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Forgotten Parties: Shifting the Focus of Donor Conception to Donor-Conceived Persons Through Reasonable Regulation

Tiffany D. Gardner*

I. INTRODUCTION

In an age in which information is at our fingertips with a few keystrokes, members of the fertility industry are increasingly confronting the reality that anonymous sperm and egg donation is no longer realistic—and has not been for some time.¹ With the advent of

*Miami University (Ohio) (B.A., cum laude, 2004); Mercer University School of Law (J.D., magna cum laude, 2010). Member, Mercer Law Review (2008–2010); Managing Editor (2009–2010). Member, State Bar of Georgia. The views and opinions expressed in this article are my own. I wish to thank Jalayne Arias, Melissa Bornico, Naomi Cahn, Mary Davis, Rob Elzey, and Erin Jackson for their assistance in reviewing and refining this article. I am particularly grateful to Tyler Levy Sniff for his many thoughtful comments and contributions. I also wish to extend my sincere gratitude to the members of the Mercer Law Review. As a former managing editor of this same publication, I well remember the long hours, attention to detail, and dedication required to prepare each article for publication. It is truly an honor to return to these pages as an author, and I recognize this would not be possible without the hard work of the Mercer Law Review members. Finally, I thank my husband, Ross Gardner, and my sons, Liam, Neil, and Evan, for their unwavering love, patience, and support, which made completion of this article possible.

1. See Andrea M. Braverman & William D. Schlaff, *End of anonymity: stepping into the dawn of communication and a new paradigm in gamete donor counseling*, 111 FERTILITY & STERILITY 1102 (2019), <https://doi.org/10.1016/j.fertnstert.2019.04.015> [<https://perma.cc/9W4S-S2J3>] (“As early as 2010 professionals in our field began to recognize that the rise of increasingly sophisticated internet technology, facial recognition, and direct to consumer DNA testing would inevitably erode if not eliminate the possibility of donor anonymity.”); Meghana Keshavan, *There’s no such thing as anonymity: With consumer DNA tests, sperm banks reconsider long-held promises to donors*, STATNEWS (Sept. 11, 2019), <https://www.statnews.com/2019/09/11/consumer-dna-tests-sperm-donor-anonymity/> [<https://perma.cc/8HUM-SFHK>] (explaining that direct-to-consumer DNA testing “has forced a reckoning for the industry” with many clinics revising policies “not to eliminate

at-home commercial DNA testing, multiple generations are not only learning they were conceived through the use of reproductive material provided by third parties (“donors”²) but also identifying those formerly anonymous donors.³ These revelations, and increasing advocacy by the people born of such donations (*i.e.*, donor-conceived people) are changing the landscape of third-party reproduction around the world.⁴ But the United States lags behind in protecting the interests of donor-conceived people and, in some respects, donors and gamete recipients.

Donor-conceived people have long been the forgotten parties of third-party donor conception, despite the American Society for Reproductive Medicine’s recognition that each person has a “fundamental interest in knowing their biological origins.”⁵ While the

‘anonymous’ donations, but to make clear that the term only means they will not share donor information” and other clinics “gravitating toward ‘open ID’ donor systems, in which donors are told that offspring could connect with them when they turn 18—or sooner—if both parties agree to it”).

2. Although this Article refers to gamete providers as “donors” throughout, this term is a misnomer, given that commercial “donors” in the United States receive payment and are thus compensated. *See* *Perez v. Comm’r of Internal Revenue*, 144 T.C. 51, 53 (2015) (noting that the phrase “egg ‘donation’ . . . is a misnomer [because] the participant in the egg-stimulation and retrieval is compensated”). This Article avoids referring to donors as the donor to a donor-conceived person because gametes are “donated” to intended parents for their use in conceiving and giving birth to the donor-conceived person. While there is no uniform consensus within the donor-conceived community about what to call a donor, many such persons refer to the donor as a biological or genetic parent. *See* Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1079–80 (2014).

3. *See* Keshavan, *supra* note 1 (acknowledging that the “rise of consumer genetic tests” now “allow[s] people to connect with relatives they never knew they had, including some who never intended to be found in the first place” and “sites like 23andMe and Ancestry.com are giving customers the genetic clues they need to identify biological parents on their own”). In 2019, an estimated 30 million people had used commercial DNA tests. *See* *Donor anonymity ‘a thing of the past’*, FOCUS ON REPRODUCTION (Aug. 19, 2019), <https://www.focusonreproduction.eu/article/News-in-Reproduction-Gamete-donation> [<https://perma.cc/GGC7-NWYR>]. Yet, as recently as 2018, the Supreme Court of Mississippi failed to recognize the reality that “anonymous” sperm donors are largely subject to potential identification—at least by their adult genetic offspring or recipient parents who DNA test their donor-conceived children—when that court vehemently asserted it is “arguably factually and legally impossible for the child ever to obtain the identity of the donor.” *Strickland v. Day*, 239 So. 3d 486, 492 (Miss. 2018).

4. *See* Tetsuya Ishii & Inigo de Miguel Beriain, *Shifting to a model of donor conception that entails a communication agreement among the parents, donor, and offspring*, BMC MED ETHICS (Mar. 4, 2022), <https://doi.org/10.1186/s12910-022-00756-1> [<https://perma.cc/CP3X-B7NR>] (noting that Germany, Sweden, and the United Kingdom now allow donor-conceived people to access donor identity information, although China and Italy mandate anonymity).

5. Ethics Committee of the American Society for Reproductive Medicine, *Informing offspring of their conception by gamete or embryo donation: an Ethics Committee opinion*,

fight for access to genetic information by the adoptee community has recently gained momentum and broader acceptance,⁶ discussions on behalf of similar interests for donor-conceived people are only beginning to garner mainstream attention.⁷ But the same question continues to arise: how can the rights and interests of gamete donors and legal parents be reconciled with the rights and interests of donor-conceived people when they appear, at times, to conflict? This Article will address those questions.

Part II of this Article traces the early history and legal treatment of third-party donor conception in the United States to today, examining how certain harmful practices came to exist and why they continue. Part II then contrasts the lack of regulations in the United States to the laws enacted in other democracies and developed countries before detailing the harms that result from the lack of regulation.

Part III proposes that, as the literal product of third-party donor conception, the interests of donor-conceived people must be considered from the outset of the process. Part III also looks to legislation recently enacted in Colorado, legislation proposed in California, and growing public attention to the concerns of donor-conceived people. It then recommends other states adopt the same or similar legal protections as those in Colorado to protect donor-conceived people and their families by regulating the donor gamete industry and protecting diverse family structures.

Part IV addresses some of the anticipated public policy criticisms and potential legal challenges to such regulation and provides rebuttals to those attacks.

II. BACKGROUND

Today, for less than \$100, we can spit into a tube and one month later stare at a color-coded world map detailing the geographic and ethnic origins of our ancestors. On another page is a seemingly endless list of the hundreds of distant cousins we never knew existed. With a quick hop over to social media, we can learn which restaurants these mysterious relatives frequent, their favorite movie, relationship status, and whether we bear some resemblance. A few more web searches later, we can

109 FERTILITY & STERILITY 601, 602 (2018), <https://doi.org/10.1016/j.fertnstert.2018.01.001> [<https://perma.cc/ZQA7-63BC>] [hereinafter ASRM Ethics Committee].

6. See *id.*

7. See, e.g., Amy Dockser Marcus, *As Donors' Secrets Emerge, What Should the Children Know?*, WALL ST. J. (May 27, 2022), <https://www.wsj.com/articles/as-dna-donors-secrets-emerge-what-should-the-children-know-11653663778> [<https://perma.cc/VV5R-CCXN>].

possibly find an address for these members of our newly expanded family tree. And all of this became possible in fewer than twenty years.

Of course, this technological landscape was unimaginable during the formation of the donor gamete industry's earliest practices, under which secrecy and anonymity were identified as vital components. This section will explore why those practices developed and have largely continued, despite their detrimental impact on the people the industry creates.

A. America: The Birthplace of Modern Gamete Donation

America claims the first documented instance of sperm donation, which took place in a nineteenth-century Philadelphia medical facility.⁸ As the story goes, a healthy woman whose husband was diagnosed with azoospermia—a lack of sperm—was inseminated with sperm from a medical student. That sperm donor was chosen by the doctor based on his good looks. Upon discovering that his wife was pregnant, the husband requested his wife, who was inseminated while under anesthesia, never be informed about the use of donor sperm.⁹ Thus, sperm donation in America was quite literally born and bred amongst shame and secrecy.¹⁰

During the next century, the ensuing legal doctrines affecting third-party donor conception reinforced these beliefs. In 1954, an Illinois state court concluded that even if a husband consented to use of third-party donor sperm, the practice was “contrary to public policy and good morals, and considered adultery on the mother’s part.”¹¹ Some

8. 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, 478 (2010).

9. *Id.*

10. See Joanna E. Scheib & Rachel A. Cushing, *Open-Identity Donor Insemination in the United States: Is It on the Rise?*, 88 FERTILITY & STERILITY 231, 232 (2007), <https://doi.org/10.1016/j.fertnstert.2007.04.001> [<https://perma.cc/HXT5-UYS6>] (recognizing that heterosexual couples can be deterred from disclosing use of donor insemination due to stigma surrounding male-factor infertility). See generally PETER J. BONI, UPROOTED: FAMILY TRAUMA, UNKNOWN ORIGINS, AND THE SECRETIVE HISTORY OF ARTIFICIAL INSEMINATION (2022) (tracing the history of artificial insemination and third-party gamete donation from ancient origins to modern practices, and analyzing the historical precedents for secrecy and shame).

11. Jacqueline Gutmann & Tiffany Palmer, *Assisted Reproduction: What Does the Future Hold for the Intersection of Law and Science?*, 315 N.J. LAW. 46, 48 (2018) (quoting *Doornbos v. Doornbos*, No. 54-s-14981 (Super. Ct., Cook County, Ill. Dec. 13, 1954) (unreported), *appeal dismissed Doornbos*, 139 N.E.2d 844 (Ill. App. Ct. 1956) (unpublished)); see also Dan M. Cain, Note, *Artificial Insemination: A New Scientific Achievement Gives Rise to a Need for New Legislation in Texas*, 23 SMU L. REV. 575, 577 n.17–18 (1969), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=3840&context=smulr> [<https://perma.cc/T8N5-UNHX>] (describing the factual and procedural history of *Doornbos*).

thirty years before this, a court in Canada reached the same conclusion, albeit in dicta.¹²

But even for early commentators who balked at the idea that using third-party donor sperm was the equivalent of adultery,¹³ the belief that secrecy and anonymity were vital components of the procedure remained because of the “novelty of the technique,” which “would mean scandal or acute psychological pain for participants” in some communities.¹⁴ Thus, these commentators concluded that anonymity should be preserved for the “continued happiness and security of [the] donor, couple, doctor and child”¹⁵

In the years that followed, without legal structures to legitimate the families established through the process, the use of third-party donor sperm gave way to official medical practices to shield inseminating doctors from potential legal fallout.¹⁶ In general, this led to the

12. See Barbara K. Kopytoff, *Surrogate Motherhood: Questions of Law and Values*, 22 U.S.F. L. REV. 205, 216 (1988) (explaining that “[e]arly cases in the United States and Canada deemed artificial insemination by donor an adulterous act and the resulting child illegitimate”); see also *Doornbos*, No. 54-s-14981; *Orford v. Orford*, [1921] 58 D.L.R. 251 (Can. Ont.). See generally Allen D. Halloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A. J. 1089, 1091–92 (1957) (describing the facts and outcome of *Orford*, including that the commentary as to artificial insemination with donor sperm being adultery was dicta).

13. See *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, 58 YALE L.J. 457, 463–64 (1949) (“[Artificial insemination with donor sperm] is not literally included within any extant definition of adultery; therefore, it can be reasoned that a woman who practices it cannot be an adulteress and her offspring must be legitimate. This would follow inevitably if the law would take its basic premise from sex crimes. Then adultery will require intercourse which, as in the lay view, requires sexual penetration by an adulterer measured by the realistic criteria of rape. Since [artificial insemination with donor sperm] can no more square with one set of traditional concepts than the other, selection of the initial term controls the result. That initial selection depends primarily on whether the judge feels more moral indignation against the evils of sterility than against the encroachment by science on the legal reserves of family life.”).

14. *Id.* at 464.

15. *Id.*

16. See *id.* at 465 (“Faced with a legal attitude towards artificial insemination varying from opposition to disregard, the doctors have evolved a body of ‘ground rules’ in an attempt to police the practice and to obtain a degree of self-protection. Rightly noting that the crux of every question that turns on [artificial insemination with third-party donor sperm] is the status of the child or would-be-child with respect to its mother’s husband, institutional patterns and ground rules have been developed to attest and bind the mother and husband and child as a family.”).

Although this Article will not delve into the murky eugenic underpinnings of artificial insemination using donor sperm in the early twentieth century, it is worth noting that some early commentators were already making note of the same as part of the “ground rules” established by the medical community. See *id.* at 466–67 (“Medicine has included in its ground rules provisions capable of producing eugenically superior children in better

inseminating doctor sending the couple to a new physician for the child's birth—one completely unaware that donor sperm was used in the conception. This practice ensured the inseminating doctor did not knowingly falsely swear to the child's paternity on the eventual birth certificate.¹⁷

Yet professionals remained divided on how to hold donors, recipients, and the donor-conceived person to their so-called “proper spheres.”¹⁸ Some suggested the various roles, obligations, and consent be memorialized in “complex, signed, sealed, and fingerprinted bilateral agreements.”¹⁹ Others recommended complete abandonment of maintaining *any* records, “premising security on the legal presumption favoring legitimacy, the physician client privilege, and donor and couple selection designed to avoid the litigious.”²⁰

In terms of presumptive legitimacy, beginning with Georgia in 1968, the United States made progress defining heterosexual parentage rights and roles when using assisted reproduction technology, but those laws

homes than is true in most instances where the child is biologically related to its mother's spouse. In [artificial insemination using donor sperm,] these objectives are achieved by means of a simple operating code which requires that couples showing the biologic indications for heterologous insemination must demonstrate, prior to resort[ing] to [the procedure], average or better than average intelligence, marital and emotional stability, and absence of serious dysgenic characters in the female. The couple must also show reasonable financial ability to care for a child, and most important, both spouses must sincerely want to attempt [the procedure]. Professional concern for the broader eugenic and social aspects is further reflected in the factors which govern donor selection. Here the donor must be physically healthy, have no dysgenic hereditary traits, have a high spermatozoa count and motility index, and resemble the male spouse in racial, physical, and emotional setup. Married men with children are preferred. The children provide a test of physiological factors and a focus for the donor's parental affection. And finally the profession has been placed on guard against donor and doctor fees likely to make cost a prohibitive factor.” (footnotes omitted)). For commentary on this issue, see Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1895–96 (2009) (discussing the early focus on eugenics in donor conception, and providing citations to medical literature from the 1950s through the 1970s).

17. See *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, *supra* note 13, at 465 (“Most states require that both the obstetrician and the parents shall attest to registration statements of parenthood. Where the doctor knows the child to have been born via [artificial insemination using donor sperm], he must either swear falsely or sacrifice crucial secrecy. And of course the couple is always forced to face this false swearing dilemma For secrecy, if the doctor who inseminates the mother does not care to swear falsely with respect to the husband's paternity, the ground rules categorically advise him to send the couple elsewhere at birth that his brother in ignorance may innocently swear to the false.”).

18. *Id.*

19. *Id.*

20. *Id.*

often hinge upon a woman undergoing artificial insemination with donor sperm with her husband's consent.²¹ In 1981, twenty-three states had laws providing for the legitimacy of a child born to heterosexual couples as a result of donor insemination, with nine of those statutes modeled on the Uniform Parentage Act (UPA),²² which will be discussed in further detail *infra*.²³

But these legal advancements notwithstanding, medical practitioners *still* sent heterosexual couples home with instructions to never think of the procedure again, which included never telling their child the truth about their genetic parentage.²⁴

B. Where We Are Today: A Multi-Billion Dollar Industry

The first commercial sperm bank opened in Minnesota in the 1970s.²⁵ Thereafter, seventeen commercial sperm banks operated across the United States in the 1980s, which led to the birth of an estimated 20,000 babies.²⁶ The number of sperm banks exploded by 1999, with more than

21. See Ben-Asher, *supra* note 16, at 1895 (explaining that “[i]n 1968, Georgia was the first state to legitimize donor insemination by a statute providing a conclusive presumption of legitimacy when a child is born through donor insemination performed with the written consent of both husband and wife, and permitting only licensed physicians to perform the procedure”); see also *id.* at 1895 n.42 (“By the end of the 1970s at least fifteen states had statutes regulating donor insemination. All provided that the resulting child was the natural child of the recipient’s husband if the husband consented to the procedure. Five states required that the consent be filed with a state agency and six states, either directly or by implication, limited the practice of donor insemination to physicians.”).

Interestingly enough, the Supreme Court of Georgia recently interpreted Georgia’s statute, O.C.G.A. § 19-7-21 (“All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination.”), to apply only to children conceived through intrauterine insemination and to exclude children conceived through *in vitro* fertilization. See *Patton v. Vanterpool*, 302 Ga. 253, 253, 806 S.E.2d 493, 494 (2017) (“This appeal presents the question of whether [O.C.G.A. § 19-7-21’s] irrebuttable presumption applies to children so conceived by means of *in vitro* fertilization (IVF). We conclude that it does not.”). The Georgia General Assembly has not amended O.C.G.A. § 19-7-21 in the wake of *Patton*, and the potential domino effect of the statute’s plain language as interpreted by the Supreme Court of Georgia has yet to be further developed by caselaw or thoroughly explored by legal scholars.

