

WHAT'S MY PLACE IN THIS WORLD?

A Response to Professor Ellen Waldman's

What Do We Tell the Children?

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A child born from a created embryo, assuming she learns the truth about her origins (as she has a right to do) will know that the sources of the gametes who produced her did not ever have a human connection or a relationship with each other. Her existence may feel like a *cosmic accident*, like she was not truly meant to exist. Thus children born via embryo creation may have a more difficult time developing a sense of identity and a conviction that they have a place in the world.¹

Ask a child what he wants to know about his parents, and himself, and he'll likely respond, according to his age, with something having to do with his search for meaning in life. A child, particularly one approaching young adulthood, wants to know what his origins are and what they mean for him and his future.² The debate presented by this Wells Conference panel asked what children of assisted reproductive techniques (ART) should be told. This Article responds to Professor Ellen Waldman's suggestions³ by seeking to listen to children themselves to discern their deepest needs, above all adult voices.

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¹ SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL & ETHICAL CONSIDERATIONS 328 (1998).

² See, e.g., Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 890-92 (2000).

³ See Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517 (2006).

Often a young person will bury himself in music in search for meaning, because music can intensely communicate confused feelings.⁴ One songwriter and artist has stated this profound hunger for purpose and meaning in a powerful way in his work entitled “Place in This World.”⁵

Professor Waldman opened her presentation with anecdotal evidence from her own daughter’s experience, and from that we gleaned that it is clear that kids born from ART need not only facts, but also knowledge of ART in its proper perspective. They require information about the meaning of assisted reproduction and its relevance to their own lives and the lives of others.⁶ Professor Waldman thoroughly examined the international legal backdrop of encouraging openness by adoptive parents in communicating with their children that their origins have resulted from

⁴ See, e.g., Brian D. Wassom, *Unforced Rhythms of Grace: Freeing Houses of Worship from the Specter of Copyright Infringement Liability*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 61, 121 (2005).

⁵ MICHAEL W. SMITH, *Place in This World*, on THE FIRST DECADE 1983–1993 (Reunion Records 1993) (“The wind is moving / But I am standing still / A life of pages / Waiting to be filled / A heart that’s hopeful / A head that’s full of dreams / But this becoming / Is harder than it seems / Feels like I’m / Looking for a reason / Roaming through the night to find / My place in this world / My place in this world / Not a lot to lean on / I need Your light to help me find / My place in this world / My place in this world / If there are millions / Down on their knees / Among the many / Can you still hear me / Hear me asking / Where do I belong / Is there a vision / That I can call my own / Show me I’m / Looking for a reason / Roaming through the night to find / My place in this world / My place in this world”).

⁶ To open her symposium presentation, Professor Waldman shared that she has a beautiful, blonde six-year-old daughter, who when asked one day how babies were born, explained, “By the mommy going to the doctor, [getting inseminated,] coming home, and having the baby.” Ellen Waldman, *What should we tell the children?: What are the ethical considerations associated with children whose adoptions stem from assisted reproduction?* (Apr. 7, 2006) (video on file with Capital University Law Review). Professor Waldman immediately recognized that she needed to further discuss the birds and the bees with her sweet daughter at some point to help the child understand that children are not usually conceived from a sperm donor. *Id.* Although “there is no empirical evidence determining the psychological impact a child will experience regarding the truth about his or her origin of life,” it is nonetheless absolutely true that “[n]o parent can avoid the ‘birds and the bees’ conversation. Children will invariably question ‘where they came from.’” Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 571 (2003).

ART.⁷ Noting the potential analogy between traditional adoption laws and possible policies for ART offspring,⁸ she concluded that more research is necessary.⁹

When we consider adoption of children from the ART process, we essentially combine two social problems into one even more delicate concern. Adoption is a solution that solves the problem of a deserving child in need of parents and a family, rather than the inverse of finding a child for a family.¹⁰ When discussing an embryo in need of parents and a

⁷ See Waldman, *supra* note 3. Much of her research came from international data on informational openness of ART and progress toward agencies, donors, and parents endorsing a child's right to know about his origins when the birth has resulted from ART. See *id.* A thorough review of various nations' rules on this matter is contained in the Council of Europe study done by the Steering Committee of Bioethics in a compilation of questionnaires to member countries. See generally STEERING COMMITTEE OF BIOETHICS (CDBI), REPLIES BY THE MEMBER STATES TO THE QUESTIONNAIRE ON ACCESS TO MEDICALLY ASSISTED PROCREATION (MAP) AND ON RIGHT TO KNOW ABOUT THEIR ORIGIN FOR CHILDREN BORN AFTER MAP (2005), http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Bioethics/Texts_and_documents (follow "Reports" hyperlink; then follow "CDBI/INF (2005) 7" hyperlink).

⁸ A review of the literature reveals several articles focused on openness of adoption records to adoptees of traditional adoption. Among them are: Rosemary Cabellero, *Open Records Adoption: Finding the Missing Piece*, 30 S. ILL. U. L.J. 291, 298 (2006) (noting that courts are unwilling to acknowledge adoptees' fundamental right to privacy completely in light of third parties' right to learn birth information), and Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461 (2005) (reviewing state laws on allowance (or not) of adoptees to discover the identity of birth parents). Other articles that have already proffered a comparison with traditional adoption information rules include: Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 679–80 (2004) (noting that no legislation aims to protect the rights of intended egg donor children), and Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393 (comparing and challenging the proliferation of ART in light of children in need of homes awaiting adoption).

⁹ Waldman, *supra* note 6 ("Until we know more about the benefits and the risks of disclosure—both to the child, to the social parents, and to donor sperm supply—I think we should avoid 'command and control' legal responses, and rather encourage pluralism and choice.").

¹⁰ William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 788 (2003).

family, the best interests of the embryo are at stake.¹¹ “The question here is whether or not someone should be advocating for the rights of children who are not yet born or conceived, and whether we can know—even prior to conception—whether a child will be psychologically harmed as a result of the circumstances of its conception or birth.”¹²

The voices surrounding this discussion are many, and the adult voices¹³ particularly are so loud that they tend to drown out the voices of the children involved. This Article intentionally attempts to block out all other voices and to listen to the children—to gain a child’s perspective regarding his desire to find a place in the world. It will consider what a child might want to know, what a child ought to be able to know if he so chooses, what is in a child’s best interests, and how all that is best protected by laws that do not prohibit information from children, as well as by parental responsibilities supported by agency integrity.

¹¹ See Ellen Sarasohn Glazer, *In the Best Interests of the Embryos?*, AM. INFERTILITY ASS’N, Sept. 2001, <http://www.perspectivespress.com/item.asp?recordid=embryoadooption&pagestyle=default>.

Need cries out, adoption answers. In so doing, adoption serves the best interest of children—new lives are entering the world and without adoption, they would have no one to feed them, change them, love them, teach them. It is difficult for me to view a cryopreserved embryo as having the same feelings, needs, destiny as a growing fetus. However, there are those who argue that life begins with fertilization. How then can they act in the best interests of their embryos? It seems to me that they face choices and the challenges of achieving truly informed consent.

