

ACCIDENTAL INCEST: DRAWING THE LINE – OR THE CURTAIN? – FOR REPRODUCTIVE TECHNOLOGY

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Incest is a significant concern in the new world of test tube families. In 1980, the geneticist Martin Curie-Cohen raised the possibility of “inadvertent inbreeding” from the increasing use of donor sperm.¹ Others have

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¹ Martin Curie-Cohen, *The Frequency of Consanguineous Matings Due to Multiple Use of Donors in Artificial Insemination*, 32 AM. J. HUM. GENETICS 589, 590 (1980).

called this “accidental incest,” in which “the offspring of donated sperm or ova meet and are unknowingly attracted.”² The fear is pervasive in the reproductive technology world,³ but fundamental questions remain: What is incest?⁴ Does inadvertent inbreeding qualify?⁵ Should it?

In other countries, the fears of accidental incest have resulted in precautionary legislation that places limits on the number of offspring any given donor can produce. The Netherlands restricts the number of children from any individual donor to twenty-five.⁶ In Austria, a donor can only provide sperm to one clinic, and no more than three couples can use that sperm.⁷ In England, no more than ten families can use the same donor, although the

² Libby Purves, *Whose Body is it Anyway?*, TIMES (LONDON), Jan. 15, 2008, available at http://www.timesonline.co.uk/tol/comment/columnists/libby_purves/article3187337.ece; see also Steven Kotler, *The God of Sperm: In an Industry Veiled in Secrecy, a Powerful L.A. Sperm Peddler Shapes the Nation's Rules on Disease, Genetics—and Accidental Incest*, L.A. WKLY., Sept. 27, 2007, available at <http://www.laweekly.com/2007-09-27/news/the-god-of-sperm/>.

³ See, e.g., Evonne Barry, *Donor Secrecy 'Could Lead to Incest'*, SUNDAY HERALD SUN (MELBOURNE), Aug. 10, 2008, at 24 (noting that the Infertility Treatment Authority in Australia fears that “relationships could inadvertently be formed between half-siblings”); Kotler, *supra* note 2 (noting that incest is a “growing concern within industry watchdog groups”).

⁴ The term “incest” means the actual sexual act between family members (however family is defined). The act of incest, in turn, may be subject to specific criminal or civil sanctions. All states criminalize sexual relationships between genetically related parents and children as well as full-blooded siblings, and the civil system voids any marriages between defined groups of family members. States vary in the civil and criminal sanctions imposed for relationships based on affinity, such as marriage or adoption, rather than on blood. See generally MODEL PENAL CODE § 230.2 (Official Draft and Revised Comments 1980) (exemplifying state incest laws in the United States).

In some states, the crime of incest arises from either marriage or from a sexual relationship. See, e.g., LA. REV. STAT. ANN. § 14:78 (2007) (defining the crime of incest in Louisiana as “marriage to, or sexual intercourse with, any ascendant or descendant, brother or sister, uncle or niece, aunt or nephew, with knowledge of their relationship”); MD. CODE ANN., CRIM. LAW, § 3-323(a) (West 2008) (“A person may not knowingly engage in vaginal intercourse with anyone whom the person may not marry” under civil law.); NEB. REV. STAT. §§ 28-702, 28-703 (2007) (defining incest as “knowingly intermarry[ing] or engag[ing] in sexual penetration” with a person who is a parent or child, grandparent or grandchild, brothers or sister (whole or half), uncle or niece, or aunt or nephew, or as “engag[ing] in sexual penetration with his or her minor stepchild”).

⁵ The traditional definition of incest involves a sexual relationship between family members, but reproductive technology enables reproduction *without* any type of interpersonal sexual relationship. Thus, in the reproductive technology area, Guido Pennings has suggested that, in certain contexts, such as when one sibling uses another sibling’s gametes, incest is a problematic concept. See Guido Pennings, *Incest, Gamete Donation by Siblings and the Importance of the Genetic Link*, 4 REPROD. BIOMEDICINE ONLINE 13, 14 (2002). This article does not address the legal or ethical issues involved in this use of the reproductive technology. For a discussion of these issues, see MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS (2001); see also Kimberly Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1212656>.

⁶ See P.M.W. JANSSENS, SPREADING OF HEREDITARY DISEASES THROUGH DONOR SPERM: NOT A REASON FOR REDUCING THE NUMBER OF OFFSPRING PER DONOR IN THE NETHERLANDS, 146 NEDERLANDS TIJDSCHRIFT VOOR GENEESKUNDE 1215 (2002).