22. Ben-Asher, *supra* note 16, at 1895; UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017).

23. See *infra* notes 195–202 and accompanying text.

24. Braverman, *supra* note 8, at 482.

25. Ben-Asher, *supra* note 16, at 1897 (noting that “commercial sperm banks have appeared in the fertility landscape since the 1970s, when the first for-profit bank opened its doors in Minnesota”).

26. Ben-Asher, *supra* note 16, at 1897; see Karen M. Ginsberg, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L.

100.²⁷ In 1984, egg donation was possible, and three years later, the Cleveland Clinic established the first egg donor program in the country.²⁸ Since then, the use of egg donation has steadily increased.²⁹

Today, approximately two dozen sperm banks operate in the United States with their ownership split amongst a handful of companies with large donation programs. The growth of large commercial sperm banks—and the disappearance of smaller programs—is traceable to the growing concern of potential HIV transmission through sperm donation in the 1980s,³⁰ which led to using quarantined frozen donor sperm (which is tested for infectious diseases³¹) as opposed to fresh specimens, making the donor insemination process more costly and complex.³² In 2015, an estimated 30,000–60,000 children were born as a result of sperm donation and more than 8,000 from egg donation in the multi-billion dollar gamete-donation industry.³³ Of course, without mandatory live-birth reporting, there is no way to know how many donor-conceived

REFORM 823, 826 (1997) (providing approximate numbers of births resulting from donor insemination).

27. Ben-Asher, *supra* note 16, at 1898.

28. Julianne E. Zweifel, *Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child*, 104 FERTILITY & STERILITY 513, 513 (2015); Associated Press, *Clinic in Ohio Starts Egg Donor Plan*, N.Y. TIMES, Jul. 15, 1987, at A16, <https://www.nytimes.com/1987/07/15/us/clinic-in-ohio-starts-egg-donor-plan.html>.

29. Zweifel, *supra* note 28, at 513 (noting then-most recent data from the Society for Assisted Reproductive Technology “indicate[s] a trend of about 18,000 egg donor cycles per year with each of those years resulting in 9,000–10,000 children”).

30. Some women were indeed infected with HIV through donated sperm. *See generally* MR Araneta et al., *HIV transmission through donor artificial insemination*, 273 JAMA 854 (1995).

31. *See generally* Amy Dockser Marcus, *FDA Faces Push to Loosen Rules for Sperm Donations*, WALL ST. J. (Apr. 25, 2022), <https://www.wsj.com/articles/sperm-donor-fda-hiv-hepatitis-b-11650826320> [<https://perma.cc/E5MV-4KVX>] (explaining that “[t]he FDA requires sperm banks to test all donors for HIV, the virus that causes AIDS, and other pathogens and to quarantine vials for at least six months so that the donors can be retested”).

32. Peter G. McGovern & William D. Schlaff, *Sperm donor anonymity: a concept rendered obsolete by modern technology*, 109 FERTILITY & STERILITY 230, 230 (2018), <https://doi.org/10.1016/j.fertnstert.2017.12.011> [<https://perma.cc/HN9T-XSDQ>].

33. *See* Rachel L. Emerson, *Privacy vs. Identity Rights: A Call for the United States to Adopt the United Kingdom’s “Open ID” System for Artificial Reproductive Technology*, 54 CASE W. RES. J. INT’L LAW 419, 434 (2022); Press Release, CooperSurgical to Acquire Generate Life Sciences, COOPER SURGICAL (Nov. 10, 2021), <https://www.coopersurgical.com/wp-content/uploads/Generate-Life-Sciences-Acquisition.pdf> [<https://perma.cc/JANG-FHQJ>] (announcing agreement to acquire leading sperm and egg donation parent company for \$1.6 billion). *See generally* Rachel Arocho et al., *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995–2017*, 112 FERTILITY & STERILITY 718 (2018), <https://doi.org/10.1016/j.fertnstert.2019.05.031> [<https://perma.cc/W7HC-BJ3Q>].

people are truly born each year.³⁴ But researchers estimate that from 2006 to 2017, more than 1.5 million women used donor sperm in the United States.³⁵

Despite shifting societal norms, increased use, and technological advancements, commercial gamete donation in the United States largely remains untouched by regulation or control. In contrast, in 1984, Sweden broke ground as the first country to ban anonymous sperm donation.³⁶ Today, Germany, Finland, Portugal, Sweden, the United Kingdom, New Zealand, the Netherlands, Austria, Norway, Switzerland, Ireland, Uruguay, Argentina, and the Australian states of Western Australia, South Australia, Victoria, and New South Wales all permit a donor-conceived person to identify the donor upon reaching the age of eighteen—or earlier in some countries.³⁷ Most recently, in 2022, France joined the growing list of countries to abolish anonymity, now requiring by law that donors consent to the disclosure of their identity when offspring turn eighteen.³⁸

34. See Sarah Zhang, *The Children of Sperm Donors Want to Change the Rules of Conception*, THE ATLANTIC (Oct. 15, 2021), <https://www.theatlantic.com/science/archive/2021/10/do-we-have-right-know-our-biological-parents/620405/> [https://perma.cc/498G-D27N].

35. See Arocho et al., *supra* note 33.

36. See Brigitte Clark, *A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins*, 40 GA. J. INT'L & COMPAR. L. 619, 633 (2012).

37. See Sonia Allan, *Donor identification: Victorian legislation gives rights to all donor-conceived people*, 98 FAMILY MATTERS 43, 52 (2016), <https://aifs.gov.au/research/family-matters/no-98/donor-identification> (listing the Australian states in addition to Austria, Croatia, the Netherlands, Norway, Finland, New Zealand, Sweden, Switzerland, the United Kingdom, Uruguay, Argentina, and Ireland, and providing citations to those laws); Vladimiro Silva, *Non anonymous egg, embryo and sperm donation in Portugal. Legal aspects, costs and availability.*, EUROPEAN FERTILITY SOCIETY, <https://www.myivfanswers.com/video/non-anonymous-egg-embryo-sperm-donation-portugal/> [https://perma.cc/U6CK-V8WW] (last visited Jan. 4, 2023) (explaining that Portugal banned anonymous donation in 2018); Ishii & Beriain, *supra* note 4 (noting that Germany permits donor identification).

38. *End of automatic anonymity for sperm and egg donors in France*, LE MONDE (Sept. 1, 2022), https://www.lemonde.fr/en/france/article/2022/09/01/end-of-automatic-anonymity-for-sperm-and-egg-donors-in-france_5995495_7.html [https://perma.cc/DL7R-XPWQ]. France is also developing a commission to assist existing donor-conceived adults in their quest to learn more about their biological origins. *Id.* And as of February, 2023, the Australian state of Queensland is considering abolishing anonymous sperm donation. Australian Associated Press, *Queensland moves to allow sperm donors to be identified by those conceived via donation*, THE GUARDIAN (Feb. 28, 2023), <https://www.theguardian.com/australia-news/2023/feb/28/queensland-moves-to-allow-sperm-donors-to-be-identified-by-those-conceived-via-donation> [https://perma.cc/SY7X-R33N].

In the United States, however, the U.S. Fertility Clinic Success Rate and Certification Act of 1992³⁹ is the *only* federal law specifically regulating assisted reproductive technologies. The extent of its regulation requires fertility clinics to report pregnancy success rates for annual publication by the Centers for Disease Control.⁴⁰ In terms of oversight by the Food and Drug Administration (FDA), its regulation of human cells, tissues, and cellular and tissue-based products requires donor gametes and embryos handled by covered entities to be subject to limited record-keeping and screening for communicable diseases.⁴¹ The FDA rejected a petition in 2018 to further regulate in this area.⁴²

At the state level, aside from legislation only recently enacted in Colorado and discussed *infra*, no other comprehensive state laws meaningfully regulate gamete donation.⁴³ Finally, in terms of self-regulation, the American Society for Reproductive Medicine (ASRM) maintains a set of non-binding guidelines⁴⁴ that are entirely aspirational and voluntary because, as a professional organization, ASRM has no legal enforcement power.⁴⁵

Some commentators have outwardly celebrated the lack of regulation in the United States: “[L]ack of regulation and a relatively low price for the gametes means that it is both an open market in which a large number of people can participate, and a free market that flourishes

39. See Fertility Clinic Success Rate and Certification Act of 1992, Pub.L. No. 102-493, 106 Stat. 3146.

40. See 42 U.S.C. §§ 263a-1-a-7.

41. See 21 C.F.R. § 1271.1 (2023).

42. See Ariana Eunjung Cha, *44 Siblings and Counting*, WASH. POST (Sept. 12, 2018), <https://www.washingtonpost.com/graphics/2018/health/44-donor-siblings-and-counting/> [<https://perma.cc/F53H-PB3K>] (noting that the FDA rejected a petition to regulate the number of live births per donor because “such oversight exceeds [its] mission”).

43. See Naomi Cahn & Sonia M. Suter, *The Art of Regulating ART*, 96 CHI-KENT L. REV. 29, 42 (2021) (describing state regulation of ART as “a patchwork of highly variable laws” that range from regulation of embryo research and disposition, bans on cloning, licensing standards, and insurance laws). New York regulates donor eligibility requirements. See 10 NYCRR § 52-8.5 (2000) (providing for specific donor qualifications).

44. American Society of Reproductive Medicine, *Guidance regarding gamete and embryo donation*, 115 FERTILITY & STERILITY 1395 (2021), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/recs_for_gamete_and_embryo_donation.pdf [<https://perma.cc/48L3-866P>] [hereinafter ASRM].

45. See Cahn & Suter, *supra* note 43, at 43 (“[P]rofessional guidelines by such organizations as [ASRM] function as a form of quasi-regulation.”); *id.* at 63–64 (“[P]rofessional organizations have no enforcement authority; they depend on voluntary compliance. Relatedly, they are not accustomed to directly overseeing safety with their own members, but instead rely on the diligence and accuracy of those regulated to self-report and self-monitor any problems.” (footnotes omitted)).

because of its comparative freedom from regulation.”⁴⁶ But in the absence of meaningful regulation, the U.S. fertility industry’s policies and practices fail to adequately consider and protect the interests of the people created through third-party gamete donation, despite calls even from within the industry itself to center the interests of donor-conceived people.⁴⁷

C. *What About the Donor-Conceived Person?*

In 1957, attorney Allen D. Halloway had the foresight to question the use of donor sperm’s impact on the person actually created, writing in the *American Bar Association Journal* that

[t]he proponents for artificial insemination [using donor sperm] stress the happiness brought to childless marriages and the biologic benefit to a wife in being able to give birth to her child. It seems to me there must also be taken into account the ultimate product, the child. How is he or she affected? . . . Is the mother’s happiness greater than the resultant child’s happiness?⁴⁸

Halloway further opined that the secrecy surrounding donor insemination was “frightening,” observing that “[a] secret, like murder, will eventually become known.”⁴⁹ Finally, Halloway considered the potential for consanguinity because only the inseminating doctor would know the donor’s identity.⁵⁰ He predicted the “records which would be needed to control this aspect would eventually be monumental” and believed the “tremendous trust” required of the profession could “lead to serious if not disastrous results” if misused or carelessly employed.⁵¹

Ultimately Halloway stressed the necessity of “a very thorough study” of the practice “by all the various groups and professions interested, including legislators in each state, to the end of adopting some uniform

46. See Martha M. Ertman, *What’s Wrong with A Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 16 (2003).

47. See Braverman & Schlaff, *supra* note 1, at 1102 (“The world of family building demands that we consider the donor-conceived persons at the center of patient-centered care.”).

48. Halloway, *supra* note 12, at 1092.

49. *Id.* at 1156.

50. *Id.*

51. *Id.* Inexcusably, racist ideology motivated Halloway’s concern. But decades later, as we hear increasing discoveries of “doctor-donor fertility fraud” (in which a doctor secretly inseminates a patient with his own sperm rather than use the selected donor), Halloway was correct about the potential for abuse. See generally Sydni R. Eibschutz, “Dr., I Don’t Want Your Baby!”: *Why America Needs a Fertility Patient Protection Act*, 106 IOWA L. REV. 905 (2021); OUR FATHER (Netflix 2022).

statute” and to avoid the creation of a “tragic situation” that would “be only tardily utilized as a test case involving some . . . phase of artificial insemination [with donor sperm].”⁵²

This sentiment was shared even a decade earlier in an uncredited piece published in the Yale Law Journal,⁵³ which presciently recognized that “[w]hile enactment of model legislation is urgently needed now, the likelihood [sic] of diversity among the statutes, if the several states are left to treat the issue, creates questions in the conflict of laws.”⁵⁴ Even in 1949, the use of donor gametes was “a case study in the technique of change.”⁵⁵ As the Yale author so eloquently noted, “[f]or even after growth and innovation are no longer branded as undesirable, there remains the task of formally and gracefully accommodating them within a culture.”⁵⁶

These early commentators identified and highlighted how the interests of the resulting person would be impacted in the long term and the urgent need even then for legislation to regulate the practice. But in the absence of meaningful consideration of either point in the intervening years, harmful policies and practices have continued to flourish.

1. Parental Non-Disclosure is Destructive

As discussed *supra*, secrecy and non-disclosure of a donor-conceived person’s status harken back to the early days of third-party donor conception. As same-sex couples and single mothers by choice began using the services of sperm donors, the ability—and desire—to maintain

52. Halloway, *supra* note 12, at 1156.

53. See *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, *supra* note 13, at 467 (“Despite this complex of regulation, the law remains a persistent hazard to the doctors’ attempts to save couples, donors, children and themselves from the reality of severe social and legal complications. Detailed analysis of the problems involved suggests that legislative decision is the only ultimate solution. The status of all the parties must be reviewed and made official; and if the related genetics and financial considerations are to be left in the shadowland of professional rule, this lacuna should be the product of purpose and not of default.” (footnote omitted)).

54. *Id.* at 469.

55. *Id.*

56. *Id.*

such secrets in third-party gamete donation also shifted.⁵⁷ But ASRM only started to strongly “encourage” disclosure by parents in 2004.⁵⁸

In the meantime, studies have revealed that, as with late disclosure of a person’s status as an adoptee,⁵⁹ late disclosure of a person’s donor-conceived status results in shock, distress, and feelings of having been deceived.⁶⁰ And mothers who have not informed their children about their conception through donor gametes report higher levels of distress compared to mothers who *have* disclosed,⁶¹ not to mention the “prevailing wisdom of mental health professionals . . . that secrecy, or nondisclosure, results in a family atmosphere of tension and distance that impedes

57. Braverman, *supra* note 8, at 482; see Scheib & Cushing, *supra* note 10, at 232 (noting that “single women and lesbians almost always are open about their use of [donor insemination] and consequently may want the option of open-identity donation for their children”).

58. See Ethics Committee for the American Society for Reproductive Medicine, *Informing Offspring of Their Conception by Gamete Donation*, 81 FERTILITY & STERILITY 527, 527 (2004), <https://doi.org/10.1016/j.fertnstert.2003.11.011> [<https://perma.cc/DTF2-TJK2>] [hereinafter *Informing Offspring*] (explaining that “[w]hile ultimately the choice of recipient parents, disclosure to offspring of the use of donor gametes is encouraged”); see also Clark, *supra* note 36, at 657–58. A 2007 survey group showed a discrepancy between disclosure by heterosexual couples versus disclosure by lesbian parents or single mothers by choice. See Vasanti Jadvā et al., *The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type*, 24 HUMAN REPROD. 1909 (2009), <https://doi.org/10.1093/humrep/dep261> [<https://perma.cc/2TGF-EXKT>] (finding that, in a 2007 survey group of 165 donor-conceived people, 56% of children raised by lesbian couples were told between the ages of zero to three, 63% of those raised by single mothers by choice were told between the ages of zero to three, and 9% of those raised by heterosexual couples were told between the ages of zero to three; whereas 33% of those raised by heterosexual couples were told when they were older than eighteen and 0% were told at that age when raised by single mothers by choice or lesbian couples); see also Clark, *supra* note 36, at 623 (noting that “[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”).

59. *The Best Time to Disclose Adoption Status to Children*, MONTCLAIR STATE UNIVERSITY (July 22, 2019), <https://www.montclair.edu/newscenter/2019/07/22/the-best-time-to-disclose-adoption-status-to-children/> [<https://perma.cc/7M66-EB3T>] (reporting on study that found disclosure of adoption past the age of three resulted in greater emotional distress and lower life satisfaction).

60. See Ishii & Beriain, *supra* note 4; Jadvā et al., *supra* note 58, at 1911 (finding that survey respondents who learned of their donor conception as adults reported feelings of confusion (69%), shock (75%), upset (44%), isolation (41%), numbness (38%), and anger (38%), and noting that those told during adulthood were more likely to report feeling ashamed); *id.* at 1917 (explaining that survey findings were “in line with research on adoption which shows that adopted individuals benefit from early disclosure about their origins”).

