

WHAT DO WE TELL THE CHILDREN?

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Assisted reproductive technologies (ART) now offer multiple pathways to parenthood for infertile heterosexuals, gay and lesbian couples, and singletons of varying sexual preferences. Adoption once provided the only recourse for family-seeking individuals who were biologically unable or socially ill-positioned to conceive children. Today, donor insemination, egg donation, and surrogacy offer alternative routes to family life, creating biological linkages that adoption bypasses. For this reason (and others), the number of ART families is growing.¹

For some, the explosion of ART-inspired families is cause for celebration; for others, it signals the subversion of important social values.² But regardless of whether one embraces or reviles the trend, the proliferation of nontraditional baby-making poses a multitude of questions. One of the most vexing involves the ethics of disclosure. What do we tell the children? What are they ethically or legally entitled to know? How might disclosure affect other ART participants? And who is to make these difficult decisions—the parents or the state?

In my house, the question of disclosure arose early. I am unmarried, and my daughter's biological father is known to me by a number only. His twenty-page profile (housed in a file reserved for "special" things) protects his desire for anonymity, yet is full of intriguing facts: a recent college

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* Professor of Law, Thomas Jefferson School of Law. Many thanks go to Chris Sove for his diligent research assistance, and to the Thomas Jefferson School of Law for financial support. As always, my daughter Aviva spurs me to think more and harder about the nature of family in the post-ART era.

¹ See VICTORIA C. WRIGHT ET AL., CTR. DISEASE CONTROL & PREVENTION, CONTROL ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2003 (May 26, 2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5504a1.htm> (stating that in 2003, 122,872 ART procedures were reported to the Center for Disease and Control (CDC), resulting in the birth of 48,756 infants); see also VICTORIA C. WRIGHT ET AL., CTR. DISEASE CONTROL & PREVENTION, CONTROL ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2000 (Aug. 29, 2003), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5209a1.htm> (stating that in 2000, 99,629 ART procedures were reported to the CDC, resulting in the birth of 35,025 infants).

² See Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 958–59 (1996) (arguing that the use of ART, even by heterosexual couples, threatens the "traditional paradigm" of families).

graduate at the time of donation, he summered as an animal trainer, double majored in theoretical math and comparative literature, and professed a liking for spicy food and pistachios. When questioned about goals, he said that he was opposed to multi-tasking as a state of being, preferring instead to do whatever he is doing “all the way” and then “relax all the way.” I like to imagine him as tall and lithe and a bit abstract, making his way at his own pace, as my daughter seems to do—already very much her own person in her own abstract, determinedly unique way.

For her first two years, her dadless state provoked no queries. Was not a mom—and a doting nanny—bounty enough? But, within a week of starting preschool, afternoon pick-up presented a steadily growing gaggle of two- and three-year-olds pointing to my daughter and asking, “Why doesn’t she have a dad?” And so, maneuvering within the Disney-inspired imaginations of the toddler-set, I sought to craft an explanation of a generous stranger who gave my daughter and me a gift we can never repay.

For singletons and gay couples, the stark facts of biology render the question of disclosure moot. Inevitably, a child will ask, “Where did the sperm or egg come from?” and there is little incentive to lie. For married heterosexual couples the issue is more complex. Continued stigma surrounding infertility, concerns about a child’s “identity confusion,”³ and worries that disclosure will impair bonding between the nonbiologically linked parent and offspring lead many couples to keep the use of donor gametes secret.⁴ This secret-keeping reinforces existing policies of anonymous donation that signal to adoptive parents and donors alike that the act of donation is a “one-shot deal” establishing no enduring bonds or connections. It views ART participants as atomistic market actors whose interactions should be carefully monitored to ensure limited involvement beyond the mechanical mixing of gametes.

Today, a growing grassroots movement is questioning this operational premise. The children of sperm and egg donation have begun agitating for

³ See Maggie Kirkman, *Parents’ Contributions to the Narrative Identity of Offspring of Donor-assisted Conception*, 57 SOC. SCI. & MED. 2229, 2234 (2003) (noting parents’ reluctance to disclose the use of donor gametes for fear that it will confuse and distress the child, and quoting one parent as saying, “[My child] will be brought up in this world without the burden of knowing she was conceived by someone else’s sperm.”).

⁴ See E. Lycett et al., *School-Aged Children of Donor Insemination: A Study of Parents’ Disclosure Patterns*, 20 HUM. REPROD. 810, 817 (2005) (reporting that adoptive parents of donor-inseminated offspring were reluctant to disclose use of gametes for fear that “the father’s status as a parent could be undermined if the child reacted negatively to the knowledge of their donor origins”).

more open policies regarding donor identity, just as adoptees began pushing for more open adoption policies in the late 1970s.⁵ Countries in Europe and provinces in both Australia and New Zealand have moved toward open-donation policies⁶ and many contend that the United States should follow suit.⁷ Arguing that information about origin is every child's legal and moral right, these groups are urging a shift from anonymous to mandatory open donation.⁸

Central to this claim is the assumption that existing policies disadvantage ART's "children of choice."⁹ Advocates for open donation purport to speak on behalf of donor-gamete children and cloak their call for legal reform in the rhetoric of the children's "best interests."¹⁰ However, before following international trends toward open donation in third-party assisted reproduction, it is important to examine current data on ART children in both open and closed donation settings. Policy makers should look closely at the data on donor offspring for clues as to how these children are doing. And, before decisions affecting generations of donor insemination (DI) children can be made, a number of questions must be answered. Is closed donation exacting a psychological cost on ART progeny? Does clear data establish the superiority of open systems, or are

⁵ Nanette R. Elster, *All or Nothing? The International Debate over Disclosure to Donor Offspring*, INST. ON BIOTECHNOLOGY & HUM. FUTURE, http://www.thehumanfuture.org/commentaries/assisted_reproductive_technology/art_commentary_elster01.html (last visited Apr. 17, 2007).

⁶ *See id.*

⁷ *See id.* (arguing that "[t]o continue a culture of secrecy shuns, rather than celebrates, the children born of such arrangements and the donors who made their births possible").

⁸ *See id.* (arguing that even though "non-identifying information may be sufficient to meet the needs of [an] inquiring party," a more extensive registry should be implemented so that "if and when [identifying] information is desired or needed, it will be available"). Currently, no judicial doctrine or legislative rule requires donors to give anonymously. In fact, use of sperm from known donors occurs. However, anonymous donors from sperm banks are immune from child support claims. Conversely, courts have recognized paternity rights and imposed obligations when women use known donors to conceive children they intend to raise without donor intervention. *See, e.g., In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (finding that Colorado's Uniform Parentage Act did not exclude sperm donors from parental rights and responsibilities where the donation was made nonanonymously to an unmarried woman). In this way, courts are providing anonymous donation a legal subsidy, while saddling known donation with undesirable legal baggage.

⁹ *See* JOHN A. ROBERTSON, *CHILDREN OF CHOICE* (1994) (coining the phrase "Children of Choice").

¹⁰ *See* Elster, *supra* note 5.

the benefits of open systems exaggerated by advocacy groups who speak for smaller numbers than their vocal advocacy efforts imply? Additionally, should lawmakers take a broad view of the ART kinship unit and ask how policy shifts would affect other ART participants, namely donors and adoptive parents?

Advocates for change in gamete-donation policies draw heavily on developments in the adoption context that they contend establish the superiority of open policies over more buttoned-up approaches.¹¹ For that reason, this Article begins with the story of how evolving conceptions of adoption and the best interests of the adopted child led to dramatic changes in the way adoption records and birth parent anonymity are handled. The next section examines the analogies between adopted children and the children of ART to determine whether the risk/benefit calculus that led adoption professionals toward more open practices translates to the ART context. This part surveys the literature on families of gamete donation in an effort to determine whether anonymous donation appears to be harming donor offspring and whether open donation would offer a more therapeutic alternative. This part also broadens perspectives by examining the experience of countries that have legally banned or strongly discouraged anonymous donation, looking at its effect on adoptive parents, donors, and children. Finally, this Article offers some predictions and recommendations regarding how we should address this question in the United States, and how we can craft policies that preserve ART's capacity to fulfill the dreams of family-seeking adults, while maximizing the wellbeing and healthy functioning of donor offspring.

I. CHANGES IN ADOPTION POLICIES: FROM SECRECY TO OPENNESS

For the greater part of the last century, adoption records were sealed to prevent access to birth parents, adoptive parents, adult adoptees, and the general public.¹² Birth parents were kept ignorant about the whereabouts

¹¹ 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, 366–68 (2001) (arguing that “although different treatment [of adoption and ART] may be permissible, openness and identity release are the superior policy positions in both contexts, serving the best interests of the child involved”).

¹² Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 369 (2001). In 1960, 40% of states (20) allowed adopted adults unrestricted access to their birth certificates. *Id.* at 378. Only 35% of these states (seven) allowed access to adopted parents. *Id.* at 379. From 1960
(continued)

and welfare of their birth children, and adoptive parents and children were similarly walled off from knowledge about birth parents.¹³ This penchant for secrecy reflected attitudes about single mothers, adopted children, and the meaning of adoption as a social practice.¹⁴

Although perennially stigmatized in American thinking as unprincipled and sexually wanton, single mothers in the post-World War II era came to be associated with the taint of mental dysfunction.¹⁵ In the late 1940s and 1950s, psychological theorizing began to attribute out-of-wedlock births to the instability and emotional volatility of the mother.¹⁶ Pregnancy in a single woman was thought to represent the presence of a “significant pathology”¹⁷ that would doom the child to a psychologically damaging upbringing. As one influential psychiatrist, Leontine Young, wrote in 1945, “All these girls, unhappy and driven by unconscious needs, had blindly sought a way out of their emotional dilemma by having an out-of-

through the 1980s, all but three of the twenty states allowing adoptee access had reversed course, closing the records. *Id.* at 369. From the 1990s through the present, eleven additional states have passed statutes allowing adoptee access to original birth certificates, though only five (Alabama, Arkansas, Kansas, New Hampshire, and Oregon) allow access without restriction. *See* ALA. CODE § 22-9A-12(c) & (d) (LexisNexis 1997); ALASKA STAT. § 18.50.500(a) (2004); COLO. REV. STAT. § 25-2-113(3) (2006); CONN. GEN. STAT. ANN. § 19a-42(c) (West 2003); DEL. CODE ANN. tit. 16, § 3110(b) (2003); KAN. STAT. ANN. § 65-2423(a) (2002); MD. CODE ANN., [Health-Gen.] § 4-211(e)(2)(i) (West 2005); MINN. STAT. ANN. § 144.218 (subdivision 1) (West 2005); MONT. CODE ANN. § 50-15-304(2)(c) (2005); NEB. REV. STAT. § 71-626.01(3) (2003); N.H. REV. STAT. ANN. § 5-C:9(I) (LexisNexis Supp. 2006); OR. REV. STAT. § 432.240(1) & (2) (2005); TENN. CODE ANN. § 68-3-313(a)(1)–(3) (2001); WASH. REV. CODE ANN. § 26.33.330(1) (West 2005).

¹³ *See* Samuels, *supra* note 12, at 386.

¹⁴ *See id.* at 408–09.

¹⁵ *See* ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* 111 (2006) (“Women who did not subscribe to the prevailing domestic model were seen as a threat both to the family and to society The nuclear family—typified by a male breadwinner and a wife who stayed home and devoted herself to the needs of her husband and children—was held up not only as the ideal but also as a patriotic endeavor. Men and women who did not conform to this model ‘risked being perceived as perverted, immoral, unpatriotic, and pathological.’”).

¹⁶ Samuels, *supra* note 12, at 408.

¹⁷ Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, in *PSYCHOLOGY OF ADOPTION* 295, 297 (David M. Brodzinsky & Marshall D. Schechter eds., 1990).

wedlock child None of these violent neurotic conflicts are helpful ingredients in creating a good mother.”¹⁸

Adoption came to be seen as a good solution for birth parent and illegitimate child alike. Given the obvious mental impairment of the birth mother, the social stigma surrounding bastardy, and the availability of “normal” adoptive parents, adoption seemed the perfect remedy for an otherwise unsavory situation.¹⁹ Additionally, inclinations toward a nurture rather than nature theory of human behavior led child psychologists and social workers to view adoption as a way for children with a “bad start” to begin anew.²⁰ Unburdened by the discoveries of our genomic era, adoption professionals were confident that adoption would seamlessly transplant newborns into adoptive families, one family entirely displacing and eradicating the other.²¹ Emphasis was placed on matching children to adoptive parents by appearance, interests, and apparent personality traits with the expectation that the fact of adoption could be papered over by particularly skilled pairing.²²

Secrecy and the sealing of records was thought important to protect bonding between parents and their adopted children, the children’s psychological development, and the privacy of the birth mother. Mental health professionals were concerned that if records were left open and identities revealed, birth mothers might intrude upon adoptive families, corroding existing ties and wreaking havoc on the children’s emerging

¹⁸ Leontine R. Young, *Personality Patterns in Unmarried Mothers*, in UNDERSTANDING THE PSYCHOLOGY OF THE UNMARRIED MOTHER 7, 13 (Family Serv. Ass’n of Am. ed., 1945).

