

ARTICLES

A BALANCING ACT? THE RIGHTS OF DONOR-CONCEIVED CHILDREN TO KNOW THEIR BIOLOGICAL ORIGINS

*Brigitte Clark**

TABLE OF CONTENTS

I. INTRODUCTION 621

II. INTERNATIONAL JURISPRUDENCE: CHILD’S BEST INTERESTS? 624

 A. *Interpretation of the CRC* 625

 B. *The European Court of Human Rights: A Holistic Approach?* 630

III. COMPARATIVE LAW POSITION: CONTRASTING APPROACHES 633

 A. *France: Anonymity Rules* 634

 B. *Sweden and England: Banning Anonymity but No Absolute Right* 635

 C. *United States: No Federal Legislative Regulation* 638

IV. JUSTIFICATIONS FOR NONDISCLOSURE 639

 A. *Focusing on the Would-Be Parents* 640

 1. *Deliberate Deception or Legitimate Failure to Disclose?* 640

* Currently a Senior Lecturer at Oxford Brookes University, Dr. Brigitte Clark, a graduate of Rhodes University (B.A., LL.B, Ph.D.) and Cambridge University (LL.M), qualified as an Attorney in South Africa and spent the rest of her career as an academic at the Universities of Cape Town and Rhodes, where she was Deputy Dean of the Law Faculty, before commencing an academic career in England. She continues to work in both jurisdictions—researching in English family law and maintaining her South African links, especially via her continuing role as Editor (General and Contributing) of the Butterworth Family Law Service.

2.	<i>Parents' Reasons for Nondisclosure</i>	640
3.	<i>Discrimination Against "Social" Parents</i>	641
B.	<i>Focusing on the Sperm Donor</i>	642
1.	<i>Protection of the Sperm Donor</i>	642
2.	<i>Detrimental Effects of Removal of Donor Anonymity</i>	643
C.	<i>Focusing on the Child</i>	645
1.	<i>The Child's Right to Life and Autonomy</i>	645
2.	<i>The Analogy of Adoption</i>	646
3.	<i>Child's Welfare and Knowledge of Genetic Origins</i>	647
V.	JUSTIFICATIONS FOR DISCLOSURE.....	649
A.	<i>The Importance of Genes</i>	650
B.	<i>Lack of Regulation Leads to Dangerous "Free for All"?</i>	651
C.	<i>Focusing on the Child</i>	653
1.	<i>"Genealogical Bewilderment" and the Movement from Welfare to Rights</i>	653
2.	<i>Disclosure of Identity by Lesbian Couples to Their Donor-Inseminated Children</i>	656
VI.	CONCLUSION	658

I. INTRODUCTION

Increasing numbers of children are conceived through donor-assisted conception utilizing donated gametes, especially donated sperm.¹ Despite the fact that using donated sperm is one of the most ancient forms of fertility treatment, it has traditionally been shrouded in secrecy, perhaps because it is used most commonly to redress problems of a husband's infertility through the use of donated semen.² However, the unabated advance of medical science (exemplified by the development of DNA testing) is altering the tradition of secrecy.³ The relative ease with which it is now possible to discover the identity of a person's genetic parents, the open identification policy with regard to adoption, and the development of genetic testing for disorders have all dramatically influenced the development of human rights law in favor of the child's right to know the truth about his or her genetic makeup.⁴ A growing body of research, largely conducted in the adoption field, supports the argument that knowledge of one's genetic background is crucial to the development of a sense of identity or self.⁵ Despite the fact

¹ JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW* 470 (3d ed. 2009). Egg donation is not as successful or as simple a process. Additionally, the cost of donor conception utilizing donor eggs and the acute shortage of egg donors further complicate use of donated eggs. Kamal K. Ahuja et al., *Egg Sharing and Egg Donation: Attitudes of British Egg Donors and Recipients*, 12 *HUM. REPROD.* 2845 (1997).

² FORTIN, *supra* note 1, at 471. The procedure itself dates to 1884, when the first donor insemination case was reported. Eric Blyth, *Donor Anonymity and Secrecy Versus Openness Concerning the Genetic Origins of the Offspring: International Perspectives*, 2 *JEWISH MED. ETHICS* 4 (2006).

³ See Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 *INT'L J.L. POL'Y & FAM.* 174, 175 (2009) (discussing bans on donor anonymity). Eleven developed, democratic countries have prohibited anonymous gamete donation and established systems to assist donor-conceived people, even children, identify their donors since 1985. *Id.* The jurisdictions include Austria, England, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland, Wales, and the Australian states of New South Wales, Victoria, and Western Australia. *Id.* at 177. Generally, access to identifying information is limited to offspring only. *Id.* Austria is the only country that allows children as young as fourteen to have access to this information. *Id.* at 179. Generally the age is sixteen or above, although some countries provide for exceptions in certain cases, such as when a donor-conceived child is born with a congenital disability. *Id.* at 179–80.

⁴ Tabitha Freeman & Martin Richards, *DNA Testing and Kinship: Paternity, Genealogy and the Search for the 'Truth' of Genetic Origins*, in *KINSHIP MATTERS* 67, 75 (Fateme Ebtahaj et al. eds., 2006).

⁵ See, e.g., Katherine O'Donovan, *Interpretations of Children's Identity Rights*, in *REVISITING CHILDREN'S RIGHTS* 73, 75 (Deirdre Fottrell ed., 2000) (reporting on a study of Aboriginal children and the negative effects of policies that ignored their identity); see also Geraldine Hewitt, *Missing Links: Identity Issues of Donor-Conceived People*, *J. FERTILITY*

that the analogy of donor conception to adoption is somewhat controversial,⁶ the use of rights-based arguments to endorse the position that children conceived by donor sperm should have access to identifying information about their gamete donor has gained credence and is now a commonly expressed argument.⁷

The ability of donor-conceived children to access information about their genetic origins initially depends on their awareness of the nature of their conception.⁸ Without this knowledge, such children will assume that their “social” fathers are their genetic parents.⁹ Hence, the onus of revealing the manner of conception rests on the social parents, unless such information is disclosed by the state, such as through a birth certificate,¹⁰ or it is obvious that they cannot be the biological children of their social father.¹¹ Concerns

COUNSELING, Autumn 2002, at 14, 19 (noting that “of the 47 donor-conceived people who took part in this study, only 3 had not experienced identity issues” and the other forty-four persons indicated that their identity issues related to “their conception through anonymous donor sperm”).

⁶ Ilke Turkmendag et al., *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J.L. POL'Y & FAM. 283, 286, 289 (2008).

⁷ Lucy Frith, *Beneath the Rhetoric: The Role of Rights in the Practice of Non-Anonymous Gamete Donation*, 15 BIOETHICS 473, 473 (2001).

⁸ See Rebecca Probert, *Families, Assisted Reproduction and the Law*, 16 CHILD & FAM. L.Q. 273, 287 (2004) (stating that a child's right to know their origins only has meaning if the parents have a duty to disclose, and such a duty could be found in recording requirements like on a more “flexible” birth certificate updated throughout life that remains private until the child reaches the age of maturity).

⁹ A ‘social parent’ is “a genetically unrelated parent, but it can also refer . . . to a person who assumes the care and responsibilities usually associated with parenthood.” Leanne Smith, *Is Three a Crowd? Lesbian Mothers' Perspective on Parental Status in Law*, 18 CHILD. & FAM. L.Q. 231, 232 (2006). Traditionally in England, relationships in a social family took precedence over biological ties. *Id.* at 232–33. Courts only consider interfering in presumed legitimacy in order to pursue the genetic truth about parenthood in cases where a marriage had already dissolved. *Id.* By contrast, the modern English judiciary has generally “become a champion for the cause of genetic [parenthood].” *Id.* at 235.

¹⁰ The English government has not followed up on numerous suggested birth certificate changes that would alert donor-conceived children to their status and genetic parentage. Blyth & Frith, *supra* note 3, at 185–86. The Joint Committee in their recommendations on the draft Human Tissue and Embryos Bill expressed deep concern at this omission, commenting that the authorities “may be colluding in a deception.” JOINT COMMITTEE ON THE HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, VOLUME I REPORT, 2006-7, H.L. 169-I, H.C. 630-I, para. 276 [hereinafter JOINT COMMITTEE REPORT].

¹¹ Whilst acknowledging the importance of allowing donor-conceived children access to information about their genetic background, the English government argued that it was preferable to educate parents “about the benefits of telling children that they were donor-conceived rather than forcing the issue through the annotation of birth certificates.” SECRETARY OF STATE FOR HEALTH, GOVERNMENT RESPONSE TO THE REPORT FROM THE JOINT COMMITTEE ON THE HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, 2007, Cm. 7209, para. 69

have been expressed about low levels of parental disclosure.¹² A study conducted in 2002 indicated that as few as 5% of parents of donor-conceived children had told their near-adolescent children about their conception origins.¹³ Even that number may be high as reported disclosure rates are likely to be overestimated because some non-respondents do not participate due to privacy issues and fears of revealing their use of donor conception.¹⁴

The low rate of disclosure may change as the United Nations Committee on the Rights of the Child puts increasing pressure on national systems that withhold information about the identities of biological fathers from children born by donor conception.¹⁵ Although legislative changes removing donor anonymity may play a part in facilitating parental disclosure,¹⁶ a parental decision not to reveal the truth to a donor-conceived child is a complex family matter and therefore very difficult to regulate by law. Furthermore, in Europe, such intervention could arguably be construed as a violation of Article 8 of the European Convention on Human Rights (ECHR), which guarantees the right to privacy and family life, *inter alia*, subject to justifiable state intervention.¹⁷

[hereinafter RESPONSE TO DRAFT BILL]. However, it has agreed to keep the issue under review. *Id.* para. 70.

¹² See Claes Gottlieb et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, 15 HUM. REPROD. 2052, 2052 (2000) (noting that a majority of Swedish parents who utilized donor conception did not inform their children despite the fact that under the Swedish law children could not learn this except by parental disclosure); RICHARD J. BLAUWHOFF, FOUNDATIONAL FACTS, RELATIVE TRUTHS: A COMPARATIVE LAW STUDY ON CHILDREN'S RIGHT TO KNOW THEIR GENETIC ORIGINS 290–96, 302–05 (2009) (discussing the position in France, Germany, and Portugal); see generally Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517 (2006) (discussing the position in the United States).

¹³ Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow Up at Age Twelve*, 73 CHILD DEV. 952, 966 (2002) (noting that two out of thirty-seven children surveyed had been told their genetic origins). An earlier study suggested that few (4%) planned to tell and a further 1% were undecided. Gottlieb et al., *supra* note 12, at 2053.

¹⁴ See Gottlieb et al., *supra* note 12, at 2052, 2054 (noting that higher rates of revelation were likely in the group of parents that responded to the questionnaire and that prior to Swedish legislation in 1985 all donors were anonymous and unable to be traced, and the mother and nonbiological father were encouraged not to inform anyone about the donation).

¹⁵ U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, paras. 31–32, CRC/C/15/Add.188 (Oct. 9, 2002) [hereinafter U.N. Comm. on the Rights of the Child: UK].

¹⁶ E. Lycett et al., *School-Aged Children of Donor Insemination: A Study of Parents' Disclosure Patterns*, 20 HUM. REPROD. 810, 811 (2005).

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

This Article argues that, although the data regarding open adoption appears promising, policy makers should be wary of a wholesale transfer of the analogous lessons from adoption policy to the world of donor insemination. Before embracing such a wholesale change in legal policies, this Article argues that there should be a careful assessment of the adoption analogy and examination of empirical evidence about children born through gamete donation in various countries. In order to reach this conclusion, Part II of this Article examines international jurisprudence regarding donor anonymity. Part III of this Article presents a comparative study of the policy regarding anonymous donation in France, Sweden, England, and the United States. Part IV then presents arguments for nondisclosure of donors, whereas Part V discusses the arguments for disclosure. Finally, Part VI recommends a nuanced approach to considering the varied interests and rights of all family members that gives adequate weight to the collective family interests and rights of all parties, including those of the would-be parents and sperm donor.¹⁸

II. INTERNATIONAL JURISPRUDENCE: CHILD'S BEST INTERESTS?

The United Nations Committee on the Rights of the Child and the European Court of Human Rights are two of the international bodies concerned with producing guidelines and enforcing international laws regarding right to know one's origins. The United Nations Committee on the Rights of the Child is in charge of monitoring the enforcement of the United Nations Convention on the Rights of the Child (CRC),¹⁹ while the European Court of Human Rights is in charge of reviewing national decisions based on the ECHR.²⁰ This Part of the Article focuses on the jurisprudence surrounding the interpretation of the CRC and the ECHR, and how those interpretations have influenced European developments.

¹⁸ Cf. 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 (2001). This article describes how recent Tennessee and Oregon statutes granting adoptees the right to know their genetic parents have withstood challenges under state and federal constitutions and questions whether a similar right should be granted to donor-conceived children by arguing that a child's best-interest analysis supports the right to discover the identity of their genitors. *Id.* at 369–74. Chestney asserts that such statutes would withstand constitutional attack in the United States. *Id.* at 390.