61. Zweifel, *supra* note 28, at 514.

healthy parent-child communication.”⁶² Further, when a donor-conceived person learns the truth of their conception through an at-home DNA test or communications with a non-parent privy to the information, this “unintended pathway to disclosure creates a potential threat to trust in parent-child relationships.”⁶³

Without an earlier widespread course correction by the industry to rectify years of bad advice that discouraged disclosure, the result is that generations of donor-conceived people are belatedly learning they are donor conceived—not to mention the untold number that are not yet aware, or might never be aware, that they are donor conceived.

2. The Haunting Vestige of Promised Anonymity

Donor anonymity is another relic of the earliest iterations of the industry that remains in practice today. A 1991 study of sperm donors in two U.S. programs acknowledged that “[o]ver the years, the belief developed that donors themselves were unwilling or reluctant to provide in-depth [personal] information . . . and would not donate if required to do so.”⁶⁴ That analysis concluded, however, this was not the case, as 90% of the donors subject to the study willingly completed lengthy application forms, 60% indicated a willingness to meet and connect with offspring in the future, and 72% included a personal message to future offspring. The study intended to “redefin[e] the ‘truths’ about donor attitudes.”⁶⁵

In 1983, The Sperm Bank of California (a nonprofit) implemented the first program to allow donor identification release to adult donor-conceived people in response to requests from its customers—primarily lesbian couples and single mothers by choice—who wanted their children to have this option.⁶⁶ Empirical studies suggest that “most [donor-conceived offspring] are interested in gaining more information about [the] donor”⁶⁷ and that donor-conceived people accept the practice

62. *Id.* at 515; see Anne Brewaeys, *Review: parent-child relationships and child development in donor insemination families*, 7 *HUM. REPROD.* 38, 39 (2001) (noting that “patients cited as causes of distress the uncertainty and isolation resulting from the secrecy involved” in donor insemination).

63. Zweifel, *supra* note 28, at 515.

64. Patricia P. Mahlstedt & Kris A. Probasco, *Sperm donors: their attitudes toward providing medical and psychosocial information for recipient couples and donor offspring*, 56 *FERTILITY & STERILITY* 747, 748 (1991), [https://doi.org/10.1016/S0015-0282\(16\)54610-X](https://doi.org/10.1016/S0015-0282(16)54610-X).

65. *Id.* at 753.

66. See Joanna E. Scheib & Alice Ruby, *Contact among families who share the same sperm donor*, 90 *FERTILITY & STERILITY* 33, 34 (2008) (describing the history of The Sperm Bank of California’s open-identity donor program).

67. Zweifel, *supra* note 28, at 514–15. Research “suggest[s] that children who express little interest in the[] donor may be doing so out of concern for their social parent’s feelings”

of third-party gamete donation “if the donor is identifiable and the parents disclose the use of a donor to their child at an early age.”⁶⁸ A 2017 study revealed that “[donor-conceived] [a]dult interest in contacting the donor . . . and possibly forming a relationship . . . signified the relevance of genetic relatedness and origins knowledge to both identity formation and the identification of important people, even in the absence of a social connection.”⁶⁹ Thus, the researchers concluded that “sharing the family’s donor origins with the [donor-conceived] person, as well as considerable nonidentifying knowledge about the donor . . . were *not enough* to address information needs of these adults.”⁷⁰ The study also revealed that “the potential for information and contact holds considerable importance to the [donor-conceived] person, as was clear from the strong negative responses of adults whose donors took away that potential” by rejecting contact.⁷¹

Consistent with these findings are the results of a 2020 survey in which 76% of nearly 500 donor-conceived respondents did not support anonymous gamete donation, whereas 53% were comfortable with the use of non-anonymous or identifiable gamete donors.⁷² 81% of donor-conceived respondents supported ending fully anonymous gamete donations.⁷³ In a 2021 survey of 148 donor-conceived individuals, researchers concluded that “for the future well-being of all involved, anonymous donation ought to be discouraged.”⁷⁴ And according to a 2022 survey, a majority of Americans support the idea that donor-conceived adults should “have a legal right to receive information on their donors’

because the interest “may be perceived in some families as hurtful to the parent without the genetic link.” Scheib & Ruby, *supra* note 66, at 40.

68. Zweifel, *supra* note 28, at 515.

69. Joanna Scheib et al., *Who requests their sperm donor’s identity?*, 107 FERTILITY & STERILITY 483, 491 (2017), <https://doi.org/10.1016/j.fertnstert.2016.10.023> [<https://perma.cc/952M-MULR>].

70. Scheib et al., *supra* note 69, at 491 (emphasis added).

71. *Id.*

72. *2020 We Are Donor Conceived Survey Report*, WE ARE DONOR CONCEIVED (Sept. 17, 2020), <https://www.wearedonorconceived.com/2020-survey-top/2020-we-are-donor-conceived-survey/> [<https://perma.cc/ES5X-MFPL>] (support for anonymous and non-anonymous donor agreements).

73. *Id.* (supporting specific reforms).

74. Rennie Burke et al., *How Do Individuals Who Were Conceived Through the Use of Donor Technologies Feel about the Nature of Their Conception?*, HARVARD MED. SCH. CTR. FOR BIOETHICS (Apr. 1, 2021), <https://bioethics.hms.harvard.edu/journal/donor-technology> [<https://perma.cc/B98A-PR59>].

identit[y] after turning [eighteen],”⁷⁵ despite 45% of respondents also believing required identity release would decrease the number of willing donors.⁷⁶ Furthermore, donors who have agreed to release their identifying information when their offspring turn eighteen report mostly positive experiences⁷⁷ and support the removal of anonymity.⁷⁸

Today, some of the largest sperm banks in the United States have shifted away from fully anonymous donors and require all new donors to consent to release of their identity to requesting offspring at age eighteen.⁷⁹ But some of these same companies continue to sell old stock of anonymous sperm⁸⁰ and accept anonymous egg donations at their egg

75. *Egg and Sperm Donation YouGov Poll: June 10–14, 2022*, YOUGOV AMERICA (July 8, 2022), <https://today.yougov.com/topics/society/articles-reports/2022/07/08/egg-and-sperm-donation-yougov-poll-june-10-14-2022> [<https://perma.cc/356G-WCMJ>].

76. *Id.*

77. See Aneta Skoog Svanberg et al., *Psychosocial aspects of identity-release gamete donation—perspectives of donors, recipients, and offspring*, 125 *UPSALA J. OF MED. STUDIES* 175, 176 (2020).

78. See Susanna Graham, *The opposite of a step-parent—The genetics without any of the emotion: ‘sperm donors’ reflections on identity-release donation and relatedness*, 14 *REPROD. BIOMEDICINE & SOC’Y ONLINE* 192, 195 (2022), <https://doi.org/10.1080/03009734.2019.1696431> [<https://perma.cc/47HY-JAMV>].

79. The release of the donor’s identity at eighteen does not necessarily mean the donor has also agreed to have contact with the donor-conceived offspring, as some banks specifically market donors who *have* agreed to at least one instance of contact. See *Donor Search*, CA. CRYOBANK, <https://www.cryobank.com/search/> [<https://perma.cc/2YW8-9JCG>] (last visited Mar. 1, 2023) (offering twenty-five donors open to at least one instance of contact as of March 1, 2023).

80. *Id.* (offering 102 anonymous donors and 175 donors whose identity can be released when the donor-conceived person turns eighteen as of March 1, 2023); *Donor Search*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/search/> [<https://perma.cc/CQ6V-SEGV>] (last visited Mar. 1, 2023) (offering sixty-nine anonymous donors and 163 donors whose identity can be released when the donor-conceived person turns eighteen as of March 1, 2023); *Sperm Donor Search*, XYTEX CORP., <https://www.xytext.com/search-donors> [<https://perma.cc/Y4LB-3UWS>] (last visited Mar. 1, 2023) (offering 133 anonymous donors and 674 donors whose identity can be released when the donor-conceived person turns eighteen as of March 1, 2023).

banks.⁸¹ Still, other banks only continue to accept and market anonymous donors.⁸²

3. Donor-Conceived Siblings: The Value of Connection & The Harm of Large Groups

In countries that either ban *or* mandate donor anonymity, there are limits on the number of offspring allowed in each family and the families that can be established with the gametes from one donor.⁸³ For instance, in China, Spain, Hong Kong, and Taiwan, where anonymity is mandated, donors are limited to five pregnancies (China), six offspring (Spain), three offspring (Hong Kong), and one offspring (Taiwan).⁸⁴ In France, Germany, Denmark, the United Kingdom, Croatia, New Zealand, Austria, and states in Australia where anonymity has been legally abolished, donors are limited to ten offspring (France), fifteen offspring (Germany), twelve offspring (Denmark), five women (New South Wales (Australia)), ten women (Victoria (Australia)), three offspring (Croatia), and use in up to ten families (United Kingdom), six families (France), five families (New Zealand, Western Australia (Australia)), and three couples (Austria).⁸⁵

81. See *What is the Difference Between Being a Non-disclosure and ID Disclosure Egg Donor?*, DONOR EGG BANK USA, <https://donoreggbankusa.com/our-egg-donors/donate-eggs> [<https://perma.cc/QK65-MYF5>] (last visited Jan. 4, 2023) (explaining that egg donors may choose whether to have their identities released to donor-conceived offspring at age eighteen); *What is an ID Option Donor?*, FAIRFAX EGG BANK, <https://www.fairfaxeggbank.com/donor-learning-center/egg-donor-faqs/> [<https://perma.cc/75FZ-HPGZ>] (last visited Jan. 4, 2023) (same).

82. See *Donor List*, CRYOGAM COLO., <https://www.cryogam.com/donor-list> [<https://perma.cc/AM4B-37PY>] (last visited Mar. 1, 2023) (explaining that all donors are anonymous as of March 1, 2023); *Anonymous Donor Sperm Program*, INT'L CRYOGENICS INC., <https://www.internationalcryo.com/anonymous-donor-sperm/anonymous-donor-sperm-program> [<https://perma.cc/GE47-572L>] (last visited Mar. 1, 2023) (explaining that program only uses anonymous donors as of March 1, 2023).

83. See Cha, *supra* note 42.

84. See *id.* (providing limits for China, Spain, Hong Kong, and Taiwan).

85. See *id.* (providing limits for Germany, Denmark, and the United Kingdom); see also Assisted Reproductive Treatment Amendment Act 2021 (VR) pt 2 § 19 (Austl.) (providing limit for Victoria, Australia); Assisted Reproductive Technology Act 2007 No. 69 (NSW) pt 2 div 3 § 27(1) (Austl.) (providing limit for New South Wales, Australia); Human Reproductive Technology Directions 2021 (WA) pt 8 § 8.1 (Austl.) (providing limit for Western Australia, Australia); FORTPFLANZUNGSMEDIZINGESETZ [FMEDG] [REPRODUCTIVE MEDICINE ACT] BUNDESGESETZBLATT [BGBl] No. 275/1992, as amended, § 4, § 14(2) (Austria) (providing limit for Austria); Andrea Rodrigo and Sandra Fernández, *Regulations governing egg and sperm donation in Croatia*, INVITRA (June 13, 2016), <https://www.invitra.com/en/regulations-governing-egg-and-sperm-donation-in-croatia/> [<https://perma.cc/A4NZ-HPSB>] (providing limit for Croatia).

In contrast, in the United States, banks, clinics, and agencies create their own policies in response to the demand of consumers because the only guidance they receive is from the nonbinding *suggestion* by ASRM to limit the number of offspring from any one donor to twenty-five within a population of 800,000.⁸⁶ Under that standard, using the population of the United States at the time of the 2020 census, it is permissible to produce more than 10,000 offspring from one donor within the United States alone.⁸⁷

Studies show that connections between families with children born from the same donor are generally viewed positively, with recipient parents who engage in such meetings often considering their children's half siblings "family."⁸⁸ But most banks, clinics, and agencies do not offer registries by which donor-conceived half siblings may identify one another and form a connection if desired.⁸⁹ Thus, organic identification methods have sprouted from the desire to identify not only gamete donors but siblings born to other families. The privately-operated Donor Sibling Registry was established in the United States in 2000 and permits donors and donor-conceived people to attempt identification by matching the

86. ASRM, *supra* note 44, at 1400 ("It has been suggested that in a population of 800,000, limiting a single donor to no more than 25 births would avoid any significant increased risk of inadvertent consanguineous conception."); see Tabitha Freeman et al., *Gamete donation: parents' experiences of searching for their child's donor siblings and donor*, 24 HUMAN REPROD. 505, 506 (2009) (noting that the number of offspring produced per donor is "open to the discretion of individual fertility clinics in a commercial market that may be driven more by consumer demand than limited by ethical considerations").

87. *Population*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045221> [<https://perma.cc/E7WA-72FG>] (last visited Jan. 4, 2023) (providing that the population of the United States in 2020 was 331,449,281). Using the estimated world population in 2019, ASRM's guideline would permit the birth of more than 200,000 offspring per donor worldwide. See *World Population History*, WORLD POPULATION REV., <https://worldpopulationreview.com/> [<https://perma.cc/NL28-NXRQ>] (last visited Jan. 4, 2023) (providing that the estimated world population in 2019 was 7,715,000,000).

88. See Freeman et al., *supra* note 86, at 511, 513 (noting that, in a study of parents who connected with their child's donor-conceived siblings, the overwhelming majority reported the experience positively and that their "descriptions of their child's relationship with their donor siblings also conveyed a sense of family, with children generally choosing to refer to their donor siblings as 'brothers' and 'sisters', and developing close attachments with them"); Scheib & Ruby, *supra* note 66, at 36–37, 39 (noting that in study of families who had connected with other families who used the same donor, "participants described contact as a way to create family—not for them, but for their children"; that while "only about one-third of participants viewed their relationship to the matched family as family, . . . two-thirds viewed their child's relationship as family"; and that the findings "suggest that contact among donor-linked families can be a very positive and exciting experience").

89. *2022 Sperm Bank Survey Results*, U.S. DONOR CONCEIVED COUNCIL (forthcoming 2023) (on file with the author).

unique number assigned to a donor at the time of donation.⁹⁰ And, of course, at-home DNA tests now provide the opportunity to identify and locate siblings who might not have been told about their donor-conceived status.⁹¹

These methods of identifying siblings have led to the revelation that, consistent with the lack of binding family limits in the United States, dozens to *hundreds* of offspring have indeed been born from the donations of a single gamete donor.⁹² Some donor-conceived sibling groups must resort to using databases and spreadsheets to keep track of each other,⁹³ and the ever-expanding growth of sibling groups can make it difficult to establish close relationships despite feelings of relatedness.⁹⁴ Additionally, large sibling groups must contend with when, how, and whether to contact and then share information about previously anonymous donors depending on individual sibling desires and interests, which can become particularly tricky with donors whose identities are released when the oldest sibling turns eighteen, but other members remain minors.⁹⁵ And the existence of large sibling groups could spread

90. See Freeman et al., *supra* note 86, at 506 (“The US-based worldwide registry, the Donor Sibling Registry (DSR), was founded in 2000 in order to counter the constraints faced by members of donor conception families wishing to trace donor relations by providing a mechanism for facilitating contact between families who share the same donor [using a donor’s unique identification number].”).

91. See Ishii & Beriain, *supra* note 4 (acknowledging that the use of direct-to-consumer DNA testing can lead to donor siblings identifying and contacting one another).

92. See, e.g., Marcella Robertson, “*This is a loophole*”: *Why a family created via anonymous sperm donation wants to see industry changes*, WUSA (May 18, 2022), <https://www.wusa9.com/article/features/originals/advocates-want-sperm-donation-fertility-industry-regulated-fairfax-cryobank-colorado-legislaton-removes-anonymity/65-1367d710-b791-4e2d-91a7-bc5077658277> [<https://perma.cc/F2HA-3L75>] (concerning sibling group of 237); Eli Baden-Laser, *A Family Portrait: Brothers, Sisters, Strangers*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/magazine/sperm-donor-siblings.html> [<https://perma.cc/G5JB-LVFP>] (concerning sibling group of thirty-two); Farah Otero-Amad, *A modern family: 20-plus sperm donor siblings find each other*, NBC NEWS (Nov. 2, 2019), <https://www.nbcnews.com/news/us-news/modern-family-20-plus-sperm-donor-siblings-find-each-other-n1071656> [<https://perma.cc/8V6Q-QANK>] (reporting that the largest sibling group to connect through the Donor Sibling Registry is 200); Cha, *supra* note 42 (concerning sibling group of forty-five).

93. Cha, *supra* note 42.

94. Rosanna Hertz, *Sociological Accounts of Donor Siblings’ Experiences: Their Importance for Self-Identity and New Kinship Relations*, 19 INT’L J. OF ENVTL RES. & PUB. HEALTH (SPECIAL ISSUE) (2022), <https://doi.org/10.3390/ijerph19042002> [<https://perma.cc/R4BV-D3QE>].

95. *Id.* at 11–12; see Joanna Scheib et al., *Finding people like me: contact among young adults who share an open-identity sperm donor*, 2020 HUM. REPROD. OPEN 1, 10 (2020) (noting the potential complexities around donor and donor offspring contact within sibling

rare genetic diseases and fears of accidental incest.⁹⁶ Finally, studies show that donors who are open to the release of their identity desire to limit the number of offspring who may contact them in the future, and most of such donors would like to know when their donations result in pregnancy and birth.⁹⁷

In light of these considerations, researchers describe it as “crucial that donor siblings are incorporated into discussions about the regulation of gamete donation, with a key consideration being the number of donor offspring to be conceived using any one donor.”⁹⁸ Large sibling numbers could impede the formation of close relationships between siblings due to overwhelming numbers.⁹⁹ Likewise, they could detrimentally impact donors who are otherwise open to releasing their identity.¹⁰⁰

groups with members who are a variety of ages and differ in their desire for such contact or information).