¹⁹ See Harold D. Grotevant et al., *Adoptive Identity: How Contexts Within and Beyond the Family Shape Developmental Pathways*, 49 FAM. REL. 379 (2000) (stating that “secrecy and anonymity . . . were largely an effort to shield children from the presumed stigma of ‘illegitimacy’ or ‘bad blood’”).

²⁰ See FESSLER, *supra* note 15, at 148–52 (discussing coercion exercised by social workers to promote waiver by birth mothers).

²¹ See Fred J. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L.Q. 221, 248 (1943) (Asserting, consistent with mid-twentieth century notions, that adoption results in a “complete severance of all contacts between the adopted child and the natural family. The adoptee becomes such an integral part of the adoptive family that it is best for all concerned that all relationship with the natural family be discontinued.”).

²² See Grotevant et al., *supra* note 19, at 379–80 (stating that the underlying goal of matching was for the child to be able to “pass” as a biologically related member of the adoptive family).

sense of place and self.²³ Moreover, it was felt that record sealing was a boon to the birth mother, whose post-birth resurrection could only be adversely affected by disclosures of her earlier sexual transgression.²⁴

Adoption remained a furtive social practice until the 1960s, when the impulse to question existing power relations led to a re-examination of adoption's status quo. Just as the civil rights and feminist movements sought to realign the power balance between blacks and whites and men and women, a growing movement sought to empower adopted children with information about their biological parents.²⁵ Sociologists and psychologists aided this movement as they began to question whether adoptive families could mirror biological families and whether adoption was a time-limited event as opposed to an "ongoing force in the lives of adoptees, adoptive parents, and birth parents."²⁶ Studies like those of David Kirk in 1964²⁷ and Sorosky, Baran and Pannor in 1978, revealed that adoptive families have distinctive qualities and characteristics, and recommended that families embrace these differences rather than deny

²³ Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents' Feelings Seven Years Later*, 48 SOC. WORK 409, 410 (2003).

²⁴ See Miriam Reitz, *Groundswell Change in Adoption Requires Anchoring by Research*, 16 CHILD & ADOLESCENT SOC. WORK J. 327, 328 (1999) (stating that "[t]he sealing of adoptee birth records, state by state, reflected public opinion about the most humane way to solve several problems. The child became 'legitimate[,] . . . [t]he adoptive parents were no longer childless[,and t]he birth mother could go on with her life as though she never had given birth.'").

²⁵ See *id.* at 333.

²⁶ *Id.* (emphasis omitted).

²⁷ See H. DAVID KIRK, *SHARED FATE: A THEORY OF ADOPTION AND MENTAL HEALTH* 98–99 (1964). H. David Kirk, an adoptive parent and sociologist, theorized that adoptive parents cope with the differences between their adoptive family and biologically related families in two general ways. *Id.* at 58–59. He claimed that some adoptive parents employ "rejection-of-difference" mechanisms, used to help them deny that their family unit is different from biologically related families. *Id.* at 60–61. Others use "acknowledgment-of-difference" mechanisms, which embrace the uniqueness of their family unit. *Id.* at 58–64. Kirk concluded that "acknowledgment-of-difference" strategies are more conducive to effective intrafamily communication than "rejection-of-difference" strategies, which create a poor atmosphere for open communication. *Id.* at 99.

them.²⁸ Further, these studies identified the harms that closed record policies inflicted on all adoption participants and urged change.²⁹

Later studies of adoption kinship networks with varied levels of information exchange and contact between birth parent and child indicated that open adoption did not pose the threat to adopted children or their families that theorists had earlier prognosticated. One large-scale longitudinal study, the Minnesota/Texas Adoption Research Project, culled data in two waves. Participants included parents in 190 adoptive families, at least one adopted child in 171 of the families, and 169 birth mothers.³⁰ The study recruited these 720 individuals from thirty-five adoption agencies located in twenty-three regions throughout the United States.³¹ The families' information exchange ranged from purely open (children, adoptive parents, and birth parents exchanged information freely), to mediated (information exchange mediated by a third party), to completely confidential (no information exchanged).³²

The first data set, collected from 1987 to 1992, tracked adopted children when they were between the ages of four and twelve.³³ The second set, collected from 1996 to 2000, tracked changes in kinship relationships and attitudes occurring in adolescence and young adulthood.³⁴ Data collection focused on several measures, including: levels of openness between adoptive parents, child, and birth parents,³⁵ changes in contact over time;³⁶ birth parent satisfaction and adjustment;³⁷ adopted children's satisfaction with contact, self-esteem, and adjustment,³⁸ and adoptive parents' confidence in their bonds with their children.³⁹

²⁸ See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 89–93, 105–09, 119 (1978).

²⁹ See *id.* at 146–49 (arguing that closed records aggravate identity confusion in adopted children).

³⁰ HAROLD D. GROTEVANT & RUTH G. MCROY, *OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS* 68 (1998).

³¹ *Id.* at 67.

³² *Id.* at 69, 72.

³³ *Id.* at 69.

³⁴ See Minnesota/Texas Adoption Research Project (MTARP), Participants, <http://fsos.che.umn.edu/img/assets/12980/Participants2.pdf> (last visited Apr. 17, 2007).

³⁵ GROTEVANT & MCROY, *supra* note 30, at 72.

³⁶ *Id.* at 75.

³⁷ *Id.* at 135.

³⁸ *Id.* at 88–90.

³⁹ *Id.* at 88.

Data from both waves indicated that open adoptions were working well for all participants. Younger children's satisfaction with contact did not vary by degree of contact, but the adolescents surveyed later in wave two did stratify based on whether they had contact with their birth mother or not; those who had contact reported higher satisfaction levels than those who did not.⁴⁰ No correlation was reported between levels of openness and children's socio-emotional adjustment or self-esteem; rather, the strongest adjustment predictors centered on adoptive parents' assessments of the child's compatibility with the family.⁴¹ When contact and other interactions were characterized by "mutual respect, empathy, and valuing of the relationship," children reported better adjustment.⁴²

Concerns that information about or contact with the birth mother would precipitate identity confusion in adoptive children proved unfounded. Adolescents' views of their adoptive identity ranged from uninterested and unengaged to highly interested and invested.⁴³ Some adolescents had primarily negative feelings about being adopted, while others had primarily positive feelings.⁴⁴ Interestingly, "[d]ifferences in adoptive identity or degree of preoccupation with adoption were not related to the level of openness in the adolescent's adoption."⁴⁵ Older children, as opposed to younger children, tended to demonstrate more curiosity about their birth parents, and older children in fully open adoptions rated satisfaction with their adoption openness more highly than did children in fully confidential or mediated adoptions.⁴⁶ Adoption openness appeared not to influence more global measures of self-worth or self-esteem.⁴⁷ Thus, data emerging from the Minnesota/Texas project exploded the myth that open adoption would precipitate a crisis in identity, but also defused the arguments of open adoption advocates who said that more openness

⁴⁰ Tai J. Mendenhall et al., *Adolescents' Satisfaction with Contact in Adoption*, 21 CHILD & ADOLESCENT SOC. WORK J. 175, 182 (2004).

⁴¹ Minnesota/Texas Adoption Project (MTARP), Key Findings 7 (2005), <http://fsos.che.umn.edu/img/assets/12980/Key%20Findings%20for%20Web.pdf> [hereinafter Key Findings].

⁴² *See id.*

⁴³ *See id.* at 7–8.

⁴⁴ *See id.* at 9.

⁴⁵ *See id.*

⁴⁶ *See* GROTEVANT & MCROY, *supra* note 30, at 94; Key Findings, *supra* note 41, at 3–4.

⁴⁷ Key Findings, *supra* note 41, at 6.

would lead to better adjusted and happier children.⁴⁸ Although providing information about birth mothers and allowing for contact seemed to boost children's satisfaction levels with adoption openness, it did not yield children with higher levels of self-esteem or self-regard, nor did it move children to "levels of understanding" about their adoption status "beyond [their] cognitive capabilities to reach."⁴⁹

Birth mothers in fully open adoptions reported higher satisfaction levels than birth mothers in confidential or mediated adoptions⁵⁰ and lower levels of adoption-related distress.⁵¹ Information about the children placed for adoption and their adoptive parents seemed to diminish post-placement grief and enhance functioning.⁵²

Adoptive parents, a group thought to be placed at risk by open adoption, proved to be surprising beneficiaries of the process. Compared as a group to parents in confidential adoptions, open-adoption parents reported more empathy toward birth parent and child, less fear of intrusion, and greater feelings of permanence in their parenting relationship.⁵³ Other studies reinforce the conclusion that adoptive parents in open adoptions view the arrangement as positive and helpful to their children and supportive of their role as parents.⁵⁴ When asked, "How, if at all, have your feelings about openness changed over time?" all sixteen parents in one study uniformly reported that they either had not changed or had become more positive about the arrangement as time went on.⁵⁵ The only regret parents expressed was not fostering openness earlier and not encouraging greater levels of contact and interaction with birth relatives.⁵⁶

Although social science data rarely translates directly into legislative reform, the lobbying efforts of adoption-rights groups combined with

⁴⁸ See GROTEVANT & MCROY, *supra* note 30, at 102–03.

⁴⁹ *Id.* at 104–05.

⁵⁰ See Key Findings, *supra* note 41, at 9.

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.* at 10.

⁵⁴ See Siegel, *supra* note 23, at 416–17.

⁵⁵ *See id.* at 415 (reporting that adoptive parents reported feeling "more confident" and "more enthusiastic" about openness seven years post-adoption than they did initially. When asked, "What, if anything, would you do differently in retrospect?", most reported that they wished they had been more open with their adoptive children from the start).

⁵⁶ *See id.* (noting one parent's wish that "we'd made an agreement with the birth mother so we could contact her, not just the other way around," and another's regret that her family did not push the agency about "notifying the birth mother about our letters to her").

shifting attitudes on the part of psychologists, social workers, and other adoption professionals led states to begin to dismantle the legal hurdles preventing birth parents and adoptive children from learning about and interacting with each other. Today, nearly all states allow adopted children to receive nonidentifying information about their birth relatives once they turn eighteen.⁵⁷ Generally, this information is available upon written request, although a few jurisdictions require a court order before any information will be released.⁵⁸

States generally allow the release of identifying information with the consent of the individual whose information is being requested.⁵⁹ Many

⁵⁷ See, e.g., MINN. STAT. ANN. § 259.83(1a) (West 2003) (“If a person aged 19 years and over who was adopted . . . requests the detailed nonidentifying social and medical history of the adopted person’s birth family . . . agencies must provide the information”); MISS. CODE ANN. § 93-17-207(1)(a) (2004) (“The bureau or the agency shall release the nonidentifying information . . . to . . . [a]n adoptee eighteen (18) years of age or older.”). For a definition of nonidentifying information, see ALA. CODE § 26-10A-31(g) (1992) (“[N]onidentifying information . . . shall be limited to the following: (1) Health and medical histories of the adoptee’s natural parents; (2) The health and medical history of the adoptee; (3) The adoptee’s general family background, including ancestral information, without name references or geographical designations; (4) Physical descriptions; (5) The length of time the adoptee was in the care and custody of one other than the petitioner; and (6) Circumstances under which child comes to be placed for adoption.”). Additionally, Alabama, Illinois, Kansas, Maryland, Minnesota, Mississippi, and Wyoming allow adoptive parents to request additional health information from birth parents in the event that a medical need for information arises. See *id.* § 26-10A-31(i); 750 ILL. COMP. STAT. ANN. 50/18.4a (West Supp. 2006); KAN. STAT. ANN. § 59-2122 (2005); MD. CODE ANN., [FAM. LAW] § 5-356 (LexisNexis 2006); MINN. STAT. ANN. § 259.83(1a); MISS. CODE ANN. § 93-17-209(5); WYO. STAT. ANN. § 1-22-116 (2005). Alabama allows an adult adoptee to petition a court for disclosure of identifying information of the genetic parents. See ALA. CODE § 26-10A-31(j).

