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

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/ss5004a1.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,”
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. 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. 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. 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. This penchant for secrecy reflected attitudes about single mothers, adopted children, and the meaning of adoption as a social practice.

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. In the late 1940s and 1950s, psychological theorizing began to attribute out-of-wedlock births to the instability and emotional volatility of the mother. Pregnancy in a single woman was thought to represent the presence of a “significant pathology” 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-


See Samuels, supra note 12, at 386.

See id. at 408–09.

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.’”).

Samuels, supra note 12, at 408.

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

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. 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. 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. 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{26} Studies like those of David Kirk in 1964\textsuperscript{27} 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

\textsuperscript{23} Deborah H. Siegel, \textit{Open Adoption of Infants: Adoptive Parents’ Feelings Seven Years Later}, 48 SOC. WORK 409, 410 (2003).

\textsuperscript{24} See Miriam Reitz, \textit{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.”).

\textsuperscript{25} See \textit{id.} at 333.

\textsuperscript{26} \textit{id.} (emphasis omitted).

\textsuperscript{27} See H. DAVID KIRK, \textit{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. \textit{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. \textit{id.} at 60–61. Others use “acknowledgment-of-difference” mechanisms, which embrace the uniqueness of their family unit. \textit{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. \textit{id.} at 99.
them. Further, these studies identified the harms that closed record policies inflicted on all adoption participants and urged change.

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. The study recruited these 720 individuals from thirty-five adoption agencies located in twenty-three regions throughout the United States. 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).

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

29 See id. at 146–49 (arguing that closed records aggravate identity confusion in adopted children).
31 Id. at 67.
32 Id. at 69, 72.
33 Id. at 69.
34 See Minnesota/Texas Adoption Research Project (MTARP), Participants, http://fso.s.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.\footnote{Tai J. Mendenhall et al., \textit{Adolescents’ Satisfaction with Contact in Adoption}, 21 Child & Adolescent Soc. Work J. 175, 182 (2004).} 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.\footnote{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].} When contact and other interactions were characterized by “mutual respect, empathy, and valuing of the relationship,” children reported better adjustment.\footnote{See id.}

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.\footnote{See id. at 7–8.} Some adolescents had primarily negative feelings about being adopted, while others had primarily positive feelings.\footnote{See id. at 9.} 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.”\footnote{See id.} 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.\footnote{See Grotevant & McRoy, supra note 30, at 94; Key Findings, supra note 41, at 3–4.} Adoption openness appeared not to influence more global measures of self-worth or self-esteem.\footnote{Key Findings, supra note 41, at 6.} 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

\footnote{Tai J. Mendenhall et al., \textit{Adolescents’ Satisfaction with Contact in Adoption}, 21 Child & Adolescent Soc. Work J. 175, 182 (2004).}

\footnote{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].}

\footnote{See id.}

\footnote{See id. at 7–8.}

\footnote{See id. at 9.}

\footnote{See id.}

\footnote{See Grotevant & McRoy, supra note 30, at 94; Key Findings, supra note 41, at 3–4.}

\footnote{Key Findings, supra note 41, at 6.}
would lead to better adjusted and happier children. 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.”

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

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. 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. 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. The only regret parents expressed was not fostering openness earlier and not encouraging greater levels of contact and interaction with birth relatives.

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.
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.\textsuperscript{57} Generally, this information is available upon written request, although a few jurisdictions require a court order before any information will be released.\textsuperscript{58}

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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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
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. A

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


The [State Department 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
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. 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. 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. 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.

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

CAL. FAM. CODE § 9203(a)(1) & (2).

31 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, and others grant disclosure upon request, provided no affidavit from the birth parents is on file denying release.

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. 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, adoptees have requested their records, but only eleven birth parents have expressed a desire not to be contacted. Oregon voters passed a similar ballot initiative in 1998. 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).
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.”).
(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 misguided
ly 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

72 DEL. CODE ANN. tit. 13, § 923(b) (1999).
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
75 See id.
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”).
75 See Feast, supra note 77.
76 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”).
77 Id.
78 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.\(^\text{82}\)

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.\(^\text{83}\)

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

---


\(^{83}\) 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. 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. 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. 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.

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”).
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. Unfortunately, the study that has figured prominently in the anonymous donor debate is a small, qualitative inquiry that is marred by bias in its selection of subjects.

The study, authored by psychologists A. J. Turner and A. Coyle, sought to explore how donor offspring felt about the secrecy surrounding their conception, their difficulty in obtaining information, and their efforts to make contact with their missing “father.” Participants were recruited from donor conception support networks located in the United Kingdom, United States, Canada, and Australia. 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. Researchers analyzed the data, identified associations and

---

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).
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:

(continued)
connections, and extrapolated a series of major themes from those associations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{100} Respondents’ accounts were laced with feelings of loss—loss because they did not know the donors and because that absence seemed ignoble.\textsuperscript{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.\textsuperscript{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.

\textit{Id.}

\textsuperscript{96} \textit{Id.} at 2044.
\textsuperscript{97} \textit{Id.} at 2045–46.
\textsuperscript{98} \textit{Id.} at 2044–46.
\textsuperscript{99} \textit{Id.} at 2045.
\textsuperscript{100} \textit{Id.} at 2046.
\textsuperscript{101} See \textit{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.”).
\textsuperscript{102} \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{112} Initially, the study was based in the UK, where a total of 184 families participated.\textsuperscript{113} Ultimately, the researchers expanded the study to include families from the Netherlands, Spain, and Italy.\textsuperscript{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

\textsuperscript{109} Turner & Coyle, supra note 90, at 2043.