96. See Benjamin T. Forman, Note, *Statutory Requirements for Artificial Insemination: A Sperm Donors' Fight to Let Go of His Rights*, 9 PITT. J. ENV'TL PUB. HEALTH L. 66, 79, 89 (2014); see also Gunilla Sydsjö et al., *The optimal number of offspring per gamete donor*, 94 Acta Obstetrica et Gynecologica Scandinavica 1022, 1022–26 (2015) (concluding that donor offspring should be limited to ten per 10 million inhabitants to mitigate spread of rare genetic diseases and consanguinity).

97. See Svanberg et al., *supra* note 77, at 176 (“For identity-release gamete donors, the number of children conceived with their gametes is of particular interest, since the offspring will be able to obtain the donor’s identity and may attempt to contact the donor. However, only one study was found investigating donors’ views regarding the number of children a donor may conceive. About half of 235 oocyte and sperm donors 5–8 years after their donation regarded 1–10 children to be an acceptable number of offspring from one donor, with oocyte donors more often supporting an upper limit than sperm donors. Following identity-release donation, a majority of both oocyte and sperm donors would like to be informed if their donation results in pregnancy and birth.” (footnotes omitted)).

98. Freeman et al., *supra* note 86, at 514; see Scheib & Ruby, *supra* note 66, at 41 (“Current findings also hold implications for setting limits on the number of individuals or families that any one donor can help create.”).

99. See Scheib et al., *supra* note 95, at 10 (noting that the benefits of sibling contact “depend on the numbers of people conceived with the help of any one donor” because “large groups can be perceived as ‘very uncomfortable and a bit unhealthy’, detracting from the overall experience and, among other issues, putting individuals at risk of losing their sense of individuality and not being able to maintain meaningful contact” (citations omitted)).

100. See Scheib & Ruby, *supra* note 66, at 42 (“For those who seek contact with donor-linked families, having the possibility of meeting several families may be very appealing. This number becomes daunting, however, when the number of individuals to whom one is related climbs from 5 to 30 or more. It is unclear how such high numbers will impact families. It is certainly something that will need to be addressed not only for the childrens’ well-being but also for the effect on open-identity donors and their families.”); see also *Half-Sibling Cohorts of 100 or 200 or More: What’s the Problem?*, THE DONOR SIBLING REGISTRY BLOG (July 5, 2021), <https://donorsiblingregistry.com/blog/half-sibling-groups-of-100-or-more-than-200-what-s-the-problem> [<https://perma.cc/9U86-CXN7>] (reporting that a

4. Donor-Conceived People Lack Access to Accurate and Updated Health Histories

According to the Centers for Disease Control and Prevention (CDC), “[k]nowing and acting on your family health history can be an important part of staying healthy” because “[f]amily health history can help your doctor decide what screening tests and other interventions you need and when.”¹⁰¹ Likely in recognition of this reality, ASRM’s infertility patient intake form includes detailed questions regarding family medical history.¹⁰² Yet complete knowledge of family medical history is often missing for donor-conceived persons—either because they do not know they are donor conceived or because the history provided by the donor was incomplete or false.¹⁰³

As previously discussed, during the formative years of modern gamete donation, there was a distinct hesitancy to maintain records that could connect donors and recipients. Thus, it is perhaps unsurprising that even today no binding federal regulation or guideline requires gamete banks and agencies to *permanently* maintain donor records, with the FDA only requiring record retention for “at least 10 years.”¹⁰⁴ Nor are entities

donor with thirty-six offspring said he took “a while to respond” because he “didn’t know what to do” because he was “overwhelmed”).

101. *Family Health History for Adults*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/genomics/famhistory/famhist_adults.htm [<https://perma.cc/RSD6-4YXX>] (last visited Jan. 4, 2023).

102. *See, e.g., American Society for Reproductive Medicine Infertility Patient Intake Form*, WAKE FOREST BAPTIST HEALTH, <https://www.wakehealth.edu/-/media/WakeForest/Clinical/Files/Reproductive-Medicine/WFBH-ASRM-Intake-Form.pdf> [<https://perma.cc/L3VF-7TYG>] (last visited Jan. 4, 2023).

103. *See, e.g., Norman v. Xytex*, 310 Ga. 127, 848 S.E.2d 835 (2020) (concerning case in which, despite claims by sperm bank that it carefully screened donors’ personal and family health history, donor who was previously diagnosed with psychotic schizophrenia, narcissistic personality disorder, and significant grandiose delusions lied about, *inter alia*, his mental health, and bank never verified his self-reported information); *Johnson v. Superior Ct.*, 124 Cal. Rptr. 2d 650, 654 (Cal. Ct. App. 2002) (concerning case in which, despite donor’s disclosure of family history of kidney disease, information was not provided by cryobank to the gamete recipients at or prior to time of selecting the donor); Amy Dockser Marcus, *A Son’s Death Raises Questions about Sperm Donor’s Medical History*, WALL ST. J. (Jan. 19, 2022), <https://www.wsj.com/story/a-sons-death-raises-questions-about-sperm-donors-medical-history-52053a3c> [<https://perma.cc/T422-DUDX>].

104. *See ASRM, supra* note 44, at 1401 (“The Food and Drug Administration requires that records pertaining to each donor (screening and test results) be maintained for at least 10 years; some states may be required to maintain record for longer. However, in the opinion of ASRM, a permanent record of each donor’s screening and test results should be maintained. As far as possible, clinical outcome should be recorded for each donation cycle. A mechanism to maintain such records should exist as a future medical resource for any offspring produced.”).

required to acquire periodic updates to those records or apprise gamete recipients or the resulting donor-conceived person of developments to the donor's personal or family medical history. Without access to accurate and updated family health information, some have questioned whether a donor-conceived adult can provide informed consent to their own healthcare treatment.¹⁰⁵

III. DEMANDS FOR CHANGE LEAD TO GROWING ATTENTION & NEW REGULATION

In 2022, focus on the policies and practices of the third-party donor gamete industry increased thanks to legislation enacted in Colorado, legislation proposed in California, additional media attention, and advocacy efforts by donor-conceived people.

A. Colorado's "Donor-conceived Persons and Families of Donor-conceived Person's Protection Act"

In June 2022, Colorado became the first North American jurisdiction to enact meaningful regulation of commercial gamete donation with the "Donor-conceived Persons and Families of Donor-conceived Persons Protection Act."¹⁰⁶ Colorado State Senate President Stephen Fenberg introduced the Act as S.B. 22-224, explaining that "[a]nonymity is a promise that cannot be kept due to the popularity of at-home DNA testing," and that the then-bill "recognizes this reality and affirms that while shared DNA does not always make a family, the identity of the donor is important to the health and identity of many donor conceived persons."¹⁰⁷ During S.B. 22-224's final reading in the Colorado House of

The American Medical Association also recommends permanent record retention, though not for purposes of providing donor-conceived people with access to those records. See *Gamete Donation*, Code of Medical Ethics Opinion 4.2.2(f)(i)–(ii) ("[Doctors who participate in gamete retrieval should a]dhere to good clinical practices, including ensuring that identifying information is maintained indefinitely so that[] . . . [d]onors can be notified in the event a child born through use of his/her gametes subsequently tests positives for infections disease or genetic disorder that may have been transmitted by the donor [and so that] [t]he number of pregnancies resulting from a single gamete donor is limited.").

105. Rebecca Johns, *Abolishing Anonymity: A Rights-Based Approach to Evaluating Anonymous Sperm Donation*, 20 UCLA WOMEN'S L.J. 111, 118 (2013) ("[Medical history] may be necessary for donor conceived children to give true informed consent to medical procedures, as risks from such procedures may change depending on their genetic makeup. Therefore, these children have a right to lift donor anonymity so that they may learn their medical histories as well as learn of any changes to such histories.").

106. COLO. REV. STAT. §§ 25-57-101–25-57-112 (2023).

107. *U.S. Donor Conceived Council Makes History and Protects Donor Conceived People Through Passage of Bipartisan Colorado Bill*, U.S. DONOR CONCEIVED COUNCIL,

Representatives, Minority Leader Hugh McKean remarked that the bill became important due to the many donor-conceived people who reached out to legislators during the term about their “real” concerns.¹⁰⁸

In that same vein, Colorado’s act begins with a legislative declaration that includes, among other things, findings that “[t]he interests of donor-conceived persons must be considered and protected[,]”¹⁰⁹ “[i]t is important to many, but not all, donor-conceived persons to know the identity of the gamete donor used in their conception,”¹¹⁰ and “[s]tudies have shown that family secrecy about family formation can negatively affect children and family relationships.”¹¹¹

The Act, the terms of which generally only apply to gametes collected on or after January 1, 2025,¹¹² requires gamete agencies, gamete banks, and fertility clinics to collect donors’ identifying information and medical history, make a good faith effort to maintain current contact information, and request medical updates at least once every three years.¹¹³ Under the terms of the Act, “identifying information” is a donor’s full name, date of birth, permanent address, and other contact information.¹¹⁴ “Medical history” means a donor’s past and present physical illnesses and any “social, genetic, and family medical history pertaining to the donor’s health.”¹¹⁵

The same entities must inform the donor about the future disclosure of their identifying information and medical history, obtain a notarized declaration from the donor agreeing to the disclosure of their information to a requesting donor-conceived person upon reaching the age of eighteen, and maintain the donor’s identifying information and medical history.¹¹⁶ When requested by such a donor-conceived person, the

<https://www.usdcc.org/2022/05/11/u-s-donor-conceived-council-makes-history-and-protects-donor-conceived-people-through-passage-of-bipartisan-colorado-bill/> [https://perma.cc/EU55-4BQU] (last visited Oct. 26, 2022).

108. *Id.*

109. COLO. REV. STAT. § 25-57-102(1)(b).

110. COLO. REV. STAT. § 25-57-102(1)(c).

111. COLO. REV. STAT. § 25-57-102(1)(d).

112. *See* COLO. REV. STAT. § 25-57-104(5); COLO. REV. STAT. § 25-57-105(6); COLO. REV. STAT. § 25-57-106(5)(a); COLO. REV. STAT. § 25-57-107(7)(b); COLO. REV. STAT. § 25-57-109(5).

113. COLO. REV. STAT. § 25-57-104(1).

114. COLO. REV. STAT. § 25-57-103(10).

115. COLO. REV. STAT. § 25-57-103(12).

116. COLO. REV. STAT. § 25-57-105(1); *see* COLO. REV. STAT. § 25-57-105(2) (“[The relevant entities] shall have each donor sign a declaration, attested by a notarial officer or witnesses, that the donor agrees to the disclosure of the donor’s identity to a donor-conceived person conceived with the donor’s gametes or embryo formed with the

relevant entity is required to provide the requestor with the donor's identifying information and may not "impede or prohibit compliance . . . or communication between" the donor-conceived person and the donor, their friends, family, or other third parties regarding the donor.¹¹⁷ In other words, gamete banks, gamete agencies, and fertility clinics may facilitate contact but cannot ultimately prevent communications between the donor and donor-conceived person. Nor may they require a donor-conceived person to sign non-disclosure agreements prior to releasing the donor's identifying information.

Additionally, the Act permits an adult donor-conceived person or the parents of a minor donor-conceived person to request and receive from a regulated entity "any non-identifying medical history of the donor that is maintained" by that entity.¹¹⁸ Furthermore, the regulated entities must permanently maintain donors' identifying information and medical history, screening and testing records, and information regarding the number of families established per donor and the entity's efforts to obtain information about established families (*i.e.*, reports of live births).¹¹⁹

The Act also attempts to tackle the lack of counseling provided to intended parents and prospective donors before receiving or donating gametes by codifying educational requirements.¹²⁰ The Colorado Department of Public Health is required to, on or before January 1, 2025, develop written materials for intended parents and donors and do so with the assistance of

licensed mental health professionals who have prior documented experience counseling gamete donors, recipients, and donor-conceived persons, as well as experience and competency in counseling families with lesbian, gay, bisexual, and transgender parents and single parents, along with organizations representing these communities.¹²¹

Limiting the educational requirements to written materials makes the Act less stringent than ASRM's guidelines, which recommend in-person

donor's gametes on request of the donor-conceived person after the donor-conceived person is eighteen years of age or older.").

117. COLO. REV. STAT. § 25-57-106(1).

118. COLO. REV. STAT. § 25-57-106(2).

119. COLO. REV. STAT. § 25-57-107(1). Entities must also "submit a proposed plan to permanently maintain the [relevant] records . . . in the event of dissolution, insolvency, or bankruptcy." COLO. REV. STAT. § 25-57-107(3); *see* COLO. REV. STAT. § 25-57-107(4) (providing procedures for entities that suffer dissolution, insolvency, or bankruptcy).

120. *See* COLO. REV. STAT. § 25-57-108(3) (explaining that materials shall be provided to intended recipients "prior to . . . matching with or receiving donor gametes" and to donors "prior to the donation of gametes").

121. COLO. REV. STAT. § 25-57-108(1); COLO. REV. STAT. § 25-57-108(2).

counseling for both parties.¹²²

For intended parents, the written materials must include information regarding the importance of informing a donor-conceived child about their status at an early age; the ability the donor-conceived person will have to identify the donor and the importance of understanding that many donor-conceived people have a desire to do so; the “needs and interests” of donor-conceived people; the limitations of screening donors; the future implications for the donor-conceived person to have many siblings in different families; and the future implications of receiving a donor’s medical updates or learning medical information from siblings in other families.¹²³ As for donors, the materials must include information regarding the potential social and emotional impacts of donating; what will be disclosed to recipient parents and the resulting donor-conceived person; the potential for multiple offspring in multiple families; and the potential for future disclosure of the donor’s identifying information to the donor-conceived person.¹²⁴ The Act contains substantially similar requirements for gamete banks, agencies, and fertility clinics outside of Colorado.¹²⁵

In another first, the Colorado act establishes a minimum donor age of twenty-one years old¹²⁶ and, consistent with research and the non-binding ASRM guidelines,¹²⁷ directs the Colorado Department of Health to promulgate a rule establishing a maximum lifetime of six retrieval cycles per egg donor, with the potential for additional cycles to conceive a sibling for an existing donor-conceived child.¹²⁸ Research shows a “cumulative risk” of serious adverse health consequences to donors who undergo more than six cycles.¹²⁹

Additionally, the Act requires gamete banks, agencies, and fertility clinics to cease distribution of a donor’s gametes when the entity “has record of or should reasonably know that twenty-five families have been

122. See ASRM, *supra* note 44, at 1402.

123. C.R.S. § 25-57-108(1).

124. C.R.S. § 25-57-108(2).

125. See COLO. REV. STAT. § 25-57-108(4).

126. COLO. REV. STAT. § 25-57-109(3).

127. See Practice Committee of the American Society for Reproductive Medicine & Practice Committee of the Society for Assisted Reproductive Technology, *Repetitive oocyte donation: a committee opinion*, 113 FERTILITY & STERILITY, 1151 (2020); ASRM, *supra* note 44, at 1400–01.

128. COLO. REV. STAT. § 25-57-109(2).

129. See, e.g., ASRM, *supra* note 44, at 1401.

established[] using a single donor's gametes in or outside of Colorado,"¹³⁰ unless the donor has requested—and the bank has agreed to—a lower limit.¹³¹ In terms of enforcing and monitoring this family limit, gamete banks, agencies, and fertility clinics are directed to

make reasonable good-faith efforts, and document such efforts, to obtain information from a recipient parent about whether and when a live birth has occurred, including requesting such information from a recipient parent or the parent's medical provider using multiple commercially reasonable methods.¹³²

Colorado's family-limit provision does not limit the number of children that can be born into any one family.¹³³ Nor does it limit children conceived by the donor outside of donation or by intended recipients who know the donor at the time of the donation. The provision also does not apply to embryos donated from one family to another.¹³⁴

Colorado will enforce these provisions by requiring compliance as a prerequisite for maintaining an operating license within the state.¹³⁵ Entities that fail to comply will be subject to civil penalties for each day of noncompliance.¹³⁶ Further, the Colorado Department of Health is directed to promulgate "any rules necessary" to implement the Act's provisions, and in developing those rules, the department is required to "consider and protect the interests of donor-conceived persons and families of donor-conceived persons, including lesbian, gay, bisexual, and transgender parents and donor-conceived persons and single parents."¹³⁷

130. A family is considered "established" under the law "when a recipient parent or parents conceive a child using gametes from a donor and a live birth results or likely resulted." COLO. REV. STAT. § 25-57-109(1)(b).

131. COLO. REV. STAT. § 25-57-109(1)(a).

132. C.R.S. § 25-57-109(1)(b).

133. C.R.S. § 25-57-109(1)(a).

134. *Id.*

135. *See* COLO. REV. STAT. § 25-57-110(1) ("On or after January 1, 2025, a gamete agency, gamete bank, or fertility clinic shall not operate as a gamete agency, gamete bank, or fertility clinic in Colorado, or match or provide gametes or embryos to recipients in Colorado, without having first obtained a license from the department. Such license is conditioned on compliance with the applicable standards, requirements, and other provisions of this article 57 and its implementing rules.").