⁵⁸ New Jersey, the District of Columbia, and North Carolina require a court order for the release of identifying information. See D.C. CODE § 16-311 (2001); N.J. STAT. ANN. § 9:3-52(a) (West 2002) (requiring that “[a]ll records of proceedings relating to adoption, including the complaint, judgment and all petitions, affidavits, testimony, reports, briefs, orders and other relevant documents, shall be filed under seal by the clerk of the court and shall at no time be open to inspection or copying unless the court, upon good cause shown, shall otherwise order”); N.C. GEN. STAT. § 48-9-102(a) & (b) (2005).

⁵⁹ See, e.g., WIS. STAT. ANN. § 48.433(2) (West Supp. 2006) (“Any birth parent whose rights have been terminated in this state at any time, or who has consented to the adoption of his or her child in this state before February 1, 1982, may file with the department, or agency . . . an affidavit authorizing the department or agency to provide the child with his or

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states have established mutual consent registries which allow birth parents, adoptive parents on behalf of minor adopted children, and adopted children upon reaching the age of majority to provide (or withhold) consent for the disclosure of their name, address, and other contact information.⁶⁰ A

her original birth certificate and with any other available information about the birth parent's identity and location.”).

⁶⁰ Thirty-five state statutes provide for an adoption registry or substantial equivalent: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin. *See* ALA. CODE § 26-10A-31 (LexisNexis Supp. 2005); ARIZ. REV. STAT. ANN. § 8-121 (Supp. 2006); ARK. CODE ANN. § 9-9-503 (2002); CAL. FAM. CODE §§ 9203-04 (West 2004); COLO. REV. STAT. § 25-2-113.5 (2006); CONN. GEN. STAT. ANN. § 45a-755 (West 2004); DEL. CODE ANN. tit. 13 § 962 (1999); FLA. STAT. ANN. § 63.165 (West 2005); GA. CODE ANN. § 19-8-23(9) (2004); HAW. REV. STAT. § 578-15 (1993); IDAHO CODE ANN. § 39-259A (2002); 750 ILL. COMP. STAT. ANN. 50/18.05 (West Supp. 2006); IND. CODE ANN. § 31-19-23-1 to 14 (West 1999); IOWA CODE ANN. § 144.43A (West 2005); LA. REV. STAT. ANN. § 15:1270 (2004); ME. REV. STAT. ANN. tit. 22, § 2706-A (2004); MD. CODE ANN., [Family Law] § 5-4C-02 (LexisNexis 2006); MASS. GEN. LAWS ch. 210 § 5D (2004); MICH. COMP. LAWS ANN. § 710.27a (West 2002); MISS. CODE ANN. § 93-17-215 (2004); MO. ANN. STAT. § 453.121 (West Supp. 2006); NEV. REV. STAT. § 127.230 (1995); NEV. ADMIN. CODE CH. 127 § 090 (2005); N.J. ADMIN. CODE § 10:121C-7.1 (2005); N.M. STAT. ANN. § 32A-5-40 (2003); N.Y. PUB. HEALTH LAW § 4138-c (McKinney 2002); OHIO REV. CODE ANN. § 3107.40-41 (West 2005); OKLA. STAT. tit. 10, § 7508-1.2 (Supp. 2007); OR. REV. STAT. § 109.425-507 (2005); 23 PA. CONST. STAT. ANN. § 2905(d) (West Supp. 2006); R.I. GEN. LAWS § 15-7.2-1 to 15-7.15 (2003); S.C. CODE ANN. § 20-7-1780(E)(1) (Supp. 2005); S.D. CODIFIED LAWS § 25-6-15.3 (2004); TENN. CODE ANN. § 36-1-128 to 36-1-131 (2005); VT. STAT. ANN. tit. 15A § 6-103 (2002); WIS. STAT. ANN. § 48.434 (West 2003). California's disclosure statute provides:

The [State D]epartment [of Family Service] or a licensed adoption agency shall do the following: (1) Upon the request of a person who has been adopted pursuant to this part and who has attained the age of 21 years, disclose the identity of the person's birth parent or parents and their most current address shown in the records of the department or licensed adoption agency, if the birth parent or parents have indicated consent to the disclosure in writing. (2) Upon the request of the birth parent of a person who has been adopted pursuant to this part and who has attained the age of 21 years, disclose the adopted name of the adoptee and the adoptee's most current address shown in the records of the department or licensed adoption agency, if the adult adoptee has indicated in writing, pursuant to the registration program developed by

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majority of states employ an opt-in procedure, in which willing parties file affidavits affirming a willingness to make their identity known to other adoption participants.⁶¹ The remaining minority of states allow disclosure of information from the registry upon request, so long as the party whose information is being requested has not filed an affidavit requesting continued anonymity.⁶² Whereas a desire for absolute confidentiality was once assumed, today many states ask birth parents in the process of relinquishing parental rights if they are willing to have their name and whereabouts disclosed to the adopted child at the age of eighteen.⁶³ Absent a consent on file, adopted children must petition the court for disclosure, demonstrating by clear and convincing evidence that a compelling reason for disclosure exists that outweighs the confidentiality interests of the birth parent.⁶⁴

the department, that the adult adoptee wishes the adult adoptee's name and address to be disclosed.

CAL. FAM. CODE § 9203(a)(1) & (2).

⁶¹ Thirty-one states have an opt-in registry: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, and Wisconsin. See sources cited *supra* note 60; see, e.g., MO. ANN. STAT. § 453.121(10) (West Supp. 2006) (“The central office of the children’s division within the department of social services shall maintain a registry by which biological parents, adult siblings, and adoptive adults may indicate their desire to be contacted by each other. The division may request such identification for the registry as a party may possess to assure positive identifications. At the time of registry, a biological parent or adult sibling may consent in writing to the release of identifying information to an adopted adult.”).

⁶² Hawaii, upon request of an adopted adult adopted before January 1, 1991, will attempt to reach birth parents for permission to release identifying information. HAW. REV. STAT. § 578-15(b) (1993). If the birth parents agree or cannot be contacted, the information will be released. *Id.* If the adult was adopted after December 31, 1990, identifying information will be released if there is not an affidavit on file from the birth parent requesting confidentiality. *Id.* Three states (Indiana, Michigan, and Vermont) have registries that transition from opt-in to opt-out based upon when the adoption took place. See IND. CODE ANN. § 31-19-23-1 to 31-19-25-14 (West 1999); MICH. COMP. LAWS ANN. § 710.68 (West 2002); VT. STAT. ANN. tit. 15A § 6-105 (2002).

⁶³ See, e.g., COLO. REV. STAT. § 19-5-305(1.5) (2006).

⁶⁴ See, e.g., ARK. CODE ANN. § 9-9-506(c) (2002) (requiring that “[i]n exceptional circumstances, specified papers and records pertaining to particular adoptions may be inspected by the adoptee, the adoptive parents, and the birth parents if the court granting the adoption finds by clear and convincing evidence that good cause exists for the inspection”).

Another way adoptees can gain information about their birth is to request a copy of their original birth certificate. As with requests for identifying information about birth parents, some states require a showing of good cause,⁶⁵ and others grant disclosure upon request, provided no affidavit from the birth parents is on file denying release.⁶⁶

Open-record opponents often contend that moves to pierce birth record confidentiality violate the expectations of birth parents who were promised secrecy when they relinquished their parental rights.⁶⁷ Yet, birth parents have not been staunchly set against disclosure. Instead, some have sided with the open-record movement, and stunningly few have filed objecting affidavits in states where disclosure is automatic absent a nonconsent document on record. In New Hampshire, which passed legislation in 2005 granting adoptive children the right to their original birth certificates,⁶⁸ 779 adoptees have requested their records, but only eleven birth parents have expressed a desire not to be contacted.⁶⁹ Oregon voters passed a similar ballot initiative in 1998.⁷⁰ As of 2005, the five year anniversary of the bill

⁶⁵ See, e.g., COLO. REV. STAT. § 19-5-305(2) (2006).

⁶⁶ Subject to date of adoption restrictions, four states will release the original birth certificate if the birth parents have not filed an affidavit requesting that the certificate be withheld: Minnesota, Montana, Nebraska, and Washington. See MINN. STAT. ANN. § 259.89 (West 2003); MONT. CODE ANN. § 42-6-109 (2005); NEB. REV. STAT. § 43-146.05(2) (2004); WASH. REV. CODE ANN. § 26.33.345(3) (West 2005).

⁶⁷ See Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 275-77 (1994).

⁶⁸ See N.H. REV. STAT. ANN. § 5-C:9 (LexisNexis Supp. 2006) (“I. Upon written application by an adult adoptee, who was born in this state and who has had an original birth certificate removed from vital statistics records due to an adoption, the registrar shall issue to such applicant a non-certified copy of the unaltered, original certificate of birth of the adoptee, with procedures, filing fees and waiting periods identical to those imposed upon non-adopted citizens of the state. I-a. The registrar shall prescribe and, upon request, shall make available to each birth parent named on the original birth certificate, a contact preference form on which the birth parent may state a preference regarding contact by an adoptee who is the birth child of the birth parent. Upon such a request, the registrar shall also provide the birth parent with an updated medical history form, which shall be completed and returned, together with the completed contact preference form, by the birth parent to the registrar.”).

⁶⁹ Editorial, *Maine Adoptees Have Right to See This Bill Passed*, PORTSMOUTH HERALD, Jan. 17, 2006, <http://seacoastonline.com/news/01172006/editoria/83185.htm>.

⁷⁰ Oregon Dep’t of Human Servs., Adoption Services: Preadoption Birth Record, http://egov.oregon.gov/DHS/children/adoption/adopt_registry/adoptreginfo.shtml (last visited Apr. 18, 2007).

(not including eighteen months of appeals, stays, and extensions), over 8,000 adult adoptees had pursued access to their original birth certificates and only eighty-three birth parents had requested that they not be contacted.⁷¹ In Delaware, which passed legislation that opened birth certificates to adoptees whose birth parents have not filed an affidavit opposing disclosure,⁷² very few birth parents have denied access.⁷³

Maine legislators set to vote on a recently proposed open-record bill faced arguments from the state's Roman Catholic Diocese, who claimed that initiatives to unseal original birth certificates would betray the confidences of birth mothers who were promised privacy protection when they gave up their babies to Catholic adoption agencies.⁷⁴ Interestingly, the Church's main opposition comes from Access 2006, an adult-adoptee advocacy group cofounded by a birth parent who claims that women who gave up their children for adoption are disserved by groups misguidedly trumpeting their interests while continuing to shroud the waiver of parental rights in a cloud of secrecy and shame.⁷⁵

Although legislative battles in the adoption context continue, most informed partisans in the debate concede that open policies appear to benefit all adoption participants while imposing few costs.⁷⁶ The mental health concerns that led family placement professionals in the middle of the last century to urge a "don't ask/don't tell" approach have not materialized. Allowing for information exchange and contact between birth parent and adopted child does not weaken adoptive families, dilute identity-formation in children, or impede the grieving and healing process of birth mothers.⁷⁷ Instead, opening up access and encouraging disclosure

⁷¹ Oregon Dep't of Human Servs., Measure 58 Update, <http://www.oregon.gov/DHS/ph/chs/order/58update.shtml#05312005> (last visited Apr. 17, 2007).

⁷² DEL. CODE ANN. tit. 13, § 923(b) (1999).

⁷³ Legislative Updates, <http://forums.adoption.com/search-birthfamily-adoptee/112963-legislative-updates.html> (last visited Apr. 17, 2007) (indicating that as of May 2003, almost three and a half years after the legislation was passed, 472 adoptees had obtained copies of their original birth certificates and only fifteen birth parents had not consented to the release).

⁷⁴ See Tess Nacelewicz, *Adoptees Seek Law for Access to Birth Records*, PORTLAND PRESS HERALD, Jan. 29, 2006, at A1.

⁷⁵ See *id.*

⁷⁶ See, e.g., Child Welfare League of Am., Openness in Adoption, http://www.cwla.org/programs/adoption/open_records4.htm (last visited Apr. 17, 2007).

⁷⁷ See Julia Feast, *Using and Not Losing the Messages from the Adoption Experience for Donor-Assisted Conception*, 6 HUM. FERTILITY 41, 45 (2003); Nacelewicz, *supra* note (continued)

has proven a salutary development. Adoptive families and children appear stronger and more intact as a result.⁷⁸

For some, the happy movement from secrecy to openness in the adoption context presents a model and a call to arms for the ART community.⁷⁹ They argue that adoption should serve as the template for families created via donor gametes.⁸⁰ If adopted children are now seen as having rights to genealogical information from their “missing parent,” this recognition should be extended to the interests of children conceived via third-party gametes.⁸¹ They too should be given the right to learn about the “missing piece” of their family tree.

