

**NO SECRETS: OPENNESS AND DONOR-CONCEIVED  
“HALF-SIBLINGS”**  
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I. INTRODUCTION

The worlds of adoption and assisted reproductive technology (ART)<sup>1</sup> have much in common—and they are very different. Both adoption and ART are means for creating families in which the child is not genetically related to one or both parents, facilitating the formation of alternative family forms. Similarly, both must balance the potentially competing rights and interests of the parties involved, whether they are gamete providers, recipients, and donor-conceived offspring; or birthparents, adoptive parents, and adopted persons. Both have been cloaked in secrecy (although ART has been subject to even more secrecy and much less regulation than has adoption).<sup>2</sup> In addition, objections to increased disclosure about a child’s biological origins have used comparable language in each area.<sup>3</sup>

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<sup>1</sup> ART is a general term that refers to a variety of methods for achieving pregnancy by assisted means. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3–4 (2010), available at [http://www.cdc.gov/art/ART2008/PDF/ART\\_2008\\_Full.pdf](http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf). ART 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/IVF) to using sperm/egg (gamete) and embryos created by others. Although the CDC does not include sperm donation, *id.*, this paper will include the practice because of its focus on third party reproduction, that is, ART involving the exchange of gametes. A note on language, which is somewhat contested in this area: gamete exchanges include the sale or gift of sperm, eggs, and embryos, even though they are typically referred to as “donor” gametes or embryos.

<sup>2</sup> See NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 73–74 (2009) [hereinafter CAHN, TEST TUBE FAMILIES].

<sup>3</sup> See *id.* at 77, 116.

While adoption does not necessarily set out model policies for the regulation of ART, adoption does offer some templates for establishing policies for families formed outside of the traditional nuclear biological family structure. Modern approaches to adoption began to develop in the United States in the mid-nineteenth century, while modern approaches to ART began to develop in the mid-twentieth century. Accordingly, the adoption world has struggled for a longer time with the equivalence of families formed through the intervention of third parties and families formed without third party intervention, as well as with managing the relationships between adoptive families, the adopted individual, and the birth parents.<sup>4</sup> Adoption now provides more explicit acknowledgement of the complexities of adoptive families as well as the complexities of the relationships between members of the adoption process.<sup>5</sup> As this has occurred, the adoption world has moved towards more “openness”<sup>6</sup> in various contexts, including: (1) adoption with contact, whereby, the birthparents meet and then maintain some ongoing (albeit limited) connection to the adoptive family and (2) records availability, with virtually all states allowing for some degree of disclosure to adopted individuals with respect to their original birth certificates.<sup>7</sup> Indeed,

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<sup>4</sup> See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003) [hereinafter Cahn, *Perfect Substitutes*]. To be sure, many adoptions occur within biological families, such as through stepparent or second-parent adoptions. See, e.g., Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA’s Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 244 (2010).

<sup>5</sup> See CAHN, TEST TUBE FAMILIES, *supra* note 2, at 73–79 (charting how the development of adoption laws in America reflects the development of more complex and varied realities).

<sup>6</sup> The language in this area is quite complex. “Openness” itself implies such a broad spectrum of possibilities that it needs further definition. Moreover, use of the term “donor” suggests that gametes involve altruistic gifts when, in fact, they typically involve financial compensation. Or consider the terms “natural parents” verse “birth parents” in the adoption context.

<sup>7</sup> *Access to Adoption Records: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY (Dep’t of Health & Human Servs., Washington, D.C.), June 2009, at 1–6, available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/infoaccessapall.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessapall.pdf); Madelyn Freundlich, *For the Records: Restoring a Legal Right for Adult Adoptees*, 2007 EVAN B. DONALDSON ADOPTION INST. 1, available at [http://www.adoptioninstitute.org/publications/2007\\_11\\_For\\_Records.pdf](http://www.adoptioninstitute.org/publications/2007_11_For_Records.pdf); Jeanne A. Howard et al., *For the Records II: An Examination of the History and Impact of Adult Adoptee Access to Original Birth* (continued)

openness provides one area of overlap, and adoption can provide some important insights for ART. The ART world is quite distant from the adoption world when it comes to openness. Donors often do not know whether their gametes have resulted in any offspring, and no state has provided for disclosure of the identity of a donor.<sup>8</sup>

This article examines various aspects of openness in adoption and the ART context as a basis for exploring the importance of allowing donor-conceived half-siblings to find one another. The relatively closed nature of the ART system, in which children may not know of their origins, donors and recipients may never meet, and the possibility that offspring will find half-siblings is realized on an ad hoc basis, could be profoundly affected by lessons from the legal regulation of adoption, notwithstanding the differences between the two means of creating families. At another Wells conference five years ago, Professor Ellen Waldman carefully considered similar issues of privacy and openness and concluded: “Data on donor offspring suggests that openness in families should be encouraged, but no crisis in donor offspring welfare exists that requires urgent repair. Moreover, the question remains whether law is the best mechanism for changing the way third-party conception is handled within the intimate family sphere.”<sup>9</sup> As more studies of donor offspring emerge, and as technological developments continue to overshadow legal developments,<sup>10</sup> there are issues that the law can and should productively address. Legal intervention provides the most secure means for ensuring basic protections of both privacy and limited disclosure. Moreover, new studies show how donor offspring are affected by their status and by finding others who share the same donor—“donor siblings.”<sup>11</sup>

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*Certificates*, 2010 EVAN B. DONALDSON ADOPTION INST. 1, available at [http://www.adoptioninstitute.org/publications/7\\_14\\_2010\\_ForTheRecordsII.pdf](http://www.adoptioninstitute.org/publications/7_14_2010_ForTheRecordsII.pdf).

<sup>8</sup> See, e.g., CAHN, TEST TUBE FAMILIES, *supra* note 2, at 116.

<sup>9</sup> Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 560 (2006); see also Lynn Marie Kohm, *What's My Place in This World? A Response to Professor Ellen Waldman's What Do We Tell the Children?*, 35 CAP. U. L. REV. 563 (2006) (“This article responds to Professor Ellen Waldman’s suggestions by seeking to listen to children themselves to discern their deepest needs.”).

<sup>10</sup> See Gaia Bernstein, *The Role of Diffusion Characteristics in Formulating a General Theory of Law and Technology*, 8 MINN. J.L. SCI. & TECH. 623 (2007); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002) [hereinafter Bernstein, *The Socio-Legal Acceptance of New Technology*].

<sup>11</sup> See CAHN, TEST TUBE FAMILIES, *supra* note 2, at 126.

This article recommends that, in the ART world, openness should mean not just telling a child that she is donor-conceived and allowing her to access records concerning her donor but also should include providing information about half-siblings and the opportunity to connect. The article explores this paradigm-shifting<sup>12</sup> change in the meaning of disclosure in the ART world, showing how legal regulation can ensure respect for the interests of all involved. It first sets out a typology of openness in the adoption world before turning to a comparison of openness in the adoption and ART worlds. Next, it explores the development of connections between donor-conceived families, examining studies of these connections. Finally, it suggests how the law can (and why it should) facilitate these connections both between donors and their genetically related offspring and between the genetically related offspring themselves.

## II. OPENNESS IN ADOPTION

Openness in adoption refers to several practices: first, the adopted adult's right to obtain information about her original birth certificate; second, the information provided to prospective adoptive parents about the child and her origins; and third, the ability for some openness, such as an exchange of information or contact, to exist between the biological parents and the new adoptive family.<sup>13</sup> Openness, thus, covers the adopted adult's interest in learning about her biological family as well as the interests of the adults involved in learning more about each other and potentially

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<sup>12</sup> See Naomi Cahn, *Finding Families* (July 21, 2010) (unpublished manuscript) (on file with author) [hereinafter Cahn, *Finding Families*], for further discussion of the paradigm shift.

<sup>13</sup> 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 (2008) [hereinafter Appell, *The Endurance of Biological Connection*]; Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 *CHILD. LEGAL RTS. J.* 24 (1998); David M. Brodzinsky, *Reconceptualizing Openness in Adoption: Implications for Theory, Research, and Practice*, in *PSYCHOLOGICAL ISSUES IN ADOPTION: RESEARCH AND PRACTICE* 145, 152 (David Brodzinsky & Jesus Palacios eds., 2005) (referring to a "continuum" of different meanings of openness, depending on how willing individuals are to engage in communication about all of the processes of adoption); Harold D. Grotevant et al., *Openness in Adoption: Outcomes for Adolescents Within Their Adoptive Kinship Networks*, in *PSYCHOLOGICAL ISSUES IN ADOPTION: RESEARCH AND PRACTICE*, 167, 167 (David Brodzinsky & Jesus Palacios eds., 2005).

remaining in contact.<sup>14</sup> As this section explores, all three aspects of openness in adoption have been transformed over the past half-century.