¹⁹ Convention on the Rights of the Child art. 43(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

²⁰ ECHR, *supra* note 17, art. 19.

A. *Interpretation of the CRC*

In 1989, the CRC was drafted as the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political, and social—to protect children (defined as persons under the age of eighteen).²¹ By ratifying the CRC, States Parties commit themselves to protecting and ensuring children's rights and developing actions and policies to promote the best interests of the child. However, none of the articles in the CRC specifically promote a child's right to knowledge of his or her origins.²²

The United Nations established the Committee on the Rights of the Child to monitor the rights granted by the CRC, but failed to provide the Committee with enforcement powers and, further, there is no mechanism for individual petition under the CRC.²³

Article 7 of the CRC states:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.²⁴

²¹ See generally CRC, *supra* note 19. The CRC sets out these rights in fifty-four articles and two optional protocols, which spell out the basic human rights that children should have—the right: to survival; to develop to the fullest; to protection from harmful influences, abuse, and exploitation; and to participate fully in family, cultural, and social life, essential for the human dignity and harmonious development of every child. *Id.*; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (entered into force Feb. 12, 2002); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (entered into force Jan. 18, 2002).

²² Douglas Hodgson, *The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness*, 7 INT'L J.L. POL'Y & FAM. 255, 265 (1993).

²³ Samantha Besson, *Enforcing the Child's Rights to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137, 150 (2007).

²⁴ CRC, *supra* note 19, art. 7.

The Committee has interpreted Article 7 as granting a child's right to knowledge of his or her origins.²⁵ Further, it has consistently criticized nations that do not allow for such a right or that allow mothers to give birth anonymously, as in France,²⁶ and made recommendations to contracting States Parties regarding incomplete national enforcement of the child's right to know his or her origins.²⁷ However, national authorities have a degree of discretion, provided they do not give higher priority to parental rights than children's rights and do not "diverge in their interpretations of the scope and degree of the duties imposed by [the CRC]."²⁸

In the context of the right to know, the reference to parents could indicate a right to know one's biological parents since it is possible to interpret Article 7 broadly so that the term "parents" includes not only social or legal parents, but also biological and gestational parents. Furthermore, if Article 7 is read in the light of the rest of the CRC, in particular Articles 9 and 18, it would appear to guarantee the child's right to have a relationship with her parents, but it is not entirely clear what the right to know and be cared for by one's parents would entail.²⁹ It might imply the right to contact them as well as knowledge of their identity. On the one hand, it might be argued that there should be legislation imposing this obligation on family relationships, and that such an obligation should be based on a model of scientifically derived genetic truth. On the other hand, it could be maintained that the right to know one's origins is simply a fashionable notion fueled by advances in biomedical sciences.³⁰ Clearly the biological model of parenthood cannot rank as highly as other types of parenthood, such as those arising from active caring, nurturing, and love. Like the right to know, the right to be cared for

²⁵ Besson, *supra* note 23.

²⁶ *Id.* at 153–54.

²⁷ U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Denmark, U.N. Doc. CRC/C/15/Add.33 (Feb. 15, 1995) [hereinafter U.S. Comm. on the Rights of the Child: Denmark]; U.N. Comm. on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Norway, U.N. Doc. CRC/C/15/Add.23 (Apr. 25, 1994) [hereinafter U.S. Comm. on the Rights of the Child: Norway]; U.N. Comm. on the Rights of the Child: UK, *supra* note 15.

²⁸ Besson, *supra* note 23.

²⁹ See CRC, *supra* note 19, arts. 9(3), 18 (demanding that states respect the right of children separated from one or more parents to maintain relationships with each and recognizing the common responsibilities of parents in child rearing).

³⁰ See generally Carol Smart, *Law and the Regulation of Family Secrets*, 24 INT'L J.L. POL'Y & FAM. 397 (2010) (highlighting the potential negative effects stemming from knowledge of genetic origins).

by one's biological parents, besides one's social parents, is always qualified by the words "as far as possible."³¹

Article 8 states:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. . . . Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.³²

Article 8 was originally proposed in order to deal with the abuses committed by the military regime in Argentina in the 1970s and 1980s, which abducted infants from their mothers before their births had been registered and illegally gave them to couples associated with the armed forces and the police.³³ However, during the drafting process of the CRC, many countries opposed Article 8's emphasis on the child's identity and its inconsistency with secret adoption and protecting the identity of gamete donors.³⁴ As a result, a political compromise was reached.³⁵ The provision was retained with the addition of a few provisos, such as "without unlawful interference," "illegally," or "as recognized by law."³⁶ "Lawful" is understood to encompass national as well as international legal norms, so that national legal restrictions will not be permitted to contradict international obligations.³⁷

Article 8 does not define the concept of identity. Instead, it gives three examples of what identity includes: nationality, name, and family relations.³⁸ Knowledge of one's family relations is usually interpreted as going beyond knowing one's legal parents and extending to biological and birth parents.³⁹

³¹ CRC, *supra* note 19, art. 7.

³² *Id.* art. 8.

³³ BLAUWHOFF, *supra* note 12, at 52–53.

³⁴ THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 293 (Sharon Detrick ed., 1992) [hereinafter A GUIDE TO THE "TRAVAUX PRÉPARATOIRES"].

³⁵ *See id.* (noting deliberations between several countries regarding the language to be used in Article 8).

³⁶ CRC, *supra* note 19, art. 8.

³⁷ A GUIDE TO THE "TRAVAUX PRÉPARATOIRES," *supra* note 34.

³⁸ CRC, *supra* note 19, art. 8.

³⁹ Andrew Bainham presents a logical argument in favor of this approach. *See* Andrew Bainham, *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important*

Article 8 implies duties to register and preserve data regarding a child's identity and to make that data accessible to the child.⁴⁰ It emphasizes positive duties of assistance by referring to states "undertaking to preserve" the child's identity and calling for appropriate measures to reestablish the child's identity.⁴¹ Another guiding principle may be found in Article 3 of the CRC, which makes the child's best interest a primary consideration, imposing limits on the right to know in cases where the information would be blatantly contrary to the child's best interests.⁴² The United Nations Committee on the Rights of the Child appears to interpret the CRC as bestowing a clear right to donor-conceived children to knowledge of their genetic identity.⁴³ However, no convincing research been done to indicate that the enforcement of such a right is as beneficial for donor-conceived children as it is for adopted children.⁴⁴ Additionally, if children have a right to know their genetic origins, then from a Hohfeldian perspective, a corresponding duty should rest on the parent or the state to inform the child.⁴⁵ That specific right appears to be lacking in the framework of the CRC.

Neither Article 7 nor Article 8 settles the issue of which among the child's interests should prevail in case of conflict between her interest to know her origins and her other interests. Nor do they provide any criteria as to how to balance the child's interests with those of others in case of conflict. Thus the provisions of the CRC relating explicitly to the child's identity do not directly offer any protection to the child's individual identity.⁴⁶

Distinctions, in WHAT IS A PARENT? A SOCIO-LEGAL ANALYSIS 25, 37–38 (Andrew Bainham et al. eds., 1999).

⁴⁰ CRC, *supra* note 19, art. 8.

⁴¹ *Id.*

⁴² Article 3 of the CRC provides that the best interests of children must be the primary concern in making decisions that may affect children. *Id.* art. 3. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budgetary, policy, and legal decisions.

⁴³ U.N. Comm. on the Rights of the Child: Denmark, *supra* note 27; U.N. Comm. on the Rights of the Child: Norway, *supra* note 27; U.N. Comm. on the Rights of the Child: UK, *supra* note 15.

⁴⁴ See Turkmendag et al., *supra* note 6, at 290 (describing that most studies are in the context of adopted children and that the ones that are specific to donor offspring are methodologically flawed).

⁴⁵ See generally WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (Walter Wheeler Cook ed., 1919) (presenting Hohfeld's perspective that every right should have a correlative duty, a perspective that has dominated much of the jurisprudential discussion of rights).

⁴⁶ Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J.L. POL'Y & FAM. 147, 160 (2004).

Moreover, the preamble to the CRC appears to envisage a social family, which succors the inner psychological sense of well-being of a donor-conceived child.⁴⁷ It refers to the fact that countries that have ratified the CRC have accepted the obligations that the CRC imposes on states to take account of the significance of traditional and cultural family values “for the protection and harmonious development of the child.”⁴⁸ The well-being of the child would thus appear to be the main object of the CRC, rather than a bald focus on the child’s right to identity, although the two concepts are clearly linked. Furthermore, Article 20 states that, when children are deprived of their family environment, whether or not it be for their own best interest, “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”⁴⁹ Finally, Article 5 of the CRC states that “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom . . . to provide . . . appropriate direction and guidance in the exercise by the child of the rights recognized in the [CRC].”⁵⁰

Overall it would appear that, despite the interpretation of the United Nations Committee on the Rights of the Child, the formulation of the CRC is in fact open-ended and can accommodate interpretations such as a child’s socio-legal parentage, religious, and cultural identities. Other human rights documents in the United Nations framework and substantive provisions of the CRC further that interpretation.⁵¹

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting CRC, *supra* note 19, art. 18(2)).

⁴⁹ CRC, *supra* note 19, art. 20. Children who cannot be looked after by their own family have a right to special care and must be looked after properly, by people who respect their ethnic group, religion, culture, and language. *Id.*

⁵⁰ *Id.* art. 5. Article 5 of the CRC provides that governments should respect the rights and responsibilities of families to direct and guide their children so that, as they grow, they learn to use their rights properly. Helping children to understand their rights does not mean pushing them to make choices with consequences that they are too young to handle. Article 5 encourages parents to deal with rights issues “in a manner consistent with the evolving capacities of the child.” *Id.* The CRC does not take responsibility for children away from their parents and give more authority to governments. It does, however, place on governments the responsibility to protect and assist families in fulfilling their essential role as nurturers of children. *Id.*

⁵¹ BLAUWHOFF, *supra* note 12, at 58; *see also* Council of Eur. Comm. of Experts on Family Law, Report on Principles Concerning the Establishment and Legal Consequences of Parentage – “The White Paper,” at 7 (Nov. 15, 2006), *available at* http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf. This White Paper “reflect[s] a balance between ‘the biological truth’, reflecting primarily biological and genetic parentage, and ‘the social parenthood’, reflecting . . . with whom the child is living and who is taking care of

B. The European Court of Human Rights: A Holistic Approach?

It is arguable that the greater balance demonstrated in the jurisprudence of the European Court of Human Rights correlates more closely to that of the original intention of the drafters of the CRC. Both the European Court of Human Rights and the original drafters of the CRC recognized the importance of cultural and social inheritance and a stable family to a child. Article 8(2) of the ECHR expressly acknowledges the possibility that it may be necessary to restrict the right to know one's origins when it conflicts with other rights and outlines the conditions and balancing guidelines that should be respected.⁵² The jurisprudence of the European Court of Human Rights has also maintained that the right of a donor-conceived child to know his or her identity is not absolute.⁵³ Arguably, a state's positive duties resulting from the right to know one's origins are best determined by national efforts to balance that right against the rights of other parties.⁵⁴ This Court respects the state's margin of appreciation when balancing rights⁵⁵ and provides

him or her." *Id.* The commentary specifically states that, in certain situations, the child's best interests may justify withholding information regarding his or her origins. *Id.* at 31. The Council of Europe Ad Hoc Committee of Experts on Progress in the Biomedical Sciences affirms that donor anonymity should be maintained more generally, but certain exceptions should permit the child access to donor information. Council of Eur. Ad Hoc Comm. of Experts on Progress in the Biomedical Scis., Report on Human Artificial Procreation (1989) [hereinafter Report on Human Artificial Procreation], available at http://www.coe.int/t/dg3/healthbioethic/source/PMAprinciplesCAHBI1989_en.doc (affirming Principle 28 of the White Paper that donor anonymity should be maintained). The health of the child is mentioned as a factor that could require a waiver of donor anonymity, but there is no indication of who should disclose the identifying information to the child in these circumstances. *Id.*

⁵² Besson, *supra* note 23. *But cf.* CRC, *supra* note 19, art. 8(2) (stating that "[w]here a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity," and suggesting a narrower right to know).

⁵³ Besson, *supra* note 23.