136. *See* COLO. REV. STAT. § 25-57-110(6)(b) (providing that the Colorado Department of Public Health "may assess a civil penalty of not more than twenty thousand dollars . . . for each day the person is in violation of this article").

137. COLO. REV. STAT. § 25-57-111.

B. California's Attempt to Enact Limited Regulation

Following in Colorado's footsteps, on August 31, 2022, the California State Legislature nearly unanimously passed Assembly Bill 1896 (A.B. 1896),¹³⁸ which sought to require commercial gamete banks licensed in the state to provide written educational materials to intended gamete recipients and potential gamete donors, and *discussion* of those materials with potential donors.¹³⁹

Building upon the educational requirements of Colorado's new law, A.B. 1896 sought to provide intended recipients with written information regarding (1) the benefits of telling a donor-conceived child that the child is donor conceived; (2) the ability of and tools available to a donor-conceived person to identify the donor, and that "many, but not all, donor-conceived persons have a strong desire to know the identity of the donor and of other donor-conceived persons born as the result of using the same donor's gametes"; (3) the potential for a donor's personal medical and family medical history to influence health conditions and inform medical care for donor-conceived people and the children of donor-conceived people; (4) limitations related to screening donors for genetic diseases and risk factors; (5) the potential for one or more genetic diseases or risk factors to be passed on to a donor-conceived person; (6) that some donor-conceived persons desire contact with the gamete donor or with donor-conceived siblings; (7) the benefits of limiting the number of families established with gametes from the same donor; (8) whether the bank attempts to limit the number of persons born from or families that can be established with a donor's gametes, and the bank's policy on the same; and (9) whether the bank requests and will pass along medical updates from gamete donors.¹⁴⁰

As to potential donors, A.B. 1896 would have required gamete banks to provide and discuss written materials regarding (1) potential emotional and social impacts of donating; (2) that "many, but not all, donor-conceived persons have a strong desire to know the identity of the donor," and that "some donor-conceived persons are or may be interested in contact with the donor . . . or other persons born as the result of using and families established with use of the same donor's gametes;" (3) what

138. Assemb. B. 1896 (Cal. 2022). The bill passed with forty votes in favor and zero votes in opposition in the Senate, and with seventy-seven votes in favor, one vote in opposition, and one "no vote recorded" in the Assembly. See *Votes*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB1896 [<https://perma.cc/L578-Z6GZ>] (last visited Jan. 4, 2023).

139. See *Text*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1896 [<https://perma.cc/HM7Y-4V3W>] (last visited Jan. 4, 2023).

140. See Assemb. B. 1896 §§ 2(c)(1)(A)–(I) (Cal. 2022).

information about the donor would be provided and disclosed to intended recipients, and the potential for the donor to be identified through commercial DNA testing even if the donor chose to donate anonymously; (4) the potential for one or more genetic children of the donor to be born into multiple families; (5) whether the bank attempts to limit the number of persons born from or families that can be established with a donor's gametes, and the bank's policy on the same; and (6) whether the bank requests and will pass along medical updates from gamete donors.¹⁴¹

In addition to the foregoing educational requirements, the California bill made significant legislative findings.¹⁴² These included a recognition that “[t]he health, welfare, and interests of gamete donors, intended parents, and donor-conceived persons must be considered and protected”;¹⁴³ the importance to “many, but not all,” donor-conceived people to identify the donor and their donor-conceived siblings and potentially make contact;¹⁴⁴ the potential for gamete donation to lead to large groups of siblings, and that donor-conceived people *and* gamete donors “may face psychosocial harm upon discovery of or contact with an unexpectedly large number of” people born as the result of using the same donor's gametes;¹⁴⁵ that longitudinal studies have shown that early disclosure of a person's donor-conceived status is “associated with beneficial impacts on personal well-being and family relationships for donor-conceived persons and their parents”;¹⁴⁶ that at-home DNA testing makes it “possible for parents and donor-conceived people to identify the donor and other persons born from the same donor's gametes without accessing information provided to the gamete bank at the time of donation,” even if a donor chooses to donate anonymously;¹⁴⁷ and that intended recipients and potential gamete donors “should have access to information and resources” about the interests of donor-conceived persons and other relevant topics.¹⁴⁸

A.B. 1896 was introduced by Assemblymember Dr. Bill Quirk,¹⁴⁹ whose interest in the topic was inspired by his two donor-conceived

141. See Assemb. B. 1896 §§ 2(c)(2)(A)–(F) (Cal. 2022).

142. See Assemb. B. 1896 §§ 2(b)(1)–(9) (Cal. 2022).

143. Assemb. B. 1896 § 2(b)(2) (Cal.).

144. Assemb. B. 1896 § 2(b)(3) (Cal.).

145. Assemb. B. 1896 §§ 2(b)(4), (8) (Cal.).

146. Assemb. B. 1896 § 2(b)(5) (Cal.).

147. Assemb. B. 1896 § 2(b)(7) (Cal.).

148. Assemb. B. 1896 §§ 2(b)(6), (9) (Cal.).

149. Assemblymember Quirk retired at the end of the California State Legislature's session, leaving open the question of whether another member of the state legislature will pursue the same or similar legislation in the near future. See Emily Deruy, *East Bay Assemblymember Bill Quirk won't seek reelection*, MERCURY NEWS (Dec. 14, 2021),

grandchildren.¹⁵⁰ RESOLVE: The National Infertility Association (RESOLVE) supported A.B. 1896, noting it “was developed and vetted by an inclusive group of stakeholders to include and protect everyone involved in the family building process.”¹⁵¹ RESOLVE believed the bill would “ensure the health and well-being of gamete donors, intended parents, and donor-conceived persons.”¹⁵² The Sperm Bank of California also supported the bill, explaining that “education and information sharing with donors, intended parents and subsequent families, similar to what A.B. 1896 proposes, supports them in making fully informed decisions and improves the welfare of donor-conceived persons, their parents, and donors.”¹⁵³

Finally, LGBTQ+ advocacy organizations supported the bill’s provision and facilitation of “important education of providers of gametes and embryos and intended parents” because the education would

<https://www.mercurynews.com/2021/12/10/east-bay-assemblymember-bill-quirk-wont-see-re-election/> [<https://perma.cc/S7EK-XDN2>].

150. See U.S. Donor Conceived Council, *California AB 1896 Senate Health Committee Testimony—June 22, 2022*, YOUTUBE (June 22, 2022), <https://www.youtube.com/watch?v=B9PWG5OWais> [<https://perma.cc/9UNM-AJYC>] (containing comments by Assemblymember Quirk). Assemblymember Quirk also shared his belief that A.B. 1896 would allow for “an opportunity to start educating recipient parents of sperm and egg donation about the psychological, social, and genetic burdens faced by many donor-conceived people” in addition to providing education for “sperm and egg donors so they can understand the full implications of their donations.” *Id.*; *USDCC Supports California’s Passage of New Gamete Bank Regulation*, U.S. DONOR CONCEIVED COUNCIL, <https://www.usdcc.org/2022/09/01/usdcc-supports-california-ab1896-gamete-bank-legislation/> [<https://perma.cc/XLP8-RWAG>] (last visited Feb. 2, 2023).

151. Letter from Barbara Collura, President/CEO, RESOLVE: The National Infertility Association, to Members of the California Senate (Aug. 25, 2022), <https://resolve.org/wp-content/uploads/2022/08/RESOLVE-Letter-of-Support-AB-1896.pdf>.

152. *Id.* Despite an existing collaboration agreement between RESOLVE and ASRM, see *ASRM Collaboration*, RESOLVE, <https://resolve.org/about-us/team/asrm-collaboration/> [<https://perma.cc/EE6T-37TD>] (announcing a three-year collaboration between the groups, beginning in 2019, to help “more people struggling to build a family access the care they need and deserve”) (last visited Jan. 4, 2023), ASRM opposed A.B. 1896, opining the bill would place an “undue burden on physicians” and contained “language that is too open-ended to be regulatable and leaves gamete banks and those who provide valuable family-building care open to liability.” Letter from Sean Tipton, Chief Advocacy & Policy Officer, American Society for Reproductive Medicine, to Assembly Committee on Appropriations (June 21, 2022), https://www.asrm.org/globalassets/asrm/asrm-content/about-us/media-and-public-affairs/advocacy/6-21-22_caab1896opposefinal.pdf.

153. Letter from Joanna Scheib, Research Director, The Sperm Bank of California, & Alice Ruby, Executive Director, The Sperm Bank of California, to Members of the California Senate (Aug. 26, 2022).

“support openness and transparency in a way that will promote the well-being of children and families.”¹⁵⁴

The state legislature’s passage of A.B. 1896 was lauded as a major success by activists in the donor-conceived and adoptee communities¹⁵⁵ because California is home to the largest commercial sperm bank in the United States, if not the world.¹⁵⁶ Additionally, nine more of the country’s largest or otherwise well-known commercial sperm banks are also located or licensed in California.¹⁵⁷ Indeed, at least six sperm banks

154. Letter from Jordan Budd, Executive Director, COLAGE, et al., to Senate President Atkins & Assembly Speaker Rendon (Aug. 26, 2022) (including support from representatives of COLAGE, Family Equality, GLBTQ Legal Advocates & Defenders (GLAD), and NCLR).

155. See *USDCC Supports California’s Passage of New Gamete Bank Regulation*, U.S. DONOR CONCEIVED COUNCIL, <https://www.usdcc.org/2022/09/01/usdcc-supports-california-ab1896-gamete-bank-legislation/> [<https://perma.cc/8U2A-52FX>] (last visited Oct. 5, 2022); Adoption Knowledge Affiliates, FACEBOOK (Sept. 1, 2022), <https://www.facebook.com/AdoptionKnowledgeAffiliates/> (celebrating the passage of A.B. 1896); Adoption Source Resource Connection, TWITTER (Sept. 1, 2022), <https://twitter.com/COTriadConnect> (same); Donor Conceived Alliance of Canada, FACEBOOK (Sept. 1, 2022), <https://www.facebook.com/DCAllianceCA/> (same); MPower Alliance, TWITTER (Sept. 1, 2022), <https://twitter.com/MPowerAlliance> (same); Right to Know, FACEBOOK (Sept. 1, 2022), <https://www.facebook.com/RighttoKnowUS> (same); U.S. Donor Conceived Council, FACEBOOK (Sept. 1, 2022), <https://www.facebook.com/donorconceivedcouncil> (same).

156. See Haley Eber, *This L.A. Sperm Bank is More Exclusive Than an Ivy League College*, LOS ANGELES MAGAZINE (Apr. 2, 2019), <https://www.lamag.com/citythinkblog/sperm-bank-california-cryobank/> [<https://perma.cc/6D43-XGV8>] (explaining that the United States is home to about two dozen sperm banks, and California Cryobank is the largest); Soo Youn, *America’s hottest export? Sperm*, THE GUARDIAN (Aug. 15, 2018), <https://www.theguardian.com/science/2018/aug/15/americas-hottest-export-sperm-fertility> [<https://perma.cc/ABM6-TUEU>] (explaining that California Cryobank is the largest sperm bank in the United States and also claims to be the largest in the world).

157. These facilities are Fairfax Cryobank; Cryobio (Cryobiology, Inc.); CryoGam Colorado; New England Cryogenic Center; The Sperm Bank of California; Sperm Bank, Inc. d/b/a Fertility Center of California; Seattle Sperm Bank (doing business in California as San Diego Sperm Bank); Cryos International; and Xytex Corporation. See *Licenses*, CRYOS INT’L, <https://www.cryosinternational.com/en-us/us-shop/professional/about-us/licenses/> [<https://perma.cc/2BA5-G7L6>] (last visited Jan. 4, 2023) (providing link to California Tissue Bank License); *Licenses*, CRYOBIO, <https://cryobio.com/additional-resources/additional-resources/licenses/> [<https://perma.cc/S9PX-UNEB>] (last visited Jan. 4, 2023) (same); *California License*, CRYOGAM COLO., <https://www.cryogam.com/california-license> [<https://perma.cc/AMN5-KJ2J>] (last visited Jan. 4, 2023) (same); *Licensure*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/licensure> [<https://perma.cc/XV5L-SMAF>] (last visited Jan. 4, 2023) (same); *Medical Licenses & Accreditations*, NEW ENGLAND CRYOGENIC CENTER, <https://www.necryogenic.com/medical-licenses-accreditations/> [<https://perma.cc/9B3Y-K4QA>] (last visited Jan. 4, 2023) (same); *Why Choose the Fertility Center of California*, SPERM BANK INC. D/B/A FERTILITY CENTER OF CALIFORNIA, <https://www.spermbankcalifornia.com/california-fertility-center.html> [<https://perma.cc/>]

licensed in California have been identified as “key players” in the “global sperm bank market,”¹⁵⁸ including another bank that touts itself as the largest in the world.¹⁵⁹ And the state itself has been called the “world’s fertility treatment destination” because it “possesses some of the country’s most well-regarded labs, surrogacy brokers, and egg donation agencies.”¹⁶⁰

Despite all of this—and A.B. 1896’s sweeping support within the state legislature—California Governor Gavin Newsom was not persuaded the bill would have a meaningful impact. Citing this concern, in addition to concerns from the California Department of Public Health about the cost of implementing the bill’s requirements, Governor Newsom vetoed A.B. 1896 on September 29, 2022.¹⁶¹

C. Increasing Attention to Donor-Conceived Voices

Earlier in 2022, the documentary *Our Father* brought mainstream attention to “fertility fraud,” in which fertility doctors have used their own sperm to inseminate patients without the patient’s knowledge or consent.¹⁶² Though the general public might have been unaware of this issue prior to the release of the *Netflix* documentary, doctor-donor-conceived activists have worked for years to enact state

N59N-J7MQ] (last visited Jan. 4, 2023) (same); *Licenses and Accreditations*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/licenses-accreditations/> [https://perma.cc/Y695-X6VN] (last visited Jan. 4, 2023) (same); *Licensing*, THE SPERM BANK OF CALIF., <https://www.thespermbankofca.org/content/licensing> [https://perma.cc/N2ND-MB52] (last visited Jan. 4, 2023) (same); *Licenses*, XYTEX CORP., <https://www.xytex.com/licenses/> [https://perma.cc/9PBM-W5TB] (last visited Jan. 4, 2023) (same).

158. See The Brainy Insights, *Sperm Bank Market Size Worth \$7.25 Billion by 2030*, YAHOO! (Sept. 30, 2022), <https://www.yahoo.com/now/sperm-bank-market-size-worth-121200783.html> [https://perma.cc/MB7S-R5VY] (identifying, among others, Cryos International, Fairfax Cryobank, California Cryobank, Xytex, and Seattle Sperm Bank as “key players in the global sperm bank market”).

159. See Youn, *supra* note 156.

160. Jancee Dunn, *How California Became the World’s Fertility Treatment Destination*, VOGUE (Mar. 13, 2019), <https://www.vogue.com/article/california-worlds-fertility-treatment-destination> [https://perma.cc/2T2U-6UP4].

161. See *Governor Newsom Issues Legislative Update*, OFFICE OF GOVERNOR GAVIN NEWSOM (Sept. 29, 2022), <https://www.gov.ca.gov/2022/09/29/governor-newsom-issues-legislative-update-9-29-22/> [https://perma.cc/KUY8-KZRN] (providing link to PDF of official A.B. 1896 veto statement); *Governor’s Veto Message*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB1189 [https://perma.cc/EHU9-6RX8] (last visited Jan. 4, 2023).

162. See, e.g., Natalie Finn, *The Jaw-Dropping True Story Behind Netflix’s ‘Our Father’*, NBC PHILADELPHIA (May 21, 2022), <https://www.nbcphiladelphia.com/entertainment/entertainment-news/the-jaw-dropping-true-story-behind-netflixs-our-father/3247236/> [https://perma.cc/NR88-WTFW].

laws to criminalize this behavior.¹⁶³ Additionally, the tragic story of Steven Gunner, a donor-conceived person who passed from a drug overdose after mental health struggles, introduced proposals for state and federal legislation to require verification of donors' self-reported medical history.¹⁶⁴

In the aftermath of Colorado's new law and Governor Newsom's veto of A.B. 1896, for the first time in history, from October 20, 2022, to October 21, 2022, donor-conceived advocates met in person in Los Angeles with industry stakeholders at a meeting coordinated and hosted by California Cryobank/Donor Egg Bank USA, Fairfax Cryobank/Fairfax Eggbank, RESOLVE: The National Infertility Association, and U.S. Donor Conceived Council.¹⁶⁵ Attendees included gamete bank representatives, mental health professionals, legal scholars, donor-conceived advocates, parents of donor-conceived people, advocates for the LGBTQ+ community, and many others.¹⁶⁶ The meeting provided an opportunity for donor-conceived advocates calling for increased regulation to share their personal experiences with other stakeholders, and for the group as a collective to discuss the issues that were the impetus for Colorado's legislation.¹⁶⁷

Additionally, the day before this historic meeting, ASRM announced the formation of a "Taskforce on the Interests of Donor Conceived People and their Families" to "help clarify and articulate ASRM's approach and priorities" with regard to "provider education regarding the needs of families from gamete donation[,] [e]ducational and outreach materials

163. See, e.g., Charlotte Huffman & Mark Smith, *Dallas woman advocates expanding fertility fraud law*, WFAA (May 14, 2021), <https://www.wfaa.com/article/news/local/investigates/dallas-woman-eve-wiley-advocates-expanding-fertility-fraud-law/287-5ad8424f-ed1f-4b48-9f5c-b3df1ed6cbc4> [<https://perma.cc/4DJL-ZH7G>]. In early 2023, these same advocates introduced federal legislation aimed at nationwide criminalization of fertility fraud. See Ellen Trachman, *Victim Advocates Convene in DC Over It's-About-Time Federal Fertility Fraud Bill*, ABOVE THE LAW (Jan. 25, 2023), <https://abovethelaw.com/2023/01/victim-advocates-convene-in-dc-over-its-about-time-federal-fertility-fraud-bill/> [<https://perma.cc/7MVB-NA8K>]; see also H.R. 451, 118th Cong. (2023).