A. *The Legal Progression of Open and Sealed Records*

While original birth certificates<sup>15</sup> were not sealed following an adoption in the majority of states until the 1950s, they were then sealed in almost all states.<sup>16</sup> Only Alaska and Kansas never sealed their records to preclude adopted adults from accessing their original birth certificates.<sup>17</sup> A 1917 Minnesota statute was one of the first ones to restrict confidentiality in adoption: only the “parties in interest and their attorneys and representatives of the state board of control” were allowed to access adoption court files.<sup>18</sup>

The rationale for sealing records was to protect those involved in the adoption; it was not designed to prevent them from having access to this information.<sup>19</sup> Instead, records were made confidential and closed to protect against public access based on concerns about the stigma of illegitimacy and nonmarital motherhood.<sup>20</sup> Originally, the goal of the early statutes was to prevent only the press and general public from being able to access information about nonmarital mothers and their children; therefore, the statutes did not limit the birth parents, adoptive parents, or the adoptees from acquiring the information in court or agency files.<sup>21</sup> Later, in order to protect adoptive families from the stigma of infertility and to create the fiction of a biological family, statutes broadened their access restrictions.

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<sup>14</sup> Appell, *The Endurance of Biological Connection*, *supra* note 13, at 303.

<sup>15</sup> E. Wayne Carp, *How Tight Was the Seal? A Reappraisal of Adoption Records in the United States, England and New Zealand, 1851–1955*, in INTERNATIONAL ADVANCES IN ADOPTION RESEARCH FOR PRACTICE 17, 19 (Gretchen Miller Wrobel & Elsbeth Neil eds., 2009) [hereinafter Carp, *How Tight Was the Seal?*] (noting there are three different kinds of records relating to an adoption: court records, agency case files, and birth certificates).

<sup>16</sup> Elizabeth J. Samuels, *The Strange History of Adult Adoptee Access to Original Birth Records*, 5 ADOPTION Q. 63, 64 (2002).

<sup>17</sup> See 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).

<sup>18</sup> See E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 40 (1998) [hereinafter CARP, FAMILY MATTERS] (quoting Children’s Code of Minnesota, ch. 222, 1917 Minn. Laws 335, 337).

<sup>19</sup> Carp, *How Tight Was the Seal?*, *supra* note 15, at 19.

<sup>20</sup> *Id.*; see Jennifer Butch, Note, *Finding Family: Why New Jersey Should Allow Adult Adoptees Access to Their Original Birth Certificates*, 34 SETON HALL LEGIS. J. 251, 257–59 (2010).

<sup>21</sup> CARP, FAMILY MATTERS, *supra* note 18, at 40–41.

These statutes, mostly enacted from the early twentieth century until the late 1960s, limited the access of adoption records, preventing even the adopted parents, adoptees, and birth parents from obtaining these records.<sup>22</sup> In a state which sealed records, not only was the adopted child's original birth certificate sealed, but the adopted child was also issued a new birth certificate that listed the adoptive parents as the child's biological parents.<sup>23</sup> Most states eventually created a complete bar to anyone accessing court or agency documents relating to an adoption. Unless an individual could prove to a court that there was "good cause to make the information available," individuals participating in a particular adoption could not access their own adoption records.<sup>24</sup> As is true of the ART world, sealed records created a fiction of a fully biologically formed family.

In reaction to these strict access boundaries, beginning in the 1970s, many adult adoptees, their birth parents,<sup>25</sup> and adoptive parents began pursuing legal action, both judicially and legislatively, to change the laws to permit access. In addition, these individuals began using the media as a tool for challenging the sealing of their record. Although these court challenges were unsuccessful,<sup>26</sup> the open records movement has achieved some success through legislation and citizen initiatives.<sup>27</sup> As a result of these efforts, in an increasing number of states, legislatures have considered and enacted bills that would allow adult adoptees access to their original birth certificates.<sup>28</sup> Currently, six states provide general access to

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<sup>22</sup> See Carp, *How Tight Was the Seal?*, *supra* note 15, at 20–24; Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER F. WORLD AFF. 181, 189 (2004).

<sup>23</sup> CARP, FAMILY MATTERS, *supra* note 18, at 54–55.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> For information on the psychology of birth parents see, for example, Susan Livingston Smith, *Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process*, 2007 EVAN B. DONALDSON ADOPTION INST. 1, available at [http://www.adoptioninstitute.org/publications/2006\\_11\\_Birthparent\\_Study\\_All.pdf](http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_All.pdf).

<sup>26</sup> See Howard et al., *supra* note 7, at 22; Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 161–62 (1999).

<sup>27</sup> Howard et al., *supra* note 7, at 12–13.

<sup>28</sup> See, e.g., S. 799 & 1399, 214th Leg. (N.J. 2010); S. 5269, H.R. 7877, 2010 Gen. Assemb., Jan. Sess. (R.I. 2010).

them for adult adoptees.<sup>29</sup> Another three provide general access with a few restrictions:<sup>30</sup> in Delaware and Illinois, the birth parent can veto access,<sup>31</sup> and in Tennessee, the birth certificate is available except in cases of rape.<sup>32</sup> Other states permit access in more limited ways, but the trend toward more disclosure, both retrospectively and prospectively, is growing.<sup>33</sup> Laws regarding access to original birth certificates by adult adopted persons also have evolved internationally towards more openness.<sup>34</sup>

### *B. Psychological Consequences, Openness, and Adoption*

Being adopted has psychological consequences for many of those involved in the process. As adoptees become adolescents and young adults, they are more likely to report that their identity as adoptees is significant to them.<sup>35</sup> Research has also documented the negative impact of secrecy on adopted persons and adoptive family functioning.<sup>36</sup> One of the reasons that adoptees have higher rates of psychological treatment may be because of the more complex issues of identity that they confront.<sup>37</sup> In popular culture, Rapper DMC explained, “This is really about identity and the truth of a human being’s existence.”<sup>38</sup> Parents who are more open and communicative with their adopted children facilitate their children’s

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<sup>29</sup> ALA. CODE § 22-9A-12 (LexisNexis 2006); ALASKA STAT. § 18.50.500 (2008); KAN. STAT. ANN. § 65-2423 (2002); ME. REV. STAT. tit. I, § 2768 (Supp. 2009); N.H. REV. STAT. ANN. § 170-B:24 (LexisNexis 2010); OR. REV. STAT. § 432.240 (2009).

<sup>30</sup> DEL. CODE ANN. tit. 13, § 923 (2009); 750 ILL. COMP. STAT. 50/18.05 (West 2009); TENN. CODE ANN. § 36-1-127 (2010).

<sup>31</sup> DEL. CODE ANN. tit. 13, § 923; 750 ILL. COMP. STAT. 50/18.3.

<sup>32</sup> TENN. CODE ANN. § 36-1-27(e)(2).

<sup>33</sup> *Access to Adoption Records*, *supra* note 7, at 5–6; *see* Freundlich, *supra* note 7, at 11; Howard et al., *supra* note 7, at 13.

<sup>34</sup> 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, 49 (2008) [hereinafter Carp, *Opening Adoption Records*].

<sup>35</sup> Holly McGinnis et al., *Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption*, 2009 EVAN B. DONALDSON ADOPTION INST. 29, available at [http://www.adoptioninstitute.org/publications/2009\\_11\\_BeyondCultureCamp.pdf](http://www.adoptioninstitute.org/publications/2009_11_BeyondCultureCamp.pdf).

<sup>36</sup> For a summary of some of this research, see, for example, E. Gary Spitko, *Open Adoption, Inheritance, and the “Uncleing” Principle*, 48 SANTA CLARA L. REV. 765, 766–67 (2008); Appell, *The Endurance of Biological Connection*, *supra* note 13, 295–96, 303.

<sup>37</sup> ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 85 (2000).

<sup>38</sup> Wendy Koch, *As Adoptees Seek Roots, States Unsealing Records*, USA TODAY, Feb. 13, 2008, at 2A.

adjustment; by contrast, children who experience greater secrecy feel more distant from their parents and often had difficulties with identity and trust issues.<sup>39</sup> More communication between parents and children about the child's origins is associated with more positive child and family functioning in both adopted children and children conceived through ART.<sup>40</sup> When surveyed, adult adoptees have provided several reasons to explain why they want to know about their birth origins:

Adult adoptees cite health-related, medical, and psychological reasons for wanting to know the identity of their birth parents. Many are searching to fill in what they claim are missing parts of their identity, for an explanation of why they were relinquished for adoption, or to reassure their birth parents that they are well. Adoptees who seek information about their birth parents are generally not estranged from their adoptive families; indeed, in recent years many adoptive parents have supported their children's search efforts.<sup>41</sup>

As openness becomes more acceptable, this helps dissolve any stigma that might have been associated with being adopted.

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<sup>39</sup> See Brodzinsky, *supra* note 13, at 164; Judith A. Feeney, Nola L. Passmore & Candida C. Peterson, *Adoption, Attachment and Relationship Concerns: A Study of Adult Adoptees*, 14 PERS. RELATIONSHIPS 129, 130 (2007); Nola L. Passmore, Alexis R. Foulstone & Judith A. Feeney, *Openness and Secrecy in Adoptive Families and Possible Effects on the Interpersonal Relationships of Adult Adoptees* 5 (Univ. of S. Queensland, Research Paper), available at [http://eprints.usq.edu.au/4294/2/Passmore\\_Foulstone\\_Feeney\\_AV.pdf](http://eprints.usq.edu.au/4294/2/Passmore_Foulstone_Feeney_AV.pdf) (last modified July 9, 2010).