⁵⁴ See Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 3 (1998) (noting the inference that where there is a wide but legitimate range of opinion on a subject, the ECHR drafters intended a democratic resolution at the national level). In particular, Mahoney points to the danger to democratic orders should the European Court of Human Rights allow persons to gain rights in Strasbourg via judicial interpretation that they have been unable to obtain democratically and legislatively in their own country. *Id.*

⁵⁵ *Id.* Margin of appreciation implies that, "[b]y reason of their direct and continuous contact with . . . their countries, State authorities are . . . in a better position than the international judge[s] to give an opinion on the exact content of the[] requirements" of the European Convention on Human Rights, "as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them." *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) para. 48 (1976). "Where the law and practice differ widely among the Contracting States,

particularly broad determinative powers in matters pertaining to private life and identity when there is no consensus among state parties.⁵⁶ Private life and the nature of the state's obligation will depend on the particular aspect of private life that is at issue.⁵⁷ For a long time, the court respected the national margin of appreciation in the case of violations of the right to know one's origins.⁵⁸

In *Nylund v. Finland*, the European Court of Human Rights held that, since a mother and her husband believed a paternity test would disturb their family relationship, it was fully justifiable for the courts of Finland to give more weight to the interests of the child and the family unit than to the interests of the applicant's father in establishing the biological truth of his paternity, even when he claimed that it was also in the child's best interest.⁵⁹ The European Court of Human Rights suggested that after reaching the age

individual countries will, as a result, be afforded a wider margin of appreciation by the [European Court of Human Rights]." Brian Tobin, *Same-Sex Couples and the Law: Recent Developments in the British Isles*, 23 INT'L J.L. POL'Y & FAM. 309, 317 (2009). However, the margin of appreciation should not be confused with the discretionary area, which is the freedom of action open to institutions such as Parliament from domestic courts. Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT'L J.L. POL'Y & FAM. 249, 275 (2006).

⁵⁶ *Schalk v. Austria*, 2010 Eur. Ct. H.R. para. 46 (2010). In *Schalk v. Austria*, the European Court of Human Rights acknowledged that there had been major social changes in the nature of marriage since the adoption of the ECHR, but held that there was still no consensus in the matter. *Id.* para. 58. Thus, the court refused to undertake a dynamic interpretation of the ECHR in the belief that it should not be hasty to substitute its own judgment for those of national states. *Id.* para. 62. See generally Masha Antokolskaia, *Harmonisation of Substantive Family Law in Europe: Myths and Reality*, 22 CHILD & FAM. L.Q. 397 (2010) (noting the common background of European nations regarding family law, the current division on that issue, and the European Court of Human Rights' treatment of the margin of appreciation in light of the presence or absence of consensus).

⁵⁷ The margin focuses on the consensus that prevails in Convention signatory States and is not concerned with the position in an individual Convention State. Nicholas Bamforth, "The Benefits of Marriage in All but Name?" *Same-Sex Couples and the Civil Partnership Act 2004*, 19 CHILD & FAM. L.Q. 133, 143 (2007).

⁵⁸ This flexible approach was evident in *Mikulic v. Croatia*, 2002-I Eur. Ct. H.R. In this case, the mother of a five-year-old girl claimed on her daughter's behalf that the fact that her daughter had no means of forcing a putative father to submit himself to DNA testing violated her right to private life under Article 8 of the ECHR since there was no independent authority to which she could submit her paternity claim. *Id.* paras. 8, 47, 56, 64. The European Court held that the right to private life should include the determination of the legal relationship between an extramarital child and her natural father. *Id.* paras. 53–55. Croatia needed to put in place procedures to allow her, without unnecessary delay, to obtain certain knowledge of her personal identity. *Id.* paras. 64–65. However, the Court stressed that in each case it is important to strike a balance, recognizing that the father also has a right to privacy that entitles him to avoid forced DNA testing. *Id.* para. 65.

⁵⁹ *Nylund v. Finland*, 1999-VI Eur. Ct. H.R. (located under heading "The Law" pt. 2(a)).

of fifteen the child would be able to decide for herself whether or not she wished to institute paternity proceedings.⁶⁰ The result of this case indicates that the European Court has, in the past, recognized that legal certainty and the continuity of a stable family unit may promote a child's interests. The court also expressed a measure of doubt about the necessity of establishing the biological truth where the child is very young and the search for paternity emanates from a third party.⁶¹

The European Court of Human Rights has also rejected the claim that the absolute birth secrecy granted in some European countries, like France, violates Article 8 of the ECHR.⁶² In 2003, the French practice was challenged under Article 8 of the ECHR in the *Odièvre* decision.⁶³ The court held that the possibility that the anonymously born claimant might be provided with non-identifying data, together with the provisions of the 2002 legislation authorizing an independent council to waive confidentiality with the mother's consent, were sufficient evidence of France's efforts to seek a balance and to ensure proportional weighting of competing interests.⁶⁴

Dissenting judges in *Odièvre* regarded the right to know as having been entirely sidestepped.⁶⁵ In *Jäggi v. Switzerland*, decided only three years after *Odièvre*, the court adopted the dissenting judges' approach and emphasized the importance of the balancing of all rights without giving absolute priority to any of them.⁶⁶ It would appear that the court would no longer decide *Odièvre* along the same lines today, and that French law will most likely have to be amended accordingly.⁶⁷

⁶⁰ *Id.*

⁶¹ BLAUWHOFF, *supra* note 12, at 71. Note that *Nylund* seemed to forestall any further claims by presumptive genetic fathers. *Nylund*, 1999-VI Eur. Ct. H.R. (located under heading "The Law" pt. 2(a)).

⁶² *Odièvre v. France*, 2003-III Eur. Ct. H.R. paras. 3, 49.

⁶³ *Id.* In that case, Ms. *Odièvre* argued that the fact that her mother had been allowed to keep Ms. *Odièvre*'s biological identity from her via the French practice of anonymous birth infringed Article 8 of the ECHR. *Id.* paras. 10, 24–25.

⁶⁴ *Id.* para. 49.

⁶⁵ *Id.* para. 7 (Wildhaber, J., dissenting). According to the dissenting judges in the case, the margin of appreciation doctrine should not be regarded as exempting the Court from its duty to review the way in which the rights had been balanced. *Id.* paras. 10–12 (Wildhaber, J., dissenting). Moreover, the problem with the decision lay in the fact that French law, by giving absolute priority to the right of the mother, precludes any balancing of the interests at stake, resulting in a violation of the inner core of the child's rights. *Id.* paras. 11–12 (Wildhaber, J., dissenting).

⁶⁶ *Jäggi v. Switzerland*, 47 Eur. Ct. H.R. 30 (2006).

⁶⁷ See BLAUWHOFF, *supra* note 12, at 399 (noting that recent "admonishments . . . have prompted the French government to review its legislation on *accouchement sous X* [the right to anonymous birth]").

A nuanced and sensitive approach is needed to balance the child's interests and safeguard the child's emotional well-being. If knowledge of a child's origins might destabilize the child's family life, it is questionable which of the child's interests takes precedence and must be protected. To what extent will the interest of knowing one's biological parents be protected? No answer to this question is provided in the wording of the ECHR or offered by the jurisprudence of the European Court of Human Rights. What is clear, however, is that neither the CRC nor the ECHR provide a legal framework that permits the assertion of an absolute, child-constructed right to identity.⁶⁸

III. COMPARATIVE LAW POSITION: CONTRASTING APPROACHES

This Part of the Article examines the law in various jurisdictions, particularly France, Sweden, England,⁶⁹ and the United States and their varying approaches to the issue. The vastly differing legal approaches in these countries are integrated into this Article's arguments for and against mandatory disclosure and anonymous sperm donation. France has been selected for examination because in that country the doctrine of anonymity is respected as an absolute necessity by the French medical profession in accordance with its general duty to maintain secrecy.⁷⁰ By contrast, Sweden has been selected because it was the first nation to ban donor anonymity in light of its growing culture of openness.⁷¹ Passage of the Human Fertilisation and Embryology Authority (Disclosure of Donor Information)

⁶⁸ Ronen, *supra* note 46, at 167.

⁶⁹ Prior to the 1980s, there was little information available about donor conception in England and no regulation or central recording of semen donations. Turkmendag et al., *supra* note 6, at 285. Until 1977 children born through donor insemination were considered illegitimate and would-be parents had to legally adopt the child. *Id.* Clinicians recommended parents tell the child that he or she was adopted rather than conceived through donor insemination. Waldman, *supra* note 12, at 547. The donor was the legal father rather than the mother's husband, but the husband was often recorded as the father on the birth certificate, which was technically a crime. Turkmendag et al., *supra* note 6, at 285. Prior to the development of DNA testing to prove genetic parentage conclusively, scientific blood testing had limited ability fully to determine paternity. Smart, *supra* note 30, at 398. Even the availability of DNA tests hardly changed the situation since a mother could refuse permission for a blood sample to be taken from her child. *See, e.g.*, Re F (a Minor) (Blood Test: Parental Rights) [1993] Fam. 314 (Eng.); Re CB (Unmarried Mother) (Blood Test) [1994] 2 F.L.R. 762 (Eng.).

⁷⁰ *See infra* Part III.A.

⁷¹ S. Leeb-Lundberg et al., *Helping Parents to Tell Their Children About the Use of Donor Insemination (DI) and Determining Their Opinions About Open-Identity Sperm Donors*, 85 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 78, 78 (2006).

Regulations modified English law⁷² by removing the right to anonymity from gamete donors and giving adult children conceived through donor conception the right to acquire the identity of the donor.⁷³ Conversely, in the United States, neither state nor federal legislation prohibits or enforces anonymous sperm donation.⁷⁴ Nonbinding professional guidelines have traditionally recommended that gamete donors remain anonymous,⁷⁵ but in 2004, the American Society for Reproductive Medicine Ethics Committee endorsed disclosure by parents to their children about the use of donor gametes.⁷⁶

The different approaches of these selected legislatures to this issue are briefly outlined in this Part, and then principles from these four jurisdictions will be used to support arguments for and against the acknowledgement of an absolute right of the child to know his origins.

A. *France: Anonymity Rules*

Traditional French “respect for life” arguments for the maintenance of *accouchement sous X*⁷⁷ have joined with the feminist “pro-choice” argument to form an “anti-biological” opposition to arguments for a right to origins.⁷⁸ Instead, the parent–child relationship is considered a “purely social construction.”⁷⁹ In France, maternity and motherhood were historically regarded as clearly separate, and women have possessed the right to give birth anonymously (*accouchement sous X*) since the Revolution.⁸⁰ Anyone who discloses the identity of a donor registered in France is, in principle, liable to criminal prosecution.⁸¹ However, French law does provide for the

⁷² Wherever English law is referred to in this Article, it includes references to Welsh law.

⁷³ Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations, 2004, S.I. 2004/1511 (U.K.) [hereinafter Regulation 2004/1511]; Press Release, U.K. Dep’t of Health, Anonymity to Be Removed from Future Sperm, Egg and Embryo Donors (Jan. 21, 2004).

⁷⁴ Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 819 (2001).

⁷⁵ *Id.* (citing ETHICS COMM., AM. SOC’Y FOR REPROD. MED., ETHICAL CONSIDERATIONS OF ASSISTED REPRODUCTIVE TECHNOLOGIES (1998)).

⁷⁶ Ethics Comm., Am. Soc’y for Reprod. Med., *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 527 (2004).

⁷⁷ Translated as the right to anonymous birth.

⁷⁸ JEAN-LOUIS BAUDOIN & CATHERINE LABRUSSE-RIOU, *PRODUIRE L’HOMME: DE QUEL DROIT? ETUDE JURIDIQUE ET ÉTHIQUE DES PROCRÉATIONS ARTIFICIELLES* (1987).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ BLAUWHOFF, *supra* note 12, at 313–14; *see also* CODE DE LA SANTÉ PUBLIQUE art. L1211-5 (Fr.). The state utilizes this legislation to promote the public goal of protecting the mother

collection of non-identifying data about birth mothers asking for anonymity and states that these birth mothers may end their anonymity at any time.⁸² But children still have no right to access documents revealing the biological mother's name, and the possibility of establishing any bond between the mother and the child is generally prohibited.⁸³ However, since the CRC came into force, secret birth can be lifted on request of the child and with the assent of the mother.⁸⁴ Further non-identifying information has also been made more easily accessible through independent sources.⁸⁵

B. Sweden and England: Banning Anonymity but No Absolute Right

Both Sweden and England have banned anonymous sperm donation.⁸⁶ In 1984, Sweden was the first country to remove the anonymity of sperm donors.⁸⁷ A child born in Sweden through donor insemination has the right, but only when "sufficiently mature," to receive information about the use of donor insemination and the identity of the donor.⁸⁸

Two decades after the introduction of this legislation, studies indicate that Swedish parents are becoming more comfortable with disclosing the circumstances of donor conception to their children. An early study conducted in 2000, found that only 11% of Swedish parents had informed their children about the nature of their conception.⁸⁹ An additional 41% of the parents intended to tell their children at a later time.⁹⁰ It should be noted, though, that the children of parents that intended to disclose information to at a later date were young, the average age being three-and-a half years old.⁹¹

and child at the birth, preventing illegal abortions and child abandonment. BLAUWHOFF, *supra* note 12, at 395.

⁸² BLAUWHOFF *supra* note 12, at 196; *see generally* CODE DE L'ACTION SOCIALE ET DES FAMILLES art. L147-1 (Fr.). An important function of the Code de l'Action Sociale et des Familles is to gather together information requested by all departments, overseas territories, and relevant organizations and to make it easier to access information about one's origins. *Id.*

⁸³ CODE CIVIL [C. CIV.] art. 311-19 (Fr.).

⁸⁴ BLAUWHOFF *supra* note 12, at 120-21.

⁸⁵ Besson, *supra* note 23, at 154.

