifying information may raise privacy issues, future laws that establish parameters for identity release in the donation process do not trigger these concerns.³²³

CONCLUSION

As these families come together, there is much uncharted territory on how to define their connections. While existing doctrines provide some useful analogies, they are incomplete models. This Article has explored how the law might begin to nurture relationships, foster emotional connection, and recognize the multiple forms of intrafamily relationships. It has suggested a paradigm shift, regulating donor-conceived families communities not just as scientific and

DNA test, a woman found out she had two half-siblings, and ultimately was able to trace her sperm donor); see also Elizabeth E. Joh, Essay, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857 (2006) (describing forms of involuntary genetic testing).

318. For examples in the adoption context, see ALA. CODE § 22-9A-12(d) (LexisNexis 2006) (contact preference form); ME. REV. STAT. tit. 22, § 2769(3) (Supp. 2010) (same); TENN. CODE ANN. § 36-1-128 (2010) (availability of no-contact form). The forms typically provide the opportunity to indicate a preference for contact, contact with an intermediary, or no contact.

319. The choice to require counseling as opposed to an opt-in system depends on governmental priorities. Certainly, allowing recipients of information to choose counseling is a more flexible option, but the state might decide that the impact of the information merits mandatory counseling. See Blyth & Frith, *supra* note 243, at 181 (discussing various government-required forms of counseling).

320. Somewhat ironically, Monica Bowers and her wife chose not to use an identity-release donor precisely because they “considered that contacting the donor could possibly be a traumatic experience for our child. We can neither control nor predict the ID-Release donor’s reaction 18 years from now, if our son were to contact him.” Monica Bowers, *Cryobanks and Donor Anonymity*, THE EXAMINER, Jan. 20, 2009, <http://www.examiner.com/lgbt-parenting-in-national/cryobanks-and-donor-anonymity#ixzz1SYrhV3OK>.

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

322. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 532–35 (2006).

323. And, as discussed *supra* note 318 and accompanying text, the no-contact forms can provide protection against unwanted communications.

medical constructs but also as relational entities. Families connected through the same donor, but who do not share dependencies or a home, may develop emotional intimacies that resemble those of other familial structures. These relationships transcend their origins, which may be rooted in commercial transactions and medical cures. Family law will need to adapt existing doctrines as it develops an approach to these families. The difficulty, as is the case whenever existing laws must evolve to cover new situations, is determining how to apply legal standards and institutions developed for other purposes.

This process of evolution must respect the particular characteristics of donor-conceived familial relationships. This Article has suggested that the law adapt to these new families in two basic ways. First, these relationships must find a home within family law in addition to their current home within health law. Second, the traditional focus in family law on relationships and on a child's best interests should replace the existing medicalized focus on patients' interests in the donor world. While the simple biological relationship should not necessarily entitle members to privileges or state support of the relationships within traditional family law doctrine, it should entitle members to state regulation based on fairness and other important goods at stake.

The law already provides a background to the development of donor-conceived families; it does not provide adequate structure to answer the challenges raised by these families. As the number of families that owe their existence to reproductive technology increases, the paradigm for regulation and respect must be based on family law, which has historically regulated comparable relationships. This Article provides a framework for conceptualizing how family law and constitutional law can adapt to establish basic principles to ensure the integrity of donor-conceived family networks. These principles have even broader application, leading to changes in how we conceive families. The kinds of reforms with respect to gamete donation will reinforce the open records in adoption movement, and should help in the recognition of the equality of collaboratively formed families of various kinds—adoptive families (both domestic and transnational), donor gamete families, and surrogacy families, regardless of their genetic relatedness. Ultimately, recognizing donor-conceived family communities will promote a more nuanced understanding not only of the meaning of family relationships, but will also challenge concepts of genetically-based relationships. It can affirm the integrity and privacy of families, however they are formed, while also recognizing the significance of understanding and connecting to one's genetic origins. Indeed, the paradigm shift in the donor world could prompt broader changes more generally, creating options beyond framing all families within the dyadic nuclear family model. Without diluting parental responsibility, a new model can acknowledge pluralism of family forms. The result would benefit those in all family forms, including heterosexual, biologically formed ones.