<sup>40</sup> See, e.g., Roni Berger & Marilyn S. Paul, *Family Secrets and Family Functioning: The Case of Donor Assistance*, 47 FAM. PROCESS 553, 559 (2008) (noting that openly communicating families may function better); David M. Brodzinsky, *Family Structural Openness and Communication Openness as Predictors in the Adjustment of Adopted Children*, 9 ADOPTION Q. 1, 5 (2006) (noting that openness helps the adjustment process for adoptees); Marilyn S. Paul & Roni Berger, *Topic Avoidance and Family Functioning in Families Conceived with Donor Insemination*, 22 HUM. REPROD. 2566, 2567, 2569 (2007) (describing how secrecy in adoptive families has a negative effect on relationships and how having both parents disclose a child's donor origins correlates with better family functioning).

<sup>41</sup> Naomi R. Cahn & Joan Heifetz Hollinger, *Adoption and Confidentiality*, in FAMILIES BY LAW: AN ADOPTION READER 123, 123 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). See generally PERTMAN, *supra* note 37 (adoptive father advocating for open records).

*C. Openness in Contemporary Adoption: Expansions and Frustrations*

Current law in every state now permits adoptees and their adoptive parent's access to non-identifying information.<sup>42</sup> Adoptive parents can access their child's medical background and may also be able to obtain other basic background information.

Furthermore, in the 1980s and 1990s, states instituted procedures that allowed adoptees and their birth families to exchange information where there was evidence of "mutual consent" to do so. These procedures typically take one of two forms: first, about thirty states have mutual voluntary consent registries, where information is released when a birth parent and an adoptee, after her eighteenth or twenty-first birthday, both file consent forms;<sup>43</sup> or second, in more than a dozen states, there are confidential intermediary systems whereby if an adoptee or biological parent requests identifying information, the state has an affirmative obligation to search for and to request consent from the other party to the release of the information.<sup>44</sup> These procedures are indirect and often frustrating.

Outside of Alaska and Kansas, relatively few states permit adult adoptees to routinely access their original birth certificates.<sup>45</sup> In those states that began to allow for the release of identifying records,<sup>46</sup> there were fears about invasions of birth parents' privacy; these concerns appear to have been overstated.<sup>47</sup> For example, in the first nine years after Oregon implemented an open records policy, more than ten thousand adult

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<sup>42</sup> See, e.g., ALA. CODE § 26-10A-31(g) (LexisNexis 2009); MICH. COMP. LAWS ANN. § 710.68 (West 2002); MISS CODE. ANN. § 93-17-207 (2004); N.C. GEN. STAT. ANN. § 48-9-103 (2009); S.D. CODIFIED LAWS § 25-6-15.2 (2004).

<sup>43</sup> *Access to Adoption Records*, *supra* note 7, at 4.

<sup>44</sup> Cahn & Singer, *supra* note 26, at 165; see also CARP, FAMILY MATTERS, *supra* note 18, at 225 (noting that seventeen states permit a confidential intermediary to investigate).

<sup>45</sup> Howard et al., *supra* note 7, at 13.

<sup>46</sup> Several states now allow adoptees to obtain their original birth certificates if their adoptions were completed after the late 1990s. See *id.* Alabama, Maine, New Hampshire, and Oregon now allow adult adoptees access to original birth certificates to those born within their borders; Tennessee, Delaware, and Illinois are working to restore access to adopted persons but with restrictions. *Id.*

<sup>47</sup> See Carp, *Opening Adoption Records*, *supra* note 34, at 32, 37-38.

adoptees requested their birth records and very few birth parents (eighty-five) filed forms indicating a preference for no contact.<sup>48</sup>

Supporters of open birth records often justify their position by stating that adoptees have the same rights as any other person in accessing information about their birth. Alternatively, opponents argue that such unrestricted access is a violation of the birth parents' right to privacy.<sup>49</sup>

A second expansion of openness has occurred in the context of information sharing between agencies, biological parents, and adoptive parents. In the early part of the twentieth century, information about family origins was minimal, rarely recorded, and to the extent that it existed, it was often inaccurate.<sup>50</sup> As adoption agencies collected more background information in the 1950s, they shared only "positive" aspects of the child's history with prospective parents.<sup>51</sup> By contrast, best practices in the contemporary adoption field support collecting as much background history as possible and providing non-identifying portions, such as health and social information about the birthparents and the child, to both adoptive parents and adult adoptees.<sup>52</sup> Information about children's birthparents is now routinely shared with prospective adoptive parents and vice-versa.<sup>53</sup> At the same time, practice has shifted so that in domestic

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<sup>48</sup> Or. Health Authority, *Measure 58 Update: Significant Dates and Events: Nine Year Anniversary Report*, OREGON.GOV (May 31, 2009), <http://www.oregon.gov/DHS/ph/chs/order/58update.shtml#05312009>.

<sup>49</sup> See Howard et al., *supra* note 7, at 22; Cahn & Singer, *supra* note 26, at 157–58.

<sup>50</sup> See, e.g., Steve Mulligan, *Inconsistency in Illinois Adoption Law: Adoption Agencies' Uncertain Duty to Disclose, Investigate, and Inquire*, 39 LOY. U. CHI. L.J. 799, 804–05 (2008).

<sup>51</sup> See Madelyn Freundlich, Evan B. Donaldson Adoption Inst., & Lisa Peterson, Spence-Chapin Servs. to Families & Children, Presentation at the American Bar Association's Ninth National Conference on Children and the Law: Wrongful Adoption: Litigation/Practice Issues 3 (Apr. 8–10, 1999), available at <http://www.adoptioninstitute.org/policy/wrongful.html>.

<sup>52</sup> See Mulligan, *supra* note 50, at 808; see also D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 686–87 (1992) (pointing out deficiencies in state disclosure statutes); Laura Methvin, *Improving Access to Nonidentifying Medical Information in Florida Adoptions: A Call for Legislation*, 22 FLA. ST. U. L. REV. 565, 566–67 (1994) (examining why adoptees should know their family medical histories).

<sup>53</sup> See Brent J. Clayton, Note, *How Much Do You Need to Know About Yourself? Why Utah Should Start Letting More Adult Adoptees Decide*, 10 J.L. & FAM. STUD. 421, 429 (2008) ("The adoption process has become increasingly open as participants and observers alike have recognized the benefits of a mature understanding of the circumstances."); see

(continued)

infant adoption, expectant mothers and fathers (when they are involved) often select the adoptive parents for their children, and they typically receive background information on prospective adoptive families in order to make an informed choice.<sup>54</sup> The Oscar-winning movie *Juno*<sup>55</sup> is representative of the common practice in which birthparents and prospective adoptive parents meet each other and increasingly develop plans allowing for post-adoption contact.<sup>56</sup>

This final form of openness reflects the ability of biological parents to remain in contact with the adoptive family. In states that recognize open adoptions, the adoptive family is the child's legal family, but the biological parents retain rights, such as visitation or annual updates.<sup>57</sup>

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also Kirsten Widner, Comment, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 357 (2007) (noting the increase of "open adoptions" where birthparents and adoptive parents meet to share information).

<sup>54</sup> See, e.g., Leigh Gaddie, Comment, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 500 (2009). Most adoptions are "open" in some way, such that the adoptive parent and birth parent have some form of contact. Analisa Nazareno, *Birth Moms Share a Lingering Regret: Women Who Gave Their Infants for Adoption Are Meeting Today*, SAN ANTONIO EXPRESS-NEWS, May 11, 2002, at 1B.

<sup>55</sup> JUNO (Fox Searchlight Pictures 2007).

<sup>56</sup> See, e.g., Grotevant et al., *supra* note 13, at 168. See generally Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995) (discussing and comparing different legal methods of facilitating open adoptions and how such adoptions may benefit dependent children); Annette R. Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1 (2010) [hereinafter Appell, *Toward a More Child-Centered Adoption*] (reflecting on the trend of recent decades towards more open adoptions and how states' laws and judicial decisions have both helped and hindered this transition); Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L.J. 163 (2002) (exploring the possibility of contact between birth parent, adoptive parents, and child).

<sup>57</sup> Joan Heifetz Hollinger, *Agreements and Court Orders for Post-Adoption Contact Between Adoptive Families and Birth Parents or Other Birth Relatives*, in ADOPTION LAW AND PRACTICE app. § 13-B.02 (Joan Heifetz Hollinger ed., 2009). These agreements are enforceable in twenty-one states including Arizona, California, Connecticut, Florida, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Vermont, Washington, and West Virginia. *Id.*

### III. SAMENESS AND DIFFERENCE: COMPARING ADOPTION AND ART

Numerous similarities and differences provide the basis for any discussion on the meanings of openness in both adoption and ART. First, while both adoption and ART are means of creating families that serve as alternatives to the traditional nuclear and biologically formed family, their demographics differ.<sup>58</sup> Second, ART typically involves the sale of so-called donor gametes, and 45% of ART children in a recent study indicated that the exchange of money disturbed them (although ART offspring are more likely, the study showed, to participate in third party reproduction themselves).<sup>59</sup> Adoption strictly prohibits baby selling.<sup>60</sup> Third, the legal structure for each is entirely different; adoption is highly regulated, while ART has evolved with far fewer legal interventions.<sup>61</sup> Finally, the differing meanings of openness in the adoption context do not necessarily have exact correlations in the ART context. However, as discussed later, the three different meanings of openness in the adoption world—birth records, exchange of information, and post-birth contact—certainly *do* have parallels in the ART world.<sup>62</sup>

#### A. Demographic Differences in ART and Adoption

First, ART and adoption both allow for the development of families outside of the traditional married biological model, and both involve self-

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<sup>58</sup> See ROSE M. KREIDER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PUB. NO. CENSR-6RV, ADOPTED CHILDREN AND STEPCHILDREN: 2000, at 1, 15-17 (2003), available at <http://www.census.gov/prod/2003pubs/censr-6.pdf> (detailing the different demographics for biological and adoptive families).