⁸⁶ LAG OM INSEMINATION (Svensk författningssamling [SFS] 1984:1140) (Swed.); Regulation 2004/1511, *supra* note 73, art. 2, para. 3.

⁸⁷ Frith, *supra* note 74.

⁸⁸ 4 § LAG OM INSEMINATION (SFS 1984:1140) (Swed.); *see* A. Lalos et al., *Legislated Right for Donor-Insemination Children to Know Their Genetic Origin: A Study of Parental Thinking*, 22 HUM. REPROD. 1759, 1759 (2007).

⁸⁹ Gottlieb et al., *supra* note 12, at 2055.

⁹⁰ *Id.* The mean age of the children who had been told was five-and-a-half years old, and that of those who might be told in the future was three-and-a-half. *Id.* at 2053-54.

⁹¹ *Id.* at 2053.

In a Swedish study for 2006, 75% of parents were found to have disclosed or to be intending to disclose the nature of the conception.⁹² Most recently, a study published in 2011 found that as many as 90% of parents who had used donor conception supported disclosure and openness to children concerning their genetic origin.⁹³

The reasons furnished by parents for increased openness were the avoidance of an accidental discovery by the child, a general desire for openness, and recognition of the child's fundamental right to know.⁹⁴ Thus, in Sweden, the rates of disclosure have improved significantly, which may indicate that the removal of anonymity and counseling have facilitated disclosure.⁹⁵ Further studies are required to determine whether the parents who intended to disclose their real identities to their donor-conceived offspring, actually did so.

English law has increasingly become a champion for the right to know one's origins and the importance of the genetic family. Adoptive parents are now encouraged to allow adopted children to know about their biological parents and even to have contact with them if it is in their child's best interests. Similarly, after divorce, the courts encourage children to remain in contact with their nonresident fathers.⁹⁶ This same trend is apparent in regard to donor-conceived children. Judicial arguments in England and Wales now acknowledge the right of a donor-conceived child to identifying information under Article 8 of the ECHR.⁹⁷ Furthermore, beginning in April 2005 donor-conceived adults were allowed to obtain identifying information from the Human Embryology and Fertility Authority register, which is

⁹² S. Isaksson et al., *Two Decades After Legislation on Identifiable Donors in Sweden: Are Recipient Couples Ready to Be Open About Using Gamete Donation?*, 26 HUM. REPROD. 853, 853 (2011).

⁹³ *Id.*

⁹⁴ Lalos et al., *supra* note 88, at 1765. Parents who had not told their children feared public attitudes and considered artificial insemination a private matter. *Id.* at 1766.

⁹⁵ A Swedish study found that counseling may help some couples to find the right "scripts" to inform their child about their conception, for example, by referring to the donor as a "kind man" who was eager to assist them in overcoming their problems. *Id.* at 1762.

⁹⁶ Carol Smart, *Family Secrets: Law and Understandings of Openness in Everyday Relationships*, 38 J. SOC. POL'Y 551, 564 (2009).

⁹⁷ *Rose v. Secretary of State for Health*, [2002] EWHC (Admin) 1593, [2002] 2 F.L.R. 962, [47]–[48]. In this case, the court recognized the right of such a child to the knowledge of the identity of his or her father. The judge held that there is "an obligation on the state to allow the ties of family life to develop normally and that this obligation is not limited to compelling a state to abstain from interference with family life; it may require the existence in domestic law of legal safeguards that render family life possible. The same . . . applies to respect for private life which often cannot be separately compartmentalized from family life . . ." *Id.* [42].

supplied to clinics.⁹⁸ Also beginning in April 2005 clinics obtained identifying information from all donors⁹⁹ and in 2023 the first eighteen-year-old, donor-conceived adults will have the right to establish the identity of their sperm donors.¹⁰⁰ The inconsistency of information provided by donors in the past is likely to continue to pose problems. Before the banning of donor anonymity, clinics were advised to encourage donors to record as much non-identifying information as they could,¹⁰¹ but earlier studies

⁹⁸ Regulation 2004/1511, *supra* note 73, art. 2, para. 3. In England, donor-conceived people are also currently entitled to information about half-siblings who share the same donor. Human Fertilisation and Embryology Act, 1990, c. 37, § 31ZA (U.K.) [hereinafter HFEA 1990]. The Human Fertilisation and Embryology Act 1990, as amended by the Human Fertilisation and Embryology Act, 2008, c. 22 (U.K.) [hereinafter HFEA 2008], grants them the right to ascertain the existence, number, sex, year of birth, and, by mutual agreement, the identity of other individuals sharing the same donor. HFEA 1990, *supra*, §§ 31ZA(2)(b), 31ZE. Donor-conceived children aged sixteen and above have the right to know (with the specified person's consent) whether or not they may be related to a specified person with whom they intend to enter into a marriage, a civil partnership, or an intimate physical relationship. *Id.* § 31ZB. Once aged eighteen, donor-conceived children have the right to obtain identifying information about any donor-conceived genetic siblings who are also at least eighteen and who have agreed to identifying information being released to a genetically related sibling who is requesting such information. *Id.* § 31ZE(2). Donors also have the right to access non-identifying information about children conceived through the use of their gametes, such as number, sex, and dates of birth. *Id.* § 31ZD.

⁹⁹ Regulation 2004/1511, *supra* note 73, art. 2, para. 3. In a study intended to investigate the new phenomenon of parents of donor children contacting donor siblings, 791 participants provided information regarding their reasons for attempting to find their child's biological parent and siblings, the outcome of the searches, and their experiences regarding contact with biological family members that were found. T. Freeman et al., *Gamete Donation: Parents' Experiences of Searching for Their Child's Donor Siblings and Donor*, 24 HUM. REPROD. 505, 505 (2009). Whereas parents' principal motivation for seeking out donors was enhancing their child's sense of identity, the primary reason for seeking out donor siblings was curiosity. *Id.* Searches for donor siblings sometimes led to the discovery of a large number of donor siblings. *Id.* Ultimately, a majority of the parents who participated in the study reported a positive experience with the process. *Id.* These findings emphasize that

having access to information about a child's donor origins is important for some parents and has potentially positive consequences. These findings have wider implications because the removal of donor anonymity in the UK and elsewhere means that increasing numbers of donor offspring are likely to seek contact with their donor relations in the future.

Id.

¹⁰⁰ See RESPONSE TO DRAFT BILL, *supra* note 11, para. 66 (noting that donor-conceived persons born after 2005 have the right to access identifying and non-identifying information).

¹⁰¹ *Donor Recruitment, Assessment and Screening*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, para. 11.9, <http://www.hfea.gov.uk/498.html> (last visited Mar. 27, 2012). The Human Fertilisation and Embryology Authority has collected personal information about the donor such as the donor's name at the time of donation, name at time of birth, place of birth and whether or not the donor has children and some physical characteristics since 1991.

suggested that the information provided on the forms was sparse and most donors preferred not to complete any of the optional parts.¹⁰²

Despite new legislation promoting disclosure to donor-conceived children, both English and Swedish law continue to allow an infertile couple who has used donor conception to pass the child off as entirely their own biological child.¹⁰³ One research study indicated that as many as 46% of donor-conceived children in England grow up assuming that their legal parents are also their biological parents.¹⁰⁴

C. United States: No Federal Legislative Regulation

The minimal presence of state and federal regulation of the sperm donor industry in the United States has resulted in a patchwork of nonbinding professional guidelines and use of individual clinical discretion.¹⁰⁵ “Almost

However, providing that information did not become compulsory until 2005. HFEA 1990, *supra* note 98.

¹⁰² See *Making Your Decision*, DONOR CONCEPTION NETWORK, <http://www.dcnetwork.org/making-your-decision> (last visited Mar. 27, 2012) (noting the lack of donor information available to clinics in multiple nations).

¹⁰³ See Lalos et al., *supra* note 88 (noting the failure of the law to determine who, if anyone, has the duty to inform children of their donor-conceived status); S. Golombok et al., *Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3*, 21 HUM. REPROD. 1918, 1921 (2006).

¹⁰⁴ See Golombok et al., *supra* note 103, at 1921 (noting that 46% of parents had no intention of ever informing their children regarding donor-conceived status).

¹⁰⁵ Frith, *supra* note 74. Some states have enacted legislation proclaiming that the donor, child, or both acknowledge the absence of rights or duties with regard to the other. See, e.g., OR. REV. STAT. ANN. § 109.239 (West 1989); VA. CODE ANN. § 32.1-257(D) (2011). Some states establish that the sperm donor has no rights as father and, if the woman is married, that her husband is the legal father. See, e.g., ARK. CODE ANN. § 9-10-201 (1987); 750 ILL. COMP. STAT. ANN. 40/2 (West, Westlaw through P.A. 97-1136 of 2012 Reg. Sess.); N.Y. Dom. Rel. Law § 73 (McKinney 2008). Nine States have enacted the Uniform Parentage Act of 2000, which allows agencies that maintain birth records to release such information to donors, state and federal agencies, and courts only. Uniform Parentage Act (2000); see, e.g., Alabama Uniform Parentage Act, ALA. CODE § 26-17-101 (2008). Twelve states have adopted the 1973 Uniform Parentage Act which calls for donor information to be confidential, but subject to inspection by the court upon a showing of good cause. Uniform Parentage Act (1973); see, e.g., CAL. FAM. CODE §§ 7600-7730 (West 1992); COLO. REV. STAT. §§ 19-4-101 to -130 (1987); HAW. REV. STAT. §§ 584-1 to -26 (1975); 750 ILL. COMP. STAT. ANN. 45/1-45/28 (1984); KAN. STAT. ANN. §§ 38-1110 to -1138 (West, Westlaw through 2012 Reg. Sess.); MINN. STAT. ANN. §§ 257.55-75 (West, Westlaw through 2012 Reg. Sess.); MO. REV. STAT. §§ 210.817-854 (2000). In *Johnson v. Superior Court*, the court acknowledged that California possessed a compelling interest in protecting the health and welfare of children conceived by artificial insemination and that at times it became necessary for those using

all fertility clinics in the United States now offer detailed, non-identifying information about the potential donor's characteristics and medical history,"¹⁰⁶ and an increasing number of clinics offer recipients the choice of gametes from donors who agree to be identified. In most of these arrangements, the donor contractually permits the clinic to release identifying information to resulting children in the future, if the child asks for it.¹⁰⁷ Clinics, such as the California Sperm Bank, may offer both the donor and the couple a choice of anonymous or open donors and match them accordingly.¹⁰⁸

Though most sperm banks tend to comply with professional guidelines, inconsistencies still exist nationally.¹⁰⁹ A large number of fertility clinics discard the relevant documentation as soon as an insemination procedure is finished.¹¹⁰ This practice is acceptable because the guidelines are voluntary, not binding.¹¹¹

IV. JUSTIFICATIONS FOR NONDISCLOSURE

A policy of nondisclosure may be perceived as a way of ensuring that, firstly, the nongenetic parent feels connected to the child; secondly, the child develops a strong bond with the one genetic parent; thirdly, the appearance of a "normal" family is maintained; fourthly, there is as little disruption of the child's stability as possible; and finally, the genetic parent's infertility (a condition that may still carry a negative stigma in some societies) is able to remain undisclosed. This "nondisclosure model" favors the interests of the

artificial insemination to obtain biological and genetic information about their child's donor. 95 Cal. Rptr. 2d 867, 878 (Cal. Ct. App. 2000). In such cases, the court held that parents of donor-conceived children must have some avenue to uncover the otherwise confidential documentation regarding artificial insemination and ordered the disclosure of information that was necessary and relevant to the litigation to the person who sought the information. *Id.* at 879.

¹⁰⁶ See Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 11–12 (2008).

¹⁰⁷ *Id.* at 12.

¹⁰⁸ Barbara Raboy, *Secrecy and Openness in Donor Insemination: A New Paradigm*, 12 POL. & LIFE SCI. 191, 191 (1993) (noting that 80% of the clinic's recipients chose to use open donors).

¹⁰⁹ Pino D'Orazio, Note, *Half of the Family Tree: A Call for Access to a Full Genetic History for Children Born by Artificial Insemination*, 2 J. HEALTH & BIOMEDICAL L. 249, 258 n.35 (2006).

¹¹⁰ *Id.* at 262.

¹¹¹ *Id.* at 258.

would-be parents, the child's need for stability and normality, and the privacy rights of the sperm donor.