164. See Marcus, *supra* note 7; N.Y. S. Bill S7602, Reg. Sess. (2021); H.R. 8307, 117th Cong. (2022).

165. See Ellen Trachman, *Historic Meeting Ushers in New Era in US Donor Conception*, ABOVE THE LAW (Nov. 2, 2022), <https://abovethelaw.com/2022/11/historic-meeting-ushers-in-new-era-in-us-donor-conception/> [<https://perma.cc/L8Q8-DLF7>]; *USDCC Presents at Historic Donor Conception Stakeholder Meeting*, U.S. DONOR CONCEIVED COUNCIL (Oct. 27, 2022) <https://www.usdcc.org/2022/10/27/usdcc-presents-at-historic-donor-conception-stakeholder-meeting/> [<https://perma.cc/93PS-UUWT>].

166. See Trachman, *supra* note 165; U.S. Donor Conceived Council, *supra* note 165.

167. See Trachman, *supra* note 165.

for [such] families, [and] legislation related to donor conception and [donor-conceived persons].”¹⁶⁸ Finally, just days *after* the stakeholder meeting, in some of his first remarks as the incoming president of ASRM, Dr. Michael A. Thomas highlighted his desire to incorporate the voices of marginalized groups, including people of color, LGBTQ+ individuals, *and* donor-conceived people.¹⁶⁹

Through increased media attention and the enactment of legislation in Colorado, the third-party gamete donation industry is beginning to acknowledge that the people they created are now legal adults with their own opinions and that, despite what ASRM’s chief advocacy and policy officer has said in the past, adult donor-conceived advocates *are* the right people to consult about how to better the outcomes for future generations.¹⁷⁰

IV. PROPOSAL: WIDESPREAD ADOPTION OF THE “COLORADO/CALIFORNIA (COCA) MODEL”

As the Yale Law Journal recognized in 1949, “our legal system lacks positive techniques for making old law adapt to scientific change”¹⁷¹ and “the ensuing struggle will be rife with danger both for doctor and for patient until artificial insemination shall have made its peace with the law.”¹⁷² Today, interest in the issues of concern to many donor-conceived people is growing not only from the media but, finally, from state legislatures and the fertility industry itself. Nevertheless, in the continuing absence of *binding* and *enforceable* industry guidelines, it is high time commercialized third-party gamete donation “make its peace with the law.”

Federal oversight is undoubtedly a sensible suggestion,¹⁷³ but a consensus is difficult to reach in a highly polarized Congress, and the

168. American Society for Reproductive Medicine, *ASRM Announces Taskforce on the Interests of Donor Conceived People*, ASRM BULLETIN, <https://www.asrm.org/news-and-publications/news-and-research/press-releases-and-bulletins/asrm-announces-taskforce-on-the-interests-of-donor-conceived-people/> [<https://perma.cc/Z3VY-QCY8>] (last visited Oct. 27, 2022).

169. See *VIDEO: Incoming ASRM president highlights goals for 2023*, HEALIO (Oct. 26, 2022), <https://www.healio.com/news/womens-health-ob-gyn/20221026/video-incoming-asrm-president-highlights-goals-for-2023> [<https://perma.cc/J252-V2Y3>].

170. See Zhang, *supra* note 34.

171. *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, *supra* note 13, at 458.

172. *Id.*

173. See Cahn & Suter, *supra* note 43, at 67, 78 (proposing the establishment of “a special section within the FDA” to achieve “centralized regulation of ART in a single entity”); Emerson, *supra* note 33, at 440–42 (proposing there is sufficient rationale for Congress to regulate ART under the Commerce Clause).

states traditionally control family law. The states must sufficiently protect diverse family structures to avoid any unintended harm or consequences by potential federal regulation. Thus, I propose the adoption of what I will refer to as the California/Colorado Model, or “COCA Model” for short, in states with sufficient protections for diverse family structures that are also home to a significant market share of the third-party gamete donation industry.

The COCA Model entails Colorado’s “Donor-conceived Persons and Families of Donor-conceived Persons Protection Act” subject to the enhanced educational requirements passed by the California state legislature in its proposed A.B. 1896. Given the aforementioned support for A.B. 1896¹⁷⁴ and the public endorsement and celebration of Colorado’s legislation by, among others, national LGBTQ+ advocacy groups, mental health professionals, legal scholars, and major commercial gamete banks,¹⁷⁵ this should not be a controversial proposition.

Nevertheless, I also propose the COCA Model be subject to certain enhancements described below, including a lower family limit, optional donor identity release before age eighteen, and required operation of donor-sibling registries. Additionally, for states that have not already adopted the Uniform Parentage Act, as Colorado has,¹⁷⁶ enactment of protections for diverse family structures should be concurrent with regulating third-party donor conception.

A. Lower Reasonable Family Limit

The COCA Model currently limits the number of families that may be established per donor to no more than twenty-five, with no limit on the number of children born into each established family from the same donor. This number of families, however, could conceivably result in more than dozens of donor-conceived siblings if each family has more than one child. Survey data from U.S. Donor Conceived Council shows that most respondents composed of donor-conceived people, recipient parents, and

174. See *supra* notes 148–150 and accompanying text.

175. See *What Supporters Say about Colorado SB 22-224*, U.S. DONOR CONCEIVED COUNCIL, <https://www.usdcc.org/2022/05/13/sb224-colorado-supporters/> [<https://perma.cc/2SCD-CEWJ>] (last visited Jan. 4, 2023) (including words of support from, *inter alia*, Colorado Fertility Advocates, COLAGE, Dr. Diane Tober, Family Equality, GLBTQ Legal Advocates & Defenders (GLAD), Naomi Cahn, Sonia Suter, National Center for Lesbian Rights (NCLR), CooperSurgical (d/b/a California Cryobank, Donor Egg Bank USA, Northwest Cryobank), Seattle Sperm Bank, The Sperm Bank of California, and We Are Egg Donors). As of March 1, 2023, two more states are considering legislation based upon Colorado’s law. See S.B. 2418, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); H.B. 482, 2023 Leg., 445th Sess. (Md. 2023).

176. See COLO. REV. STAT. § 19-4-101 (2023).

donors favored limits of less than ten families per donor (93% of donor-conceived people, 80% of recipient parents, and 54% of sperm donors).¹⁷⁷ This data is consistent with another study finding donors who are subject to identity release to offspring at age eighteen support a limit of one to ten *offspring* per donor.¹⁷⁸

A regulatory limit of no more than ten families—a limit successfully used by The Sperm Bank of California through pregnancy and birth tracking¹⁷⁹—would put the United States more in line with the many other countries that have set limits.¹⁸⁰ Additionally, even with a limit under twenty-five, donors should still be permitted to request a lower family limit, which might encourage more participation in open identity donor programs if donors can have greater comfort with, assurance of, and control over the potential number of offspring who might want future contact.¹⁸¹

B. Optional Release of Donor's Identity Before Age Eighteen

The COCA Model requires the provision of a gamete donor's identifying information to a requesting donor-conceived person when that person turns eighteen. But many donor-conceived people consider such "open identification at 18" donors to effectively be "anonymous until 18" donors.¹⁸² And to the extent that much of a person's identity formation occurs in the years before reaching the age of majority, it is

177. See *2022 Advocacy Survey Results*, U.S. DONOR CONCEIVED COUNCIL (last visited Mar. 1, 2023), <https://www.usdcc.org/2022/11/16/2022-advocacy-survey-results/> [<https://perma.cc/6LP7-N3PZ>].

178. See Svanberg et al., *supra* note 77, at 176 ("About half of 235 oocyte and sperm donors 5-8 years after their donation regarded 1-10 children to be an acceptable number of offspring from one donor, with oocyte donors more often supporting an upper limit than sperm donors." (footnotes omitted)).

179. *Why Choose TSBC?*, THE SPERM BANK OF CALI., <https://www.thespermbankofca.org/why-choose-tsbc#ethical> [<https://perma.cc/5398-WRFU>] (last visited Jan. 4, 2023).

180. See discussion *supra* note 178 and accompanying text.

181. See Svanberg et al., *supra* note 77, at 176 (explaining that open-identity at eighteen donors desire to limit the number of offspring that could contact them in the future); see also *J.B. v. M.B.*, 170 N.J. 9, 25 (2001) (holding that biological mother's "right not to procreate may be lost through attempted use or through donation of the preembryos"); Patricia A. Martin, *The Human Preembryo, the Progenitors, and the State: Toward A Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 290 (1990) ("Genetic ties may form a powerful bond between an individual and his or her progeny even if the progenitor is freed from the legal obligations of parenthood."). Many banks already require a donor to indicate whether they consent to future donation of embryos created with their gametes.

182. See *2020 We Are Donor Conceived Survey Report*, *supra* note 72 (showing that 50% of survey respondents composed of donor-conceived people support the abolishment of "anonymous-until-18 (open-ID) agreements").

certainly reasonable to argue that the release of a donor's identity prior to that time could benefit many donor-conceived people. Indeed, as previously discussed, several countries' laws permit the identification of a donor before a donor-conceived person turns eighteen, and the United Kingdom is currently considering whether to permit the same.¹⁸³

There is support for the option of earlier donor identification. A 2020 survey of donor-conceived people showed that 67% of respondents support making a donor's identity available to a donor-conceived person from birth.¹⁸⁴ And in a 2022 survey of approximately 500 donor-conceived people, gamete donors, and recipient parents, about 76% of respondents supported disclosure of the donor's identity prior to a donor-conceived person turning eighteen (76% of donor-conceived people, 71% of recipient parents, and 80% of donors).¹⁸⁵ Further, most respondents supported optional identity release by the age of twelve (60% of donor-conceived people, 56% of recipient parents, and 58% of donors).¹⁸⁶

Some families wish to establish and form a relationship with the gamete donor before a donor-conceived person turns eighteen.¹⁸⁷ To recognize the “[intimate] choices concerning . . . family relationships, procreation, and childrearing,”¹⁸⁸ the option for earlier identification and contact should be available to recipient parents who wish to do so and donors who are open to such arrangements. The reality is that even without regulations or policies permitting the release of a donor's identifying information prior to the age of eighteen, many families already independently seek this type of information and relationship—or at least desire to do so.¹⁸⁹

183. See Kat Lay, *Watchdog calls for anonymity of IVF donors to be lifted*, THE TIMES (Feb. 28, 2023), <https://www.thetimes.co.uk/article/watchdog-calls-for-anonymity-of-ivf-donors-to-be-lifted-w9hfwtmj3> [<https://perma.cc/VZ43-DHSA>]; Hannah Devlin, *UK fertility watchdog could recommend scrapping donor anonymity law*, THE GUARDIAN (May 20, 2022), <https://www.theguardian.com/society/2022/may/20/uk-fertility-watchdog-could-recommend-scrapping-donor-anonymity-law> [<https://perma.cc/N42P-LR7J>].

184. See 2020 *We Are Donor Conceived Survey Report*, *supra* note 72.

185. See U.S. DONOR CONCEIVED COUNCIL, *supra* note 177.

186. See U.S. DONOR CONCEIVED COUNCIL, *supra* note 177.

187. See discussion *supra* Section IV.B. In some sibling groups, when a donor's identity is revealed to an older sibling when that donor-conceived person turns eighteen and requests the information, younger siblings (and their families) have the potential to learn the donor's identity prior to reaching the age of majority. See 2020 *We Are Donor Conceived Survey Report*, *supra* note 72.

188. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

189. See Freeman et al., *supra* note 86, at 514 (“Parents in households without fathers demonstrated higher levels of curiosity about their child's donor origins, as reflected by the greater proportions searching for donor relations overall, as well as being more likely to be concerned with issues around their child's identity. These differences were particularly

C. Condition Licensure on Operation of Donor-Sibling Registries

As previously mentioned, most gamete banks in the United States do not operate registries to identify and connect donors with offspring or donor-conceived siblings born into different families. Instead, donor-conceived people must pay to use the independently operated Donor Sibling Registry or submit their DNA to multiple commercial databases to find even a fraction of their siblings. Thus, as a condition of licensure, entities regulated under the COCA Model should be required to operate donor-sibling registries and ensure cross-communication between those registries to identify donors who provide gametes to multiple entities.¹⁹⁰ Operation of such registries with cross-communication is vital not only to connecting donor-conceived families but also for successful limitation of families established through the gametes of any one donor.¹⁹¹

D. Protect Diverse Family Structures

For parents who consider it in their child's best interest to identify and form a relationship with a willing donor prior to age eighteen, there could be fear of potential legal risks to their existing family structure¹⁹²—the stability of which is *also* in the best interest of their child.¹⁹³ Donor anonymity has been described as “crucial because family law often links biology to parental rights and responsibilities.”¹⁹⁴ But laws and societal expectations must continue to adapt so that the interests of donor-conceived people are not ignored. Thus, rather than rely upon

marked with respect to lone-mother families, who constituted 60% of those who endorsed ‘to give my child a more secure sense of identity’ as their principal reason for searching for both their child’s donor siblings and donor.”).

190. See generally Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203 (2008).

191. *Id.*

192. See *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”); *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (same).

193. Cf. *Obergefell*, 576 U.S. at 646, 667–68 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education By giving recognition and legal structure to their parents’ relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” (citations and punctuation omitted)).

194. Ertman, *supra* note 46, at 19.

anonymity to protect a family's structure, some states, beginning in 1973, began to adopt the Uniform Parentage Act (UPA).¹⁹⁵

The UPA has not been adopted in all states, and for those that have adopted it, not all have done so with the amendments made in 2017.¹⁹⁶ The 2017 UPA provides that in assisted reproduction, “[a] donor is not a parent of a child conceived by assisted reproduction.”¹⁹⁷ Additionally, if a donor was identified by recipient parents and established a relationship with a donor-conceived child, the standard by which the donor could be considered a *de facto* parent is high, which assures protection.¹⁹⁸ Finally, the 2017 UPA provides for establishing parentage through voluntary acknowledgments of parentage, which are statutorily given the equivalent of adjudications of parentage.¹⁹⁹ The 2017 UPA also provides that courts will give such acknowledgments full faith and credit.²⁰⁰

Widespread adoption of the 2017 UPA combined with a provision for optional donor identity release before age eighteen would help ensure the stability of diverse family structures while respecting the interests of

195. Ertman, *supra* note 46, at 20; *see, e.g.*, Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583 (2022) (surveying the parentage laws of all fifty states to consider protections for unmarried same-sex couples).

196. *See* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L. J. FORUM 589, 597–98 (II) (2018); *Uniform Parentage Act of 2017*, NCLR, <https://www.nclrights.org/our-work/legislation-policy/uniform-parentage-act-of-2017/> [<https://perma.cc/95UD-XRGE>] (last visited Jan. 4, 2023). The problem with relying upon older versions of the UPA was recently exemplified in Oklahoma, where a non-biological mother who did not adopt a child born through sperm donation was found to lack legal rights while the known sperm donor was granted parental rights. *See Wilson v. Williams*, No. FD-2021-3681, Letter Ruling (Dist. Ct. Okla. Cty. Feb. 13, 2023).

197. UNIF. PARENTAGE ACT § 702 (UNIF. L. COMM’N 2017). At least one court has interpreted a similar provision as inapplicable when an unmarried woman and a known sperm donor who “agreed that the known donor would have parental rights and expressly agreed at the time of insemination that he would be treated as the natural father of any child so conceived.” *In Interest of R.C.*, 775 P.2d 27, 35 (Colo. 1989); *see former COLO. REV. STAT. § 19-4-106(2)* (2003) (“The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”).

198. UNIF. PARENTAGE ACT § 609(d) (UNIF. L. COMM’N 2017) (providing that in a claim of *de facto* parentage, if a child has only one other parent or person claiming parentage, the person claiming *de facto* parentage must demonstrate with clear and convincing evidence that they (1) resided with the child as a regular member of the household for a “significant period”; (2) engaged in consistent caretaking; (3) undertook full and permanent parental responsibilities without expecting financial compensation; (4) held the child out as their own; (5) established a “bonded and dependent relationship” of a parental nature; (6) another parent fostered and supported the relationship; and (7) continuing the relationship is in the child’s best interest).

199. UNIF. PARENTAGE ACT § 302(A)(3) (UNIF. L. COMM’N 2017).

200. UNIF. PARENTAGE ACT § 311 (UNIF. L. COMM’N 2017).

donor-conceived people, recipient parents, and donors who wish to connect earlier in life.²⁰¹ However, to achieve the goals highlighted throughout this Article—namely, providing each donor-conceived person with the *option* of learning the donor’s identity—adoption of the 2017 UPA must exclude an existing provision allowing donors to opt out of identity release.²⁰² Ideally, this “opt-out” provision would be removed entirely from the UPA, and issues related to the regulation of third-party gamete donation would be legislated separately from, though perhaps concurrently with, legislation regarding parentage.