<sup>59</sup> ELIZABETH MARQUARDT ET AL., INST. FOR AM. VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 6-7, 13-14 (2010), available at [http://www.family scholars.org/assets/Donor\\_FINAL.pdf](http://www.family scholars.org/assets/Donor_FINAL.pdf). But see Eric Blyth & Wendy Kramer, 'My Daddy's Name is Donor': Read with Caution!, BIONEWS (July 9, 2010), [http://www.bionews.org.uk/page\\_65970.asp](http://www.bionews.org.uk/page_65970.asp) (pointing out potential serious flaws in the methodology and conclusions of the Marquardt study).

<sup>60</sup> Andrea B. Carroll, *Re-Regulating the Baby Market: A Call for a Ban on Payment of Birth Mother Living Expenses*, 59 KAN. L. REV. 285, 288 (2011) (noting that adoption in the United States is an "exceptionally expensive transaction").

<sup>61</sup> Compare Hollinger, *supra* note 57, at app. § 1-A (containing commentary on the many and varied state laws surrounding adoption), with MARQUARDT ET AL., *supra* note 59, at 15 (suggesting that regulation of ART in the United States, or at least in California, is "lax").

<sup>62</sup> See *infra* Part IV.

conscious choices to become parents.<sup>63</sup> Nonetheless, the families differ in several meaningful ways. Adoption may occur without any biological ties between parent and child,<sup>64</sup> while ART is more likely to involve a biological connection between one parent and the child.<sup>65</sup> Moreover, the demographics of the families appear to differ. Statistics exist on adoptive families because they are formed in the public eye and require a court order to establish their legal status.<sup>66</sup> On the other hand, ART families are formed privately,<sup>67</sup> so few statistics exist regarding their actual demographics. Although fertility clinics may engage in screening for ART that is similar to the historical screening that typified the adoption world,<sup>68</sup> ART is nonetheless legally available to anyone who can pay.<sup>69</sup> Indeed, notwithstanding discrimination by some clinics,<sup>70</sup> it is estimated that a

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<sup>63</sup> See CHARIS THOMPSON, MAKING PARENTS: THE ONTOLOGICAL CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES 6 (2005). By contrast, the unintended pregnancy rate in the United States in 1994 was close to fifty percent and in 1987 about one-third of unintended pregnancies resulting in a live birth were unwanted. John Santelli et al., *The Measurement and Meaning of Unintended Pregnancy*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 94, 94 (2003); see also The Nat'l Campaign to Prevent Teen and Unplanned Pregnancies, *Fast Facts: Unplanned Pregnancy: Key Data*, THE NAT'L CAMPAIGN.ORG (May 2008), available at <http://www.thenationalcampaign.org/resources/pdf/fast-facts-unplanned-key-data.pdf> (noting that by 2001, the unplanned pregnancy rate was still about fifty percent but the number of those pregnancies that were also considered unwanted had risen to two-thirds).

<sup>64</sup> See, e.g., KREIDER, *supra* note 58, at 2.

<sup>65</sup> See, e.g., MARQUARDT ET AL., *supra* note 59, at 5.

<sup>66</sup> See, e.g., KREIDER, *supra* note 58, at 2.

<sup>67</sup> See Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 413 (2004).

<sup>68</sup> See THOMPSON, *supra* note 63, at 6; CAHN, TEST TUBE FAMILIES, *supra* note 2, at 135.

<sup>69</sup> See THOMPSON, *supra* note 63, at 6.

<sup>70</sup> See *id.* See generally *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cmty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (involving discrimination against lesbian seeking ART treatment in California); CAHN, TEST TUBE FAMILIES, *supra* note 2, at 138 (discussing the regulation of ART); Bebe J. Anderson, *Lesbians, Gays, and People Living with HIV: Facing and Fighting Barriers to Assisted Reproduction*, 15 CARDOZO J. L. & GENDER 451 (2009) (discussing the barriers limiting the ability of gays, lesbians, and people living with HIV to participate in ART); Samuel Everett Jones, Note, *Much Ado About Nothing: The Significance of Benitez v. North Coast*, 11 J. GENDER RACE & JUST. 271 (2008) (analyzing the *Benitez* case); Crystal Liu, Note, *Restricting Access to Infertility Services: What Is a Justified Limitation on Reproductive Freedom? The Categorical Exclusion of Single Women and Same-Sex Couples from Infertility Services and Its Role in Defining What Constitutes Justified and Unjustified Limitations on Reproductive Freedom*, (continued)

large portion of sperm bank customers may be lesbians.<sup>71</sup> By contrast, states may have preferences for certain kinds of adoptive families. Three states explicitly do not permit gays, lesbians, and single parents to adopt.<sup>72</sup> Parents of adopted children are more likely to be older than the parents of biological children, and adopted children are more likely to live with parents who have incomes over \$50,000 per year and who have high educational levels.<sup>73</sup> Adopted children were also more likely than biological children to live with married parents, and correspondingly, less likely to live in a nonmarital household.<sup>74</sup> Lastly, adoptive families may be subject to more stigma than ART families because of the cultural preference for biological families.<sup>75</sup>

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10 MINN. J. L. SCI. & TECH. 291 (2009) (discussing restrictions of infertility services regarding single women and same-sex couples); Rene Almeling, *Sex Cells: The Medical Market in Eggs and Sperm* 64–71 (2010) (unpublished manuscript) (on file with author) (discussing screening in egg and sperm donation).

<sup>71</sup> See Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 25 (2003) (referencing a California sperm bank that estimates 40% of its clients are lesbians); Cheryl Miller, *Donated Generation*, 21 THE NEW ATLANTIS 27 (2008) (estimating that more than half of sperm bank customers are lesbians or single women); Kay S. Hymowitz, *The Incredible Shrinking Father Sperm Banks Are Aiding and Abetting a Radical Agenda: The Dad-Free Family*, CHI. SUN-TIMES, Apr. 29, 2007, at B1 (setting out statistics). In the absence of reliable data collection on donor insemination, however, it is difficult to verify these numbers.

<sup>72</sup> *Parenting Laws: Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN (Oct. 13, 2010), [http://www.hrc.org/documents/parenting\\_laws\\_maps.pdf](http://www.hrc.org/documents/parenting_laws_maps.pdf) (“Same-sex couples are prohibited from adopting in Mississippi and Utah. State courts in Michigan have ruled that unmarried individuals may not jointly petition to adopt.”); see also SALLY STEENLAND ET AL., CTR. FOR AM. PROGRESS, FAITH AND FAMILY EQUALITY: AN ANALYSIS OF ARKANSAS’S 2008 BATTLE OVER SAME-SEX ADOPTION (2010), available at [http://www.americanprogress.org/issues/2010/04/antigay\\_adoption.pdf](http://www.americanprogress.org/issues/2010/04/antigay_adoption.pdf) (describing political activism in Arkansas); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18 (2008) (discussing barriers to accessing reproductive technologies); Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844 (2009) (discussing parental selection of sperm donors according to race).

<sup>73</sup> KREIDER, *supra* note 58, at 16–17.

<sup>74</sup> *Id.* at 14–15.

<sup>75</sup> See Richard F. Storrow, *Marginalizing Adoption Through the Regulation of Assisted Reproduction*, 35 CAP. U. L. REV. 479, 483 (2006) (“[T]he possibility of a genetic tie to a  
(continued)

### B. Family Formations in ART and Adoption

In addition to the differences stated above, the process of family formation also differs between ART and adoption. While both ART offspring and adoptees must confront issues relating to their biological progenitors, some have speculated that ART offspring are less likely to feel the same sense of abandonment as adopted offspring.<sup>76</sup> Moreover, ART offspring typically share a genetic connection with one of their parents, so they have more information about their biological identity.<sup>77</sup> As discussed in Part IV, however, ART offspring feel the same as adoptees regarding the need to know more about their genetic forbears, and they may feel abandoned by their donors.<sup>78</sup>

### C. Legal Regulations for ART and Adoption

Finally, the legal regulation for these two forms of family creation has developed from two different sources. The goal of adoption is to serve the child's best interest; the goal of gamete donation is to serve the patients' (as parents or consumers) interests.<sup>79</sup> While some have legitimately questioned whether adoption succeeds in focusing solely on the child,<sup>80</sup> the laws of each state mandate that adoptive placements be made in the child's best interests, and the rigorous adoption process is designed to protect children.<sup>81</sup> The ART world, as discussed below, has been subject to comparatively little legal regulation, and even the laws on the rights of

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child born through assisted reproduction may make that choice appear more understandable and legitimate in a society that extols consanguineous relationships.”).