This argument, however, assumes that the adoption analogy works. It assumes children adopted at birth and children conceived via third-party gamete donation are similarly situated. It also assumes the benefits openness confers on the adoption kinship unit—namely birth parents and adoptive parents—will flow similarly to gamete donors and adoptive parents in the ART context.

Arguments for openness are invariably couched in the language of best interests. If we care about the children of ART—if we want to do what is in their best interests—we will move from secrecy to disclosure. Yet, as promising as the data on open adoption appears, we should be wary of a wholesale transfer of the lessons from adoption policy to the world of ART. Also, we should be skeptical of arguments grounded in the best interests of children who we know little about. Before embracing a radical change in legal policies, we should assess how well the adoption analogy works and examine what we know empirically about children born through gamete donation.

74 (quoting a birth mother as saying that reuniting with her son after nearly forty years was “the most spiritually healing journey of [her] life”).

⁷⁸ See Feast, *supra* note 77.

⁷⁹ See Julia Feast, *Misconceived Secrecy*, COMMUNITYCARE.CO.UK, July 4, 2002, <http://www.communitycare.co.uk/Articles/2002/07/04/37124/misconceived+secrecy+.html> (citing adoption research that establishes “the relationships formed in childhood can remain strong and withstand the adopted person’s search for identity and reunion with a birth relative”).

⁸⁰ *Id.*

⁸¹ See Feast, *supra* note 77, at 42, 45.

II. FROM ADOPTION TO ART: WHAT DO WE KNOW ABOUT ART'S "CHILDREN OF CHOICE"?

A. *The Adoption Analogy: Does It Work?*

The Children's Society of England (Society) worked long and hard to have anonymous sperm donation banned in England. Their lobbying efforts drew explicitly on trends in adoption law. In one editorial published in the *Guardian*, England's most progressive newspaper, the Society's Project Manager wrote:

The experience of allowing adopted children to know about their past strongly supports the case for change. Since 1975, adopted children have been entitled to information about their biological history Many adopted children have benefited tremendously as a result, gaining a fuller sense of their own identity.

Our research shows that over 80 per cent of adopted people search for birth relatives, many of them to help satisfy the long-standing curiosity about origins which most people share. Almost 70 per cent want to identify important background information about possible hereditary medical conditions of birth parents and over 85 per cent reported that the experience of tracing relatives was positive, even when family reunions did not work out.⁸²

The Society offers its research regarding adopted children's searches and reunions to argue that ART children experience the same curiosity about biological origins and would similarly benefit from a reunion with their gamete donor.⁸³

But the children of gamete donation differ significantly from adoptive children in a number of ways. First, they are not entirely cut off from their biological and genetic past. Children of sperm or egg donation are typically biologically linked to one of their parents. Adopted children enjoy no biological linkage with either social parent. Children of gamete

⁸² Julia Feast, *The Right to an Identity*, GUARDIAN, June 16, 2002, <http://observer.guardian.co.uk/comment/story/0,,737777,00.html>.

⁸³ See Feast, *supra* note 77 (arguing that conclusions from adoption research favoring openness apply to children of donor-assisted conception).

donation usually live with at least one of their chromosomal providers, so information about genetic makeup is readily available; adopted children, however, often cannot acquire such information when they are barred from access to written records and contact with birth parents. Additionally, gamete donors are generally required to fill out extensive surveys regarding their medical history, often tracing their genealogical history back three generations.⁸⁴ Consequently, the children of gamete donation have access to full genetic information about one side of their family and to significant medical and physical data about the other.

Second, the children of gamete donation do not stand in the same psychological relation to their absent gamete donor as do adopted children to their birth parents. Adopted children, born to biological parents who then “gave them up,” must confront and cope with the fact of this relinquishment.⁸⁵ Therefore, accepting one’s adopted status means facing the imponderable question of how and why one’s biological parents chose to abandon their parenting role. Conversely, ART children understand that their conception reflects their social parents’ intense desire to parent.⁸⁶ The donor is rarely perceived as one who took action to become a parent but then abandoned the parenting role. Rather, the donor’s role is usually conceptualized as that of an altruistic helper—an individual who provides the raw materials required to bring into existence the life that the social parent seeks to love, nurture, and protect.⁸⁷

Given these differences, the key question is whether children of gamete donation feel differently about their biological progenitors than do adoptive children. This question is central to the policy question of whether to continue or to ban anonymous donation, yet we have stunningly little empirical evidence upon which to base action. At this stage we have only the most primitive information about how the children of gamete

⁸⁴ See Jeffrey A. Kuller et al., *Disposition of Sperm Donors with Resultant Abnormal Pregnancies*, 16 HUM. REPROD. 1553, 1553 (2001) (noting recommendations that a three-generation pedigree be acquired from sperm donors during screening process).

⁸⁵ See Pasquale Patrizio et al., *Gamete Donation and Anonymity: Disclosure to Children Conceived with Donor Gametes Should Be Optional*, 16 HUM. REPROD. 2036 (2001).

⁸⁶ See *id.* (arguing that “donor conception children do not have to come to terms with being rejected by their birth parents, often the case with adopted children”).

⁸⁷ See Bonnie Steinbock, *Payment for Egg Donation and Surrogacy*, 71 MOUNT SINAI J. MED. 255, 257–58 (2004).

donation are doing. We have an equally impoverished sense of their informational needs.⁸⁸

Before reversing existing policies regarding disclosure, it seems that extensive review of the socio-emotional development of gamete donor offspring is needed. If the status quo is harming the offspring of gamete donation, then change is clearly required. If the status quo is yielding happy children in well-functioning families, then a call for change may be ill-advised.

B. What Do We Know About Gamete-Donor Children? What Is in Their Best Interests?

Data on the children of gamete donation is sparse. The debate has largely been framed by anecdotal accounts and speculative claims about who donor offspring are and what they need.⁸⁹ Unfortunately, the study that has figured prominently in the anonymous donor debate is a small, qualitative inquiry⁹⁰ that is marred by bias in its selection of subjects.⁹¹

The study, authored by psychologists A. J. Turner and A. Coyle, sought to explore how donor offspring⁹² felt about the secrecy surrounding their conception, their difficulty in obtaining information, and their efforts to make contact with their missing “father.”⁹³ Participants were recruited from donor conception support networks located in the United Kingdom, United States, Canada, and Australia.⁹⁴ They received a questionnaire consisting of twenty-seven open-ended questions, with the ability to follow-up with comments relating to topics not adequately addressed by the questions.⁹⁵ Researchers analyzed the data, identified associations and

⁸⁸ S. Golombok et al., *The European Study of Assisted Reproduction Families: The Transition to Adolescence*, 17 HUM. REPROD. 830, 838 (2002).

⁸⁹ See *id.* (“Anecdotal evidence suggests that some people who find out about their conception by DI in adulthood feel hostile towards their parents and mistrustful of them.”).

⁹⁰ See generally A.J. Turner & A. 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 (2000).

⁹¹ See G. Schilling & R. Conrad, Letter to the Editor, *Secrecy and Openness in Donor Offspring*, 16 HUM. REPROD. 2244–45 (2001) (discussing some methodological problems inherent in the Turner and Coyle study).

⁹² All participants in the study were products of donor-sperm; no donor-egg offspring were recruited to be part of the study. See Turner & Coyle, *supra* note 90, at 2044.

⁹³ *Id.* at 2043.

⁹⁴ *Id.*

⁹⁵ *Id.* The questionnaire addressed the following topics:

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connections, and extrapolated a series of major themes from those associations.⁹⁶

The themes identified all told of the destructive effect that parental secrecy had on donor offspring self-esteem and sense of place in the family. Offspring reported feeling rejected by and distant from their adoptive father.⁹⁷ They noted that the “secret” negatively affected the balance of power in the family and that the eventual discovery of their donor offspring status was shocking and identity shattering.⁹⁸ As one respondent explained, “I felt my entire life was based on a lie and I was furious with my mother for dying with this secret.”⁹⁹ Respondents also revealed a powerful desire to know their biological donors, to identify mutually-shared traits and dispositions, and to substitute a real flesh-and-blood man for the fantasy of their imagination.¹⁰⁰ Respondents’ accounts were laced with feelings of loss—loss because they did not know the donors and because that absence seemed ignoble.¹⁰¹ One donor offspring questioned the ethical credibility of anonymous donation, wondering:

If DI is an honourable way to conceive a child, why should the person who makes this possible be afforded the status of anonymity when every other act of reproduction entails responsibility for the children created? Even ‘deadbeat dads’ and promiscuous men who father children through random sex are held responsible to their offspring.¹⁰²

The circumstances surrounding the disclosure of the participants’ conception through DI; the extent to which this had been kept a secret from them and their awareness of this secret; their experiences of trying to trace and search for their genetic father (the donor) and the implications these experiences might have for identity; their current perception of DI and how families should manage openness versus secrecy; and therapeutic issues.

Id.

⁹⁶ *Id.* at 2044.

⁹⁷ *Id.* at 2045–46.

⁹⁸ *Id.* at 2044–46.

⁹⁹ *Id.* at 2045.

¹⁰⁰ *Id.* at 2046.

¹⁰¹ *See id.* (quoting one donor offspring as commenting, “I have been unable to find info about my donor. I was conceived in 1947. It makes me sad to think I may never figure this puzzle about myself out.”).

¹⁰² *Id.* at 2047.

The picture that emerges from the Turner and Coyle study is bleak. The donor offspring who were surveyed reported feeling alienated from their families, startled and disoriented by the discovery of their donor status, and haunted by the spectral “father” they would never know.¹⁰³ The researchers maintain that the study establishes “the negative and ongoing effects of withholding secrets and the knowledge that ‘things were not quite right.’”¹⁰⁴ They noted that participants revealed a profound desire to know more about their genetic origins and reported a “perceived loss of agency or self-efficacy because of the obstruction they faced in trying to search for and obtain identifying information about their donor fathers.”¹⁰⁵

The study’s unequivocal report of distress and dissatisfaction among donor offspring in closed-record regimes stands as a rebuke to policies built around anonymous donation. Indeed, the researchers draw the obvious conclusion that “[t]hese findings support the move towards openness advocated in the DI literature.”¹⁰⁶ Yet, the study’s methods and procedures are suspect. Only donor offspring who felt compelled to join a donor-insemination support network were contacted and solicited to participate in the study.¹⁰⁷ Thus, the only donor offspring interviewed were those who had already demonstrated some concern, preoccupation, or need for assistance in coping with their nontraditional conception.¹⁰⁸

¹⁰³ *Id.* at 2044–47.

¹⁰⁴ *Id.* at 2049.

¹⁰⁵ *Id.* at 2049–50.

¹⁰⁶ *Id.* at 2049.

¹⁰⁷ *Id.* at 2043.

¹⁰⁸ *See id.* The donor-conception support networks exist to provide support and assistance to third-party assisted families. *See* Donor Conception Support Group, Our Aims, http://members.optushome.com.au/dcsg/about_us/aims.html (last visited Apr. 18, 2007). Under “What we can do,” the function and purpose of the group is explained:

As a support group we are able to help each other in making the decision to use a donor, and in the experience of being on a clinic program. For those who have children, [the group gives them] the opportunity to meet other donor gamete families.

As children get older they sometimes feel they would like to talk to other donor conceived children as well. By becoming a member of the Support Group, the children can meet and grow up knowing other children who were conceived the same way they were and have the opportunity to discuss any issues they have with their peers.

Id.

Undoubtedly, donor offspring exist who do not feel the need to join support networks for solace or counseling—but their views were not tapped by the study. The study's unrepresentative sample tilts toward a finding of distress and trauma among donor offspring. More likely, a study surveying a more random sampling of donor offspring would produce different results.

Further compromising the study is the small number of survey subjects. A total of eighteen individuals responded to study solicitations, but only sixteen completed the study.¹⁰⁹ Because of its small and unrepresentative “n,” it is dangerous to treat the Turner and Coyle study as evidence of donor offspring welfare or best interests.¹¹⁰

More useful are the controlled, longitudinal studies designed and implemented by researchers in both Europe and the United States to assess the development of children in traditional and nontraditional family forms. The European Study of Assisted Reproduction Families sought to measure the quality of family relationships and child well-being in families created through natural and assisted reproduction.¹¹¹ The family forms included children conceived by in vitro fertilization (where the child is genetically linked to both parents), children conceived through donor insemination (where the child is linked to one parent), adoptive children (where the child and adoptive parents are genetically dissimilar), and naturally conceived children.¹¹² Initially, the study was based in the UK, where a total of 184 families participated.¹¹³ Ultimately, the researchers expanded the study to include families from the Netherlands, Spain, and Italy.¹¹⁴ The study assessed parental mental health, expressed warmth, joy in parenting, and perceptions of strength of relationship with child, as well as the children's

¹⁰⁹ Turner & Coyle, *supra* note 90, at 2043.