V. ANTICIPATED CRITICISMS AND CHALLENGES TO STATE REGULATION

This Article will address several possible challenges to its proposed reforms and calls for additional regulation of the industry, including that the proposal will lead to a potential decrease in the supply of donors, violate the Dormant Commerce Clause,²⁰³ give donor-conceived people “special rights,” violate a donor’s right to privacy, impede the right to procreate, or provide a “one-size-fits-all” solution that violates parents’ rights to raise their children as they see fit.

A. *Decrease in Donor Supply*

One frequent argument against the disclosure of donor identity is that it will lead to a decrease in the supply of donors.²⁰⁴ However, a 2007 analysis showed that “it appears that the ratio of open-identity to anonymous donors at a program increases the longer that a program has offered open-identity donation.”²⁰⁵ And perhaps most importantly, fears of a permanent decrease in donor supply were unfounded when Australia and the United Kingdom abolished anonymous donation.²⁰⁶ According to

201. See, e.g., Suzanne Davies, Note & Recent Case Development, *Queering America’s Heteronormative Family Law through “Well-Conceived” Legislation (or, Genetic Parents Exist and Sometimes Your Kid Might Want to Know Them)*, 46 AM. J.L. & MED. 89, 91 (2020) (proposing that the best solution of “legally protect[ing] the rights of queer parents while still providing for the unique needs of donor-conceived children” is “careful, gender-neutral regulation that codifies rights and responsibilities for all non-biological parents, in combination with stricter regulation of fertility clinics that requires them to keep accurate records about donors’ identities and medical histories”).

202. See UNIF. PARENTAGE ACT § 904(b)(2) (UNIF. L. COMM’N 2017). In states that have already adopted the 2017 UPA, the opt-out provision should be removed through amendment.

203. U.S. CONST. art. I, § 8, cl. 3.

204. Ertman, *supra* note 46, at 13.

205. Scheib & Cushing, *supra* note 10.

206. See Devlin, *supra* note 183; Damian H. Adams et al., *Does the removal of anonymity reduce donors in Australia?*, 23 JLM 628 (2016).

one article, after a “short initial decline” in the U.K., the number of donors “increased rapidly” with clinics “finding sufficient donors.”²⁰⁷

Some practitioners have also suggested that “the current generation of sperm donors . . . are likely to maintain Facebook accounts and use social media on a regular basis,” thereby disclosing to vast networks of close and distant connections “personal information about their daily lives and opinions that older generations might find shocking.”²⁰⁸ The comfort level with maintaining a very public online presence could indicate that this generation’s pool of potential donors “will be much more comfortable with being identified by offspring as compared with the donors in the past.”²⁰⁹ Thus, concerns about a permanent decrease in donor supply due to mandatory identity release could be mitigated by this more open attitude in general by young adults already accustomed to a more open society using the same tools that currently lead to the identification of “anonymous” donors.

Indeed, in a 2018 ASRM Ethics Committee opinion, that group recognized that “[j]ust as there has been an increased rate of parent disclosure of donor conception, there is also evidence of increased desire for or acceptance of open-identity donors by both *donors and recipients*.”²¹⁰ And in addition to the aforementioned 1991 study of American sperm donors, which showed a willingness to share more personal information when donating,²¹¹ other professionals have more recently recognized that donor attitudes can change over time and may continue to do so as “donors become more aware of the importance of their role to their offspring.”²¹²

Furthermore, the very fact that it is possible to identify formerly “anonymous” donors, as previously recognized, caused the fertility industry to begin reckoning with the reality that anonymity is a false promise. In light of this, to the extent that they are unaware of this possibility, potential donors should enter into these transactions free of

207. Graham, *supra* note 78, at 193; see Jeffrey M. Skopek, *Anonymity, the Production of Goods, & Institutional Design*, 82 FORDHAM L. REV. 1751, 1788 n.183 (2014) (recognizing that although the identification of sperm donors “would open donors to costs that might disincentivize creation, the existence of these costs might also give rise to new donor incentives—for example, by changing the social significance of donation in such a way that it would appeal to a new donor base” and noting that “[t]he rule choice here should turn not only on whether we want a good produced, but also on the types of producers we prefer”).

208. McGovern & Schlaff, *supra* note 32.

209. *Id.*

210. *Informing Offspring*, *supra* note 58, at 603 (emphasis added).

211. See *supra* notes 59–61 and accompanying text.

212. Susan Klock, *A survey of sperm-donors’ attitudes: a much-needed perspective*, 101 REFLECTIONS 43, 43 (2014).

this fiction.²¹³ Today, the only way to guarantee donor anonymity is to never donate in the first place.

Finally, as noted by Naomi Cahn, the federal government already limits who may become a gamete donor, including a current exclusion—men who have had sex with another man within the previous five years—thereby impacting supply.²¹⁴ And recent media attention suggests that various factors have worked against the recruitment of more racially diverse donors, which negatively impacts the ability of intended recipients to select a donor of the same racial background.²¹⁵

Thus, there are largely untapped segments of American society who are either prohibited from donating or are not yet comfortable with the idea of donating—whether due to existing cultural stigma²¹⁶ or perhaps some of the problematic industry practices this Article has addressed, such as the existence of large sibling groups that may overwhelm donors willing to be identifiable. It is also possible that the current generation of potential donors will be open to the release of their identities due to their open use of social media and growing public attention to the needs

213. See Emerson, *supra* note 33, at 439 (“In an Open ID system, those individuals who choose to donate would know and understand the possibility of a donor-conceived child contacting them, and would have enforceable legal protections in place to shield from parental liability or obligations.”).

214. See 21 C.F.R. §§ 1271.75(a), (d) (2023); 21 C.F.R. § 1271.45; Cahn, *supra* note 2, at 1114 (discussing the FDA’s existing ban on donation by men who have had sex with another man during the previous five years, and screening requirements used to determine who is an ineligible donor, and the fact that these requirements impact supply). There is currently a push for the FDA to revise this policy to allow for donation by men who have sex with men. See generally Marcus, *supra* note 31.

215. See Amber Ferguson, *America has a Black sperm donor shortage. Black women are paying the price.*, WASH. POST (Oct. 20, 2022), <https://www.washingtonpost.com/business/2022/10/20/black-sperm-donors/> [<https://perma.cc/4V6W-FYWK>] (explaining that reasons for the shortage include cryobank advertisements targeting white men, the taboo nature of infertility within the Black community, historical distrust of the healthcare system by the Black community, and the perception that sperm donation is akin to evading parental responsibilities as an absent father); Amy Dockser Marcus, *Sperm Banks Struggle to Recruit Black Donors & Other Donors of Color*, WALL ST. J. (Feb. 26, 2022), <https://www.wsj.com/articles/sperm-banks-struggle-to-recruit-black-donors-and-other-donors-of-color-11645887602> [<https://perma.cc/EW7N-ZWKR>].

216. See Alicia Summers, *Lack of minority egg donors may depend on region and race*, CBS8 (May 7, 2021), <https://www.cbs8.com/article/life/family/lack-of-minority-egg-donors-depend-on-region-and-race/509-29c21537-b39e-412c-af01-45d8c75671e4> [<https://perma.cc/83H6-C8P9>] (suggesting that a lack of Black egg donors was due in part to cultural stigma); Angela Hatem, *Sperm donors are almost always white, and it’s pushing Black parents using IVF to start families that don’t look like them*, INSIDER (Sept. 17, 2020), <https://www.insider.com/egg-sperm-donor-diversity-lacking-race-2020-9> [<https://perma.cc/L88H-UDR4>] (explaining that distrust of medical institutions and cultural stigma can lead to reduced donor numbers in communities of color).

of donor-conceived people, and changes to gamete donor recruitment tactics and targeted segments of the population could mitigate concerns of decreased supply.²¹⁷

B. State Regulation Violates the Dormant Commerce Clause

States are beginning to express interest in regulating the donor gamete industry because, as discussed earlier, Congress has not. Yet there is a suggestion that Colorado's legislation could be challenged on the ground that it violates the Dormant Commerce Clause.²¹⁸ Because Colorado's act does not facially discriminate against in-state versus out-of-state regulated entities,²¹⁹ it will be assessed under such a challenge with the second tier of Dormant Commerce Clause analysis—the “*Pike* balancing” test.²²⁰ Under this analysis, when a statute “regulates even-handedly to effectuate a legitimate local public interest,” so long as it has only incidental effects on interstate commerce, the statute will be upheld “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” and so long as the state interest would not have been promoted with a “lesser impact on interstate activities.”²²¹

The Supreme Court of the United States is currently considering whether California Proposition 12,²²² which bans the sale of pork products produced from sow confined “in a cruel manner,” including those who have less than twenty-four square feet of living space, violates the Dormant Commerce Clause.²²³ The outcome of this appeal could further

217. See Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 551 (2006) (“Countries that have been successful in maintaining local supplies have had to rethink their solicitation strategies and approach different segments of the fertile male population.”).

218. See I. Glenn Cohen et al., *The End of Anonymous Sperm Donation in Colorado: A Step Forward to a New Fertility Future in the US?*, 328 JAMA 1903, 1903–04 (2022), doi:10.1001/jama.2022.19471.

219. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981) (“Minnesota’s statute does not effect ‘simple protectionism,’ but ‘regulates evenhandedly’ by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down.”).

220. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

221. *Id.* at 142.

222. *California General Election Text of Proposed Laws: Proposition 12*, California Secretary of State, <https://vig.cdn.sos.ca.gov/2018/general/pdf/topl.pdf#prop12> [<https://perma.cc/6USJ-AFXX>] (last visited Jan. 4, 2023).

223. Nat’l Pork Producers Council, et al. v. Ross, No. 21-468, <https://www.supremecourt.gov/docket/docketfiles/html/public/21-468.html>

refine the *Pike* balancing test. California’s Proposition 12 identifies its purpose as the prevention of “animal cruelty by phasing out extreme methods of farm animal confinement, which *also* threaten the health and safety of California consumers.”²²⁴ And petitioners argue that, *inter alia*, concern for animal welfare is not a legitimate state interest for regulating interstate commerce because it bears no relation to the state’s internal health and safety.²²⁵

Notably, in contrast with California’s Proposition 12, the legislative declaration within Colorado’s act includes a recognition that “[m]any Coloradans are conceived, or establish their families, through some form of assisted reproduction involving a third-party sperm, egg, or embryo provider, also known as a gamete ‘donor’, whose identity is unknown to the family at the time of donation.”²²⁶ Then, in addition to listing the potential harms that can result to donor-conceived people from current industry practices, the Act includes a declaration that “[m]ost gametes or embryos from donors that are provided to recipients located in Colorado are provided from gamete agencies, gamete banks, or fertility clinics located in other states.”²²⁷ The legislative declarations conclude with a finding as follows:

[T]he general assembly finds that to protect the health and welfare of donor-conceived persons and their families in Colorado, it is essential to enact the ‘Donor-conceived Persons and Families of Donor-conceived Persons Protection Act’ to regulate the use of donated gametes provided from gamete agencies, gamete banks, or fertility clinics located inside or outside of Colorado to recipients in, or who are residents of, Colorado.²²⁸

Thus, the plain language of Colorado’s act identifies a legitimate public interest—protecting the health and welfare of Colorado’s donor-conceived persons and their families—and explains that

[<https://perma.cc/34WN-PKHR>]; Amy Howe, *California law on sale of pork raises concerns about interstate moral disputes in a “balkanized” nation*, SCOTUSBLOG (Oct. 11, 2022), <https://www.scotusblog.com/2022/10/california-law-on-sale-of-pork-raises-concerns-about-interstate-moral-disputes-in-a-balkanized-nation/> [<https://perma.cc/33L5-NTCN>].

224. *California General Election Text of Proposed Laws*, *supra* note 222 (emphasis added).

225. Brief for Petitioners at 39–43, National Pork Producers Council, et al. v. Ross, No. 21-468, http://www.supremecourt.gov/DocketPDF/21/21-468/227679/20220610132221228_Nat%20Pork%20Producers%20v%20Ross%20No.%2021-468%20Brief%20for%20Petitioners.pdf [<https://perma.cc/LYQ6-MEKS>].

226. C.R.S. § 25-57-102(1)(a).

227. C.R.S. § 25-57-102(1)(g).

228. COLO. REV. STAT. § 25-57-102(2) (2023).

regulation of intrastate and interstate activities is necessary to promote and effectuate this state interest precisely because most donor gametes and embryos are provided to recipients in Colorado from entities located outside of the state.²²⁹ And the vehicle by which the Colorado act effectuates these goals is by requiring compliance with the Act's requirements for in-state or out-of-state entities to acquire or maintain a license to do business. Thus, challenges to Colorado's law—or the COCA Model, if adopted by other states—are likely to survive attack under the Dormant Commerce Clause given Colorado's act does not actually impede the interstate flow of goods.²³⁰ Additionally, there is no approach to effectuate the state's goals with a lesser impact on interstate activity when the use of the product itself—commercially donated gametes—directly impacts the “health and welfare of donor-conceived persons and their families in Colorado.”²³¹

C. Regulation Gives Donor-Conceived People “Special Rights”

While it is true that donor-conceived people are not the only individuals who lack access to specific information about their genetic heritage and family medical history, there is an important fact that distinguishes donor-conceived people from other segments of this subset of the population: donor-conceived people are deliberately and often painstakingly created in a commercial transaction designed to separate

229. See *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (“We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.” (punctuation omitted)); *Houlton Citizens’ Coal. v. Town of Houlton*, 175 F.3d 178, 192 (1st Cir. 1999) (holding that protection of public health was a legitimate local interest such that waste management scheme did not violate the Dormant Commerce Clause); see also *Waste Mgmt. of Michigan v. Ingham Cnty.*, 941 F. Supp. 656, 668 (W.D. Mich. 1996) (holding that protection of public health and safety are legitimate public interests).

230. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978) (recognizing that the Supreme Court of the United States “has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods”); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (holding that conflict in state laws governing truck mud flaps unconstitutionally burdened interstate commerce); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (holding that state’s regulation of train lengths impeded interstate commerce such that it violated Dormant Commerce Clause).

231. See *Clover Leaf Creamery Co.*, 449 U.S. at 473–74 (holding that burden on interstate commerce did not clearly outweigh the state’s legitimate purpose).

them from genetic heritage and family medical history.²³² In the United States, gametes are sold for the specific purpose of being used by another person to conceive a child.²³³ In such a scenario, comparisons between people born as the result of affairs, one-night stands, or who otherwise lack access to their complete genetic family and family medical history due to personal conflicts are wholly inapposite. In a process through which intended parents can select the genetic parent of their child based upon trivial criteria such as whether the donor resembles a celebrity²³⁴ and what the donor identifies as their favorite pet,²³⁵ some consideration can—and should—be given to preserving the resulting human’s opportunity to identify and connect with their genetic parent. As one scholar has put it, “[i]n an anonymous sperm donation scenario, parents *intentionally* exercise their rights in a way that may infringe upon the rights of the resulting child to be free from harm.”²³⁶ And it is reasonable that the resulting donor-conceived person would want to identify and potentially contact the donor when recipient parents care about (and select for) the donor’s health, education, and race/ethnicity.

In contrast with other forms of procreation, donor-conceived people owe their existence to an intricately executed commercial transaction through which all participants explicitly consent, with specific factors chosen and controlled by those participants.²³⁷ To assert that the

232. See Ertman, *supra* note 46, at 16 (“Alternative insemination [using third-party donor gametes] generally involves at least two separate transactions. The sperm bank first purchases sperm from a donor and subsequently sells the sperm to a woman who uses it to become a mother. Both transactions . . . involve the exchange of money for goods and services. While the transactions differ in important respects, both transactions commodify gametes, and in doing so commodify parental rights and responsibilities.”).

233. See Ertman, *supra* note 46, at 17 (“Sellers of both sperm and eggs are called donors in legal doctrine and popular speech, yet these sellers are generally paid for their gametes. The language is likely borrowed from blood donation rhetoric, which refers to those giving up their blood as donors regardless of whether they receive money. In both contexts, the terminology masks economic elements of a transaction by suggesting that the people giving up their body parts are doing so out of altruism rather than economic self-interest.”).

234. See *Donor Look-A-Likes*, CALI. CRYOBANK, <https://www.cryobank.com/donor-search/look-a-likes/> [<https://perma.cc/F3K8-8ADD>] (last visited Oct. 7, 2022) (providing intended gamete recipients with the opportunity to learn which celebrity or celebrities a donor most resembles as determined by the cryobank).

235. See *Favorite Pet*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/search/> [<https://perma.cc/35X6-4LSA>] (last visited Jan. 4, 2023) (providing intended gamete recipients with the option to filter donor search results by a donor’s favorite pet, including dog, cat, bird, fish, reptile, small animal, and any).