<sup>76</sup> See Waldman, *supra* note 9, at 534; 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, 118 (2007).

<sup>77</sup> See, e.g., Julie L. Sauer, Comment, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 940 (2009).

<sup>78</sup> See *infra* Part IV.A.2.

<sup>79</sup> Naomi Cahn, *Old Lessons for a New World: Applying Adoption Research and Experience to Assisted Reproductive Technology*, 2009 EVAN B. DONALDSON ADOPTION INST. 14 [hereinafter Cahn, *Old Lessons for a New World*], available at [http://www.adoptioninstitute.org/publications/2009\\_02\\_OldLessons.pdf](http://www.adoptioninstitute.org/publications/2009_02_OldLessons.pdf); see Cahn, *Perfect Substitutes*, *supra* note 4, at 1114.

<sup>80</sup> See, e.g., Appell, *Toward a More Child-Centered Adoption*, *supra* note 56, at 2–3.

<sup>81</sup> See generally Hollinger, *supra* note 57, at app. § 1-A (listing all state statutory provisions related to adoption).

parents and donors remain unclear in some states.<sup>82</sup> ART takes its place in the legal domains of health law and reproductive privacy,<sup>83</sup> while adoption is firmly within the family law domain.<sup>84</sup> ART developed as a means to help patients create children, while adoption focuses on helping children find families.

#### *D. Openness in ART and Adoption*

The three different meanings of openness in the adoption world—birth records, exchange of information, and post-birth contact—have some parallels in the ART world. Allowing donor-conceived offspring access to identifying information about their donors, or even creating shadow birth certificates that list the donor as “parent,” is comparable to opening birth records. Second, allowing intending parents to know more about the donor and the donor to know more about the intending parents and any resulting child is similar to the exchange of information in the adoption situation. And finally, allowing the donor to have some kind of contact with any resulting offspring through, for example, contracting out of the default regime in which a donor has no legal rights or obligations, is similar to the adoption-with-contact system.

The next section discusses these differing forms of openness in the ART world.

### IV. OPENNESS IN ART

The headline says it all: “Sperm Donor Siblings Find Family Ties.”<sup>85</sup> Openness in the donor-conceived world, as in the adoption world, refers to information about the biological progenitors, including the identity of the donor and potential contact between the donor and the intending parents. In addition, and like the adoption world, it also refers to information about donor conception itself (in adoption, adoptees are typically told that they are adopted) and about any potential half-siblings.

Openness has not been a touchstone of the donor world. The first documented medical use of donor sperm occurred with a woman who

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<sup>82</sup> See Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 206 (2009) [hereinafter Cahn, *Necessary Subjects*].

<sup>83</sup> See, e.g., THOMPSON, *supra* note 63, at 89.

<sup>84</sup> See Cahn, *Perfect Substitutes*, *supra* note 4, at 1116–17.

<sup>85</sup> *60 Minutes: Sperm Donor Siblings Find Family Ties* (CBS television broadcast June 24, 2007).

never knew that her husband's sperm was not used.<sup>86</sup> Donor parents generally had no idea of the identity of their sperm donor, and they were encouraged not to tell their children of their origins.<sup>87</sup> Over the past several decades, these practices have begun to change. Parents can now find out a great deal of information about their donors,<sup>88</sup> and the American Society for Reproductive Medicine now encourages parents to tell children of their donor origins.<sup>89</sup>

This portion of the article explores the decision to tell offspring that they are donor-conceived, how offspring find others who share their genes, and what happens once people connect.

#### A. *Stories of Origin*

This section provides a brief history of disclosure in donor-conceived families along with an overview of some of the studies on the views of offspring towards disclosure.

##### 1. *Telling Children*

Anonymous gamete donation remains the dominant norm.<sup>90</sup> One small study found that single women and lesbian couples that used donor insemination to conceive were more likely to use an open-identity donor as opposed to an anonymous donor, while heterosexual couples were just as likely to use an open-identity donor as they were an anonymous donor.<sup>91</sup>

Some parents still do not disclose how their offspring were conceived; one physician explained in the American Fertility Association newsletter that although she believed in disclosure, "it may not be the right decision for every family in every environment."<sup>92</sup> Nonetheless, parents are

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<sup>86</sup> Bernstein, *The Socio-Legal Acceptance of New Technologies*, *supra* note 10, at 1056.

<sup>87</sup> Cahn, *Old Lessons for a New World*, *supra* note 79, at 10.

<sup>88</sup> See Cahn, *Necessary Subjects*, *supra* note 82, at 213.

<sup>89</sup> Ethics Comm., Am. Soc'y for Reprod. Med., *Ethics Committee Report: Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 527 (2004), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/informing\\_offspring\\_donation.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/informing_offspring_donation.pdf).

<sup>90</sup> See *id.* at 529.

<sup>91</sup> See Joanna E. Scheib & Alice Ruby, *Contact Among Families Who Share the Same Sperm Donor*, 90 FERTILITY & STERILITY 33, 39 (2008).

<sup>92</sup> Madeline Licker Feingold, *Building Healthy, Donor-Conceived Families*, AM. FERTILITY ASS'N (2008), [http://www.theafa.org/library/article/building\\_healthy\\_donor\\_conceived\\_families/](http://www.theafa.org/library/article/building_healthy_donor_conceived_families/).

increasingly likely to do so.<sup>93</sup> Indeed, researchers have found that children who learned of their donor origins earlier in life had a more positive outlook on the means of their conception than those children who found out later in life.<sup>94</sup> The quality of donor offspring's relationship with their legal father (whether positive or negative) did not affect the offspring's curiosity about their donor.<sup>95</sup> Moreover, donor offspring's perceptions of their conception correlated with their perceptions about their relationships with their mothers and their perceptions about their mothers' mental health.<sup>96</sup> A similar correlation existed with perceptions about their relationships with and the mental health of their fathers but not as strong as the correlation with perceptions about their mothers.<sup>97</sup>

## 2. Donor Offspring, Mental Health, and Disclosure

Susan Golombok, of the Centre for Family Research at the University of Cambridge, has followed a sample of approximately 100 donor-conceived offspring and concluded that they follow generally normal development patterns.<sup>98</sup> Nonetheless, children in families where the parents are more open about their donor conception may develop stronger attachments.<sup>99</sup> The Institute for American Values issued a report in 2010

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<sup>93</sup> See Patricia P. Mahlstedt et al., *The Views of Adult Offspring of Sperm Donation: Essential Feedback for the Development of Ethical Guidelines Within the Practice of Assisted Reproductive Technology in the United States*, 93 FERTILITY & STERILITY 2236, 2236 (2010); E. Lycett et al., *School-Aged Children of Donor Insemination: A Study of Parents' Disclosure Patterns*, 20 HUM. REPROD. 810, 811 (2005).

<sup>94</sup> Mahlstedt et al., *supra* note 93, at 2237. Participants were recruited using contact information provided through internet-based support groups for adults conceived through sperm donation. *Id.* at 2238. Of the eighty-five respondents, seventy-two were female and thirteen were male. *Id.*

<sup>95</sup> See *id.* at 2242.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* at 2243.

<sup>98</sup> Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve*, 73 CHILD DEV. 952, 966 (2002); Susan Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning and Child Development*, 11 HUM. REPROD. 2324, 2324 (1996); see also Waldman, *supra* note 9, at 538–40 (summarizing Golombok's conclusions). For later studies, see, for example, Vasanti Jadva et al., *The Experiences of Adolescents and Adults Conceived by Sperm Donation: Comparisons by Age of Disclosure and Family Type*, 24 HUM. REPROD. 1909 (2009); Lucy Owen & Susan Golombok, *Families Created by Assisted Reproduction: Parent-Child Relationships in Late Adolescence*, 32 J. ADOLESCENCE 835 (2009).

<sup>99</sup> Waldman, *supra* note 9, at 544. Professor Waldman observes:

(continued)

with the largest reported sample of donor offspring (562, all of whom actually were, or believed that they had been, conceived through donor sperm) and with comparable samples of adopted adults (562) and individuals raised by their biological parents (563).<sup>100</sup> Higher percentages of the offspring conceived through donor sperm agreed that assisted reproductive technologies “are good for children because the children are wanted” and that people should be encouraged to donate gametes than did individuals in the other two groups.<sup>101</sup> In addition, 80% of the donor-conceived offspring, compared to 69% of the adopted adults and 59% of those raised by their biological parents, believed that telling children about their biological origins at an early age was important in making it easier for children to handle their origins.<sup>102</sup> Nonetheless, almost half (45%) said that the circumstances of their conception bothered them.<sup>103</sup> Many more of the donor-conceived offspring than the adopted individuals felt hurt or sad when others talked about their genealogical heritages or when they saw

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Studies examining the well-being of donor-gamete children in “open” families versus children in more secretive families reveal that children in open families seem to enjoy more peaceful relationships with their mothers. Having noted this difference, researchers are careful to specify that parent-child relations in families where parents have not discussed the role of a donor remain within the normal and acceptable range. Therefore, the data provides no evidence that donor-gamete children are suffering. Rather, children and mothers in open families may enjoy heightened amicability in their family relations when compared to relations prevailing amidst all family types.