Id.

¹² COOPER & GLAZER, *supra* note 1, at 22.

¹³ These include donor parents, gametes and embryos, surrogates, adoptive parents, clinicians, doctors, lawyers, lobbyists, activists, and even well-meaning bystanders. Each has a perspective that is clouded by an adult interest preferred over the child’s interest. In fact, a plethora of litigation has been produced over the disputes of rights among these parties. For a comprehensive overview of some of that litigation and its lack of uniformity and focus on rights of adults, see Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466 (2006) (examining “the lack of uniformity surrounding those judicial decisions that address three issues related to assisted reproduction: whether the biological mother’s husband or known sperm donor is legally recognized as the father of the child conceived by artificial insemination, whether the biological mother’s same-sex partner is legally recognized as the child’s second parent, and whether a surrogate is legally recognized as the mother of the child she has gestated”).

Part I examines the best interests of the child and what that entails, as well as the context of family framework. Part II points out express statutory rules that prohibit children from discovering their origins and demonstrates that these laws are clearly not fostering any child's best interests. Part III demonstrates that the best interests of the embryo are preserved through parental and agency responsibility. Using the "Snowflake" example and the personalization of the embryo, this Article concludes that every child's best interests can only be properly and appropriately upheld by responsible parents making responsible choices based on what is absolutely best for the child of ART.

Wielding the profound power of ART must be accompanied by great responsibility on the part of participating adults. All the adults involved in a child resulting from ART ought to hold dear the best interests of the child they assist in creating that each should be willing to sacrifice to protect the best interests of that child. This requires some sacrifice of donors' privacy, possible sacrifice of agencies' dollars, and great sacrifice of parents in full age-appropriate honesty.¹⁴ Somehow, protecting the child's interests above one's own is the most (and possibly only truly) satisfying state of being for any adult involved in ART—not only to allow, but also to encourage that child to find his place in this world.

I. BEST INTERESTS OF THE CHILD

The legal standard applicable when children are involved is the best interests of the child.¹⁵ A recent report from a thirty-member multiparty commission of the French National Assembly highlighted the importance of this standard in the context of the law's duty to set norms in the midst of

¹⁴ Cf. Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 4 (2003) (arguing that "[t]here has been an unfortunate history of vaulting adults' interests over the needs and vulnerabilities of children in the areas of family law critical to the well-being of children" and that money drives the decisionmaking of infertility clinics).

¹⁵ A HANDBOOK OF FAMILY LAW TERMS 77–78 (Bryan A. Garner ed., 2001). The best interests of the child doctrine is the principle by which courts make decisions regarding what is to a child's greatest benefit, using numerous factors, but none of which include a consideration of the rights of adults involved, and which has been a basis of American family law for nearly two centuries since its first use in the case of *Commonwealth v. Briggs*, 33 Mass. 203 (1834). *Id.*

family law changes.¹⁶ “Children represent the future of society. They ‘must not suffer from conditions imposed upon them by adults.’ ‘The best interests of the child must prevail over adult freedoms . . . even including the lifestyle choices of parents.’”¹⁷

For the best interests standard to prevail in the ART context, every adult individual involved with an ART child must have an ongoing duty to protect that child’s best interests.¹⁸ Until children reach the age of majority and gain rights, it is up to the adults around them to preserve the best interests of children by balancing adult rights with responsibilities to the children. Frequently, they must place those responsibilities above their own rights as adults.¹⁹ The balance of the rights scale is tipped when protection owed to a child outweighs the rights of the adult, as this is the situation when the child’s psychological health is of concern.²⁰

The child’s interests have always been the focus of adoption in America.²¹ The objectives of embryo adoption are similar—to find a family for a child who needs one, with the best interests of the child clearly controlling.²² The child’s interest ought to be placed at the core of ART.²³

¹⁶ See LOUIS DESERRES, EXECUTIVE SUMMARY, REPORT ON THE FAMILY AND THE RIGHTS OF CHILDREN (Mar. 8, 2006), www.preservemarriage.ca/docs/France%20-%20summary.pdf [hereinafter EXECUTIVE SUMMARY].

¹⁷ *Id.* at 1.

¹⁸ Cf. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401–02 (1995) (comparing the parent’s legal duty to the child to a fiduciary relationship).

¹⁹ See *id.* at 2402.

²⁰ See COOPER & GLAZER, *supra* note 1, at 328–29 (discussing the existential conflict surrounding a child’s psychological health and the adult struggle for honesty toward the child in helping the child develop and mature).

²¹ WALTER WADLINGTON & RAYMOND C. O’BRIEN, FAMILY LAW IN PERSPECTIVE 198 (2001).

²² Duncan, *supra* note 10, at 798–99.

²³ See COOPER & GLAZER, *supra* note 1, at 22. Cooper and Glazer point out that the matter of medical records is exacerbated by ART:

Given our current knowledge about genetics, it is difficult to understand how modern parents of children conceived with donor gametes can justify not telling the truth. Withholding this information means that their children will go through life with an inaccurate medical record. They will in turn pass this false information on to their children, and the lie will go on into perpetuity.

Id. at 345.

Susan Lewis Cooper and Ellen Sarasohn Glazer, leading therapists in the field of assisted reproduction,²⁴ discussed in depth this dilemma of protecting the best interests of children in the context of an adult's right to reproduce.²⁵ They emphasized that a child's best interests are served by knowing her identity.²⁶

In embryo adoption, it is . . . tempting not to tell; the secret is easily hidden. However, we believe that children who were adopted, regardless of whether the adoption took place at the embryo stage or after birth, deserve to know the truth about themselves. Furthermore they deserve to know facts about their genetic history, facts that will help in their development and maturation.²⁷

Children of ART are likely to seek the truth at some point in their lives.²⁸ They might seek to know their genetic parents, their heritage, other ancestors, where they came from, and even their family tree.²⁹ “[T]his yearning appears to be of fundamental importance for some adoptees, and seeking their genetic origins may be instrumental in helping them solidify their identity. The information helps them feel complete.”³⁰ Children will likely want to know—and ought to know—about other family members, such as who their siblings are.³¹

²⁴ See *id.* at 400.

²⁵ *Id.* at 21–23.

²⁶ See *id.* at 326–29. Cooper and Glazer echo “What’s my place in this world?” See SMITH, *supra* note 5.

²⁷ COOPER & GLAZER, *supra* note 1, at 329.

²⁸ See *id.* at 326 (noting “the yearning that many have to find their genetic roots”).

²⁹ See *id.* at 344–46. “*Human beings have a basic right to know the truth about their genetic origins.*” *Id.* at 345.