236. Johns, *supra* note 105, at 125 (emphasis added).

237. See Scheib & Ruby, *supra* note 66, at 41 (distinguishing the role of a donor from the adoption and extramarital affairs because donor insemination “includes conscious decisions by all participants, prior to conception, that the child will have a social parent to whom

potential for donor-conceived people to access additional information about the donor should not be protected simply because this is an unavoidable consequence for others is hardly a sound or ethical conclusion when, for donor-conceived people, it *could be* a largely avoidable consequence.²³⁸ Indeed, in the context of reproduction using third-party donor gametes, “parents have every opportunity to consider the conditions under which they want to pursue their family building and can choose a donor based on their own children’s anticipated needs.”²³⁹ And as noted by Cahn, “[a] donor deliberately provides material to be used in the creation of a child; a romantic relationship is typically not intended to result in the creation of a child, and these moral differences can serve as an explanation . . . for legal intervention.”²⁴⁰

Regulation of the fertility industry to permit the identification of sperm donors by their resulting genetic offspring does not provide those offspring with “special rights.” On the contrary, it rectifies inherent problems within the donation scheme.²⁴¹ Regulation would instead protect the option and opportunity for the future person born as the

he/she is not genetically related, or will have only one parent intentionally, and that the male genetic progenitor will not have a social or legal parental role”); *see also* Ishii & Beriain, *supra* note 4 (“In the practice of ordinary [donor conception], the aspiring parents and gamete donor each give their respective consent. This appears to be similar to organ transplantation, for which the donor and recipient each separately consent. However, offspring born via [donor conception] cannot give prior consent to the [donor conception].”).

238. How parties to third-party donor conception actually conduct themselves after a transaction is outside of regulated entities’ control. But gamete banks and agencies can better ensure a donor-conceived person’s ability to access identifying information by refusing to accept or sell gametes provided under conditions of anonymity and no agreement to future contact. That some donors may refuse to uphold their end of the bargain—or that some recipient parents may never tell their child about the child’s status as a donor-conceived person—are outside of a regulated entities’ control. Thus, some donor-conceived people may not have access to vital information due to the personal, moral, and ethical choices of individual actors. But provision of adequate educational materials or counseling prior to entering a donor gamete transaction can help ensure donors and recipient parents understand the needs and interests of donor-conceived people, including the importance of disclosure and the potential desire for future contact.

239. Braverman & Schlaff, *supra* note 1, at 1102–03; *see also* Johns, *supra* note 105, at 126 (“[T]here remain many other methods by which people can become parents other than anonymous sperm donation . . . [A] potential [person’s] right to the identity of [the] sperm donor outweighs a potential parent’s right to make an intentional procreative decision that necessarily denies the resulting [person] that right.”).

240. *See* Cahn, *supra* note 2, at 1118.

241. Johns, *supra* note 105, at 133 (“The only reason that harms like anonymous sperm donation can be weighted against benefits is because a child exists to undergo both these harms and benefits.”).

result of commercial gamete donation²⁴² to maintain their autonomy and assert their agency without the burden of barriers deliberately put in place *prior to their conception* that would otherwise hinder them²⁴³ from exercising personal choices and making decisions about what is necessary for their own wellbeing.²⁴⁴

D. Donor Identification Violates a Donor's Right to Privacy

Requiring those who wish to become gamete donors to agree to the eventual release of their identifying information to donor conceived offspring who request the information does not violate a donor's right to privacy. Donors who enter such transactions will have done so willingly, which necessarily lessens any expectation of privacy.

In *Johnson v. Superior Court*,²⁴⁵ in considering whether to compel an anonymous sperm donor to provide deposition testimony in a family's suit against the cryobank, the court explained that even under California's broad constitutional right to privacy, some factors can lessen a person's reasonable expectation of privacy, including "customs, practices, and physical settings surrounding particular activities."²⁴⁶ There, the court held that the anonymous donor's "reasonable expectation of privacy in his identity was substantially diminished by his own conduct," which included voluntarily donating sperm to the cryobank after warnings that certain information would be disclosed to purchasers and donating on several occasions, which the court called "a substantial commercial transaction likely to affect the lives of many people."²⁴⁷ And the Supreme Court of the United States has also

242. For an excellent response to arguments regarding "future people" versus "merely possible" or "hypothetical people" in terms of discussing the harms that result from existence due to anonymous gamete donation, see Johns, *supra* note 105, at 133–34. (IV)(A) (relying upon Rivka Weinberg, *Identifying and Dissolving the Non-Identity Problem*, 137 PHIL. STUD. 3 (2008)).

243. It should go without saying that people who are born as the result of third-party gamete donation "were not a party to the contract [signed by their parents], and clearly will be able to make contact regardless of what their parents' contracts say." Braverman & Schlaff, *supra* note 1, at 1102.

244. See Cahn, *supra* note 2, at 1105 ("Allowing donor-conceived offspring to access information when they are constitutionally mature . . . does not affect parents' rights before their children become independent. Indeed, rather than serving as an 'end-run' around parental rights, such a system serves to respect an adult's interests." (footnote omitted)).

245. 95 Cal. Rptr. 2d 864 (Cal. App. 4th 2000), *disapproved of on other grounds by Williams v. Superior Ct.*, 3 Cal. 5th 531 (2017).

246. *Johnson*, 95 Cal. Rptr. 2d at 877.

247. *Id.*; cf. *Perez v. Comm'r of Internal Revenue*, 144 T.C. 51, 61 (2015) (holding that egg donor who sought to exclude "donation" earnings from her taxable income on the basis that it was damages for pain and suffering "very clearly has a legally recognized interest

recognized that voluntary participation in regulated industries can diminish a participant's expectations of privacy.²⁴⁸

If sperm donors have a diminished expectation of privacy even when donating under the auspices of anonymity, donors in an open identification system would also have a diminished expectation of privacy and would consent to the disclosure of their medical and identifying information. Thus, any assertion that a donor's privacy interests are violated by requiring agreement to release identifying information to donor-conceived offspring is unfounded.

E. Family Limits Impede the Right to Procreate

Some may argue that limiting the number of families that may be established per donor interferes with the right to procreate.²⁴⁹ In *Skinner v. Oklahoma*,²⁵⁰ the Supreme Court of the United States deemed sterilization as a penalty for specific crimes unconstitutional and, in doing so, recognized that procreation, like marriage, "involves one of the most basic . . . rights" because it is "fundamental to the very existence and survival" of humankind.²⁵¹

Nevertheless, the Supreme Court has never held that the fundamental right to procreate includes the right to do so through assisted reproductive technologies.²⁵² And the United States Court of Appeals for the Eleventh Circuit has explicitly declined to hold that "a man has a fundamental right to procreate via an IVF process that necessarily entails the participation of an unrelated third-party egg donor and a

against bodily invasion," but this interest was forgone by her "consent[] to such intimate invasion for payment").

248. See *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 627 (1989) (holding that expectations of privacy were diminished for covered employees who were subject to drug tests due to their participation in regulated industry); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (same).

249. Legal scholars have already opined that this avenue for challenge has a diminished likelihood of success. See *Cohen et al.*, *supra* note 218.

250. 316 U.S. 535 (1942).

251. *Id.* at 541. Since *Skinner*, federal courts have concluded that prisoners do not have a right to procreate, including through artificial insemination, while incarcerated. See *Gerber v. Hickman*, 291 F.3d 617, 622 (9th Cir. 2002) ("There is simply no comparison between sterilization and denial of the facilitation of artificial insemination." (punctuation omitted)); *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988) ("There is simply no comparison between sterilization, carrying with it subtle, far-reaching, and devastating effects, and denial of the facilitation of artificial insemination."), *aff'd by* 908 F.2d 1395 (8th Cir. 1990).

252. In the wake of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), it is anyone's guess whether the current composition of the Court would do so.

gestational surrogate.”²⁵³ Further, in an unreported case, the United States District Court for the Northern District of California rejected arguments from an intended recipient of donor gametes that FDA regulations barred her from procreating.²⁵⁴ The court noted that the appellant was “not impeded from exercising any general constitutional right to procreate or even a more specific right (if it exists) to procreate via artificial insemination.”²⁵⁵

Thus, not only has the Supreme Court never held that there is a fundamental right to procreate using third-party donor gametes,²⁵⁶ but even if there were, that right would not be impeded by placing reasonable regulations on the commercial practice of third-party gamete donation. Indeed, a limit on the use of *some* donated gametes (*i.e.*, gametes from donors who have reached a family limit) does not deny a person who wishes to use donated gametes the opportunity to do so.²⁵⁷ Likewise, limiting the number of families established by donations to commercial sperm banks cannot reasonably be understood as violating a commercial sperm *donor’s* right to procreate.²⁵⁸ Accordingly, a regulation limiting the number of families that may be established from one donor should survive such a challenge.

253. *Morrissey v. United States*, 871 F.3d 1260, 1269–70 (11th Cir. 2017).

254. *Doe v. Hamburg*, No. C-12-3412 EMC, 2013 WL 3783749 (N.D. Cal. July 16, 2013).

255. *Id.* at *7.

256. Andrew B. Coan, *Assisted Reproductive Equality: An Institutional Analysis*, 60 CASE W. RES. L. REV. 1143, 1146 (2010) (“[T]he Court has never addressed the constitutionality of regulating ARTs.”).

257. *See* Estate of Kievernagel, 166 Cal. App. 4th 1024, 1033 (2008) (“The disposition of [decendent’s] frozen sperm does not implicate [the wife’s] right to procreative autonomy. That would be so only if she could show that she could become pregnant only with [the decendent’s] sperm.”); *see also* McQueen v. Gadberry, 507 S.W.3d 127, 145–46 (Mo. Ct. App. 2016) (holding that although appellant “has a right to procreate, that does not mean she has a right to procreate with [her ex-husband] by implanting the frozen pre-embryos which contain his genetic material”); J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001) (holding that denying a biological father the opportunity to use or donate pre-embryos created with his former wife did not deny him the right to procreate when he could still do so through natural procreation or further use of assisted technologies).

258. *Cf.* Strickland v. Day, 239 So. 3d 486, 491 (Miss. 2018) (explaining that gamete donors “do not engage in an act of procreation but provide biological material with no intention to act as a parent”); Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993) (distinguishing the intent to “donate genetic material to anyone” from the intent “to procreate a child [who is] genetically related” and likewise holding that gestational surrogate “is not exercising her own right to make procreative choices” but is instead “agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own” (internal punctuation omitted)).

F. Provides a “One-Size-Fits-All” Solution

Some critics of Colorado’s new law have suggested it provides a “one-size-fits-all solution” and would interfere with parents’ rights to raise their children as they see fit. But it does nothing of the sort. The Act does not mandate contact or a relationship between recipient parents, donors, or donor-conceived people. It simply provides an adult donor-conceived person with the opportunity to identify and contact the donor if and when that adult donor-conceived person wishes to do so. Limiting identity disclosure to after the donor-conceived person turns eighteen avoids interfering with the legal parent-child relationship. And if optional identification of a donor is made possible *prior* to a donor-conceived person reaching age eighteen, combined with widespread adoption of the 2017 UPA, diverse family structures would have a greater ability to do what they deem is best for their children while preserving their family’s legal stability.

Additionally, while the Act requires psychosocial education for intended parents to inform them about, *inter alia*, the importance of and benefits of disclosing their use of donor gametes to their donor-conceived child for the myriad reasons explained *infra*, the Act *does not* mandate that those parents do so. Whether to disclose the use of a donor remains entirely up to the legal parents of the donor-conceived person, however unwise and risky the decision not to disclose may be, because parents have a constitutional right to rear their children as they see fit.²⁵⁹ But the benefits of adequate counseling (*i.e.*, psychosocial education) for intended gamete recipients can assist in resolving their own potential grief or trauma related to social or medical infertility;²⁶⁰ address anxiety regarding social, religious, or cultural stigmas;²⁶¹ or help them understand the importance of disclosure to their donor-conceived child along with the tools and support with which to make that disclosure at the appropriate time *if they so choose*.²⁶²

259. See *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000) (recognizing, in custody case brought against child’s mother by the child’s grandparents, that although in an “ideal world,” parents would always cultivate a relationship between a child and the child’s grandparents, that decision is left to the parents to make, not the state); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

260. See *Brewaeys*, *supra* note 62, at 39 (noting that “stress was associated with problems arising from coping with infertility and the [donor insemination] treatment itself”).

261. Zweifel, *supra* note 28, at 515.

262. The results of a New Zealand study suggest that parents who have received counseling that encourages disclosure to donor-conceived children are more likely to

G. Requires Psychosocial Education Not Required for Other Modes of Family Building

Though some may decry a requirement that recipients of donor gametes and gamete donors undergo psychosocial education/counseling when those who become parents without the need for such interventions do not, understanding the unique challenges and confluence of interests that arise through the use of donor gametes should be part and parcel of giving informed consent before undergoing or participating in this transactional medical procedure.²⁶³ And regulation of informed consent is not without precedent.

The United States regulates informed consent requirements for organ transplant programs, requiring the implementation of “written . . . informed consent policies that inform each patient” of, among other things, the potential psychosocial risks of the procedure.²⁶⁴ Programs must also implement written informed consent policies for donors and “ensure that the prospective living donor is fully informed about,” among other things, the psychosocial risks to the donor.²⁶⁵ Patients and living organ donors must also undergo psychosocial evaluations.²⁶⁶

For gamete donors, who are typically young adults, the importance of counseling is bolstered by what some social scientists deem “emerging adulthood,” which is the period between ages eighteen and thirty—a time characterized by limitations on the capacity to make independent decisions, financial stability, and ability to minimize risk-taking.²⁶⁷

actually inform their children at a young age (or at least intend to do so later). See Brewaeys, *supra* note 62, at 43 (“[T]he results of a study from New Zealand [showed] 30% of the parents had informed their children at a young age. Of the remaining parents, 77% had the intention to do so at a later stage. It is important to know, however, that 94% of this study population received counselling in which they were encouraged to disclose to children their conception circumstances, a condition which will have undoubtedly influenced their responses.” (citing Anna Rumball & Vivienne Adair, *Telling the story: parents’ scripts for donor offspring*, 14 HUMAN REPRODUCTION 1392-99 (1999))).

263. See Michelle Dennison, *Revealing your sources: the case for non-anonymous gamete donation*, 21 J. LAW & HEALTH 1, 25 (2008) (“Counseling, provided by the clinic through a program approved by the state, for both the donors and the recipient-parents should be mandatory before beginning the gamete donation/purchase process, so that both parties fully understand the future implications of [mandatory donor identification at 18], and give their informed consent.”); see also ASRM Ethics Committee, *supra* note 5, at 601 (“Counseling and informed consent about disclosure and information sharing are essential for donors and recipients.”).

264. 42 C.F.R. § 482.102(a)(4) (2023).

265. 42 C.F.R. § 482.102(b)(5) (2023).

266. 42 C.F.R. §§ 482.90(a)(1), (b)(1) (2023).

267. See Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591, 602–05, 607–11 (2006) (advocating for the adoption of “deliberative consent” for elective medical procedures that are “difficult or impossible to reverse,” including egg and

Donors have also expressed a need for counseling that discusses the emotional consequences of donating, how to disclose their donations to family, and how to manage potential contact with their donor-conceived offspring.²⁶⁸

Thus, as with organ donation, considering the potential long-term psychosocial implications involved with the donation and use of third-party gametes, it is not unreasonable to suggest some form of regulated and mandatory psychosocial education or counseling prior to receipt of or donation of those gametes as being necessary for the provision of truly informed consent to a medical procedure—a concept that is “firmly entrenched in American tort law.”²⁶⁹

VI. CONCLUSION

Each day sees the birth of an untold number of donor-conceived people, not just in the United States but worldwide, and many of those born

sperm donation, which are frequently undergone by “emerging adults” for financial gain). It is also worth noting that commercial gamete donors provide their gametes for use in connection with the relinquishment of their constitutional right to parent the child or children who result, and the Supreme Court of the United States has identified the right to “conceive and . . . to raise one’s children” as an essential, basic civil right that is “more precious than property rights.” *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Likewise, it has concluded that the “integrity of the family unit” is protected throughout the Constitution. *Id.* And waivers of constitutional rights “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970); *cf. Bumper v. North Carolina*, 391 U.S. 543, 549 (1968) (consent to a warrantless search by law enforcement must be given freely and voluntarily so as not to violate the Fourth Amendment of the Constitution of the United States). Thus, arguably, psychosocial education for gamete donors provides them with “sufficient awareness” of the relevant circumstances and likely consequences of this relinquishment, including their eventual identification, the sharing of their medical information, the potential for contact by their offspring (which may be numerous), and other details described elsewhere in this article, so as to make the relinquishment of their genetic material and attendant rights to the resulting children truly knowing and intelligent.

268. *See Svanberg et al., supra* note 77, at 177; *see also Stina Isaksson, Preferences and needs regarding future contact with donation offspring among identity-release gamete donors: results from the Swedish Study on Gamete Donation*, 102 FERTILITY & STERILITY 1160, 1165 (2014).

269. *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 269 (1990). Importantly, “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Accordingly, the Supreme Court of the United States has rejected the assertion that the First Amendment is violated when a state requires provision of specific information by medical professionals as part of obtaining informed consent. *See Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

internationally are the result of donated gametes that originated from a bank or agency located in the United States. Whether by voluntary policy changes within the industry due to the pressure of public opinion and market forces or the implementation of legal regulation, the commercial practice of third-party gamete donation must begin to focus on the long-term needs and best interests of the people it creates. These goals could be accomplished through the adoption of the COCA Model, with optional donor identification before the age of eighteen, a lower reasonable family limit, required operation of donor-sibling registries, and in states with sufficient protections for diverse family structures (*i.e.*, adoption of the 2017 UPA) that are also home to a significant market share of the third-party gamete donation industry.