\textsuperscript{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.


\textsuperscript{112} Id.

\textsuperscript{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.

\textsuperscript{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. 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. The mothers of naturally conceived children also reported more parenting-related stress than did their ART-assisted counterparts. 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.

Children’s self-esteem and feelings toward their parents were charted through self-report, in addition to parent and teacher surveys. Additionally, evaluations were conducted in the UK arm of the study. 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. 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. 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. 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.

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. The children of ART also reported receiving less criticism from their fathers than did the children of natural conception and adoption.

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. Assisted reproduction children spent less time with peers than did adopted children, but equal amounts of time as naturally conceived children. 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.

Nearly 70% of parents of children conceived via gamete donation had decided against telling their child about his or her provenance. Only 8.6% had already told their middle-school aged children; another 10% indicated they were planning to tell in the future. 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. Children in both groups were doing equally well in terms of school performance, confidence, and peer relationships, and parental relationships were comparably warm. 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.

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. 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. 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.

This result was replicated several years later in a study carried out in an assisted-conception facility in the United Kingdom. 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. The children’s teachers were also questioned, and the children were interviewed and administered a cognitive-function instrument. 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.
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. Interestingly, disclosure did not seem to have any effect on father-child relations, which were comparable for each family type.

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

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. 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.
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.
164 See id.
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. Parents were also asked if they had informed anyone other than their child about the use of a donor.

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. Seventeen (11%) families had already told their child, while sixteen families had not yet made a decision about disclosure. The mean age of the child in the undecided group was seven years. Twenty-eight families had decided to keep the use of a donor secret from their child. The mean age of the children in these families was about nine years old. Reasons given for nondisclosure ranged from feeling that discussion of the donor was "unnecessary" to concerns that it "may hurt the child." 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. 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. 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” 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. The other 93% were set on full disclosure. None of the single moms were on the fence. 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.

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. 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. 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. 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.”

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

---

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., Givarinsomned vid manlig infertilitet - slut på en epok? [Donor Insemination for Male Infertility - The End of an Era?], 87 LÃÄKTIDNINGEN 1871 (1990); K. Hagenfeldt, Givarinsomned behandlingsmetod i kris [Donor Insemination; A Treatment in Crisis], 87 LÃÄKTIDNINGEN 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,
and no Service B men had children of their own. 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. 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. 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. Service B donors were more reluctant: only 18% said they would continue under conditions of possible identification, and 63% said they would not.

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. 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. When asked about their motivation for becoming a semen provider, all donors surveyed stated that they wanted to help infertile couples. Indeed, for 70% of those surveyed, helping the infertile was the only response given. Very few mentioned financial gain as a factor. When asked how they would feel if contacted by their offspring, 62% said they would respond positively or very positively. Ten percent characterized their reaction as “mixed,” 14% said they were unsure, and only 13% admitted feeling negatively or

\[
\text{Id. at 676.}
\]

\[
\text{Id.}
\]

\[
\text{Id. at 213.}
\]

\[
\text{Id.}
\]

\[
\text{Id. at 214.}
\]

\[
\text{See Daniels et al., supra note 196, at 19.}
\]
very negatively about the prospect. 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. 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. 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. 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. And after yet another slump in participation in 2005, one fertility clinic in

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.


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).

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.” Perhaps unsurprisingly, no politicians came forward in response to the campaign.

Both New Zealand and England have adopted “open” legislation within the last three years. 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. 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.

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. 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.


231 See Marie Woolf, Britain’s Sperm Crisis, INDEP. ON SUNDAY, July 30, 2006, available at 2006 WLNR 1274299; see also Fertility Treatment Discrimination, RAINBOW NETWORK.COM, NOV. 28, 2006, http://www.rainbownetwork.com/features/detail.asp?lData=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).

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. 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. In the first six months of 2005, the number of volunteers dwindled to less than one hundred. 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.

Representatives from HFEA contest the existence of a drought, pointing out that supply continues to outstrip demand in some areas of Great Britain. 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.

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

---

234 Id.
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”).
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.  

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.  

When questioned several years post-donation, 56% said they felt the same, and 38% said they felt differently.  

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.  

Of the 25% who were newly open to identification, 22% had previously been unsure, and 3% had previously been firmly in the anonymous camp.  

Of the 13% who had moved toward a desire for anonymity, 9% were previously unsure, and 3% had previously embraced openness.  

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.  

Only 25% said they probably or definitely would not have participated under those conditions.  

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.  

Additionally, they were given ample time and opportunity to talk with clinic staff about the benefits and challenges of open donation.  

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 industry 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.” 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.

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

\[249 \text{ See id. at 1670.} \]
\[250 \text{ Daniels et al., supra note 196, at 20.} \]
\[251 \text{ See supra notes 163–81, 201, 235, and accompanying text.} \]
\[252 \text{ See Alicia Ouellette et al., Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States, 31 Am. J.L. & Med. 419, 434–35 (2005).} \]
\[253 \text{ See id. at 435.} \]
In this country, we leave those questions largely to the market. 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. 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. 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. 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

---


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 HUM. REPROD. 1404 (2002); Belgium: Law Organizes Artificial Reproduction (June 2006), http://genethique.org/en/letters/letters/2006/june.htm.


257 See id. at 72–73.

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


\(^{260}\) See id.


\(^{262}\) 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 file with author).


\(^{264}\) 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).

According to the California Cryobank’s website, communication may include, but is not limited to, “email, written letter, telephone conversation or meeting in person.”

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.”

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


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.