³⁰ *Id.* at 326–27. Cooper and Glazer caution that this yearning does not stem from dissatisfaction with adoptive parents. “The need to know where one comes from in no way seems to be a statement about the lack of bonding with adoptive parents. On the contrary, adoptees who search usually have secure relationships with their families—as do those who choose not to search.” *Id.* at 327. Again, this need to know appears to be merely a reflection of finding one’s place in the world.

³¹ See *id.* at 23 (“The use of anonymous sperm or egg donation means that children may have several half siblings that they do not know. Furthermore, the separation of genetic and gestational motherhood may mean that a couple who have donated frozen embryos has several biogenetic children who are being raised by different families, and who know nothing about each other’s existence.”).

Kids are naturally curious—they want to know as much as they can about themselves, their birth, their childhood, their past, and their future.³² They discern who to trust by perceiving adults' responses to their needs.³³ Therefore, parents become the key source and holder of a duty not to keep this kind of information from their kids.³⁴

All persons have a moral right to information that concerns themselves and the circumstances of their birth. The truth does not belong to the parents to withhold—*it is the child's birthright*. Parents *must* develop the wisdom and courage to squarely face the whole issue. It is their responsibility to tell the truth, no matter how difficult or painful that task may be.³⁵

Truth disclosing, not secrecy, should occur on the part of all adults involved in the ART process, placing the child's best interests as paramount. The impact of secrecy is dramatic.³⁶ It has consequences for adults involved,³⁷ and profoundly affects children born from embryo adoption.³⁸ In fact, some medical ethicists argue that “[c]hildren created by embryo adoption may see themselves as ‘spare’ or ‘surplus’ goods and may indeed have the same need for information—for access to their

³² See generally ANNE C. BERNSTEIN, FLIGHT OF THE STORK: WHAT CHILDREN THINK (AND WHEN) ABOUT SEX AND FAMILY BUILDING (1994).

³³ See COOPER & GLAZER, *supra* note 1, at 354–55.

Openness allows trust to develop between parent and child. If there is a secret, and the secret is revealed under unfortunate circumstances, or is sensed or guessed by the offspring, the bond of trust is harmed, and it is extremely difficult to repair. When children have been deceived once, they fear they cannot trust their parents again.

Id. at 355.

³⁴ ELIZABETH NOBLE, HAVING YOUR BABY BY DONOR INSEMINATION: A COMPLETE RESOURCE GUIDE 326 (1987).

³⁵ *Id.*

³⁶ See COOPER & GLAZER, *supra* note 1, at 350–55 (profiling stories of family secrets spilling out of the closet).

³⁷ See *id.* at 353–54 (describing what families, particularly moms and dads, must deal with in keeping secrets).

³⁸ See *id.* at 353.

story—as other adoptees, even though they have not been abandoned at birth.”³⁹

Two other legal scholars have gone before me in blocking out all other voices to hear the voices of children of ART. Naomi Cahn argued that children deserve access to information about their biological past both when the donor's identity is known to the biological parent and when it is unknown.⁴⁰ Her arguments for disclosure rest on public policy considerations that recognize the potential relationship between the child and her biological forebears, and that recognize these rights kick in fully at adulthood.⁴¹ Even if birth parents wish to be forever anonymous, the conflict of rights can no longer be ignored if the point comes where the child feels compelled to know his birth parents.⁴²

Professor Helen Alvaré argued that new reproductive technologies fail to properly consider the results for children formed, particularly with “collaborative reproduction.”⁴³ In fact, she claimed that there is very little state or federal regulation existing that takes the well-being of such technologically conceived children into account.⁴⁴ Professor Alvaré

³⁹ Judith Bernstein et al., Letter to the Editor, *Safeguards in Embryo Donation*, 65 FERTILITY & STERILITY 1262, 1262 (1996). The effects of identity confusion are crystal clear in the words of the child, such as in this account written by a nineteen-year-old who learned the truth of her ART birth at age 16:

This is my nightmare—I'm a person created by donor insemination, someone who will never know half of her identity. I feel anger and confusion, and I'm filled with questions. . . . Why the big secret? . . . I have a more difficult obstacle since the secret's been out: trust. I've wondered if there are other secrets being kept from me. . . . [A]ll the love and attention in the world can't mask that underlying almost subconscious feeling that something is askew.

COOPER & GLAZER, *supra* note 1, at 353.

⁴⁰ Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (And Whom) Do I Come From?*, 14 GEO. J. GENDER & L. 1, 4 (2001).

⁴¹ *Id.* at 4–5 (“My argument is that the balancing of the affected interests should result in making birth certificates readily available because the ‘child’s’ interest becomes paramount when she becomes an adult.”).

⁴² Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. PA. J. CONST. L. 150, 174 (1999).

⁴³ See Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 3–4 (2003).

⁴⁴ *Id.* at 4.

offered several possible regulatory responses to the problem ART poses to children and families, striving primarily to protect children. Her ideas include funding studies to research long-term physical, emotional, and social effects on children of collaborative reproduction; scrutinizing carefully any ART process before it “goes commercial”; limiting the proliferation of “leftover” embryos; preventing use of ART by unmarried persons; considering the detrimental effects of ART on marriage; taking donor choice out of the process legislatively; and reducing legislatively the economic incentives for collaborative reproduction that concern elitism, predetermination, and standardization.⁴⁵

All this requires great responsibility on the part of parents and lawmakers. The privilege of parenting and of raising a healthy child comes with a duty owed to the child specifically and to society as a whole. Parental rights are balanced by parental responsibility, as seen in American case law that clearly upholds parents’ right to direct the upbringing of their children.⁴⁶ From this base, it is assumed that a child’s parents are acting in that child’s best interests until proven otherwise.⁴⁷ This implicitly requires parental responsibility and self-governance that continually places the child’s interest above that of the parent—even to a point of self-sacrifice. Indeed, parenting requires great self-sacrifice. Good parenting requires parents to rescue their children, teach their children, and continually place their children’s interest above their own. No parent considering ART should reproduce for self-interest or self-preservation.

This tug of war between the selfish human nature of adults and the personal responsibility toward a child was touched on by Professor Waldman.⁴⁸ In ART, most conclude that honesty from the outset is the best policy: “What do you tell a child who asks about his history, if he is the product of IVF or embryo adoption? . . . Many advocate complete honesty throughout childhood, as hard as that may seem.”⁴⁹ Waldman’s research pointed out, however, that parents, like most people, are scared of

⁴⁵ *Id.* at 61–62.

⁴⁶ *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that parents have a right to direct the education of their children by allowing them to learn a foreign language); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (ruling for a parents’ right to place their children in private schools); *Troxel v. Granville*, 530 U.S. 57, 68–70 (2000) (holding that the rights of natural parents prevail over grandparents’ visitation requests).

⁴⁷ *See Troxel*, 530 U.S. at 69.

⁴⁸ Waldman, *supra* note 6.