¹¹⁰ Unfortunately, despite this danger, the study has been the basis of a number of advocacy pieces urging a ban on anonymous donation. *See, e.g.,* Feast, *supra* note 79.

¹¹¹ *See* S. Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning and Child Development*, 11 HUM. REPROD. 2324, 2324 (1996).

¹¹² *Id.*

¹¹³ This phase of the study included forty-one families with a child conceived by IVF, fifty-five families with a child adopted in the first six months of life, forty-five families with a child conceived by donor insemination, and forty-three families with a naturally conceived child. *Id.*

¹¹⁴ *See id.* The addition of these countries nearly quadrupled the study size. Ultimately, 116 in vitro fertilization, 111 donor insemination, 115 adoptive, and 120 naturally conceived families participated. *Id.*

socio-emotional development.¹¹⁵ Significantly, the parents of children conceived via in vitro fertilization (IVF) or DI obtained higher ratings for maternal and paternal warmth and emotional involvement with their child than did parents of children conceived naturally.¹¹⁶ The mothers of naturally conceived children also reported more parenting-related stress than did their ART-assisted counterparts.¹¹⁷ The lack of a genetic tie between DI fathers and their children appeared not to affect the quality of the relationship, as indicators of paternal warmth, interaction, and engagement were similar for both IVF and DI fathers.¹¹⁸

Children's self-esteem and feelings toward their parents were charted through self-report, in addition to parent and teacher surveys.¹¹⁹ Additionally, evaluations were conducted in the UK arm of the study.¹²⁰ There, researchers examined the children's security of attachment to their parents using the Separation Anxiety Test, and a child psychiatrist assessed the children's mental health by reading a transcript of an interview with each family.¹²¹ In each country, children conceived via ART showed no evidence of psychological disorder, and their perceptions of their relationship with their parents were similar to those of naturally conceived and adopted children.¹²² ART-assisted children in the UK were every bit as attached and secure in their relations with their parents as were children in other types of families, and the child psychiatrists reviewing interview transcripts did not detect higher levels of pathology in one type of family form as opposed to another.¹²³ In short, family relationships within ART-assisted families were, if anything, stronger and more intact than those within naturally conceived families, and the mental health and development of the children of ART was indistinguishable from their peers in more traditional family structures.¹²⁴

Although the news from the European study's first data set was good, researchers wondered whether ART children and families would begin to

¹¹⁵ *Id.* at 2326–27.

¹¹⁶ *Id.* at 2328.

¹¹⁷ *Id.* Adoptive parent scores were comparable to those of parents of IVF and DI children. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2327.

¹²⁰ Golombok et al., *supra* note 88, at 833.

¹²¹ *Id.*

¹²² *Id.* at 836–37.

¹²³ *See id.* at 832.

¹²⁴ *Id.* at 837–38.

show signs of stress at adolescence, when issues of identity and origin become more salient. Researchers revisited the families when the children were eleven to twelve years old and interviewed mothers, fathers, children, and teachers to learn how the parent-child bond and the children's socio-emotional functioning were maintaining over time.¹²⁵

Mother-child and father-child relationships were divided into two components—warmth¹²⁶ and discipline.¹²⁷ When mothers of naturally conceived, adopted, DI, and IVF children were compared, three findings emerged. First, mothers who used assisted reproduction reported significantly greater enjoyment of parenthood than did mothers who conceived children naturally.¹²⁸ Second, mothers who used assisted reproduction received higher ratings for emotional involvement than did mothers with naturally conceived and adopted children.¹²⁹ Third, on the disciplinary front, children conceived by assisted reproduction reported receiving less criticism from their mothers than did naturally conceived or adopted children.¹³⁰ Fathers of assisted reproduction children, including donor-gamete children, also appeared to enjoy stronger connections with their children than did fathers with naturally conceived and adopted children. Fathers with children resulting from assisted reproduction scored significantly higher for expressed warmth toward children than did fathers with naturally conceived and adopted children, and they also reported

¹²⁵ *See id.* at 832.

¹²⁶ *Id.* at 832–33 (explaining that the level of warmth toward the child was gauged during the one to one and one-half hour interview conducted with the mother, and the shorter interview administered to the father). Particular measures included: the mother's tone of voice and facial expression when talking about the child, sympathy expressed about difficulties experienced by the child, enthusiasm and interest in the child as a person, the degree to which the mother's emotional functioning is centered on the child, and the parent's ability to recognize and respond appropriately to the child's fears and anxieties. *Id.*

¹²⁷ Supervision was measured according to a five-point Likert scale assessing the mother's age-appropriate monitoring of the child's activity, and disciplinary laxity was measured according to a six-point Likert scale based on the degree of negotiation between mother and child surrounding control issues. *Id.* at 833.

¹²⁸ *Id.* at 834.

¹²⁹ *Id.* The study also concluded that assisted reproduction mothers could veer toward over-involvement. Compared to naturally conceived or adoptive children, a higher proportion of assisted reproduction mothers were classified as enmeshed. Children of assisted reproduction mothers who were classified as enmeshed reported receiving less criticism from their parents and spending less time with peers than children of assisted reproduction mothers who were not classified as enmeshed. *See id.*

¹³⁰ *Id.* at 834–36.

greater enjoyment of the paternal role than did fathers with naturally conceived children.¹³¹ The children of ART also reported receiving less criticism from their fathers than did the children of natural conception and adoption.¹³²

Follow-up data tracking the children's development seven years later revealed that the eleven and twelve-year-olds from assisted reproduction families appeared every bit as emotionally robust as their naturally conceived counterparts. When interest, effort, and confidence in school-related performance were measured, no differences emerged.¹³³ Assisted reproduction children spent less time with peers than did adopted children, but equal amounts of time as naturally conceived children.¹³⁴ Assisted reproduction children were as verbally aggressive as adopted or naturally conceived children but less likely to engage in physical aggression toward peers than naturally conceived children.¹³⁵

Nearly 70% of parents of children conceived via gamete donation had decided against telling their child about his or her provenance.¹³⁶ Only 8.6% had already told their middle-school aged children; another 10% indicated they were planning to tell in the future.¹³⁷ Researchers compared the socio-emotional functioning and parental relationship quality of children who had been told and those who had not been told of their donor-gamete status.¹³⁸ Children in both groups were doing equally well in terms of school performance, confidence, and peer relationships, and parental relationships were comparably warm.¹³⁹ However, the group who had been told about the use of a donor reported fewer and less severe child-mother disputes than those who had not been told.¹⁴⁰

Caution should be exercised in drawing lessons from this comparison. Only eight sets of parents had disclosed their use of donor gametes, so the

¹³¹ *Id.* at 834. In close correlation with assisted reproduction mothers, ART dads had a tendency to score higher in the enmeshed range regarding emotional involvement than did fathers with adopted or naturally conceived children. *See id.* Thus, like the mothers, ART fathers have a tendency to be overprotective and hovering.

¹³² *Id.* at 836.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.* at 837.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

number of children in one comparison set is very low.¹⁴¹ Still, the equivalence identified in the socio-emotional functioning of the “untold” children as compared to the “told” children seems to indicate that secret-keeping in the DI families is not impairing the healthy development of donor insemination children. Children told about their genetic origins did note fewer and less severe disputes with their mothers, but DI families that kept the use of a donor under wraps reported no higher conflict than that experienced by families with adopted or naturally conceived children.¹⁴² In sum, the follow-up of children in the European study seems to point toward a normal trajectory for ART children, regardless of what disclosure decisions their parents make. As the study authors concluded:

Theoretical predictions that difficulties in parent-child relationships would arise in assisted reproduction families as children enter adolescence were not supported by the findings of the present study. In general, assisted reproduction families with an early adolescent child appeared to be characterized by stable and satisfying marriages, psychologically healthy parents, a high level of warmth between parents and their children accompanied by an appropriate level of discipline and control, and well-adjusted children.¹⁴³

This result was replicated several years later in a study carried out in an assisted-conception facility in the United Kingdom.¹⁴⁴ Families with donor insemination children between the ages of four and eight were asked to complete structured questionnaires and to participate in interviews with a research psychologist.¹⁴⁵ The children’s teachers were also questioned, and the children were interviewed and administered a cognitive-function instrument.¹⁴⁶ Of the forty-six families who took part in the study, twenty-

¹⁴¹ See *id.* at 836.

¹⁴² See *id.* at 837.

¹⁴³ *Id.* at 838.

¹⁴⁴ See generally Emma Lycett et al., *Offspring Created as a Result of Donor Insemination: A Study of Family Relationships, Child Adjustment, and Disclosure*, 82 FERTILITY & STERILITY 172 (2004).

¹⁴⁵ *Id.* at 173. Interviews with parents solicited detailed accounts of “the child’s development, the child’s behavioral and emotional problems, the child’s response to separation and reunion with parents, parental supervision and discipline, mother-child interaction, father-child interaction, and the quality of the parents’ marriage.” *Id.*

¹⁴⁶ *Id.* at 174–75.

eight were inclined toward nondisclosure and eighteen were inclined toward disclosure.¹⁴⁷ When the disclosing families were compared with nondisclosing families, disclosure continued to be linked with more harmonious relations between mothers and children and higher levels of maternal confidence.¹⁴⁸

The children in both disclosing and nondisclosing families appeared to be doing equally well in terms of academic achievement, socialization, and self-esteem. Psychological disorders did not appear any more prevalent in one versus another family type.¹⁴⁹ Interestingly, reports of conduct problems by fathers and teachers in disclosing and nondisclosing families were roughly equivalent, while nondisclosing mothers identified more behavioral difficulties with their children than did disclosing mothers.¹⁵⁰ This fits with the generally more tempestuous parent-child relations reported by nondisclosing mothers, and with nondisclosing mothers' lower scores on perceived competence.¹⁵¹ Nondisclosing mothers reported more battles and less maternal confidence. They rated their children as more difficult than did the same children's father and teachers.¹⁵² Thus, the children of disclosing and nondisclosing mothers may have been equally challenging to care for. But, because of nondisclosing mothers' greater anxiety and diminished maternal confidence, they perceived their children as more difficult to handle.¹⁵³

The nondisclosing mothers' reports of greater conflict should not be seen as evidence of families in crisis. As the researchers noted, "[A]lthough significant differences between the disclosers and nondisclosers were identified, the higher ratings obtained by the nondisclosing families did not represent dysfunctional relationships, but instead reflected particularly positive scores in the disclosing group."¹⁵⁴ The study does suggest that talking to DI children about their donor status may reduce tension between mothers and children and may give mothers

¹⁴⁷ See *id.* at 173. Of these eighteen families, six had already told their child, and twelve intended to disclose in the future. *Id.*

¹⁴⁸ See *id.* at 176.

¹⁴⁹ *Id.* at 177.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* at 175–76.

¹⁵² See *id.*

¹⁵³ Disclosing and nondisclosing fathers did not differ with respect to any category: expressed warmth, parent-child interaction, perception of child, conflict with child, supervision, or level of criticism. *Id.* at 175–77.

¹⁵⁴ *Id.* at 179.

more comfort and self-assurance.¹⁵⁵ Interestingly, disclosure did not seem to have any effect on father-child relations, which were comparable for each family type.¹⁵⁶

Controlled studies comparing children of ART with children from other family types indicate that the children of ART are developing well, enjoying warm and robust family relationships, and reaching all developmental benchmarks in sync with their traditionally conceived peers.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.

The data pushes for openness, but only modestly. We see advantages for adoptive mothers and children in ART families who fully disclose, but the advantages are not overwhelming. Overall, children in gamete-donation families are thriving, so it appears that the current system of anonymous donation is not working grievous harm on the children born within its strictures.¹⁶⁰ Before initiating a dramatic overhaul of existing practice as some advocates would suggest, it may be wise to consider what practical impediments to an open system exist, and how changing existing procedures would affect other participants in the donor kinship system.

¹⁵⁵ *Id.* at 176.

¹⁵⁶ *Id.* at 175–77. “The lack of difference in father-child relationships between the two family types indicates that nondisclosure may have a greater impact on the mother’s relationship with the child than on the father-child relationship.” *Id.* at 178.

¹⁵⁷ See Susan Golombok et al., *The “Test Tube” Generation: Parent-Child Relationships and the Psychological Well-Being of In Vitro Fertilization Children at Adolescence*, 72 *CHILD DEV.* 599, 606–07 (2001); Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve*, 73 *CHILD DEV.* 952, 964 (2002).