*Id.* By contrast, the studies show that relationships can be improved by openness even if the children are not “suffering.” *Id.*

<sup>100</sup> MARQUARDT ET AL., *supra* note 59, at 119. While the researchers drew some deservedly controversial (and, in my mind, unsupported and unsupportable) conclusions, the data is quite rich. See Blyth & Kramer, *supra* note 59; Vardit Ravitsky, *Sperm Donation: The US Regulatory Vacuum and Its Ethical Ramifications*, BIONews (June 21, 2010), [http://www.bionews.org.uk/page\\_64758.asp](http://www.bionews.org.uk/page_64758.asp).

<sup>101</sup> MARQUARDT ET AL., *supra* note 59, at 83. Seventy-six percent of the donor-conceived individuals strongly or somewhat agreed that the technologies are good, compared to 65% of the adopted adults and 61% of those raised by their biological parents; 73% of the donor conceived children strongly, or somewhat strongly, agreed that society should encourage gamete donation, compared to 50% of adopted adults and 42% of children raised by their biological parents. *Id.*

<sup>102</sup> *Id.* at 100.

<sup>103</sup> *Id.* at 88.

other people with their biological parents.<sup>104</sup> Two-thirds of the donor-conceived offspring (67%) felt that they should have the right to know their donor's identity, while bare majorities (52%) of the other two groups believed that the donor-conceived offspring should have this right.<sup>105</sup> Finally, almost two-thirds of the donor-conceived offspring believed that they should have the opportunity to develop some sort of relationship with their donor as well as with half-siblings who share the same donor.<sup>106</sup> Ultimately, donor offspring themselves believe it is important to be told the truth about their conception at an early age and to have access to identifying information about the donor and any half-siblings.

*B. Offspring Begin to Connect*

One form of openness in the ART world differs substantially from adoption because it focuses on donor-conceived family networks. As the number of people choosing to use donor eggs or sperm increases, there are more families united by having used the same donor.<sup>107</sup> And, as this happens, a growing number of donor-conceived offspring want to know more about their origins.<sup>108</sup> An increasing number of donor-sperm offspring are searching for—and finding—their biological siblings as well as their gamete providers, both to gain medical and biological information and simply to meet them.<sup>109</sup> Beyond the emotional connections, the centrality of genetics to one's well-being is widely accepted and increasingly vital.<sup>110</sup> Family health history facilitates the prevention, diagnosis, and treatment of disease and assists in reproductive planning.<sup>111</sup>

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<sup>104</sup> *Id.* at 90.

<sup>105</sup> *Id.* at 97–98.

<sup>106</sup> *Id.* Interestingly, approximately one-quarter of the donor-conceived offspring did not believe that they should have access to non-identifying information about the donor (25%) or to identifying information (24%), or that they should have the opportunity to have a relationship with the donor (27%), or know the existence (26%) or identity (27%) of half-siblings. *Id.*

<sup>107</sup> Scheib & Ruby, *supra* note 91, at 33.

<sup>108</sup> *Id.* at 33–34.

<sup>109</sup> Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 385–86, 388 (2008).

<sup>110</sup> Ken M. Gatter, *Genetic Information and the Importance of Context: Implications for the Social Meaning of Genetic Information and Individual Identity*, 47 ST. LOUIS U. L.J. 423, 427 (2003).

<sup>111</sup> Sagit Ziskind, *The Genetic Information Nondiscrimination Act: A New Look at an Old Problem*, 35 RUTGERS COMPUTER & TECH. L.J. 163, 168–69 (2008).

Without falling into the falseness of genetic determinism, genetic information has the potential to aid in the prevention, early detection, presymptomatic diagnosis, and treatment of thousands of inherited diseases.<sup>112</sup>

In fact, whenever I give a talk about donor conception, I am always asked two things: (1) parents ask me for the best way to disclose to their children that they are donor-conceived; and (2) both parents and offspring ask how they can find others who have used the same donor. In response, I tell them that it is never too early to tell children about their origins, and I tell them about studies of people who have connected through their use of the same donor, discussing how these connections have been made along with the nature of their experiences.

According to studies, the methods used for searching for donor siblings or donors included registering in a matching service with the sperm bank used<sup>113</sup> and registering on websites devoted to facilitating contact between donor parents and their children and donor siblings and donors, such as the Donor Sibling Registry.<sup>114</sup>

The Sperm Bank of California, which was one of the pioneers in allowing for identity release donors, reports that approximately one-third of people who know they were conceived by open-identity sperm donors make a request for the donor's identity by the time they turn twenty.<sup>115</sup> However, their research shows that it is likely that additional offspring will

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<sup>112</sup> See, e.g., Dolgin, *supra* note 109, at 390. See generally Jessica D. Gabel, *Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3 (2010) (examining familial DNA testing by law enforcement agencies); Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439 (2010) (examining a federal statute prohibiting employment and insurance discrimination based on genetic information).

<sup>113</sup> See Scheib & Ruby, *supra* note 91, at 34.

<sup>114</sup> See Tabitha Freeman et al., *Gamete Donation: Parents' Experiences of Searching for Their Child's Donor Siblings and Donor*, 24 HUM. REPROD. 505, 506 (2009); Vasanti Jadva et al., *Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor*, 20 REPROD. BIOMEDICINE ONLINE 523, 523 (2010).

<sup>115</sup> *Donor Information-Releases: Tracking Outcomes*, SPERM BANK OF CAL., <http://www.thespermbankofca.org/pages/page.php?pageid=48&cat=9> (last visited Nov. 7, 2010). This may under-represent the actual number of those interested in matching because half-siblings and donors may have already found each other on the Donor Sibling Registry before they are eligible to connect through the Sperm Bank of California. See *infra* notes 120–22 and accompanying text.

make a request for identity release as they grow older.<sup>116</sup> The offspring were respectful of the donor's privacy, and they were not typically looking for a "father figure."<sup>117</sup> According to the California Sperm Bank study, most families initiated contact by phone as opposed to mail or email,<sup>118</sup> though this was a very small sample size.<sup>119</sup>

Others—including some from the Sperm Bank of California—have connected through the Donor Sibling Registry, a non-profit organization that operates a voluntary, mutual-consent, internet-based databank for matching offspring and donors.<sup>120</sup> Although the Registry started out slowly in 2000, more than 29,000 donors, parents, and children have signed up since the Registry began, and more than 7,800 half-siblings and/or their donors have been able to find each other through it.<sup>121</sup> Overwhelmingly, those who have connected report positive experiences.<sup>122</sup>

### C. *Developing Relationships*

Several studies have examined contact between donor-conceived families and between these families and their donors. Some of the questions examined include: (1) the reasons that parents of donor-conceived offspring, as well as the donor-conceived offspring themselves, search for donor siblings or donors; (2) the ways that they conduct their searches; and (3) their feelings about subsequent meetings that have resulted from their search efforts.

#### 1. *Why Do Parents of Donor Offspring Search?*

Parents' main reasons for searching for donor siblings of their children were expressed as various forms of curiosity and a desire to create a family for their children. In a small study that involved families who used the California Sperm Bank, 85.7% of parents said that one of their motivations

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<sup>116</sup> *Addressing TSBC Donor & Family Needs: Findings from the Identity-Release Task Force & Studies (1997–Present)*, SPERM BANK OF CAL., <http://www.thespermbankofca.org/pages/page.php?pageid=49&cat=9> (last visited Nov. 8, 2010).

<sup>117</sup> *Id.*

<sup>118</sup> Scheib & Ruby, *supra* note 91, at 35.

<sup>119</sup> *See id.* Only fourteen families returned completed surveys for this study. *Id.*

<sup>120</sup> DONOR SIBLING REGISTRY, <http://donorsiblingregistry.com> (last visited Nov. 8, 2010).

<sup>121</sup> *Id.*

<sup>122</sup> *See* Jadva et al., *supra* note 98, at 1910.

for seeking donor siblings was “to create a family—not for them, but for their children.”<sup>123</sup>

Additionally, 42.9% said that contact with donor siblings was a way to “acquire further information about the donor and address curiosity about him and the children’s shared genetics/ancestry.”<sup>124</sup> Less cited reasons from parents related to wanting either to connect with people in a similar situation or to provide their children with that connection.<sup>125</sup> Single women were overrepresented in the matching service, supporting “the hypothesis that contact is a way to create extended family for their children.”<sup>126</sup> Heterosexual couples were the least likely to participate in the family matching service.<sup>127</sup>

In a larger study in which participants were recruited from the Donor Sibling Registry, 85% of parents searching for donor siblings identified curiosity about similarities in appearance and personalities (among other things) as one of their reasons, with 27% of parents citing curiosity as the main reason for searching.<sup>128</sup> The second most popular reason parents searched for donor siblings in this study was “[f]or my child to have a better understanding of who he/she is” (66% cited this as a reason and 18% of parents cited this as the main reason).<sup>129</sup> The third most popular reason was “[t]o give my child a more secure sense of identity” with 61% of parents citing it as a reason for searching and 17% of parents responding that this was the main reason for searching for donor siblings.<sup>130</sup>

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<sup>123</sup> Scheib & Ruby, *supra* note 91, at 35–36. The fourteen surveys comprising this study were returned by fourteen mothers who were contacted because of their participation in a family-matching service run by the Sperm Bank of California. *Id.* at 35. Of the responding families, seven were headed by single women, six were headed by lesbian couples, and one was headed by a heterosexual couple. *Id.* Seven out of eight single-mother households that were invited to participate returned the survey, as did six out of eight lesbian couple households and one out of two heterosexual couple households. *Id.*

<sup>124</sup> *Id.* at 37.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 38.