⁴⁹ Charlotte Moore, *Updating ‘the Talk’*, ATLANTA J.-CONST., Sept. 24, 2002, at E1.

the hard work of being honest with their children—so instead, they choose the path of least resistance: a “don’t ask, don’t tell” approach.⁵⁰

Some experts among the American Academy of Pediatrics suggested that it is best to answer an ART child’s questions in much the same way a parent might answer questions of any adopted child.⁵¹ Other professional societies set out guidelines for ART, including a mandate toward “Informing Offspring of Their Conception by Gamete Donation.”⁵² The bright line guiding principle is preventing harm to members of the future generation.⁵³ This “reflects an experienced understanding of the unique vulnerabilities of children.”⁵⁴ There is a “value of and need for consistent state monitor and intervention when necessary to prevent irreparable harm to members of the future generation.”⁵⁵

The preference for the marital family in American case law is equally clear, regardless of the method of reproduction.⁵⁶ The element of preference for marital status of the intended parents is well established in American law regarding parentage as well,⁵⁷ and a wealth of sociological research supports these conclusions. Studies that have examined a child’s

⁵⁰ Waldman, *supra* note 3. Those opting for anonymity have greater difficulty coping with male infertility and an attitude of secrecy toward the child. *See id.*; *see also* A. Brewaeys et al., *Anonymous or Identity-Registered Sperm Donors?*, 20 HUM. REPROD. 820, 823 (2005).

⁵¹ Moore, *supra* note 49.

⁵² David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727, 733 (2005) (showing the American Society for Reproductive Medicine (ASRM) and the Society for Assisted Reproductive Technology (SART) professional society guidelines for ART).

⁵³ *See* Ethics Comm. of the Am. Soc’y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 528 (2004).

⁵⁴ Lynn D. Wardle, *Autonomy, Protection, and Incremental Development in Family Law: A Review of Family Law in America by Sanford N. Katz*, 39 FAM. L.Q. 805, 816 (2005). Professor Wardle discusses Professor Katz’s commitment to child protection law. *Id.* at 815–17.

⁵⁵ *Id.* at 816–17.

⁵⁶ *See, e.g.*, *Johnson v. Calvert*, 851 P.2d 776, 777–78 (Cal. 1993) (ruling that married genetic parents to a surrogacy contract, and not the surrogate, were the natural—and thus legal—parents); *Michael H. v. Gerald D.*, 491 U.S. 110, 121, 124 (1989) (holding that the intact marital family had a privacy protection against interference from third-party biological parents).

⁵⁷ *See* Jenny Wald, *Legitimate Parents: Construing California’s Uniform Parentage Act to Protect Children Born Into Nontraditional Families*, 6 J. CENTER FOR FAMILIES, CHILD, & CTS. 139, 144 (2005).

best interests generally reveal that those interests are best served by having a mother and a father married to each other.⁵⁸ These myriad studies have queried what circumstances cause children to thrive and (overwhelmingly) show that children do best in a home headed by dual-gender parents who are married to each other.⁵⁹ A pair of studies published in 2003 compared how children fare in families that contain biological, married parents with those containing biological, unmarried parents. These studies concluded that “marriage per se confers advantage in terms of” how children thrive and the extent to which parents are willing to invest in children.⁶⁰ Although these studies used biological parent subjects, the results regarding marriage may still be quite relevant to the discussion of what is best for embryo-adopted children. Plainly stated, children thrive in a home with a mother and a father married to each other.

Moral realism would require that there be no separation between marriage, adoption, and ART where a child’s best interests are

⁵⁸ Note that therapists understand that a marital family of a husband and a wife is not always the case, particularly with ART. See Anne C. Bernstein, *Making Sense of New Conceptions . . . in a Family Way*, FAM. THERAPY NEWS, Feb. 1995, available at <http://www.perspectivespress.com> (follow “Articles” hyperlink) (noting that “[n]ontraditional families will have no choice about early disclosure”).

⁵⁹ See, e.g., GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 65–66 (1997); LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 124 (2000); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 493–95 (1995); Leslie Carbone, *For Better or For Worse?*, PHIL. INQ., June 5, 1999, at A9 (stating that children residing in homes with cohabiting couples have more behavior problems); RONALD J. ANGEL & JACQUELINE L. ANGEL, PAINFUL INHERITANCE: HEALTH AND THE NEW GENERATION OF FATHERLESS FAMILIES 100–02 (1993); DAVID POPENOE, LIFE WITHOUT FATHER (1996); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); Ronald J. Angel & Jacqueline Lowe Worobey, *Single Motherhood and Children’s Health*, 29 J. HEALTH & SOC. BEHAV. 38 (1988); L. Remez, *Children Who Don’t Live With Both Parents Face Behavior Problems*, 24 FAM. PLAN. PERSP. 41 (Jan./Feb. 1992).

In fact, the research is overwhelming that a child is more likely to be abused by a mother’s partner whom she is not married to. See, e.g., MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 104 (1990).

⁶⁰ Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 230 (2003), available at http://www.popcenter.umd.edu/people/hofferth_sandra/papers/JMF203.pdf (evaluating the extent to which these newer, more carefully constructed studies can assist in isolating the impact that living in a marital home has on a child’s well-being).

concerned.⁶¹ Looking to emerging trends, one example is found in French law where there are “three forms of organization for couples: common law, civil unions (PACS) and marriage, each with its own proportionate set of rights and obligations.”⁶² The French report concluded:

Because of its higher level of commitment, permanence and judicial support for children (in divorce), marriage offers the greatest protection and benefits for children and society. “Marriage is not merely the contractual recognition of the love within a couple. It is a framework requiring rights and obligations conceived in order to allow for the welcome and harmonious development of the child.”⁶³

Thus, to achieve what is in the best interests of the child, ART ought to be embraced in the context of marriage. Statutory rules that allow or prohibit children from discovering their origins are important to this examination of how a child might discover her place in this world.

II. STATUTORY PROHIBITIONS ON INFORMATION

The debate about information needs of children of ART, or “donor conceived people,” is receiving much public attention.⁶⁴ Some believe that it is “morally wrong to deceive children and deprive them of knowledge

⁶¹ This is not to say that there ought to be anything less than “full equality for all children in their legal relationship with both parents, whatever their parents’ marital status.” David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 129 (2006).

The concept that a child thrives when having married parents logically leads to a moral order, if not also to a legal proposal (even if not likely to prevail based on the conflict of rights of persons involved) that a child has a right to have parents who are married to each other based upon this best interests standard. See Edward V. Vacek, *Vatican Instruction on Reproductive Technology*, 49 THEOLOGICAL STUD. 110, 126 (1988) (noting “a right to be conceived in and from marriage”).

⁶² EXECUTIVE SUMMARY, *supra* note 16.