A. *Focusing on the Would-Be Parents*

1. *Deliberate Deception or Legitimate Failure to Disclose?*

Parents' failure to inform a donor-conceived child of the method of his conception could be perceived as deliberately deceptive behavior, especially if children have a fundamental right to know about their genetic origins and to information about essential aspects of their personal history.¹¹² However, some parents may consider secrecy necessary if their society would ostracize them because of the fertility problem or disapprove of the method of conception of their children.¹¹³ A New Zealand study of attitudes of would-be parents indicated that, in the 1970s, donors were not considered persons with rights to inclusion in their construction of their family; these couples felt the connection of genes to parentage was artificially constructed by society.¹¹⁴ For many of them, the act of sperm donation was perceived as nothing more than an altruistic gift or a marketable service such as a blood or organ donation.¹¹⁵

2. *Parents' Reasons for Nondisclosure*

A study of would-be parents' perceptions regarding the role of donors reflected a number of tensions: a gratitude toward the donor, the desire never to meet the donor, the fear that the child might think of the donor as the "real" father, the belief that the donor is a kind person, and a constant reminder to the male partner of his infertility and the possible shame associated with it.¹¹⁶ Parents' reasons for not informing their children

¹¹² Andrew Bainham, *Arguments About Parentage*, 67 CAMBRIDGE L.J. 322, 335–36 (2008) (arguing that the law should oblige parents to inform their children that they are donor-conceived). Bainham raised this argument before the Joint Committee on the Human Tissue and Embryos (Draft) Bill in 2007. *Id.* at 334; JOINT COMMITTEE REPORT, *supra* note 10, para. 270. The government has undertaken to keep this issue under review. RESPONSE TO DRAFT BILL, *supra* note 11, para. 70.

¹¹³ Robyn Rowland, *The Social and Psychological Consequences of Secrecy in Artificial Insemination by Donor (AID) Programmes*, 21 SOC. SCI. & MED. 391, 393 (1985).

¹¹⁴ Victoria M. Grace et al., *The Donor, the Father, and the Imaginary Constitution of the Family: Parents' Constructions in the Case of Donor Insemination*, 66 SOC. SCI. & MED. 301, 302 (2008).

¹¹⁵ Turkmendag et al., *supra* note 6, at 291.

¹¹⁶ Grace et al., *supra* note 114, at 304.

differed widely; some intended parents indicate that their views were ambivalent, dominated by a focus both on their own role as parents and their desire to act in their children's best interests.¹¹⁷ Other studies found that the main reason why mothers were against disclosure or unsure about telling the truth was because they wished to protect their children and were concerned that other family members might perceive the child in a different light if the child's real genetic parentage was extensively known.¹¹⁸ Truth may at times damage complex kinship relationships, and parents are often afraid of the consequences of such knowledge in the interests of the family.¹¹⁹ Carol Smart's empirical research explores the complex area of family secrets, querying the idea that there is a simple "physical" truth.¹²⁰ Smart examines the reasons why genetic parentage has become so significant, indicating that there are certain secrets that have always existed in family life.¹²¹ Kinship depends upon lived and meaningful relationships.¹²² In the world of natural conception, as well as donor-conceived birth, the reality of family life may be harsh and complex. For example, indicating to a husband that a child was conceived from a short-lived liaison could result in a dire economic position for mother and child; though the child may live in the knowledge of her paternity, she and her mother may be economically destitute.¹²³ The interests of truth may have to be sacrificed, at times, for family stability and security in the interests of the child. Legal truth (founded exclusively on genetic testing) can cut through and disrupt these relationships.¹²⁴

3. *Discrimination Against "Social" Parents*

The potential impact of the disclosure policy on would-be parents should not be overlooked.¹²⁵ Parents may be of the view that nondisclosure is the wisest way to protect the child, themselves, and the wider family.¹²⁶ As a

¹¹⁷ *Id.*

¹¹⁸ Smart, *supra* note 30, at 400.

¹¹⁹ *Id.*

¹²⁰ Smart, *supra* note 96, at 553 (pointing out that there may be other truths, which may be just as or more significant in family life and particularly for a child).

¹²¹ *Id.* at 558–61.

¹²² *Id.* at 555.

¹²³ *Id.*

¹²⁴ *Id.* at 564–65. For example, the wish not to reveal paternity of a child may arise from a mother's need to protect a child rather than simply to preserve her own reputation. Lyn Turney, *Paternity Secrets: Why Women Don't Tell*, 11 J. FAM. STUD. 227, 243 (2005).

¹²⁵ During the anonymity debate leading up to the English legislation banning donor anonymity, these interests were largely ignored. Turkmendag et al., *supra* note 6, at 292.

¹²⁶ *Id.* at 304.

result, they tell their child that they were assisted in the conception process rather than disclosing the child's genetic parents.¹²⁷

For many parents, gestating, breast feeding, rearing, or nurturing a baby is of far greater importance than a purely genetic relationship. If the law were to impose a legal obligation on such parents to inform their children of the nature of their conception—or ensure that the child is informed by means of birth certificate or a letter delivered when the child reaches a certain age—would this not constitute an unjustifiable invasion of the privacy rights of would-be parents, especially since fertile parents have been deceiving natural-born children about their conception for generations? Would it not be discriminatory to such social parents, especially when compared with biological parents? This might discourage such couples from conceiving with the use of donor sperm and lead to a diminution of the number of couples having children via this method, thus depriving them of a family. Rather, tolerance, openness, and gradual acceptance of this method of conception over time are the only ways in which to create the notion of such an obligation to disclose.

B. Focusing on the Sperm Donor

1. Protection of the Sperm Donor

Gamete donors may be motivated to donate in order to help sterile couples, but wish to avoid a parental relationship with the resulting offspring. As a result, many will have a fundamental interest in their own privacy.¹²⁸ Sperm donors may view anonymity as reassurance that their genetic parentage cannot be established and protection from disruptive effects on their own marriage or family life—interruptions which could not be foreseen or desired by a child eager to know his or her genetic origins.¹²⁹

Increased access to information through the Internet has had a profound effect on donors' ability to maintain anonymity. The Internet has enabled donor-conceived persons to acquire much more information regarding their donor parent once they discover the nature of their conception.¹³⁰ As a

¹²⁷ *Id.*

¹²⁸ Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 943 (2009).

¹²⁹ K.R. Daniels et al., *The Views of Sperm Semen Donors Regarding the Swedish Insemination Act 1984*, 3 MED. L. INT'L 117, 124 (1998).

¹³⁰ Andrea Mechanick Braverman, *How the Internet Is Reshaping Assisted Reproduction: From Donor Offspring Registries to Direct-to-Consumer Genetic Testing*, 11 MINN. J. L. SCI. & TECH. 477, 486–87, 495 (2010).

result, the sperm donor is no longer an impassive component of the process. Instead, sperm donors are now perceived as possibly having a long-term role in the life of the donor-conceived child.¹³¹ However, there are dangers associated with unlimited Internet access to unverified donor information. The information may be inaccurate, insufficient, biased, out-of-date, or just not what the donor-conceived person wishes to know.¹³² Because of the increased use of the Internet to find donors, perhaps a well-regulated system where information provided is accurate and easily available may provide the best means of meeting the needs of all stakeholders.¹³³

2. *Detrimental Effects of Removal of Donor Anonymity*

In England, the main consequence of legislation removing donor anonymity has been an acute shortage of sperm donors.¹³⁴ Because of donors' reluctance to donate, English clinics cannot meet the demand for gametes.¹³⁵ Clinics maintain long waiting lists of patients who wish to get treatment, and patients are increasingly participating in reproductive tourism to countries where anonymity is still permitted to avoid the negative impact of the law.¹³⁶ As recruited gamete donors become less willing to make donations, there is pressure to accept donors with suboptimal characteristics; for example, in England the age profile of the average donor has increased.¹³⁷

¹³¹ *Id.*

¹³² *Id.* at 493.

¹³³ *Id.* at 496.

¹³⁴ Turkmendag et al., *supra* note 6, at 284.

¹³⁵ Jane Dreaper, *IVF Donor Sperm Shortage Revealed*, BBC News (Sept. 13, 2006), <http://news.bbc.co.uk/1/hi/health/5341982.stm>.

¹³⁶ Two of Scotland's four NHS clinics suspended services because of a lack of donors. *Figures from Scotland's IVF Clinics*, BBC News (June 10, 2006), http://news.bbc.co.uk/2/hi/uk_news/scotland/5065050.stm. In one clinic, the waiting time for egg donation treatment more than doubled after donor anonymity was removed, from two years to at least five years. *Id.* Another clinic had no new donations since the law was introduced and there were between thirty and forty patients that the clinic was unable to treat. *Id.* One clinic reported that for the first time they had to start a waiting list for treatment using donor sperm at the end of last year and they were no longer able to offer any treatment until supplies became available. *Id.* In the Netherlands, the total number of sperm donors decreased from 900 to 300, sperm banks have decreased by half, and the waiting time for treatment surpassed two years in a ten-year span. William Weber, *Dutch Sperm Donors Will Remain Anonymous For Another Two Years*, 355 LANCET 1249, 1249 (2000).

¹³⁷ Turkmendag et al., *supra* note 6, at 284, 288. In September 2005, the Human Fertilisation and Embryology Authority reported that donors in 2004 and 2005 were typically family men aged between thirty-six and forty years. HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, WHO ARE THE DONORS? AN HFEA ANALYSIS OF DONOR REGISTRATIONS AND USE OF DONOR GAMETES OVER THE LAST 10 YEARS, at 5 (2005) *available*

It has also led to the development of an underground semen market on the Internet, which often utilizes unscreened semen.¹³⁸

The desire to sustain a continuous supply of donors is a frequent argument in support of the existing legal position in the United States and France.¹³⁹ Opponents of mandated disclosure have argued that the fertility industry in the United States would disappear with a move toward mandatory disclosure of donor information.¹⁴⁰ In Britain, anticipation of the new donor legislation in 2005 contributed to the drop in the number of donors.¹⁴¹ However, it seems that there are more donations from older, more magnanimously motivated donors. As a result, if similar legislation were adopted in the United States, it is arguable that the amount of sperm donations may plateau at an acceptable rate after a few years, as happened in Sweden and appears to be happening in England.¹⁴²

at http://www.hfea.gov.uk/docs/Who_are_the_donors_factsheet.pdf. This represents a substantial change from 1994 and 1995 when the most common age group for sperm donors was eighteen and twenty-four years. *Id.*

¹³⁸ Turkmendag et al., *supra* note 6, at 284.

¹³⁹ *Id.*

¹⁴⁰ D'Orazio, *supra* note 109, at 272.

¹⁴¹ E.g., Waldman, *supra* note 12, at 555 (citing *British Sperm Banks Near Empty*, NEWS24 (Sept. 25, 2006), <http://www.news24.com/World/News/British-sperm-banks-near-empty-20060925>). In 1998 and 1999 when confidentiality was assured under English law, there were more than 10,000 donor insemination treatments performed; by 2003 when public debate over donor children's information rights was in full swing, that number had fallen to little more than 6,000. The Newcastle Fertility Centre reported a drop from 175 donor applicants in 1994 to only 25 applicants in 2003. *Donor's Crisis Over Anonymity*, DAILY MAIL, Nov. 10, 2005, at 36. It was reported that the number of donors diminished to less than 100 in the first six months of 2005 after the legislation. Ed Boyle, *Supply and Demand*, CBS NEWS (Aug. 3, 2006), <http://www.cbsnews.com/video/watch/?id=1864669n>. However, representatives for the HFEA disputed these figures and pointed out that supply still continues to outstrip demand in some areas of the U.K. *Sperm Donor Law 'Not a Deterrent'*, BBC NEWS (June 8, 2006), http://news.bbc.co.uk/2/hi/uk_news/england/5054910.stm. Similar problems were experienced in New Zealand when anonymous donation was prohibited. Waldman, *supra* note 12, at 554 (citing Emily Watt, *Wanted: Keen Kiwi Lads to Help Populate Australia*, SUNDAY STAR TIMES, Jan. 15, 2006, at 1). A normally healthy roster of donors dwindled in the two years following the legislation to a sole donor. *Id.*

¹⁴² Waldman, *supra* note 12, at 552–53, 555; see also Paula Beauchamp, *Canadians Answer Sperm Call*, AUSTRALIAN (July 9, 2004), http://www.canadiancrc.com/newspaper_articles/The_Australian_Canadian_sperm_donors_09JUL04.aspx (reporting that the state of Victoria managed to keep the sperm center operational by focusing on older more altruistic donors, but in New South Wales, there was such a shortage of donors that one clinic apparently flew Canadian students to Australia for complementary vacations, in return for three or four sperm donations a week).

C. *Focusing on the Child*

1. *The Child's Right to Life and Autonomy*

The arguments in favor of mandatory disclosure generally assume that disclosure is in the best interest of all donor offspring, but there is no clear evidence that knowledge of identifying information is required or even beneficial for the well-being of donor offspring.¹⁴³ In fact, psychological research supports the viewpoint that a genetic relationship is not essential for good social parenting or satisfactory emotional development of children.¹⁴⁴ What of a child who states that he or she does not wish to know? Should such a child be obliged to know for his or her own long-term good? Finally, at what stage should the child be told? Who decides what age is best to tell a child that he or she was conceived through donation? The value of a right to openness for a child is questionable when a child is never conceived because gamete donors are reluctant to accept a long-term commitment from which they may only expect to derive costs.