¹⁵⁸ Golombok et al., *supra* note 111, at 838; Lycett et al., *supra* note 144, at 175–78.

¹⁵⁹ Lycett et al., *supra* note 144, at 179.

¹⁶⁰ See Golombok et al., *supra* note 88, at 837.

III. PRACTICAL CHALLENGES TO A TRULY OPEN SYSTEM—PARENTS DON'T LIKE TO TELL

Parental inclination toward secrecy stands in the way of a completely open system. Legislation can bar anonymous donation and original birth certificates can be made available, but children will not know to look for their donor or their original records unless parents reveal that a donor was involved in their birth. As mentioned earlier, only 8% of the DI parents surveyed in the European Study of Assisted Reproduction Families had told their children—ages eleven to twelve at the time of data collection—about their origins.¹⁶¹ Another 10% planned to tell in the future, 11% were undecided, and 69% had decided against disclosure.¹⁶²

Other inquiries reveal numbers even more heavily tilted toward nondisclosure. In a review of the twelve studies of parental disclosure patterns conducted between 1989 and 1995, the number of parents intending to tell their children about the use of a donor never rose above 20%.¹⁶³ In eight of those twelve studies, fewer than 10% of parents had plans to talk to their children about their origins.¹⁶⁴ Even in countries with legislation that assumes norms of openness, parents remain resistant.

In 1985, Sweden became one of the first countries to give donor insemination children the right to access their donor's identifying information.¹⁶⁵ Social welfare agencies were tasked with helping children access the information once they reached their upper teens.¹⁶⁶ The law simply assumed that parents would tell their children that a third party had assisted in their birth, and that mechanisms had been implemented to help them track down and learn more about their biological "parent."

To test that assumption, donor insemination parents were recruited from two infertility centers in Sweden to answer a seventeen-item questionnaire.¹⁶⁷ The instrument explored whether parents had informed,

¹⁶¹ *Id.* at 836.

¹⁶² *Id.*

¹⁶³ See A. Brewaeys, *Donor Insemination, The Impact on Family and Child Development*, 17 J. PSYCHOSOM. OBSTET. & GYNECOL. 1, 4 (1996).

¹⁶⁴ See *id.*

¹⁶⁵ See Claes Gottlieb et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, 15 HUM. REPROD. 2052 (2000).

¹⁶⁶ See *id.* (stating that the law gives children born as a result of donor insemination the right to information about their donor when the child is "sufficiently mature." Though the law does not define sufficiently mature, it has been interpreted to fall within the upper teens.).

¹⁶⁷ *Id.* at 2053.

or intended to inform, their child about the use of donor gametes, and their reasons for disclosure or nondisclosure.¹⁶⁸ Parents were also asked if they had informed anyone other than their child about the use of a donor.¹⁶⁹

One hundred thirty-two couples, 89% of the total sample, had not told their children, although nearly half of that number—sixty-one couples—intended to tell their children at some later date.¹⁷⁰ Seventeen (11%) families had already told their child, while sixteen families had not yet made a decision about disclosure.¹⁷¹ The mean age of the child in the undecided group was seven years.¹⁷² Twenty-eight families had decided to keep the use of a donor secret from their child.¹⁷³ The mean age of the children in these families was about nine years old.¹⁷⁴ Reasons given for nondisclosure ranged from feeling that discussion of the donor was “unnecessary” to concerns that it “may hurt the child.”¹⁷⁵ Leaving the undecideds aside, a total of 52% of the couples surveyed had either told or were planning to tell their children of their donor status.¹⁷⁶ Although these are larger percentages than those recorded in earlier studies, they may still be regarded as low, given the existence of legislation making donors’ identifying information readily available. It seems that legislation aimed at helping donor children learn about their missing progenitor does not prompt parents to let the children in on the secret of their unconventionally engineered birth.

Studies conducted in the Netherlands and the United Kingdom further demonstrate legislation’s inability to shape parental disclosure patterns. In the 1980s, the plight of donor insemination children began to attract the Dutch public’s attention.¹⁷⁷ DI counselors began to advise their patients to disclose the use of donor gametes to their children, and legislators drafted a

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 2053–54.

¹⁷² *Id.* at 2053.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 2053–54.

¹⁷⁷ *See* A. Brewaeys et al., *Donor Insemination: Dutch Parents’ Opinions About Confidentiality and Donor Anonymity and the Emotional Adjustment of Their Children*, 12 *HUM. REPROD.* 1591, 1591 (1997).

model code that would require donors to register their contact information in a central database.¹⁷⁸

Interested in the effect of changing public opinion on private decisionmaking, researchers investigated the disclosure plans of parents who had conceived children via DI while this legislation was being vetted. Only 21% of the DI parents surveyed had decided to inform their child of his mode of conception, while 74% had decided to keep the information secret.¹⁷⁹ For many parents, the desire for secrecy stemmed from a concern that informing DI children about the children's conception would threaten their sense of security or would impair their relationship with their social father.¹⁸⁰ Nine percent of the nondisclosing parents said they could think of "no good reason" to inform the child of information they themselves considered "of little importance," while 5% were primarily worried about maintaining a private wall around the social father's infertility.¹⁸¹

Shifts in public opinion in England appeared to have similarly insignificant effects on DI parents' views of disclosure. Since 1990, legal mechanisms have been in place to help children discover whether they were conceived via donor gametes, and since April 2005, donor insemination children have had a legal right, upon turning eighteen, to obtain identifying information about their donor.¹⁸² Infertility clinic staff that once advised parents pursuing donor insemination to say nothing or to tell their child that he was adopted have shifted to different counseling strategies: today they urge parents to tell the child the truth.¹⁸³

With shifting public norms and industry practices, one might imagine that the vast majority of parents would be opting for disclosure. Researchers, however, have found that the movement toward openness remains slow. Of forty-six DI families recruited from clinics that endorsed a policy of openness, only 13% had told their child about the use of a donor.¹⁸⁴ Another 43% had decided not to tell, while 17% were unsure.¹⁸⁵ Twenty-six percent of families surveyed stated they intended to tell their child in the future, but given that the children were, on average, six years old at the date of survey—well beyond the age when they become

¹⁷⁸ *See id.* at 1591–92.

¹⁷⁹ *Id.* at 1593.

¹⁸⁰ *Id.* at 1594.

¹⁸¹ *Id.*

¹⁸² *See* Lycett et al., *supra* note 4, at 810.

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 811, 813.

¹⁸⁵ *Id.* at 813.

cognitively capable of absorbing information about origins—it is questionable whether the parents will make good on that intention.¹⁸⁶

Those who had decided not to disclose reported a variety of motivations. As in other studies, some parents felt the information was simply irrelevant.¹⁸⁷ Others wanted to keep the fact of infertility secret, and a third group shied away from disclosure in an effort to preserve a sense of “normalcy”¹⁸⁸ within the family. A desire to protect the child from negative social pressures was also a factor,¹⁸⁹ as well as concern about the father and the father-child relationship.¹⁹⁰

Another study recently conducted in the United Kingdom highlights the reluctance that married DI mothers feel about disclosing the lack of a biological tie between their husband and their child. Unmarried and married women who had used third-party sperm to become pregnant were surveyed regarding their plans for talking to their child about the use of donor sperm.¹⁹¹ Only 7% of single women had decided to withhold from

¹⁸⁶ See *id.* at 812, 813, 818.

¹⁸⁷ See *id.* at 815 tbl.III (quoting a parent as saying, “It’s irrelevant . . . it’s just that he’s . . . my son and that’s it . . . [W]hat has happened to us is very important because [child] is here. . . . [I]t’s in the past and it’s not going to make any difference.” (alteration in original)).

¹⁸⁸ See *id.* One parent said, “We felt that we probably had an obligation to tell them [children], but once they were born . . . we just felt that everything was normal.” *Id.* (alteration in original). Another said, “We felt that it would be easier for them [children] if they grew up thinking that they were just normal, they’d been born in a normal . . . situation and . . . there was nothing untoward about them. . . . I don’t see there’s any reason to tell them . . . we’re a normal family[.]” *Id.* (alteration in original).

¹⁸⁹ See *id.* “I think it would just cause so much upset, because he’d [child] suddenly feel so many emotions at once in the confusion of it all.” *Id.* (alteration in original). “I think at the moment they [children] are very secure children and I think that [disclosure] would rock their security completely . . . to suddenly send them to school thinking, ‘we’re different’ . . . it’s not necessary[.]” *Id.* (alteration in original).

¹⁹⁰ See *id.* Mothers expressed concern about their husbands’ feelings if their child were to learn of the absence of a genetic tie. One noted, “If the day ever came where he [child] turned round and said, ‘You’re not my Dad anyway[.]’ I couldn’t cope with that No way . . . I’m not putting him [father] in a position for that, not after all he’s [father] gone through . . . He’s more than earned his right to be called ‘Dad[.]’” *Id.* (alteration in original). Another confessed, “What I’m afraid [is], he [the child] might say, ‘Go away daddy, I don’t want to know you anymore, I want to know my real father. And I want to find out my real father and forget you!’” *Id.* (alteration in original).

¹⁹¹ See Clare Murray & Susan Golombok, *Going It Alone: Solo Mothers and Their Infants Conceived by Donor Insemination*, 75 AM. J. ORTHOPSYCHIATRY 242, 246 (2005).

(continued)

the child information about the unconventional circumstances surrounding conception.¹⁹² The other 93% were set on full disclosure.¹⁹³ None of the single moms were on the fence.¹⁹⁴ The married mothers were much more equivocal. Only 46% reported they were planning on disclosing the child's donor status, 30% had decided against disclosure, and 24% were undecided.¹⁹⁵

Clearly, single mothers find it easier to disclose their use of donor sperm, possibly because their resort to an unconventional gamete source is already assumed. The question of the child's biological father is raised by the absence of a husband. Married women, however, face a different calculus. With a husband in the picture, it is tempting to stay silent. Others, including the child, will simply assume that the husband is the father. Private struggles with infertility can remain private and an unconventional situation can be read as entirely mainstream.

Parental disclosure patterns in an era of evolving social norms are resistant to change. Infertility professionals may counsel openness and legislation may facilitate donor offspring contact, yet parents continue to balk at talking to their children about their use of donors to facilitate conception. They worry that learning of the donor's role will damage the child's sense of identity and belonging and will impair relationships within the adoptive kinship unit. Additionally, disclosing the fact of donor insemination invokes the stigma attached to infertility. Changes in social norms may help parents feel more comfortable with the complex relationships ART creates, but existing data reveals that the changes are slow and legislative initiatives exert a less powerful gravitational pull than we might expect.

A. Abolishing Anonymity: What Effect on Sperm Supply?

Although existing data suggests that telling children about their DI origins has some benefits for children and their family relationships, other players exist in DI kinship circles. Whereas most of the debate on open donation centers around the rights and interests of donor offspring, the interests and responses of donors must be considered as well. If donors are hesitant to donate under a system of mandatory openness, that hesitancy

Mothers could only be asked about their plans to tell their children because the children at the time of data collection were between six months and one year. *Id.* at 251.

¹⁹² *Id.* at 248.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

will have its own effect on the well-being of offspring.¹⁹⁶ If donor participation diminishes, families might find themselves limited to “low quality” sperm—that is, sperm less capable of fertilizing an egg, or sperm that carries with it undesirable genetic defects or disease propensities. Some sperm sources are better than others. Young sperm is better than old sperm.¹⁹⁷ Sperm from perfectly healthy donors is preferable to sperm from diseased donors. With the dwindling or contamination of available sperm supplies, donor offspring might find themselves afflicted with a higher proportion of genetically-related diseases than their naturally-conceived brethren. And if the sperm supply were to fall too precipitously, the question of donor offspring would become moot. There simply would not be any.

Opponents of open-donation legislation contend that a ban on anonymous donation will simply put a halt to the practice. Donors, they say, will only continue to offer their services if they are guaranteed confidentiality.¹⁹⁸ Indeed, when legislation was introduced in Sweden to abolish anonymous donation, some medical professionals predicted the demise of donor insemination and characterized the proposed law as “feelingless terrorism.”¹⁹⁹

The actual impact of such legislation in Sweden and elsewhere has been less dramatic. Indeed, the long-term effect of stripping donors of confidentiality protections remains unclear. Although countries that have encouraged gradual shifts toward openness using informal incentives have managed to preserve a healthy donor supply, it appears that command and

¹⁹⁶ See, e.g., K. Daniels et al., *Semen Providers and Their Three Families*, 26 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 15 (2005).