⁶³ *Id.* (quoting French law). The report goes on to support current French law that medically assisted reproduction be limited to heterosexual couples who are married or who can prove at least two years of a common-law relationship. *Id.* at 2. It also further justifies the French prohibition on surrogate motherhood because “the human body cannot be disposed of; and . . . filiation also cannot be disposed of.” *Id.*

⁶⁴ Julia Feast, *Using and Not Losing the Messages from the Adoption Experience for Donor-Assisted Conception*, 6 HUM. FERTILITY 41, 41 (2003).

about who they are.”⁶⁵ Currently, however, no legislation aims to protect the rights of intended egg donor children.⁶⁶ In the United Kingdom and in some states in America, “current legislation puts the right of a parent to have a child before the needs of a child.”⁶⁷ If the best interests of the child are to be served authentically as well as theoretically, then, as a matter of public policy, donor offspring ought to be allowed to discover the identity of their genetic parents.⁶⁸ Some states completely deny this information as a matter of law.⁶⁹

In the most restrictive states’ laws, the onus remains on of-age children⁷⁰ or the adoptive parents to prove their need to obtain either

⁶⁵ Julia Feast, *The Right to an Identity*, OBSERVER, June 16, 2002, available at <http://observer.guardian.co.uk/comment/story/0,,737777,00.html> (quoting Baroness Warnock, a former proponent of Britain’s Human Fertilisation and Embryology Act, which, at the time, largely restricted access to donor identity).

⁶⁶ Manning, *supra* note 8, at 679–80.

⁶⁷ Feast, *supra* note 65. Feast contended that this is an imbalance that must change, because “the interests of the child are crucial,” and declared, “It’s time for the Government to acknowledge that openness and honesty should now become the accepted practice, so that tomorrow’s children grow up with dignity and a right to their identity.” *Id.*

⁶⁸ Elizabeth Siberry Chestney, *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, 368 (2001) (reviewing recent rights extended to adoptees in Oregon and Tennessee, which the author argues ought to extend to ART offspring and embryo adoptees).

⁶⁹ *See id.* at 367 n.20.

⁷⁰ The age range is between eighteen and twenty-one years of age for adult adopted children to obtain information regarding their own adoptions. *See* Adopting.org, Access to Adoption Records, <http://www.adopting.org/adoptions/state-regulations-non-identifying-identifying-information.html> (last visited Apr. 20, 2007); *see also* CHILD WELFARE INFORMATION GATEWAY, ACCESS TO ADOPTION RECORDS 4 (2006), http://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessap.pdf [hereinafter CWIG ACCESS TO FAMILY INFO] (“Some States have imposed limitations on the release of identifying information. Arkansas, Mississippi, South Carolina, and Texas require the adopted person to undergo counseling about the possible consequences of contact with his or her birth family before any information is disclosed. In Connecticut, release of identifying information is prohibited if it is determined that the requested information would be seriously disruptive to any of the parties involved.”); Cahn, *supra* note 40, at 8 n.46 (describing the requirement for inspection “only upon an order of the court for good cause shown,” as set forth in the Uniform Parentage Act section 5(a) and state codes that have adopted the Act).

nonidentifying⁷¹ or identifying⁷² information. This is likely a carryover from the idea that adoption was meant to be a confidential process to maintain the parties' privacy and protection.⁷³ Current Colorado law, for example, while less restrictive than some, maintains that "confidentiality is essential to the adoption process and that any procedure to access information which relates to adoption must be designed to maintain confidentiality and to respect the wishes of all involved parties."⁷⁴ Even though the law is well-meaning, one wonders whether Colorado asked the child what he would want.

Some of the more restrictive states' laws can be found in Ohio, North Carolina, Pennsylvania, and Vermont.⁷⁵ All, at least in their application, place an incredible burden on the adopted child and his adopted parents to discover any real and helpful information useful to the adopted child's health and welfare.⁷⁶ In each of the more restrictive states, the current law is a maze, seemingly meant to discourage investigation into an adopted child's biological or sociological past.⁷⁷

⁷¹ See CWIG ACCESS TO FAMILY INFO, *supra* note 70, at 1–2.

Nonidentifying information is generally limited to descriptive details about an adopted person and the adopted person's birth relatives

Nonidentifying information may include the following:

- Date and place of the adopted person's birth
- Age of the birth parents and general physical description, such as eye and hair color
- Race, ethnicity, religion, and medical history of the birth parents
- Educational level of the birth parents and their occupation at the time of the adoption
- Reason for placing the child for adoption
- Existence of other children born to each birth parent

Id.

⁷² See *id.* at 3 ("Identifying information is any data that may lead to the positive identification of an adopted person, birth parents, or other birth relatives. Identifying information includes the current name of the person. It usually also includes an address or other contact information so that adopted persons and birth relatives can arrange personal contact.").

⁷³ See Cabellero, *supra* note 8, at 291–92.

⁷⁴ COLO. REV. STAT. ANN. § 19-5-301 (West 2006).

⁷⁵ See Adopting.org, *supra* note 70.

⁷⁶ See *infra* notes 78–91 and accompanying text.

⁷⁷ See *infra* notes 78–91 and accompanying text.

In Ohio, “[a]dopted adults, birth parents, and birth siblings can receive non-identifying information if the adoption was finalized before January 1, 1964, or after September 18, 1996. If the adoption was finalized between [those two dates], adopted adults must petition the court to receive information.”⁷⁸ This means that an of-age adopted adult who was born in that over thirty-year span may never determine the race (and therefore his own) or age of his biological parents, much less any meaningful information that may be useful in diagnosing diseases or anticipating genetic problems.

North Carolina’s law on its face allows access to nonidentifying information, but only if the birth parents or relatives “submit information about a health or genetic condition that may affect the adopted adult.”⁷⁹ The birth parents may neither voluntarily submit this information nor be aware of the genetic condition that may now be affecting the adopted adult.⁸⁰

Pennsylvania allows “[a]dopted adults age 18 or older or adoptive parents of an adoptee under 18 [to] obtain non-identifying information by petitioning the court.”⁸¹ Upon this petition, “the court shall furnish to the adoptee as much information concerning the adoptee’s natural parents as will not endanger the anonymity of the natural parents.”⁸² Apparently, the best interests of the child are not significantly considered. Regarding identifying information, Pennsylvania need only “attempt” to contact the birth parents with the information furnished to them in the file⁸³ to satisfy the law’s standard. After such an attempt, the birth parents can deny the request and leave the adopted adult with no alternative until after the death of one or more of the biological parents.⁸⁴ This leaves the adopted adult with no way to connect to her place in the world.

Like Vermont, most states today use a registry in order to facilitate the matching of those birth parents and adopted adults who want to be

⁷⁸ Adopting.org, *supra* note 70; *see also* OHIO REV. CODE ANN. §§ 3107.38, 3107.40, 3107.41 (LexisNexis 2003).

⁷⁹ Adopting.org, *supra* note 70; *see also* N.C. GEN. STAT. § 48-9-105 (LexisNexis 2005); *In re Adoption of Spinks*, 232 S.E.2d 479, 482–83 (N.C. Ct. App. 1977).