Disclosure about the process of donor conception requires the child to differentiate between the “social” and the “biological” aspects of parenthood. Obviously, historically this schism was not present, and legislators or drafters of rights on parentage are generally not ready to take on the unfamiliar topic. They fail to recognize that a sense of identity is generally the result of the child’s experience rather than an adult imposition.¹⁴⁵ An overemphasis on genes does not give full recognition to the bonds created by nurture and love by the child’s actual caretakers.¹⁴⁶ It may also lead to a desire to establish a relationship with donors at the expense of valuable bonds with the child’s extended family.¹⁴⁷ There is also the danger that a donor-conceived child might wish to establish a relationship with the donor and then be rejected.¹⁴⁸

¹⁴³ Daniels et al., *supra* note 129, at 155.

¹⁴⁴ Susan Golombok et al., *Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children*, 66 *CHILD DEV.* 285, 295–97 (1995).

¹⁴⁵ Smart, *supra* note 96, at 555.

¹⁴⁶ *Id.*; *see generally* Re J (Paternity: Welfare of Child), [2006] EWHC (Fam) 2837, [2007] 2 F.L.R. 26 (recognizing that the impact on the mother and father of revealing donor conception to a child outweighed the advantage of the child of learning the truth).

¹⁴⁷ Turkmendag et al., *supra* note 6, at 298–99.

¹⁴⁸ Sauer, *supra* note 128, at 941.

2. *The Analogy of Adoption*

The literature on adoption over the past thirty years has emphasized the right of children to know their biological origins because of the importance of that knowledge to a child's identity formation.¹⁴⁹ Those who draw analogies between adoption and donor conception favor openness and believe that children have a right to and a medical need for information about their origins.¹⁵⁰

However, an adopted child's relationship with her social or legal parents is distinct from a donor-conceived child's relationship with her birth parents. In adoption proceedings, the state is involved because adoption is, at least in Western countries, a state-created and state-controlled procedure.¹⁵¹ Thus the state has an interest in regulating identifying information in adoption cases.¹⁵² Alternatively, the medical profession rather than the state is generally engaged in the procedure of anonymous artificial insemination. Adoption and donor-assisted conception are also different in that adoption involves the creation of a family around an already existing individual, but donor conception is a form of procreation where one parent is biologically related to the child and the child's conception is greatly desired.¹⁵³

These differences contribute to the difficulty of analogizing the two situations and calls into question some countries' insistence on the comparability between adopted and donor-conceived children.¹⁵⁴ In this instance, a rights-based approach should not trump one based on the evidence of researchers into the welfare of such children and would-be parents.¹⁵⁵ Although research on adopted children indicates that such children need information about their birth as early as possible, no convincing research has found a corresponding benefit in disclosing donor

¹⁴⁹ Turkmendag et al., *supra* note 6, at 289. Baroness Warnock, Chair of the 1984 Warnock Committee of Inquiry into Fertilisation and Embryology, stated that she supported the view that donor-conceived people should have the same "right to know" as adopted people. DEPARTMENT OF HEALTH AND SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, Cm. 9314, at 24–25 (U.K.) [hereinafter DHSS REPORT].

¹⁵⁰ Glenn McGee et al., *Gamete Donation and Anonymity: Disclosure to Children Conceived with Donor Gametes Should Not Be Optional*, 16 HUM. REPROD. 2033, 2034–35 (2001).

¹⁵¹ Sauer, *supra* note 128, at 942.

¹⁵² *Id.*

¹⁵³ Erica Haines, 'Secrecy': *What Can Artificial Reproduction Learn From Adoption?*, 2 INT'L J.L. POL'Y & FAM. 46, 47 (1988).

¹⁵⁴ Turkmendag et al., *supra* note 6, at 289–91.

¹⁵⁵ *Id.* at 305.

information to donor-conceived children. In fact, research indicates that children who have not been told are well-adjusted and generally stable.¹⁵⁶

3. *Child's Welfare and Knowledge of Genetic Origins*

Although findings from research and clinical experience tend to support a child's need for openness about factual circumstances,¹⁵⁷ a far more complex picture emerges when it comes to access to donor identity. Knowledge of the identity of birth parents can contribute to the child's inner development but does not seem to be essential.¹⁵⁸ There does not appear to be clear data that nondisclosure to donor-conceived children has been exacting a psychological cost on such children.¹⁵⁹

Though some studies have indicated that there a negative effect results from failure to disclose donor information, the methodology used in at least some of those studies raised concerns. For example, one study performed by psychologists in the United States examined how donor-conceived children felt about the secrecy surrounding their conception, their problems in obtaining information, and efforts to make contact with the genetic parent.¹⁶⁰

¹⁵⁶ *Id.* at 290; FORTIN, *supra* note 1, at 473.

¹⁵⁷ See generally Sarah Maclean & Mavis Maclean, *Keeping Secrets in Assisted Reproduction – The Tension Between Donor Anonymity and the Need of the Child for Information*, 8 CHILD & FAM. L.Q. 243 (1996) (arguing that governments should facilitate openness when questions arise about a child's biological origin).

¹⁵⁸ Waldman, *supra* note 12, at 525–26. It has been argued that lack of knowledge of one's origins can be harmful to children. H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 133 (1964). Sants considered the psychodynamics of genealogical bewilderment in relation to the self-image and the Oedipus complex. *Id.* He related the bewilderment of the adopted child to the child's relationship with the mother and the triangular relationship with his or her father and mother, and concluded that no child can be severed completely from his roots in the natural family, and that no child should be kept from knowing his or her natural origins. *Id.* at 140. Although the argument was first raised in connection with adopted children, this idea has been transferred to donor-conceived children. Frith, *supra* note 74, at 82 (citing ALEXINA MCWHINNIE, *FAMILIES FOLLOWING ASSISTED CONCEPTION: WHAT DO WE TELL OUR CHILD?* (1996)). However, since Sants's initial research, it has been argued that adoptees in a secure home may be eager to know about their ancestors, but are not necessarily harmed mentally by not knowing. Michael Humphrey & Heather Humphrey, *A Fresh Look at Genealogical Bewilderment*, 59 BRIT. J. MED. PSYCHOL. 133, 133 (1986).

¹⁵⁹ Waldman, *supra* note 12, at 535–45.

¹⁶⁰ See generally A.J. Turner & A. Coyle, *What Does It Mean to be a Donor Offspring? The Identity Experience of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy*, 15 HUM. REPROD. 2041, 2042 (2000). In this study, participants were recruited from donor conception support networks in the Australia, Canada, United Kingdom, and United States. *Id.* at 2043. The participants were required to complete a

That study concluded that such children felt alienated from their families, suggesting that anonymous donation had a very negative effect on the donor offspring, and there was a need to move toward increased openness in this area of the law.¹⁶¹ However, that study may have been misleading as only sixteen people completed the study, and those people were not a truly random sample because only disenchanted donor-conceived children were contacted to participate.¹⁶²

More useful are the controlled studies performed in Europe.¹⁶³ Overall, family relationships within the families of donor-conceived children were found to be stronger than those within families of naturally conceived children, and the mental health and development of the donor-conceived children was found to be no different from that of their peers in natural families.¹⁶⁴ Such children were reassessed in adolescence.¹⁶⁵ In this group,

questionnaire, which reported feelings of rejection by and distance from their would-be fathers. *Id.* at 2043–44. The participants reported that the discovery of their donor offspring status was horrifying to them and a blow to their sense of self; they felt a powerful desire to know more about their biological donors and a feeling of loss that they did not know their genetic father. *Id.* at 2044–46.

¹⁶¹ *Id.* at 2050.

¹⁶² *Id.* at 2043.

¹⁶³ *E.g.*, S. Golombok et al., *The European Study of Assisted Reproduction Families: Family Functioning and Child Development*, 11 HUM. REPROD. 2324, 2324 (1996). This study included children conceived using donor eggs or sperm, and adoptive children. *Id.* at 2325. One hundred eleven of the families involved in the study had a donor-conceived child. *Id.* The study found that parents of children conceived via donor insemination obtained higher ratings for parental warmth and emotional involvement than parents of children conceived naturally. *Id.* at 2330. Furthermore, the study found that the quality of the relationship between donor insemination fathers and their children was not affected by the lack of a genetic tie. *Id.* The donor-conceived children had high self-esteem and strong emotional attachment toward their social parents. *Id.* There was no evidence of increased occurrences of psychological disorders and the children's perceptions of their relationship with their parents were similar to those of naturally conceived and adopted children. *Id.* *But cf.* ELIZABETH MARQUARDT ET AL., COMM'N ON PARENTHOOD'S FUTURE, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf. The study found that young adults conceived through sperm donation are "hurting more, are more confused, [and] feel more isolated from their families." *Id.* at 5. It is significant, however, that this study researched children raised by heterosexual married couples, single mothers, and lesbian couples. *Id.* at 44. Research focusing solely on donor-conceived children born to heterosexual couples finds them to be generally well-adjusted. Golombok et al., *supra* note 13, at 965.

¹⁶⁴ Waldman, *supra* note 12, at 539.

¹⁶⁵ S. Golombok et al., *The European Study of Assisted Reproduction Families: The Transition to Adolescence*, 17 HUM. REPROD. 830, 830 (2002); see also Waldman, *supra* note 12, at 539–41.

nearly 70% of parents had decided not to inform their children about their origins.¹⁶⁶ Research compared the socio-emotional function and the quality of the parental relationship with donor-conceived children who were told and those who were not told of their donor status.¹⁶⁷ Children in both groups were doing equally well in terms of school performance, confidence, and peer relationships; groups who told their children about the use of a donor reported fewer child–mother disputes than those who did not disclose.¹⁶⁸ Donor-conceived children who were not told, although not as well-off as those who had been told, were still doing well emotionally and socially and did not appear to be much damaged by the nature of their origins in terms of their relationship with their mothers.¹⁶⁹ It should be noted, however, that this set of results also appears unreliable, as only six sets of families had informed their children.¹⁷⁰ Another study examining whether disclosure of the identity of the donor affected parental bonding found that among 184 families, there was no evidence that nondisclosure was harmful for family relationship or a symptom of family problems.¹⁷¹ What this research indicates is that donor-conceived children who are unaware of their donor status are flourishing within their families, and there is little reason to be concerned for their welfare. In light of these results, legislatures need to assess carefully the risk of compulsory disclosure on such families.

V. JUSTIFICATIONS FOR DISCLOSURE

The next Part of this Article aims to assess fully the nature of the child's right to know his or her biological origins and the advantages of openness and disclosure to such a child.

¹⁶⁶ Golombok et al., *supra* note 165, at 836.

¹⁶⁷ *Id.* at 837.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; see also Emma Lycett et al., *Offspring Created as a Result of Donor Insemination: A Study of Family Relationships, Child Adjustment, and Disclosure*, 82 FERTILITY & STERILITY 172 (2004). In this study conducted in the United Kingdom, eighteen of forty-six families were inclined toward disclosure. *Id.* at 173. The study found that non-disclosing mothers reported more conflict with their children and perceived themselves as less competent parents than disclosing mothers. *Id.* at 175–76. But this was not evidence of dysfunctionality in the family, which was generally well-adjusted. *Id.* at 179. In nondisclosure families the relationship between children and parents was found to be still within a functional and normal range. *Id.*

¹⁷⁰ Lycett et al., *supra* note 169, at 178.

¹⁷¹ Robert D. Nachtigall et al., *Stigma, Disclosure, and Family Functioning Among Parents of Children Conceived Through Donor Insemination*, 68 FERTILITY & STERILITY 83, 89 (1997).

A. *The Importance of Genes*

Scientific strides made toward decoding the human genome have increased the accessibility of full-scale genetic tests.¹⁷² Donated gametes, particularly in the United States, are usually screened for a great variety of hereditary diseases and characteristics.¹⁷³ Accurate medical history is often important in preventative and diagnostic treatment of illnesses. Specific information brings a degree of certainty about future ill health or even the mode and manner of one's own death, and access to donor information may provide the donor child with a complete genetic and medical history to make health decisions.¹⁷⁴ It has been argued that proponents of donor anonymity overlook the fact that genetic information was needed in some cases and in doing so ignore the individual, personal, and psychological concerns of the child involved.¹⁷⁵ It is also argued that the lack of mandatory testing, screening of donors, general regulation, and control of this process at the federal level in the United States has resulted in an assisted reproduction industry that is incapable of tackling the issues of donor anonymity and access to genetic information through self-regulation.¹⁷⁶

Although some states have enacted legislation permitting donor-conceived children to obtain gamete donor information through court order when they make a satisfactory showing of "good cause" or a similar standard,¹⁷⁷ it is foreseeable that the strides that continue to be made in genetic science demand a system where an individual does not have to wait for an illness to gain access to his proper genetic history.¹⁷⁸ According to this view, states should address the rights of the growing population of donor offspring by implementing provisions to guarantee the documentation, preservation, and disclosure of donor information and establishing some

¹⁷² Dennison, *supra* note 106, at 14.

¹⁷³ *Id.* A number of countries, including those that still allow anonymous donation, have maintained national registries of donors that serve as a mechanism for tracking a donor should the child inherit a disease. For example, the United Kingdom has maintained a national registry since 1991 although donor anonymity was only removed in 2005. *See* HFEA 1990, *supra* note 98 (codifying the United Kingdom's national registry).

¹⁷⁴ D'Orazio, *supra* note 109, at 254–55.