<sup>127</sup> *Id.*

<sup>128</sup> See Freeman et al., *supra* note 114, at 506–08. This survey was conducted by sending out a questionnaire to all registrants of the Donor Sibling Registry. *Id.* at 506. A total of 791 parents of donor children responded out of a possible 4,140 donor parent respondents, the vast majority of whom were women. *Id.* at 507. Seven hundred and seventy-five respondents were women, while only sixteen were men. *Id.* Seventy-four percent of respondents were single or lesbian mothers. *Id.* at 514.

<sup>129</sup> *Id.* at 508 tbl.1.

<sup>130</sup> *Id.*

In terms of searching for donors themselves, the study found that the most common primary reason was “[f]or my child to have a better understanding of who he/she is” with 73% of parents who searched for donors citing it as a reason and 21% of parents citing this as the main reason.<sup>131</sup> The other most popular main reasons were “[t]o give my child a more secure sense of identity” (18%), “[c]uriosity about characteristics of my child’s donor” (10%), and “[w]anting to thank my child’s donor” (10%).<sup>132</sup> The study found that “[p]arents in households without fathers demonstrated higher levels of curiosity about their child’s donor origins, as reflected by the greater proportions searching for donor relations overall.”<sup>133</sup>

## 2. *Why Do Donor Offspring Search?*

The 2010 movie, *The Kids Are All Right*,<sup>134</sup> focused attention on why offspring search and what happens when a donor is found. The reality, of course, is often different from what occurs in movies.

In a study focused on donor offspring, of the 165 participants, 78% were searching for donor siblings, 77% were searching for donors, and 8% were not searching for either.<sup>135</sup> The most common reported reason for searching for donor siblings was curiosity about similarities in appearance and personality (94% cited this as one of the reasons for searching and 44% cited this as the main reason).<sup>136</sup> The next two most popular main reasons were “[t]o know and understand a ‘missing’ part of me” (16%) and “[m]y sibling and/or parent(s) initiated the search” (7%).<sup>137</sup> Other popular reasons involved getting to know genetic and ancestral history.<sup>138</sup> Interestingly, there was a strong association between the family type of the respondent and citing “wishing to find 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.<sup>139</sup>

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<sup>131</sup> *Id.* at 509 tbl.3.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 514.

<sup>134</sup> *THE KIDS ARE ALL RIGHT* (Mandalay Vision 2010).

<sup>135</sup> Jadva et al., *supra* note 114, at 525–26 (2010). Participants in this study were contacted because of their registration or their parents’ registration with the Donor Sibling Registry. Also, all respondents were conceived using artificial insemination. *Id.* at 524.

<sup>136</sup> *Id.* at 527–28.

<sup>137</sup> *Id.* at 528 tbl.4.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 528.

When children searched for donors, 89% cited curiosity about the characteristics of the donor as a reason, with 24% citing it as a main reason.<sup>140</sup> Other popular main reasons included wanting to meet their donor (16%) and medical reasons (12%).<sup>141</sup> Other often 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%).<sup>142</sup> In terms of what triggered searching for donor siblings 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,” or “planning to have children or having children.”<sup>143</sup>

### 3. Donor Parents’ Rating of Contact

Overall, parents of donor children rated their first contact and their children’s first contact with donor siblings and donors themselves positively. In the small study involving donor identity families at California Sperm Bank, participants rated their first contact experience with donor sibling families as moderately or very positive, giving the experience fours and fives on a five-point scale.<sup>144</sup> Feelings about the meetings ranged from feeling like the families “clicked” to feeling the families did not make a connection due to different positions on timing of disclosure to donor children and desired amount of contact.<sup>145</sup> Feelings of excitement and nervousness were also reported.<sup>146</sup> One interesting difference between parents and their donor children is the parents’ perceptions about their relationship with the donor sibling family versus their view of their children’s relationships.<sup>147</sup> While only 28.6% of parents describe their relationship with the donor sibling family as “family,” 64.3% reported “the matched family was family to their child.”<sup>148</sup> Of the children who knew of the biological connection when meeting their donor siblings,

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 529.

<sup>142</sup> *Id.* at 529 tbl.5.

<sup>143</sup> *Id.* at 529.

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 37.

<sup>148</sup> *Id.*

all six reporting parents felt their child was excited and curious about meeting their half-sibling(s).<sup>149</sup>

In the larger study using the Donor Sibling Registry, in responding to questions about contacting donor siblings, 80% of parents rated their experience meeting donor siblings as very positive and 68% of parents rated their children's experience as very positive.<sup>150</sup> Of the remaining parents who rated their and their children's experience of contacting donor siblings, 15% rated it as fairly positive for themselves and 14% rated it as fairly positive for their children.<sup>151</sup> Additionally, 5% rated the experience as neutral for themselves and 13% rated the experience as neutral for their children.<sup>152</sup> Less than 1% (only 1 parent) rated the experience as fairly negative for themselves and only 1% (1 parent) rated the experience as fairly negative for their child.<sup>153</sup> In contrast, all parents who met with their child's donor rated their and their children's experiences positively.<sup>154</sup>

#### 4. Donor Offspring Rating of Contact

Donor offspring have generally reported positive experiences when meeting with donor siblings and with the donors themselves. In one study of fourteen families that focused on parental ratings, six of the families' children were told about the donor sibling connection.<sup>155</sup> Of those six children, four reported that the child viewed the matched family as "family" and two were not sure how to classify the relationship.<sup>156</sup> One of the studies based on the Donor Sibling Registry included ratings by donor children of their contact with donor siblings and donors themselves.<sup>157</sup> Of the offspring who made contact with donor siblings, 85% (thirty-four people) rated the experience as fairly positive or very positive, 13% (five people) rated it as neutral, and 3% rated it as fairly negative (one person).<sup>158</sup> Of the offspring who made contact with donors, 80% (eight people) rated the experience as fairly positive or very positive, 10% (one

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<sup>149</sup> *Id.* at 35–36.

<sup>150</sup> Freeman et al., *supra* note 114, at 511 tbl.8.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Scheib & Ruby, *supra* note 91, at 37.

<sup>156</sup> *Id.*

<sup>157</sup> See Jadva et al., *supra* note 114, at 523–24.

<sup>158</sup> *Id.* at 530 tbl.6.

person) rated the experience as neutral, and 10% (one person) rated the experience as fairly negative.<sup>159</sup>

##### 5. *What About the Donors?*

Browsing entries on the Donor Sibling Registry, donors appear quite interested in contact with potential offspring.<sup>160</sup> Yale sociologist Rene Almeling, who undertook an extensive survey of banks, egg recruiters, and donors, found that while egg donors rarely think of themselves as mothers to the offspring who are born from their gametes, sperm donors consistently think of themselves as fathers to any resulting children.<sup>161</sup> Nonetheless, she found that both sperm donors and egg donors would like more access to information about the results of reproductive efforts that use their genetic material, and most “exhibited a mild curiosity in seeing how the children ‘turn out.’”<sup>162</sup> In one of the few studies of egg donors, the 155 participants overwhelmingly (97%) indicated an interest in contact, and none said they were not interested in contact.<sup>163</sup> Anecdotally, the media frequently covers happy donors meeting their “families,” and there are numerous other stories of donors who appreciate having been found.<sup>164</sup>

#### V. THE LAW?

These relationships all occur outside of the law, with no legal regulation supporting—or prohibiting—these contacts in the United

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<sup>159</sup> *Id.*

<sup>160</sup> DONOR SIBLING REGISTRY, <http://donorsiblingregistry.com> (last visited Nov. 8, 2010). The registry shows that both offspring and donors are interested in potential contact. *Id.*

<sup>161</sup> See Almeling, *supra* note 70, at 166–67.

<sup>162</sup> *Id.* at 178.

<sup>163</sup> Wendy Kramer et al., *US Oocyte Donors: A Retrospective Study of Medical and Psychosocial Issues*, 24 HUM. REPROD. 3144, 3146–48 (2009). The authors point out that the group had already self-selected towards seeking contact: “The chief limitation of this study is that participants were recruited from a website that attracts those donors who wish information about their donor-conceived offspring (and vice versa).” *Id.* at 3147.