⁸⁰ *See* N.C. GEN. STAT. § 48-9-105; *see also* CWIG ACCESS TO FAMILY INFO, *supra* note 70, at 5.

⁸¹ Adopting.org, *supra* note 70; *see also* 23 PA. CONS. STAT. ANN. § 2905 (West 2006).

⁸² 23 PA. CONS. STAT. ANN. § 2905(b).

⁸³ *Id.* § 2905(c)(1).

⁸⁴ *See id.* § 2905(c)(3).

identified.⁸⁵ Vermont's adoption law states that all parties involved in an adoption proceeding (including birth parents and siblings) "must go through the registry to receive information if the adoption was finalized through the State."⁸⁶ In addition to Vermont's limitation on this option (through the use of the term "must"), "[m]utual consent is required."⁸⁷ This means that birth parents may choose not to allow the information in the registry to be shared with their biological children.⁸⁸ Other states that use a registry still maintain confidentiality in administration with an obvious preference for birth parents.⁸⁹ This preference was likely to encourage adoption and may have been successful in discouraging investigation, but it carries no consideration of the best interests of the child involved in the adoption.

Most adoption law is protective of birth parents and hinges on privacy laws and historical records,⁹⁰ but many states today are moving toward laws that at least consider the best interests of the child.⁹¹ In consideration of this interest, states have provided the adoptive parents and children with the ability to access previously secretive court proceedings and have placed

⁸⁵ See Adopting.org, *supra* note 70.

⁸⁶ VT. STAT. ANN. tit. 15A, §§ 2-105, 6-102, 6-103; see also Adopting.org, *supra* note 70.

⁸⁷ Adopting.org, *supra* note 70.

⁸⁸ For adoptions "finalized on or after July 1, 1986, the registry shall disclose identifying information without requiring the consent of the former parent except the registry shall not disclose such information if the former parent has filed a request for nondisclosure" VT. STAT. ANN. tit. 15A, § 6-105(b)(2); see also Adopting.org, *supra* note 70. Even though this puts the onus somewhat on birth parents to file the request, it still may result in the adopted adult's inability to obtain any information if birth parents do file.

⁸⁹ See, e.g., LA. CHILD. CODE ANN. art. 1270(E) (2004) ("The registry shall not release any information from adoption records in violation of the privacy or confidentiality rights of a biological parent who has not authorized the release of any information.").

⁹⁰ See, e.g., GA. CODE ANN. § 19-8-23(a) (2004) ("All of the records, including the docket book, of the court granting the adoption, of the department, and of the child-placing agency that relate in any manner to the adoption shall be kept sealed and locked. The records may be examined by the parties at interest in the adoption . . . after written petition has been presented to the court . . . and the appropriate child-placing agency have received at least 30 days' prior written notice . . . and good cause having been shown to the court[.]").

⁹¹ Texas and Florida are among the states that have given rights to adopted adults and parents. See Adopting.org, *supra* note 70.

the burden of privacy solely on the shoulders of those who can bear the burden best,⁹² rather than placing that burden directly on the child.

To completely deny information to ART children is clearly anathema to a child's best interests. The more difficult the information becomes to access, the less it fosters the best interests of the child.⁹³ This interest does not need to be exclusive of the desire to protect privacy rights of adults.⁹⁴ "Nevertheless, although different treatment may be permissible, openness and identity release are the superior policy positions in both contexts, serving the best interests of the child involved."⁹⁵

Laws and obligations placed on sperm banks, agencies, and parents are equally relevant. Although many sperm banks are currently providing extensive information to parents regarding their donor's medical and psychological history,⁹⁶ most couples using donor insemination (DI) in this country are still choosing not to tell their children the truth about their origins.⁹⁷ In recent years, large bodies of mental health professionals, including family therapists, have begun to question the ethics of secrecy regarding gamete donation.⁹⁸ These clinicians believe that denying people essential information about their identity, especially when it includes their medical history, is morally unacceptable.⁹⁹ Furthermore, they cite family therapy and adoption literature documenting the negative impact of family secrets on parents and children and on family systems.¹⁰⁰

Anonymity is fast becoming unacceptable in this field. "Some commentators question whether it is ethically responsible to create a child through an anonymous embryo adoption."¹⁰¹ Moral realism requires the

⁹² See TEX. FAM. CODE ANN. § 162.018(a) (Vernon 2002) ("The adoptive parents are entitled to receive copies of the records and other information relating to the history of the child maintained by the department, licensed child-placing agency, person, or entity placing the child for adoption."); *id.* § 162.018(c) ("It is the duty of the person or entity placing the child for adoption to edit the records and information to protect the identity of the biological parents and any other person whose identity is confidential.").

⁹³ See Chestney, *supra* note 68, at 365.

⁹⁴ See *id.* at 368.

⁹⁵ *Id.*

⁹⁶ COOPER & GLAZER, *supra* note 1, at 346.

⁹⁷ *Id.* at 343.

⁹⁸ *Id.* at 351.

⁹⁹ *Id.* at 356.

¹⁰⁰ See *id.* at 351–57.

¹⁰¹ Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 874 (2003).

law to consider and correct the current state of laws and obligations surrounding ART.¹⁰² “Having an unknown genetic parent is problematic because ‘it may be psychologically or medically harmful to a person to have no information—or little information—about his/her genetic make-up.’ Some clinicians believe that it is ethically unacceptable to deny people crucial information about their identity”¹⁰³ Donors likewise have duties to the child that balance their rights,¹⁰⁴ leading Professor Waldman to cite new international trends in agency ethics and professionalism in choosing to use only donors who consent to full disclosure with moral responsibility in seeking the most appropriate standards for all parties.¹⁰⁵

¹⁰² See *id.* at 883. One situation requiring regulation is the disposition of excess embryos. *Id.* “It is clear that regulation is necessary to deal with the excess supply of embryos resulting from IVF procedures.” *Id.* See *id.* at 880–82 for several reasons supporting increased regulation. See also Paul C. Redman II & Lauren Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 595–96 (1999).

¹⁰³ Johnson, *supra* note 101, at 874–75 (quoting COOPER & GLAZER, *supra* note 1, at 24).

¹⁰⁴ See *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 875 (Cal. Ct. App. 2000) (stating in dicta that anonymity may not be protected in certain circumstances and may give way to the child’s best interests).