¹⁷⁵ *Id.* at 264.

¹⁷⁶ *Id.* at 256–57.

¹⁷⁷ ALA. CODE § 26-17-21(a) (2007); CAL. FAM. CODE § 7613(a) (2007); COLO. REV. STAT. ANN. § 19-4-106(1) (West 2007); MO. ANN. STAT. 210.824.01 (West 2007); MONT. CODE ANN. § 40-6-106(1) (2006); NEV. REV. STAT. ANN. § 126.061.1 (West 2007). In these states, the courts must assess the interests of the parties to determine what meets the "good cause" standard and what information should be disclosed.

¹⁷⁸ D'Orazio, *supra* note 109, at 252–55.

means of informing such children that they were conceived by sperm donation, even though their parents may not intend to do so.¹⁷⁹ Further research might also support the concept that the benefits of mapping the human genome depend not only on people's individual genotypes and raw genetic data, but also on the characteristics that genes produce.¹⁸⁰ For example, it may be necessary to know not only that a person has a certain gene makeup, but that his or her father also had this genetic makeup, and developed bowel cancer at fifty.¹⁸¹ This line of argument maintains that, unless donor anonymity is lifted, it may be impossible for descendants to acquire this beneficial knowledge.¹⁸²

B. Lack of Regulation Leads to Dangerous "Free for All"?

Most banks comply, on the whole, with professional guidelines, but compliance on a national level remains inconsistent.¹⁸³ Because no federal legislation governing sperm banks exists in the United States, clinics are allowed to self-regulate screening standards, the number of donations a donor may make, the age limits on recipients, and the price of the procedure.¹⁸⁴ There is no legislation to impose age or health qualifications on recipients, regulate advertisement, limit the price for donations, or constrain the grounds on which recipients can choose donors.¹⁸⁵ Private and government studies that have analyzed the artificial insemination industry have revealed problems in genetic screening and medical record keeping.¹⁸⁶

¹⁷⁹ *Id.*

¹⁸⁰ See BLAUWHOFF, *supra* note 12, at 22 (discussing hereditary risks and their effect on the right of children to know about donor insemination).

¹⁸¹ In the United States, federal regulation of assisted reproduction has been at best inactive. D'Orazio, *supra* note 109, at 261. There has not been a statutory focus on the donor's health and a donor offspring's rights to obtain information about the donor's health status. *Id.* About eighteen states provide donor offspring with the right to access donor information through a showing of good cause. *Id.* The Uniform Parentage Act, a uniform law promulgated by the National Conference of Commissioners on Uniform State Laws (NCUSL), encourages state codification of the good cause standard. Uniform Parentage Act § 5(a) (1973).

¹⁸² D'Orazio, *supra* note 109, at 249.

¹⁸³ *Id.* at 257 n.35 (citing Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823 (1997)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 260.

¹⁸⁶ *Id.* at 257. This is concerning as 80% of the world's largest sperm banks are based in the United States and rely on voluntary guidelines. Lisa Hird Chung, Note, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L L. 263, 267 (2006). The federal government "has passed regulations requiring

Perhaps because of these issues, the majority of medical professionals are in favor of establishing national standards for donor screening and testing for genetic defects in donor samples.¹⁸⁷

A major drawback of the lack of regulation in the United States is that it is impossible to know how many children result from any particular person's sperm donation.¹⁸⁸ Sperm samples from more attractive donors may be utilized to inseminate more women and result in more children from that particular donor.¹⁸⁹ Even in some countries which limit the number of children born using a particular donor, as many as twenty-five children might be related to a donor.¹⁹⁰ In the United States, that number could be even higher, increasing the risk of half-siblings unknowingly committing incest and spreading undetected genetic disorders.¹⁹¹ Beyond voluntary services such as the Donor Sibling Registry, it is impossible for donor-conceived children in the United States to know how many other children share the same biological donor.

Although donors are encouraged by the American Fertility Society's to provide detailed medical information for at least two generations of family members, undergo a blood analysis and a physical examination for sexually transmitted diseases, and provide a sperm sample, compliance with the guidelines is voluntary.¹⁹² Current regulation of the fertility industry in the

screening of cell and tissue donors for 'risk factors for, and clinical evidence of, relevant communicable disease.'” *Id.* at 277.

¹⁸⁷ D’Orazio, *supra* note 109, at 257 n.35, 278 (citing Ginsberg, *supra* note 183). The Food and Drug Administration has adopted regulations requiring screening of donors for relevant communicable disease. *Id.* at 256 n.33. As a result, clinics in North America generally screen for sexually transmitted disorders, such as HIV, and genetic disorders. *Id.* at 258.

¹⁸⁸ *Id.* at 265.

¹⁸⁹ *Id.* Sperm banks in the United States are not required to limit the sales of their most popular donor sperm. By contrast, other countries restrict the number of children one sperm donor can produce: Denmark limits the number of live births per donor to twenty-five, England limits the number to ten, and France limits the number to five. Chung, *supra* note 186, at 275–76.

¹⁹⁰ Chung, *supra* note 186, at 275–76.

¹⁹¹ Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sep. 5, 2011), <http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all>.

¹⁹² Ginsberg, *supra* note 183, at 835 (1997).

The American Fertility Society recommends genetic screening for high-risk donors and recommends access to a donor's non-identifying genetic information upon the request of the donor child. Additionally, the Ethics Committee of the American Society for Reproductive Medicine has advised sperm clinics to take steps in anticipation that donor children will seek information about their donors in the future.

D’Orazio, *supra* note 109, at 258. Further, the American Association of Tissue Banks recommends screening donors for certain medical conditions that “present contraindications

United States is largely self-imposed and “limited to ensuring that donated gametes are free from communicable diseases and easily detectible genetic disorders.”¹⁹³ In *Johnson v. Superior Court of Los Angeles County*, however, the court held that the state had a compelling interest in an action against an artificial insemination clinic in requiring a party to comply with the discovery request to disclose the sperm donor’s identity.¹⁹⁴ That court potentially opened the door to a less anonymous future for sperm donors.¹⁹⁵ It would appear that some regulation of the industry is required in the United States, and some monitoring of clinics to ensure uniform standards with penalties for noncompliance on certain issues such as the number of children which a donor may father.

C. *Focusing on the Child*

1. *“Genealogical Bewilderment” and the Movement from Welfare to Rights*

Public debate on the issue of “genealogical bewilderment” began during the 1980s.¹⁹⁶ The concept was first developed in relation to the rights of adopted children and maintains that “a genealogically bewildered child could be found in any family where one of the ‘natural’ parents was unknown [to

for donation.” Jean Macchiaroli Eggen, *The “Orwellian Nightmare” Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 673 (1991).

¹⁹³ D’Orazio, *supra* note 109, at 260 n.41 (“Statutes tend to avoid issues concerning the donor offspring’s future potential harm in not knowing his biological background or medical history. Only Idaho and Oregon require donors to satisfy certain medical standards.”).

¹⁹⁴ 95 Cal. Rptr. 2d 864, 878 (Cal. Ct. App. 2000). In *Johnson*, a donor disclosed his family medical history to the sperm bank, including the possibility that Autosomal Dominant Polycystic Kidney Disease was present in his family. *Id.* at 868. The Johnsons signed a confidentiality agreement that provided for the donor to remain anonymous and reserved the right of the sperm bank to destroy all information pertaining to the donor’s identity. *Id.* at 867. Despite assurances from the bank that the sperm was healthy, the child was diagnosed six years later with Autosomal Dominant Polycystic Kidney Disease. *Id.* at 868. The court concluded that it would not protect the anonymity of the donor if it found that the donor offspring’s interests were more compelling than the donor’s interest in maintaining his or her anonymity. *Id.* at 878.

¹⁹⁵ Jessica Reaves, *So Much For That No-Strings-Attached Stop at the Sperm Bank*, TIME (Aug. 24, 2000), <http://www.time.com/time/nation/article/0,8599,53347,00.html>.

¹⁹⁶ Deborah Dempsey, *Donor, Father or Parent? Conceiving Paternity in the Australian Family Court*, 18 INT’L J.L. POL’Y & FAM. 76, 81 (2004). The term “genealogical bewilderment” was first used by Sants. Sants, *supra* note 158.

the child concerned].”¹⁹⁷ The argument against anonymity for sperm donors is similarly based on the premise that a child’s sense of identity is inextricably linked to understanding their biological origins.¹⁹⁸ Opponents of anonymity, and sometimes of donor insemination generally, rely on the argument that biologically correct information about one’s genetic parents is necessary for a person to develop self-esteem and a positive sense of identity.¹⁹⁹

Where children do not suspect any differences in the circumstances of their conception, the children do not usually question their genetic origins. Openness and truthfulness in family relationships and respect for the child’s autonomy are ethical demands that are almost impossible to convert into a legal obligation. However, in 1969, the English court acquired the power to direct paternity testing on a child if the court considered the testing to be in the child’s best interest, irrespective of the mother or other caregiver’s refusal to consent.²⁰⁰ People began to argue that, in the past, the medical underpinning of assisted procreation had led to the prioritization of the interests of prospective parents at the expense of their children, and that secrecy regarding donors arose from a concern to protect male pride in concealing male infertility.²⁰¹ English judges and some academics began to view the revelation of genetic truths as benefiting the welfare of the child,²⁰² and, increasingly, knowing the truth came to be perceived “as (almost) unequivocally good for children.”²⁰³ Over time, this welfare standard was attached to a rights-based claim—that children had a right to know their

¹⁹⁷ Dempsey, *supra* note 196.

¹⁹⁸ *Id.* at 81–82 (noting that the premise that a child’s sense of identity is linked to understanding its biological origins “informs infertility treatment policy [in the Australian state of] Victoria . . . [where donors] must agree to enter their name and contact details in a register, in order that any offspring so desiring can have access to this information in the future”); see *Infertility Treatment Act 1995* (Vic) pt 7 (detailing the requirements of record keeping in cases of donor conception).

¹⁹⁹ BLAUWHOFF, *supra* note 12, at 403–04.

²⁰⁰ Family Law Reform Act, 1969, c. 46, § 21(3)(b).

²⁰¹ Melanie Roberts, *Children By Donation: Do They Have A Claim to Their Genetic Parentage?*, in *FEMINIST PERSPECTIVES ON CHILD LAW* 47, 53–54 (Jo Bridgeman & Daniel Monk eds., 2000).

²⁰² Smart, *supra* note 30, at 398; *Compare* Re H and A (Paternity: Blood Tests) [2002] EWCA (Civ) 383, [2002] 1 F.L.R. 1145, [29], *with* Re F (A Minor) (Blood Tests: Paternity Rights) [1993] Fam. 314 (ruling that since the applicant’s association with the mother had ceased before the birth of the child, parental responsibility or contact orders were unlikely to be made and an order for blood tests would achieve no more than a theoretical declaration of paternity, the benefit of which would be outweighed by the risk of disruption to the child’s family unit as a result of such tests).

²⁰³ Smart, *supra* note 30, at 398.

genetic origins.²⁰⁴ Many felt this recognition of children's rights was necessary as it gave children protection against adult distortions of the truth and offered children significant legal rights in relation to their parents in these difficult cases.²⁰⁵

The rights-based argument is not based on subjective and changing normative values on the child's welfare, but on a universal claim to justice for every generation through aligning legal and "physical" truth.²⁰⁶ The argument claims to defend children's rights against nondisclosure and "webs of deceit," and, at least at first, it seems that this argument is uncontestable: children would be treated unjustly if they were not permitted to know the truth of their genetic origins.²⁰⁷

In England, the passage of the Human Rights Act 1998 further influenced the law in favor of the right to know under Article 8.²⁰⁸ Previously, in 1984, the Commission of Inquiry into Human Fertilisation and Embryology, chaired by Baroness Warnock, recommended that donor-conceived children be deemed legitimate and that donors have no parental rights or duties.²⁰⁹ Although the Warnock Committee was concerned about the secrecy surrounding donor children's conception, donor anonymity was still entrenched in the Human Fertilisation and Embryology Act 1990.²¹⁰ Under the Act, if a woman is married at the time of the artificial insemination of sperm, even if the resulting embryo was not created using the sperm of her husband, the husband is treated as the father of the child, unless he shows that he did not consent to the insemination.²¹¹ Thus, the common law presumption of legitimacy applies even in the absence of consent, and the child will be regarded as the legitimate child of the mother's husband unless refuted.²¹² However, in *Rose v. Secretary of State for Health*, the court upheld the claims of a donor-conceived woman to knowledge regarding the identity of her father.²¹³ These arguments would ultimately influence the heated debates that led to legislation ending the anonymity of men who donate sperm to fertility clinics in England.²¹⁴

²⁰⁴ *Id.* at 399.

²⁰⁵ *Id.*

²⁰⁶ Smart, *supra* note 96, at 553.

²⁰⁷ *Id.* at 554.

²⁰⁸ Human Rights Act, 1998, c. 42 (Eng.).

²⁰⁹ DHSS REPORT, *supra* note 149, at 4.17.

²¹⁰ HFEA 1990, *supra* note 98, § 28.