¹⁹⁷ See Stan Zammit et al., *Paternal Age and Risk for Schizophrenia*, 184 BRITISH J. PSYCHIATRY 405, 405–08 (2003) (noting an elevated risk of schizophrenic offspring associated with older sperm).

¹⁹⁸ See Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID In the Law*, 44 DUKE L. J. 524, 568 (1994).

¹⁹⁹ See Daniels et al., *supra* note 196, at 15; see also William W. Beck, Jr., *Two Hundred Years of Artificial Insemination*, 41 FERTILITY & STERILITY 193, 194 (1984) (opining that medical professionals have “a definite responsibility to the donor which would be jeopardized with disclosure of the process. There will be no more AID anywhere if the donor thinks his privacy and his protection are threatened.”); Alf Edvinsson et al., *Givarinsemination vid manlig infertilitet - slut på en epok? [Donor Insemination for Male Infertility - The End of an Era?]*, 87 LÄKARTIDNINGEN 1871 (1990); K. Hagenfeldt, *Givarinsemination behandlingsmetod i kris [Donor Insemination; A Treatment in Crisis]*, 87 LÄKARTIDNINGEN 1849 (1990).

control legal directives do discourage some donors and push supply numbers downward.²⁰⁰ Countries that have been successful in maintaining local supplies have had to rethink their solicitation strategies and approach different segments of the fertile male population.

Passage of the Swedish law of Artificial Insemination (SAI)—a law giving donor children the right to identifying information about their donor—did prompt an initial decline in donation.²⁰¹ However, shifts in recruitment methods led to resurgence in donor numbers.²⁰² These recruitment strategies show that donor populations are not homogeneous and that different procurement techniques will produce varying yields.

Existing studies of donor characteristic and motivation reveal two very different subgroups. First is the young student who donates largely for financial gain.²⁰³ This donor likens sperm donation to paid blood-giving.²⁰⁴ It is an act engaged in largely for personal advantage, and this donor does not carefully consider future consequences.²⁰⁵ He depends on the promise of anonymity and would be unhappy at the prospect of being contacted by donor offspring.²⁰⁶ The second type of donor is older, perhaps married with children.²⁰⁷ He has likely had some brush with infertility, either through a friend or through a sister, and is primarily motivated by compassion for infertile couples and a desire to help.²⁰⁸

One study conducted at two infertility clinics in London in the mid-1990s displayed this dichotomous profile of the donor population. At Service A, the donors were largely in their late thirties to early forties.²⁰⁹ At Service B, the donors were much younger, with half in their early to mid-twenties.²¹⁰ Ninety-four percent of the men at Service A had children,

²⁰⁰ See Ken Daniels, *The Swedish Insemination Act and Its Impact*, 34 AUST. & N.Z. J. OBSTETRICS & GYNAECOLOGY 437, 438 (1994) (discussing Sweden's decline in donor participation after it enacted legislation banning anonymous donations).

²⁰¹ See *id.*

²⁰² See *id.* at 438–39.

²⁰³ See Ken R. Daniels et al., *Information Sharing in Semen Donation: The Views of Donors*, 44 SOC. SCI. MED. 673, 680 (1997).

²⁰⁴ See Schiff, *supra* note 198, at 562 & n.135.

²⁰⁵ See *id.* at 564.

²⁰⁶ See Daniels et al., *supra* note 203, at 680.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ *Id.* at 674.

²¹⁰ *Id.*

and no Service B men had children of their own.²¹¹ When asked how they would feel about being traced by donor offspring, 53% of the Service A men said they would not mind, but only 9% of the Service B donors were similarly positive.²¹² Conversely, 73% of the Service B donors expressed unhappiness with the idea, but only 35% of the Service A donors responded negatively to the possibility.²¹³ When asked if they would continue to donate if DI offspring could learn their identity, 41% of Service A donors said they would, 41% said they would not, and 18% were undecided.²¹⁴ Service B donors were more reluctant: only 18% said they would continue under conditions of possible identification, and 63% said they would not.²¹⁵

In Sweden, recruitment efforts have focused increasingly on the older, more altruistically motivated donor as a way of rebounding from the initial dampening effects of the SAI's mandatory openness requirements.²¹⁶ A study conducted at two fertility clinics ten years after SAI's passage confirmed that Sweden's current sperm donors do not resemble the young, income-seeking graduate students who have been the staple contributors to sperm banks in the United States. In Sweden, the mean and median ages for providers in one clinic were thirty-seven and forty. The numbers at the second clinic were thirty-four and thirty-three respectively.²¹⁷ When asked about their motivation for becoming a semen provider, all donors surveyed stated that they wanted to help infertile couples.²¹⁸ Indeed, for 70% of those surveyed, helping the infertile was the only response given.²¹⁹ Very few mentioned financial gain as a factor.²²⁰ When asked how they would feel if contacted by their offspring, 62% said they would respond positively or very positively.²²¹ Ten percent characterized their reaction as "mixed," 14 % said they were unsure, and only 13% admitted feeling negatively or

²¹¹ *Id.*

²¹² *Id.* at 676.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See A. Lalos et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REPROD. 212 (2003).

²¹⁷ *Id.* at 213.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *id.* at 214.

²²¹ See Daniels et al., *supra* note 196, at 19.

very negatively about the prospect.²²² These donors, spurred by empathy and concern for the plight of the infertile, appear to have given more thought to the family and child they were helping create.²²³ Consequently, they generally approached the prospect of being traced or contacted by donor offspring with equanimity.

In Victoria, Australia, legislation adopted in 1995 requiring donors to agree to be identified did depress existing levels of sperm donation until 1999, when supplies began to even out.²²⁴ Although all areas of Australia seem to have experienced a decline in donation, Victoria has managed to keep two centers alive by focusing on older, altruistically motivated donors and implementing shrewd public relations campaigns.²²⁵ In 2004, a shortage of sperm donors prompted a clinic in New South Wales, Australia, to fly Canadian students to Australia for complimentary vacations, requiring only every-other-day sperm donations in return.²²⁶ And after yet another slump in participation in 2005, one fertility clinic in

²²² *See id.*

²²³ *See id.*

Six Karolinska semen providers commented that they wondered how the children were faring in terms of their health or welfare. Two said they thought about the meeting that might take place when the offspring reach maturity. Two semen providers made comments that it was only natural to think about genetic offspring and one commented that seeing children at play triggered the thoughts.

Id. Interestingly, indications exist that even the donors who claim not to give much thought to their donor offspring may be more vested than they themselves realize. *Id.* at 18. Donors claiming to have no paternal interests whatsoever suddenly evinced disquiet when presented with the possibility that “their” child may be raised by a same-sex couple or single parent. *Id.* at 18, 20. Disavowals of bonding or responsibility to the contrary, donors nonetheless objected to the possible deficits in upbringing that their donor offspring might suffer in a fatherless household. *Id.*

²²⁴ *See* Infertility Treatment Act, 1995, §§ 79–80 (Vict., Austl.); INFERTILITY TREATMENT AUTHORITY, 2000 ANNUAL REPORT 17 (2000).

²²⁵ *See* Sandra McLean, *Banks Short of Deposits*, COURIER MAIL, Nov. 17, 2003, at 9 (discussing the shortage of sperm at sperm banks, as well as the altruistic motivations of donors); Paula Beauchamp, *Canadians Answer Call; Fertility Clinic Launches Working Holiday Plan*, HERALD SUN, July 9, 2004, at 9 (describing Australia’s attempt at procuring sperm donations by offering paid vacations to Australia).

²²⁶ Paula Beauchamp, *Canadians Answer Sperm Call*, AUSTRALIAN, July 9, 2004, http://www.canadiancrc.com/articles/The_Australian_Canadian_sperm_donors_09JUL04.htm.

Monash, Victoria, sent a letter to all male politicians under the age of forty-five asking if they had given thought to modeling by example, expressing the hope that “if some of the leading role models within our community become donors, others may follow suit.”²²⁷ Perhaps unsurprisingly, no politicians came forward in response to the campaign.²²⁸

Both New Zealand and England have adopted “open” legislation within the last three years.²²⁹ In each country, donors must register their name and address at the time of donation, and this information is offered to petitioning offspring once they reach the age of eighteen.²³⁰ Media reports from both countries proclaimed a sperm “crisis,” though experts maintain that shortages are temporary and not as severe as the popular press would suggest.²³¹

In New Zealand, clinical staff at one sperm bank, Fertility Plus, located in Auckland, reported that its normally active roster of donors has dwindled in the last two years to a solitary stalwart.²³² In England, the numbers are similarly discouraging.

²²⁷ See *Australian MPs’ Sperm in Demand*, BBC NEWS, Jan. 13, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4170869.stm> (stating that before the 1998 law requiring disclosure, about twenty new donors signed up a year, but in 2004, the number of new donors held at five).

²²⁸ *Id.*

²²⁹ See Human Assisted Reproductive Technology Act 2004 (N.Z.), Pub. Act No. 92 (2004), available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2004/an/092.html>; Human Fertilisation & Embryology Act, 1990, c. 37 (Eng.), available at http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900037_en_1.htm.

²³⁰ Human Assisted Reproductive Technology Act §§ 47–50; Human Fertilisation & Embryology Act § 31; Human Fertilisation & Embryology Authority, HFEA Register – An Introduction, <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-53810DA2/hfea/hs.xsl/1212.html> (last visited Apr. 18, 2007); Human Fertilisation & Embryology Authority, The HFEA Register – For Donors, <http://212.49.193.187/cps/rde/xchg/hfea/hs.xsl/1213.html> (last visited Apr. 18, 2007).

²³¹ See Marie Woolf, *Britain’s Sperm Crisis*, INDEP. ON SUNDAY, July 30, 2006, available at 2006 WLNR 13172362; Amanda Cameron, *Gay Men Frozen Out*, NEW ZEALAND HERALD, Jan. 30, 2005, available at 2005 WLNR 1274299; see also *Fertility Treatment Discrimination*, RAINBOW NETWORK.COM, Nov. 28, 2006, <http://www.rainbownetwork.com/Features/detail.asp?iData=26758&iCat=32&iChannel=25&nChannel=Features> (indicating that DI clinics were rebuilding their sperm banks in 2005 after a lull in donations due to the change in donor anonymity laws).

²³² See Emily Watt, *Wanted: Keen Kiwi Lads to Help Populate Australia*, SUNDAY STAR TIMES, Jan. 15, 2006, 2006 WLNR 795124.

In 1998–1999, when confidentiality was assured, more than 10,000 donor insemination treatments were performed; by 2003, when public debate over donor children’s informational rights was in full swing, that number had fallen to a little more than 6,000.²³³ In 2000, 325 men registered with the Human Fertilisation and Embryology Authority (HFEA), the government agency responsible for overseeing and maintaining statistics on gamete donation.²³⁴ In the first six months of 2005, the number of volunteers dwindled to less than one hundred.²³⁵ According to one source, several sperm banks throughout England have shut down due to lack of supply, and others have begun importing sperm from the United States and Denmark.²³⁶

Representatives from HFEA contest the existence of a drought, pointing out that supply continues to outstrip demand in some areas of Great Britain.²³⁷ Although sperm availability in Great Britain appears patchy, it is likely that as clinics move toward older, more magnanimously motivated donors, the national stock of sperm will plateau at a workable level. Research into donor attitudes provides encouraging evidence of attitude shifts. Donors who ten years ago were firmly opposed to the release of identifying information appear to be softening and growing more acclimated to the idea.²³⁸

A follow-up study of Englishmen who donated sperm between 1988 and 2002 revealed that a sizable minority were moving toward greater acceptance of contact or tracing by donor offspring. The group was questioned regarding their views on anonymity both at the time of donation

²³³ See *British Sperm Banks Near Empty*, NEWS 24, Sept. 25, 2006, http://www.news24.com/News24/World/News/0,,2-10-1462_2003416,00.html.

²³⁴ *Id.*

²³⁵ See Ed Boyle, *Supply and Demand*, CBS NEWS, Aug. 4, 2006, <http://www.cbsnews.com/stories/2006/08/04/uttm/main1864678.shtml?CMP=ILC-SearchStories>.

²³⁶ See Mark Rice-Oxley, *In Britain, a Decline in Sperm Donors*, CHRISTIAN SCI. MONITOR, Dec. 30, 2005, at 7 (reporting that “[s]everal sperm banks have shut down, leaving several regions unserved and further discouraging potential donors in those regions from coming forward”).

²³⁷ See *Sperm Donor Law ‘Not a Deterrent’*, BBC NEWS, June 8, 2006, <http://news.bbc.co.uk/1/hi/england/5054910.stm>.