¹⁰⁵ Waldman, *supra* note 3. The evidence Professor Waldman submits strongly asserts that semen donors are aging altruistic helpers for infertile people. *Id.* Some who analyze recent birth rate data suggest that trends toward aging donors could be a form of patriarchy revisited. See Phillip Longman, *The Return of Patriarchy*, FOREIGN POL’Y, Mar./Apr. 2006, at 56. Longman’s article suggests that recent birth trends indicating low birth rates for societies embracing alternative family forms, contrasted with higher birth rates among conservative cultures, suggest that “a growing portion of the next generation will be born into families who believe that father knows best.” *Id.* Similarly, laws requiring openness of donors have led to increasing numbers of aged, altruistic donors, doing what they can to assist women who do not want men in their families, presenting the irony of the dominating legacy of the donor in producing numerous offspring. “Patriarchy does not simply mean that men rule. . . . [It] is a cultural regime that serves to keep birthrates high among the affluent, while also maximizing parents’ investments in their children. No advanced civilization has yet learned how to endure without it.” *Id.* at 58. “The historical relation between patriarchy, population, and power has deep implications for our own time.” *Id.* This type of analysis seems to suggest that the donor is not necessarily releasing himself (or herself) from all self-interest, begging the questions surrounding the need for donor responsibility (openness, full disclosure, etc.). Similar concerns might be expressed regarding the agency/doctor’s interest: Is it scientific? Is it altruistic toward infertile

(continued)

Those states that expressly prohibit ART children from obtaining information on their genetic parents are directly obstructing the best interests of the child. Such a policy enacted into law expressly negates child welfare. Balancing the interests of adults is important and necessary, but must halt when those interests reach the point of completely eclipsing a child's best interests. A good start on the path to child welfare integrity would be to repeal such prohibitions and to promote more responsible practices on the part of agencies and parents.

III. LAW-MAKING AND PARENTAL & AGENCY RESPONSIBILITY: A CALIFORNIA EXAMPLE

Embryo adoption is catching on¹⁰⁶ and has blossomed in California through programs like Snowflake Adoptions, a part of Nightlight Christian Adoption Agency in Fullerton, California.¹⁰⁷ Nightlight is a traditional adoption agency that is among those agencies now moving into embryo adoption.¹⁰⁸ Others like it are Christian Adoption and Family Services of California, which “handl[es] embryo adoption like [the] traditional adoption of a newborn,”¹⁰⁹ and Bethany Christian Services, which finds

parents? Is it (purely) financial? It is likely all of these in some combination? This brings to mind the key ethical lines of *Jurassic Park*: “[Scientists] are focused on whether they can do something. They never stop to ask if they *should* do something.” MICHAEL CRICHTON, *JURASSIC PARK* 284 (Ballantine Books 1991) (1990). Likewise, ethical duties of those at the foundation of this debate often are not considered—however, that does not negate the ethical duties.

¹⁰⁶ Becky A. Ray, *Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law*, 28 S. ILL. U. L.J. 423, 452 (2003); Moore, *supra* note 49 (“Embryo adoption is fast becoming a new option for infertile couples. Infertility clinics across the country have established in-house embryo donation systems . . .”). For a review of the other salient issues surrounding embryo adoption, see generally Johnson, *supra* note 101.

¹⁰⁷ Isabel Sanchez, *Embryo Adoption Raises Challenging Legal and Ethical Issues*, ALBUQUERQUE J., May 5, 2002, at E8. The agency program is called Snowflake for the embryos themselves, which are frozen and unique. *Id.* For a thorough review and analysis of the Snowflake program, see Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 191–94 (2003) (discussing how embryo adoption is a contractual process otherwise handled in much the same way as a traditional adoption, where the agency takes responsibility for screening of adoptive parents).

¹⁰⁸ Katz, *supra* note 107, at 191. Snowflake requires a home study and the same safeguards offered with traditional adoption. *Id.* at 191–92.

¹⁰⁹ *Embryo ‘Adoption’: Trend Raises Ethical, Legal Questions*, AM. HEALTH LINE, Dec. 9, 1998.

families for frozen embryos, holding to “every life a promise.”¹¹⁰ The standards used by these clinics clearly hold the best interests of the child as paramount and afford numerous counseling opportunities and encourage parents to be open with their child from the outset.¹¹¹

The State of California responded to this trend in embryo adoption¹¹² with Assembly Bill 1926, which is an Act to amend section 7610 of the California Family Code to include establishment of parentage for embryos in adoption, allowing parentage to be established between a child and an adoptive parent through proof of transfer of an embryo to a woman pursuant to some sort of written agreement.¹¹³ Currently the law has nothing to say about the selection of embryo adoptive parents,¹¹⁴ which has

¹¹⁰ E-mail from Marc Andreas, Director of Marketing and Communications, Bethany Christian Services (Oct. 30, 2006, 09:55:00 EST) (on file with author) (stating that “Every Life A Promise” is Bethany’s current tagline); *see, e.g.*, Bethany, Branch Sites, Modesto, CA, Introduction, <http://www.bethany.org/A55798/bethanyWWW.nsf/0/5D1D7A3DA8D1BB5985256CEF00693012> (showing the use of the tagline on organization materials).

¹¹¹ Katz, *supra* note 107, at 192.

¹¹² Some suggest that California’s legislative pursuits are also in response to an adoption-like approach to traditional surrogacy. Appleton, *supra* note 8, at 417–18. Appleton continues with a discussion of the new Uniform Parentage Act (new UPA), which subjects some assisted reproductive technologies “to state oversight and regulation, but leaves others to the choices of the adult participants and the market.” *Id.* at 418. There is no provision in the new UPA allowing for or prohibiting information to a child of ART. *See* UNIF. PARENTAGE ACT (1973), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.pdf>.

¹¹³ Assemb. 1926, 2005–2006 Reg. Sess. (Ca. 2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1901-1950/ab_1926_bill_20060201_introduced.pdf. The Act is now in the Assembly Committee on the Judiciary, introduced February 1, 2006, last action April 4, 2006, held without recommendation. Assemb. 1926 Bill History, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1901-1950/ab_1926_bill_20061130_history.html (last visited Apr. 20, 2007).

¹¹⁴ For an overview of the California law prior to Assembly Bill 1926, see Frank H. Free, *A Brief Primer on Case Law Addressing Parentage Issues for Nonbiological Parents Before 2005*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 121, 121 (2005) (providing a case discussion of presumed parents); Diana Richmond, *Parentage by Intention for Same-Sex Partners*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 125, 132–33 (2005) (discussing court preference for parties’ intention at conception); and Jenny Wald, *Legitimate Parents: Construing California’s Uniform Parentage Act to Protect Children Born Into Nontraditional Families*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 139 (2005) (analyzing UPA and California court rulings involving same-sex parents).

been somewhat troublesome because agencies are left to remedy this problem with their policies.¹¹⁵

The greatest critique of the California proposal is that this law affords the personalization of the embryo. “The American Civil Liberties Union and the American College of Obstetricians and Gynecologists oppose the [California] bill as unnecessary and argues that its attempt to give an embryo the status of a person raise[s] concerns with respect to reproductive rights. Planned Parenthood concurs”¹¹⁶ The use of the terms in this discussion reveals much about the rights concerns of children or adults. “Embryo adoption” places the rights on the child, while the use of “embryo donation” clearly places the rights on the donor parent and the donee parent, rather than on the embryo.¹¹⁷ This appraisal transparently reveals the moral root of the balance between the voices of children and the voices of adults.¹¹⁸ A survey of scholarly literature reveals a parallel of that dichotomy showing a split among the organizational frameworks of ART sections. Two opposing positions emerge: that of child welfare (focusing on the child of ART) versus that of adult use of technology (focusing on the rights of adults).¹¹⁹

When the voice of the child is focused upon, it is impossible not to personalize the embryo. The realm of ART has been referred to as the “Fragile World of the ‘Almost People.’”¹²⁰ Concern over the lack of legal ethics in favor of children is well founded in this debate over how to treat embryos.¹²¹ Science appears to promulgate a sterile approach that does not consist of the ethics of caring for children and that does not embrace what

¹¹⁵ See generally Katz, *supra* note 107 (detailing the legal implications of the Snowflake Program). For more on the unregulated state of embryo adoption, see Johnson, *supra* note 101, at 875–76.