²¹¹ *Id.* § 28(2).

²¹² *Id.* § 28(5)(a).

²¹³ [2002] EWHC (Admin) 1593, [2002] 2 F.L.R. 692, [47].

²¹⁴ JOINT COMMITTEE REPORT, *supra* note 10, paras. 268–271. Baroness Warnock, who

2. *Disclosure of Identity by Lesbian Couples to Their Donor-Inseminated Children*

Lesbian couples are deliberately establishing families without men as partners or fathers,²¹⁵ and to date there is no conclusive evidence that children raised by lesbian parents from birth suffer developmental or emotional problems in the absence of conventional fathers.²¹⁶ Many lesbian couples aspire to a version of family in which two equally co-parenting mothers demonstrate that they have their child's best interests at heart by not making an irreversible decision about donor anonymity on behalf of that child and also by allowing the formation of a "donor relationship."²¹⁷ Problematically, the biological father may perceive sperm contribution as the means to form a relationship with a child, not solely contingent, as was apparent for the co-parent and the mother, on fulfilling the demands of "children's right to know."²¹⁸

In England, the House of Lords has found the biological mother's contribution as the genetic, gestational, and psychological mother to be unique from that of her lesbian partner, and has denied the lesbian partner the status of primary caretaker.²¹⁹ Despite lacking full recognition as the child's parent, legislatively, the position of the lesbian partner has been improved in England. If, prior to the child's birth, the lesbian partner becomes the biological mother's civil partner, she can apply for a Parental Responsibility Order recognizing her as the child's stepparent.²²⁰ Alternatively, if the services of licensed clinics are used to conceive, then the lesbian partner is

chaired the 1984 Committee of Inquiry into Fertilisation and Embryology, stated that she now supported the view that donor-conceived persons should have the same "right to know" as adopted people. *Call to End Sperm Donor Anonymity*, BBC NEWS (May 14, 2002), <http://news.bbc.co.uk/2/hi/health/1986683.stm>. She based her argument on the greater awareness and increasing sensitivity to genetic inheritance. Jess Buxton, *Should Egg and Sperm Donors Remain Anonymous?*, BIONEWS (May 20, 2002), http://www.bionews.org.uk/page_37624.asp. This issue of donor anonymity was one of the most controversial in the parliamentary debates leading to the removal of donor anonymity. DEP'T OF HEALTH, DONOR INFORMATION CONSULTATION: PROVIDING INFORMATION ABOUT GAMETE OR EMBRYO DONORS para. 1.15 (2001), reprinted in 5 HUM. FERTILITY 97 (2002).

²¹⁵ Kathryn Almack, *Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-Making and Understandings of the Needs of the Child*, 20 INT'L J.L. POL'Y & FAM. 1, 8 (2006).

²¹⁶ Smith, *supra* note 9, at 237.

²¹⁷ *Id.* The mother may assume that having lesbian parents automatically excludes a child from the right to have contact with his or her biological father. *Id.*

²¹⁸ *Id.*

²¹⁹ Re G (Children) (Residence: Same Sex Partner), [2006] UKHL 43, [2006] 4 All E.R. 241.

²²⁰ Children Act, 1989, c. 41, § 3(1) (U.K.).

normally treated as the child's legal parent, whether or not the two women have become civil partners.²²¹ In cases where the biological mother's lesbian partner is treated as a legal parent, the sperm donor is barred from applying for a Parental Responsibility Order.²²² However, if a sperm donor donates sperm to a lesbian couple under an informal arrangement not involving a licensed clinic, the sperm donor may be able to obtain a Parental Responsibility Order.²²³ In some cases the courts have refused to grant him parental responsibility on the grounds that he would undermine the autonomy of the lesbian family unit,²²⁴ which often has concepts of "mother," "father," "parent," and "donor" that challenge legal definitions.²²⁵ More often, however, lesbian couples are legally vulnerable and, therefore, do not have the ability to determine the biological father's rights to a legal relationship with his child or the extent of the donor father's inclusion in the family unit with the children and their "mothers."²²⁶

Although most lesbian couples do not intend for a known donor to have a parental relationship with the donor-conceived child since they regard themselves as parents, they acknowledge the child's right to know the identity of his biological father.²²⁷ Unlike heterosexual couples utilizing artificial insemination, lesbian couples do not face male infertility and the resulting reluctance to discuss issues associated with it. Also, unlike heterosexual couples that can hide the fact that a donor child is not genetically related to his father, lesbian couples will eventually have to answer their children's questions about the absence of a male parent. Thus,

²²¹ HFEA 2008, *supra* note 98, § 43.

²²² *Id.* § 54(1). Under the Child Support Act 1991, donors may also be liable for maintenance for any children born as a result of a known donor arrangement. Almack, *supra* note 215, at 5.

²²³ Re D (Contact and Parental Responsibility: Lesbian Mother and Known Father), [2006] EWHC (Fam) 2, [2006] 1 F.C.R. 556, [93].

²²⁴ Re B (Role of Biological Father), [2007] EWHC (Fam) 1952, [2008] 1 F.L.R. 1015.

²²⁵ See Almack, *supra* note 215, at 11–13 (listing descriptions of family used by lesbians who have conceived through donor conception).

²²⁶ See *Re Patrick (An Application Concerning Contract)* [2002] 28 Fam LR 579 (Austl.). This case was the first time an Australian court was required to give judgment on the kinship status of a child of a homosexual who had contributed his sperm to a lesbian biological mother by donor insemination outside a clinical setting. Dempsey, *supra* note 196, at 78. It is apparent that lesbian and homosexuals may have very different concepts of such a relationship. *Id.* The father could not conceive of himself as a "known donor" but only as a father. *Id.* at 88.

²²⁷ Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family* 4 HARV. WOMEN'S L.J. 1, 33 (1981) (noting that artificial insemination gives lesbian women a chance to have a child without involving a man, and an opportunity to raise the child with a partner in a unit of two 'parents').

among lesbian parents, rates of disclosure to their children, or plans to disclose, tend to be almost 100%.²²⁸ Thus, regarding disclosures, donor children of lesbian couples are arguably unfairly advantaged in relation to children born to heterosexual parents who are unlikely to have a social trigger obviating disclosure.

VI. CONCLUSION

There is undoubtedly a growing trend toward openness in the field of gamete donation. Arguments are already being formulated that children not only should know about donor kin, but also should have relationships with them on the basis of the analogy of adoption.²²⁹ There are also websites that make it possible for children born from sperm donation to learn the identity of their genetic or donor parents.²³⁰ Even in cases of anonymous donation it is becoming possible for curious older children to discover the identity of a donor parent.²³¹

Fundamentally, it is arguable that the right to know underlies the principle of decisional privacy, which is the basis of the right to private life.²³²

²²⁸ J.E. Sheib et al., *Choosing Identity-Release Sperm Donors: The Parents' Perspective 13–18 Years Later*, 18 HUMAN REPRODUCTION 1115, 1117 (2003). In Australia, the Victorian model of clinical donor insemination requires that sperm donors supply identifying information that can be made available to adult offspring on request, satisfies the desire for the autonomous two parent “homo-nuclear” family that many lesbians prefer as well as the strong belief many prospective lesbian parents display in support of the principle of children’s “right to know.” Dempsey, *supra* note 196, at 98.

²²⁹ See generally Julie Wallbank, *Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child*, 10 MED. L. REV. 271 (2002) (arguing this in relation to surrogacy on the grounds that the gestational mother in a surrogacy arrangement should be regarded as just as much a mother as the commissioning mother and that it is likely to be harmful to the child to be denied contact with the gestational mother).

²³⁰ See, e.g., ACEBABES, <http://www.infertilitynetworkuk.com/acebabes/> (last visited Feb. 21, 2012) (providing support to families using assisted conception); UK DONORLINK, <http://www.ukdonorlink.org.uk/> (last visited Feb. 21, 2012) (a pilot voluntary contact register linking donors and donor-conceived children).

²³¹ Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, NEWSCIENTIST, Nov. 3, 2005, at 6. In 2005, a teenager tracked down his biological father using a mail-order DNA kit and online search engines. The donor concerned had contracted with the fertility clinic to remain anonymous. The teenager had very little access to information, except the date and place of the man’s birth, but took a swab of the inside of his cheek and mailed it to an online genealogy DNA-testing service. Having acquired the date and place of the donor’s birth, the teenager managed to trace his biological father. *Id.*

²³² See *Mikulic v. Croatia*, 2002-I Eur. Ct. H.R. para. 54 (“The Court has held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of

Biological parentage may be considered one aspect of a person's fixed identity and an immutable quality. The notion of decisional privacy suggests that people should, in principle, have free choice when interpreting their fixed identity—a right to informational self-determination. Arguably, the existence of the right to know is not a matter based on concern for individual emotional welfare, because there is not enough evidence available as to whether it conduces to an individual's welfare to have such knowledge. Instead, the concept is based on the proposition that no one has the right to decide on another person's behalf whether that other person should or should not be able to know about their own genetic history.²³³ Even if this informational self-determination is considered to be partially socially constructed and only pressing as a result of the adoption movement and biomedical developments it defies historical interpretation and is immutable.

However, arguments opposing the blanket assertion of such a right take into account the majority of donor conception cases, in which there is a social father and a recognized family unit that appears, in the case of the heterosexual family, to be otherwise “normal,” stable, and ready to embrace a much-longed-for child. Such families are anxious not to disturb that stability. They also argue that the donor-conceived child's right to know in such cases conflicts with the rights to autonomy and privacy of the mother, the “social” father, and the gamete donor. In this sphere, placing greater pressure on social parents via a legal responsibility to disclose a donor-conceived child's biological origins could constitute not only an invasion of the parents' privacy rights, but also a moralizing circumstance entirely insensitive to the parents' situation at the time of conception, especially in view of the fact that the parents may risk social ostracism in some societies if they disclose the information surrounding their child's birth.

It may be difficult for a donor-conceived child to conceptualize a genetic donor purely in terms of biological inheritance and not as a social father.²³⁴ Conversely, a biological father who enters the donor-conceived child's life may have more than merely a psychological role; instead their biological connection may, and perhaps should, become a factor in donor-child relationships that arise. Ultimately, more research is needed before firm conclusions can be made about the role of fathers in such donor-conceived families.

importance because of its formative implications for his or her personality.”).

²³³ *Memorandum by David Gollancz (Ev 44)*, in JOINT COMMITTEE ON THE HUMAN TISSUE AND EMBRYOS (DRAFT) BILL, VOLUME II: EVIDENCE, 2006–7, H.L. 169-II, at 366 (U.K.).

²³⁴ Grace et al., *supra* note 114, at 312.

Infertility success rates continue to rise as medical technologies advance.²³⁵ Donor-conceived children enrich the lives of many who would have been infertile in another era, giving such parents the opportunity to raise much-desired children who are genetically related to one parent. But this opportunity is threatened by the removal of anonymity. For example, the removal of donor anonymity in England has caused some frustration and despair.²³⁶ There is a possibility that fewer children will be conceived if social parents become hesitant about using this method of conception and the pool of regulated sperm donors diminishes for fear of lost privacy.²³⁷

Given the fact that the CRC was not drafted with sperm donation in mind, there is no clear answer in regard to the child's right to know in the donor conception context.²³⁸ It is suggested that legislation mandating disclosure of donor status is not the solution, but rather a balancing test should be formulated involving all competing interests.²³⁹ Ultimately, a holistic approach that takes into account the best interests of the entire family, rather than narrowly focusing on fulfilling the rights of donor-conceived children to access information about the identity of their biological fathers is required. Such a narrow focus may not benefit any of the parties in the long run.²⁴⁰ A holistic approach would take account of the psychological complexities of donor conception, as well as the fact that mandatory donor identification statutes do not lead immediately to greater disclosure by parents, but rather to dramatic dips in sperm supplies leading to the escalation of undesirable "reproductive tourism."²⁴¹

It is therefore suggested that a gradual process which gently nudges the process toward greater transparency is more desirable in this area. The movement toward greater openness would be facilitated by the removal of the stigma of infertility and a greater sensitivity by donor parents to the needs of their offspring. This will bring about disclosure conducive to the welfare of children and the stability of all families involved. The blunt instrument of

²³⁵ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 65 (2009).

²³⁶ See Lucy Frith et al., *UK Gamete Donors' Reflections on the Removal of Anonymity: Implications for Recruitment*, 22 HUM. REPROD. 1675, 1676–77 (2007) (explaining the apprehension caused by the removal of donor anonymity in the U.K.).

²³⁷ *Id.*

²³⁸ Frith, *supra* note 74, at 821; see also Report on Human Artificial Procreation, *supra* note 51 (calling for anonymity of gamete donors unless national law provides otherwise).

²³⁹ Sauer, *supra* note 128, at 954.

²⁴⁰ *Id.*

²⁴¹ Waldman, *supra* note 12, at 555.

legislative enforcement requiring disclosure of genetic origins of donor-conceived persons is not recommended in this area nor is it necessitated by the jurisprudence of the European Court of Human Rights or a careful interpretation of the CRC.