²³⁸ See generally K. Daniels et al., *Short Communication: Previous Semen Donors and Their Views Regarding the Sharing of Information with Offspring*, 20 HUM. REPROD. 1670 (2005).

and again in early 2004.²³⁹ At the time of donation, nearly 38% said that they would be happy to be identified to offspring, roughly 16% were grateful that their identity remained unknown, and nearly 44% stated that they were unsure about the topic.²⁴⁰ When questioned several years post-donation, 56% said they felt the same, and 38% said they felt differently.²⁴¹ Of the group that had experienced a change of heart, 25% said they now were willing to be identified to offspring, and 13% said they now wished to remain anonymous.²⁴² Of the 25% who were newly open to identification, 22% had previously been unsure, and 3% had previously been firmly in the anonymous camp.²⁴³ Of the 13% who had moved toward a desire for anonymity, 9% were previously unsure, and 3% had previously embraced openness.²⁴⁴

Over time, more men migrated toward openness—from a position of uncertainty or aversion—than moved from openness to secrecy. Indeed, when asked if they still would have proffered their sperm if identity-disclosure had been a condition of donation, 50% said yes, and 25% said they were unsure.²⁴⁵ Only 25% said they probably or definitely would not have participated under those conditions.²⁴⁶ The men surveyed in this study—older, married with children, and recruited without payment or expense reimbursement—fit into the demographic most sympathetic to tracing and contact.²⁴⁷ Additionally, they were given ample time and opportunity to talk with clinic staff about the benefits and challenges of open donation.²⁴⁸ Although this donor sample was likely more primed to embrace openness than a randomly selected grouping, it is nevertheless encouraging that the men became more accepting of openness over time.

²³⁹ *Id.* at 1670–71 (reporting that donors from the assisted conception unit of King’s College Hospital who had provided sperm between 1988 and 2002 were surveyed both at the time of donation and then again in 2004).

²⁴⁰ *Id.* at 1672.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* Of the 25% who were unsure, nearly 19% suggested they may have donated under an open system, and 6% said they would need to consult their wives before making such a decision. *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 1671 (indicating that more than 75% of the donors were living with their partner and child at the time of donation).

²⁴⁸ *See id.* at 1674.

It may be that the public debate over donor offspring rights pushed donors to reevaluate their roles and responsibilities, leading them to move gradually toward greater acceptance of an open system and the possibility of contact with offspring as they mature. Contrary to media reports of an unremitting shortage, this data offers optimism that the existing poverty in supply may ease as clinics pursue a different demographic and offer more counseling on the delicate issue of disclosure.

In sum, mandatory identification policies do initially depress sperm donor supplies. However, fertility doctors' predictions that banishing anonymous donation will destroy the industry²⁴⁹ appear unfounded. Mandatory disclosure legislation will likely dissuade donation from mercenary-minded men resistant to the long-term implications of their donation, but more altruistically motivated men will likely continue to participate in donor programs, and clinics will need to reshape their advertisements and solicitations to reach out to this population.

IV. SOLUTIONS: WHAT ROLE FOR THE LEGAL SYSTEM?

In many parts of the world, donors continue to provide their sperm under a cloak of confidentiality. They are encouraged to view themselves as bodily fluid vendors—much like a blood or bone marrow provider—not as “someone with children in other people’s families.”²⁵⁰ Donor offspring advocacy groups urge legislative change, assuming the law can function as a revolutionary lever in precipitating wide scale shifts in social attitudes and behaviors. But command and control legislation that ignores ART’s psychological complexities may backfire. Mandatory donor identification statutes do not lead more parents to disclose their use of donor gametes, and sperm supplies do dip in response to a burdening of the donation process.²⁵¹

There is another way. ART has largely developed in the United States as a response to consumer choice.²⁵² Government planning and regulation has been startlingly absent.²⁵³ Other countries have passed laws restricting who can donate, who can receive, and what price will be paid for donor

²⁴⁹ See *id.* at 1670.

²⁵⁰ Daniels et al., *supra* note 196, at 20.

²⁵¹ See *supra* notes 163–81, 201, 235, and accompanying text.

²⁵² See Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 434–35 (2005).

²⁵³ See *id.* at 435.

gametes.²⁵⁴ In this country, we leave those questions largely to the market.²⁵⁵

American faith that the market will iron out ART's wrinkles has prompted serious critique. Many contend that the market fails to protect ART consumers who act with imperfect information in an emotionally charged environment.²⁵⁶ Without third-party intervention, profit seeking by fertility professionals threatens to form a dangerous synergy with aspiring parents' desperation, leading to exploitative deals that perfectly informed, rational self-maximizers would avoid.²⁵⁷ Fertility professionals need to do a better job explaining their "product's" risks, costs, and sometimes vanishingly small likelihood of benefit. Government regulation ensuring full disclosure and adherence to best practices in donor screening and lab procedures seems entirely justified.²⁵⁸ Still, with all the flaws of a market-based approach to ART development, the treatment of donor privacy seems to fall in a different category. This facet of ART's development seems better suited to gentle normative nudging, rather than the blunt edge coercion of legal mandates.

No draconian legal change is required in the donor gamete market, where savvy suppliers are attuned to the cultural shift toward openness. Since their inception, sperm banks have understood that adoptive parents and their children crave detailed medical information. Therefore, centers like the California Cryobank and Fairfax Cryobank have long required donors to provide three generations of medical histories for distribution to

²⁵⁴ See Joseph G. Schenker, *Assisted Reproduction Practice in Europe: Legal and Ethical Aspects*, 3 HUMAN REPRODUCTION 173, 174–77 (1997).

²⁵⁵ See Ouellette, *supra* note 252. In the U.S., no law bars an elderly woman from inseminating herself. Private banks and health professionals may adopt their own limiting policies, but those restrictions are a matter of contract, not government intervention. See *id.* at 420. If a sixty-year-old woman can find a physician to treat her, she can receive a donor egg and become a mother. In contrast, some countries legally preclude women over a particular age from bearing a child via egg donation. Israel sets the limit at fifty-one and Belgium sets the limit at forty-seven. D. Rabinerson et al., *Subsidised Oocyte Donation in Israel (1998–2000): Results, Costs and Lessons*, 17 HUMAN REPRODUCTION 1404 (2002); Belgium: Law Organizes Artificial Reproduction (June 2006), <http://genethique.org/en/letters/letters/2006/june.htm>.

²⁵⁶ See Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57, 71–72 (2004).

²⁵⁷ See *id.* at 72–73.

²⁵⁸ See generally PHILIP G. PETERS, JR., HOW SAFE IS SAFE ENOUGH? OBLIGATIONS TO THE CHILDREN OF REPRODUCTIVE TECHNOLOGY (2004).

prospective adoptive parents.²⁵⁹ Additionally, donors are asked to provide scholastic records, test scores, and baby pictures.²⁶⁰ As prospective DI parents' appetite for information grew, cryobanks responded by requiring donors to reveal more of themselves. Currently, donors for the Fairfax bank are asked to take a personality test,²⁶¹ and donors at the California Cryobank submit to a staff evaluation of their attractiveness, with five being "average" and ten being "hotter than Tom Cruise."²⁶²

The laws of supply and demand have not stopped with baby pictures. The argument that donor offspring have a legal and moral right to know their donors has led some parents to ask for donors willing to make contact with their grown offspring.²⁶³ Ever responsive to consumer wishes, cryobanks are now supplementing their existing stable of anonymous donors with "open" or "identified" donors.²⁶⁴

Fairfax's "ID Consent" donors must be twenty-two years old, agree to maintain yearly contact with the cryobank, and be willing to supply limited "identifying information" to their progeny.²⁶⁵ Participants in California Cryobank's recently inaugurated "Open Donor Program" must agree at the time of donation to be willing to communicate—at least once—with their

²⁵⁹ See Fairfax Cryobank, Sperm Banking with Fairfax Cryobank – Sperm Donor Information, <http://www.fairfaxcryobank.com/donorinfo.aspx> (last visited Apr. 18, 2007).

²⁶⁰ See *id.*

²⁶¹ See Fairfax Cryobank, Sperm Banking with Fairfax Cryobank – Donor Sperm FAQs, <http://www.fairfaxcryobank.com/donorfaq.aspx?menu=5&turn=on> (last visited Apr. 18, 2007).

²⁶² See California Cryobank Sperm Bank, Order Donor Information, <http://www.cryobank.com/profiles.cfm?page=41> (last visited Apr. 18, 2007); E-mail from Marlo Jacob, Marketing Assistant, California Cryobank (Oct. 12, 2006) (on filed with author).

²⁶³ J. Thomas Oldham, *How an Eccentric Eyeglass Manufacturer Revolutionized Assisted Reproduction in the U.S.*, 39 FAM. L.Q. 781, 785–86 (2005) (reviewing DAVID PLOTZ, *GENIUS FACTORY* (2000)); see also Marilyn Gardner, *Sperm Donors No Longer Bank on Anonymity*, CHRISTIAN SCI. MONITOR, Mar. 30, 2005, <http://www.csmonitor.com/2005/0330/p11s02-lifp.htm>; Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at A1; Telephone interview with California Cryobank staff (Jan. 1999).

²⁶⁴ California Cryobank's Open Donor Program was inaugurated in August 2004. Jacob, *supra* note 262. Fairfax Cryobank's ID Consent Program began January 18, 2006. E-mail from Suzanne Seitz, Communications Director, Fairfax Cryobank (Oct. 11, 2006).

²⁶⁵ See Fairfax Cryobank, Sperm Banking with Fairfax Cryobank – Donor Sperm FAQs, <http://www.fairfaxcryobank.com/donorfaq.aspx?menu=5&turn=on> (last visited Apr. 18, 2007).

offspring when they come of age.²⁶⁶ According to the California Cryobank's website, communication may include, but is not limited to, "email, written letter, telephone conversation or meeting in person."²⁶⁷ Although the bank will work to facilitate contact, no further interaction is required after the one communication, and "there may be a situation where a contact between the donor and offspring cannot be established."²⁶⁸

As DI parents become more sensitive to the informational needs of their donor offspring, they will increasingly demand "open" donors, leading cryobanks to move increasingly toward soliciting men willing to make that commitment. Parents who are planning to disclose their use of third-party conception and who are concerned about the possibility of "genetic bewilderment" will self-select toward the open donor categories. Parents disinclined toward openness are not likely to give much thought to the donor's status. Their children are unlikely to learn of their donor status, and if they do, they will make do with the rather extensive medical, physical, and personal information already provided.

CONCLUSION

Although anonymous gamete donation remains the norm in the United States, the assumptions that undergird that system are subject to challenge. Many now contend that donor offspring have a moral right to connect with the missing half of their family tree. Recognition of those rights would require a change in our current system of anonymous donation, and advocates are urging the United States to emulate countries requiring donors to disclose identifying information as a legal precondition to donation.

This Article counters that such a move would be premature. 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. Existing data from countries with open-donation legislation suggests that law exerts a weak effect on parental disclosure patterns. The legislation, however, does negatively affect donor motivation—at least in the short run. Absent stronger signs that donor offspring are suffering

²⁶⁶ See California Cryobank, Open Donor Program, <http://www.cryobank.com/opendonor.cfm?page=52> (last visited Apr. 18, 2007).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

psychological harm from current confidentiality policies, a legislatively induced ban on anonymous donation appears unwarranted. Ongoing efforts to eliminate the stigma that continues to surround infertility and the new chimerical relationships that ART creates will do more to encourage openness in gamete donation than draconian, legislatively mandated bans and conditions.

Approaching her eighth year now, my daughter occasionally asks about the person she calls her “sperm donor dad.” I have gone over the twenty-page profile with her and she has begun speculating that the reason she so adores dogs is that her dad is a self-professed animal lover. I know that someday she will want to meet him, and I hope she gets that chance. But he donated under a promise of confidentiality, so it is his right to remain a spectral figure.

In the meanwhile, I answer every question as openly as I can. I am grateful to my daughter’s phantom donor for his role in bringing her into the world. She is happy and healthy and a constant source of joy. Although the question of nature versus nurture is a complicated one, I cannot help but think highly of the genetic material he generously passed to us, and I am wary of any legal moves that would unduly shrink or lessen the pool of available donors—even if the shrinkage is temporary.

Policymakers in this arena should move slowly, carefully evaluating every step, and those who profess to speak for the children of ART should be careful what they ask for. The current system of donation is working well and adjustments in the market will yield further improvements. We should not legislate anonymous donation out of existence, but rather move cautiously, through education and consciousness-raising, toward a day when ART-inspired families are treated with respect and tolerance, and the impulse toward secrecy fades away on its own accord.