¹¹⁶ AB 1926 Assembly Bill – Bill Analysis, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1901-1950/ab_1926_cfa_20060330_165950_asm_comm.html (last visited Apr. 20, 2007).

¹¹⁷ See Appleton, *supra* note 8, at 441–42.

¹¹⁸ Similarly, David Smolin asserted, “The abortion debate also influences the views of many courts and secular bioethicists regarding the status of the in vitro early embryo.” David M. Smolin, *Does Bioethics Provide Answers?: Secular and Religious Bioethics and Our Procreative Future*, 35 CUMB. L. REV. 473, 509 (2005).

¹¹⁹ Appleton, *supra* note 8, at 399.

¹²⁰ The Fragile World of the “Almost People”, http://www.albertmohler.com/blog_read.php?id= (Mar. 14, 2006, 02:30 EST).

¹²¹ See Johnson, *supra* note 101, at 867–72 (comparing the conflicting views of the embryo as property, life, and potential life).

children ought to be told about their own existence; instead, it offers that any gesture in favor of the embryo being a human child is merely an ambush of emotion.¹²²

Science and the law both work on the basis that an embryo at this very early stage is a sub-human scrap of genetic material and only becomes a person later in its development. The majority of people going through IVF probably agree (it does make what they are doing far less morally complicated). But those who have been through IVF or made it happen know that even the clearest of minds can be ambushed by emotion and find themselves personalizing embryos.¹²³

Professor Katheryn Katz pointed out that embryo adoption has chiefly been treated as a medical matter rather than a legal one.¹²⁴ Embryonic stem cell research further complicates the debate between adult rights and child protections, making it nearly impossible to hear the voice of the child, which may be why such research has generated passionate social debate.¹²⁵ To offer protections to an adoptable embryo as Professor Katz suggested, “[o]ne does not have to believe that the embryo should enjoy the moral and legal status of a born human being to support laws that protect children who will come into the world with a combination of genetic, gestational, and rearing parents.”¹²⁶ The adoption parallel,

¹²² Fragile World, *supra* note 120.

¹²³ *Id.* (emphasis omitted). Even discarding the embryos reveals the depth of this dilemma:

Some people ask to take home the ones that have not been used,” says Andy Glew, senior embryologist at the Essex Fertility Centre, in Buckhurst Hill. “We make sure that life has been terminated before we let them out of the building, but then we do give couples the embryos in a water-based solution so that they can bury them in the garden, or whatever they need to do.

Id.

¹²⁴ Katz, *supra* note 107, at 180.

¹²⁵ See Sina A. Muscati, *Defining a New Ethical Standard for Human In Vitro Embryos in the Context of Stem Cell Research*, 2002 DUKE L. & TECH. REV. 0026, 11, <http://www.law.duke.edu/journals/dltr/articles/PDF/2002DLTR0026.pdf> (proposing the need for a new ethical standard, arguing against treating the embryo as either a person or as property, and favoring treating the embryo as a special entity).

¹²⁶ Katz, *supra* note 107, at 181.

however, cannot be ignored or denied, because it carries with it a wealth of knowledge and expertise about what children ought to know about their origins.¹²⁷

This Article disagrees with the assumption that promotion of embryo adoption is a calculated strategy to win personhood legal status for embryos and other unborn children.¹²⁸ Rather, the mere fact that scholars are asked to consider what to tell children of embryo adoption reveals the underlying truth about the humanity of the practice. This is about children and the future of society, and what we consider about them now will certainly have an impact on what they perceive to be their place in this world later.

IV. CONCLUSION

In defrosting this debate on embryo adoption, much can be gleaned about what we should tell the children. It is clear that whatever is told must be based on the best interests of the children, and honesty from the outset is critical to healthy child development.¹²⁹ In addition, the best interests standard for children can only be upheld by adults involved in the ART process, adults who choose to sacrifice to protect the best interests of the children.¹³⁰ Currently, the law only works to impede openness favoring a child's ability to know about his origins and to use the past to discern what his place in the world is by directly applying adoption law to ART.¹³¹ This requires sacrifice from all the adults around the ART process, especially the parents. Successful parenting involves protecting the child's interest above one's own, which in turn can be the most truly satisfying state of parental responsibility.

The law has not yet connected with the need for information that a child of ART will sense.¹³² Agency standards, however, are currently

¹²⁷ *Id.*; see also COOPER & GLAZER, *supra* note 1, at 361.

¹²⁸ See Katz, *supra* note 107, at 194 (stating that embryo adoption is “an integral component of concerted efforts by abortion opponents to have embryos accorded the same legal status as children”).

¹²⁹ See COOPER & GLAZER, *supra* note 1, at 347–76 (proffering numerous scenarios, suggestions, and conclusions about talking with children of embryo adoption as conceived in love; holding that there are legitimate ethical arguments for openness; and advocating a sound family therapy position).

¹³⁰ *See id.*

¹³¹ *See id.* at 362.

¹³² Katz, *supra* note 107, at 219.

driving the ART market, for better or for worse,¹³³ and may be providing an impetus for legal change (as in the California example). Responsible adults who desire to protect the best interests of children above their own interests should be active in this discussion. Minimally, law ought not to prohibit a child from discovering his genetic origins.

Protecting the child's interest above one's own is possibly the most satisfying state of being for any adult involved in ART, to not only allow, but also to encourage that child to find his place in this world. No child should be left to believe he is a cosmic accident or a surplus spare part in a world of adult rights. Every child of embryo adoption relies on benevolent adults to gain a proper perspective.¹³⁴

¹³³ For example, Snowflake/Nightlight requires home studies for embryo adoptions and full health and psychological screening for all donors, which is much more than is required by most general IVF clinics. *See id.* at 191–92. These standards are clearly in accord with the numerous suggestions offered by Cooper and Glazer. *See generally* COOPER & GLAZER, *supra* note 1.

¹³⁴ “A life of pages / Waiting to be filled / A heart that's hopeful / A head that's full of dreams / But this becoming / Is harder than it seems . . . Not a lot to lean on / I need Your light to help me find / My place in this world.” SMITH, *supra* note 5.