<sup>164</sup> See David Plotz, *Donor White Meets His Daughter*, SLATE (Aug. 7, 2002, 3:23 PM), <http://www.slate.com/id/2069027/> (“The donor and his wife rushed over to meet his baby daughter . . . . When the visit ended, [the donor] told Vaux he ‘would live on that moment for the rest of his life.’”); see also David Crary, *The Search for the Donor She Calls ‘Dad’*, VIRGINIAN-PILOT, Aug. 16, 2010, at A3 (describing a happy relationship between a donor and his three separately raised children); Amy Harmon, *Sperm Donor Father Ends Anonymity*, N.Y. TIMES, Feb. 14, 2007, at A18 (reporting on one donor’s successful meeting with his children).

States.<sup>165</sup> Indeed, the donor world is developing in a legal vacuum. Federal law regulates the safety of donor gametes, and it requires clinics to report accurate data.<sup>166</sup> Neither federal nor state laws require any long-term record keeping of information about donors or the children they produce. The federal government requires that clinics report on the number of births through donor eggs and embryos but not with respect to donor sperm.<sup>167</sup>

The law says nothing about whether offspring must learn that they are donor-conceived<sup>168</sup> or about the development of potential relationships between donor-conceived families or between donors and offspring. While state laws often address the relationship between donors, parents, and offspring,<sup>169</sup> many states still have not clarified the relationship between egg donors and the intending parents.<sup>170</sup> There are no laws that mandate the disclosure of identifying information on gamete providers or that facilitate contact by establishing even a voluntary databank.<sup>171</sup>

The parameters of contact are established through contracts, such as those between donors and banks, through peripheral tort-based claims, such as privacy constraints, or through criminal law-based claims, such as prohibitions against stalking and related actions.<sup>172</sup> While this legal regulatory vacuum allows for the development of these connections, it

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<sup>165</sup> Vardit Ravitsky, "Knowing Where You Come From": *The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, 11 MINN. J. L. SCI. & TECH. 665, 666 (2010).

<sup>166</sup> Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. §§ 263a-1 to a-7 (2006).

<sup>167</sup> *Id.*

<sup>168</sup> See, e.g., *Children Born After Donor Insemination Should Be Told as Soon as Possible About Their Conception*, MEDICAL NEWS TODAY (July 8, 2008, 5:00 PM), <http://www.medicalnewstoday.com/articles/114242.php>.

<sup>169</sup> See, e.g., OHIO REV. CODE ANN. § 3111.97 (West Supp. 2010).

<sup>170</sup> See, e.g., GA. CODE ANN. § 19-8-1 to -26 (2010) (addressing relationship rights of parents who choose adoption but ignoring the relationship between egg donors and intending parents).

<sup>171</sup> Cahn, *Old Lessons for a New World*, *supra* note 79, at 13.

<sup>172</sup> See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 876 (Ct. App. 2000) (discussing a sperm donor's constitutional right of privacy in maintaining anonymity); 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, 371-72 (2001) (describing Tennessee law that has a contact veto for birth parents in adoption situations; if anyone violates the veto they will be subject to criminal penalties).

does not respond to the needs and interests of all involved to provide additional space to foster these relationships. While many activists within the donor movement argue for greater openness and disclosure, not all professionals are convinced.<sup>173</sup> Moreover, there are issues related to parent education about disclosure (reasons for disclosure, counseling related to disclosure, how disclosure is handled, and other services for families), which is a topic that is becoming the subject of increasing study.<sup>174</sup> Nonetheless, greater disclosure would yield important benefits in gamete donation beyond providing information to offspring; it would help guard against accidental incest and it would help in the creation of family-conceived donor networks.<sup>175</sup>

In another piece, I argued for a paradigm-shift in the area of donor-conceived families so that they are regulated by family law as well as by health and consumer laws.<sup>176</sup> One specific aspect of this new regime should be to allow donor-conceived offspring to find one another. This requires record keeping not just about the donor but also about children born from that donor's gametes. While the current system focuses on parents, critical issues for offspring concern their "rights: the right to personal information" and "the right to medical information."<sup>177</sup> These issues leave open various unanswered questions: "Do these children have any rights that trump those of their parents? Can they demand access to their genetic parents' medical information? Can they track their genetic siblings and ensure, at a minimum, that they do not procreate with them?"<sup>178</sup>

Given the needs and desires of donor offspring evident in numerous studies, the answer to many of these questions is certainly yes. Providing rights to donor offspring requires a mandatory databank to which all

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<sup>173</sup> See Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189 (2010) [hereinafter Bernstein, *Regulating Reproductive Technologies*].

<sup>174</sup> Cahn, *Old Lessons for a New World*, *supra* note 79, at 13.

<sup>175</sup> See Cahn, *Finding Families*, *supra* note 12, at 53–57.

<sup>176</sup> See *id.* There are dangers in regulation, and these are particularly acute with respect to potential limitations on who can obtain access to reproductive technologies. See, e.g., THOMPSON, *supra* note 63, at 25–26; Ertman, *supra* note 71; see also Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1458–59 (2008) (describing regulations in other countries).

<sup>177</sup> Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J.L. SCI. & TECH. 41, 56–57 (2009).

<sup>178</sup> *Id.*

fertility clinics must report. This databank could supplement clinic-reporting requirements under the 1992 Fertility Clinic Success Rate and Certification Act, or it could be added to the requirements for safety testing under FDA regulations.<sup>179</sup> Of course, data encryption protection would be necessary, as would regulations on how these data could be accessed. A contact veto or contact preference form of the type used in the adoption context<sup>180</sup> might be useful for purposes of ensuring the maximum amount of information.

The numerous potential objections to establishing such a databank and to allowing contact help explain why the United States has not yet followed the lead of other countries in creating these spaces for donor-conceived families.<sup>181</sup> Nonetheless, the potential benefits outweigh these objections. Indeed, a focus on the best interests of the child is the basis for numerous doctrines within family law and is recognized by international law; the Convention on the Rights of the Child recognizes the right to an identity (even though the United States has not ratified it).<sup>182</sup> In the United Kingdom, the national ART regulatory entity—the Human Fertilisation

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<sup>179</sup> Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. §§ 263 a-1 to a-7 (2006) (mandating that fertility clinics submit ART success rate data and describing the responsibilities of the CDC concerning data reports and licensing); 21 C.F.R. § 1271.80 (2010) (regulating testing of donors); *see also* 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, 24–25 (2010) (describing the regulations as “nominal and vague”); Catherine A. Clements, *What About the Children? A Call for Regulation of Assisted Reproductive Technology*, 84 IND. L.J. 331, 347–48 (2009) (outlining inadequacies in the current system).

<sup>180</sup> *See, e.g.*, Howard et al., *supra* note 7, at 13.

<sup>181</sup> *See* Bernstein, *Regulating Reproductive Technologies*, *supra* note 173; Cahn, *Necessary Subjects*, *supra* note 82, at 213–16; Cahn, *Finding Families*, *supra* note 12. One of the objections is the potential infringement on parental rights. *See* Jason K. M. Hanna, *Revisiting Child-Based Objections to Commercial Surrogacy*, 24 BIOETHICS 341 (2010), for an interesting perspective on the relationship between parents' and children's rights in the reproductive technology context.

<sup>182</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (ratified Sept. 2, 1990). The United States has not, of course, ratified the Convention, so it is not bound to its provisions. LUISA BLANCHFIELD, CONG. RESEARCH SERV., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 5 (2009), available at <http://www.fas.org/sgp/crs/misc/R40484.pdf>. International law, however, can provide guidance in formulating appropriate laws. *See* Ravitsky, *supra* note 165, at 667–68 (discussing various international disclosure laws).

and Embryology Authority—has, pursuant to national law, established a voluntary registry service so that donor-linked offspring can find each other once they turn eighteen and register for contact.<sup>183</sup> While there is no legal right to find out the identity of half-siblings, offspring are legally entitled to access identifying information only about their donor. The new registry serves as official recognition of the interests that many donor-conceived offspring share in finding others who share their genes.<sup>184</sup>

The regulatory or “cultural lag”<sup>185</sup> between changes in technology and the law is affecting relationships between donor siblings. While this lag may not last beyond the next generation of donor-conceived children, we should help the current generation establish their rights to an identity and to choose to know their family members.

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<sup>183</sup> *Donor Sibling Link*, HUM. FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/donor-sibling-link.html> (last visited Nov. 8, 2010); Press Release, Hum. Fertilisation & Embryology Auth., HFEA to Help Donor-Conceived Sibling Contact Each Other (Apr. 6, 2010), <http://www.hfea.gov.uk/5838.html>; MacKenna Roberts, *UK Registry Will Allow Donor Children to Trace Biological Siblings*, BIONEWS (Oct. 5, 2009), [http://www.bionews.org.uk/page\\_49270.asp](http://www.bionews.org.uk/page_49270.asp).

<sup>184</sup> Roberts, *supra* note 183.

<sup>185</sup> Sociologist Andrew Cherlin points to the work in the 1920s of William Ogburn, who suggested “that cultural lag occurs when one part of the culture (usually technology) changes faster than another (usually behavior).” ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 142 (2009); see Bernstein, *Regulating Reproductive Technologies*, *supra* note 173, at 1203 (discussing how legal certainty can foster the utility of new technologies).