⁷ See *Donation*, 87 FERTILITY & STERILITY S28, S28 (2007).

number of children per family is unlimited.⁸ In contrast, in the United States, there are no legally enforceable limits on the number of offspring produced by assisted reproductive technologies, but with more than 40,000 children born from donor eggs and sperm last year,⁹ concerns about what is now called “inadvertent consanguinity” are quite real.¹⁰

Outside of the reproductive technology context, incest is in the air — and on the air. The ABC Sunday evening soap opera, *Brothers and Sisters*, has both symbolic and actual overtones of incest.¹¹ The highest courts in Germany and England have each upheld their incest prohibitions within the past year in cases involving siblings who had been adopted into different families and then married each other.¹² By contrast, legal commentators in the United States suggest that prohibitions on incest, at least when defined as private consensual sexual behavior between adults, may go the same way as

⁸ See Human Fertilisation & Embryology Authority, For Donor-Conceived People, http://www.hfea.gov.uk/en/1183.html#can_i_find_out_if_there_are_other_donor_conceived_people_who_are_genetically_related_to_me (last visited Nov. 23, 2008).

⁹ The Centers for Disease Control collect statistics on the number of children born from donor eggs and embryos, but not from donor sperm. See CTRS. FOR DISEASE CONTROL & PREVENTION, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES REPORT (2007), <http://www.cdc.gov/ART/ART2005/508PDF/2005ART508.pdf>. Estimates on the number of children born from donor sperm vary, with numbers ranging from 20,000 to 30,000. See LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 12 (2007) (noting that at least 30,000 children were born from sperm donation in 2004); CTRS. FOR DISEASE CONTROL, *supra*, at 17 (noting that 27,047 children were born from donor eggs or embryos in 2005). Sperm banks constitute seventy-five million dollars of the more than three billion dollars annually spent in the fertility market. Kotler, *supra* note 2.

A note about language: throughout this area, language misrepresents actual practices. Some have suggested, for example, that artificial insemination be labeled “alternative insemination.” And sperm and egg donors are, in most cases, sperm and egg *sellers*, although some gamete providers are not paid for their contributions and the practice is popularly imagined as charitable. For a discussion of donor motivation see Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319 (2007) [hereinafter *Selling Genes, Selling Gender*] and Rene Almeling, ‘Why Do You Want to be a Donor?’: *Gender and the Production of Altruism in Egg and Sperm Donation*, 25 NEW GENETICS & SOC. 143 (2006). Consider the mixed messages on charity and commodification in Stephanie Smith, *Dim Economy Drives Women to Donate Eggs for Profit*, CNN.COM, Aug. 8, 2008, <http://www.cnn.com/2008/HEALTH/08/05/selling.eggs/index.html>. Donor-conceived offspring who share a gamete provider may consider themselves to be “half-siblings.”

¹⁰ See, e.g., A. de Boer, J. Oosterwijk & C.A.E. Rigtters-Aris, *Determination of a Maximum Number of Artificial Inseminations by Donor Children per Sperm Donor*, 63 FERTILITY & STERILITY 419, 419–21 (1995); Thore Egeland, Per Hoff-Olsen & Oystein Magnus, *Excessive use of a Single Donor? And Inadvertent Consanguinity*, 67 FERTILITY & STERILITY 1181, 1181–82 (1997) (responding to the de Boer article *supra*); Practice Comm., ASRM, *Repetitive Oocyte Donation*, 86 FERTILITY & STERILITY S216, S216 (2004).

¹¹ See Kate Aurthur, *Is DNA-Tested Kiss Audience Approved?; ABC's 'Brothers & Sisters' Flirts with the Issue of Incest*, L.A. TIMES, May 12, 2008, at E1.

¹² See Fiona Barton, *Shock for the Married Couple Who Discover They Are Twins*, DAILY MAIL (London), Jan. 11, 2008, at 5.

prohibitions on private consensual sexual behavior between same-sex partners.¹³

This article examines the issue of inadvertent consanguinity raised by third party gamete use through a feminist lens. It seeks to map out the arguments about why we seek to regulate incest and how thinking about reproductive technology places these issues in sharp relief, while examining the impact of variables, such as the emotion of disgust and the existence of patriarchy, on our perspective on what to regulate, and why. The central questions this article addresses are: (1) whether criminal and/or civil sanctions of intra-familial sexual behavior should apply to relationships created through reproductive technology; and (2) whether there are reasons — apart from this concern about incest — for limiting the number of offspring produced by any individual donor. As an initial matter, if, outside of the reproductive technology context, there is no legitimate basis for prohibiting adult siblings (or half-siblings) from engaging in sexual relationships, then, within the reproductive technology world, one of the primary bases for offspring-based limits on donors is moot.¹⁴ On the other hand, if there are adequate justifications for banning relationships between close family members, then prevention of accidental incest may provide a basis for establishing limits on donors. Second, even if the rationales for banning “non-accidental” incest have less utility when applied to families created through donor gametes, then there may still be reasons for limiting the number of children born with the use of the gametes of any particular individual.¹⁵

Incest lies at the intersection of family law and criminal law and therefore has both civil and criminal law implications.¹⁶ The elements of the crime may even depend on the definition of family.¹⁷ Incest bans serve to

¹³ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing private consensual sexual behavior between same-sex partners). On challenges to the incest ban, see Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 Nw. U. L. REV. 1543, 1609 (2005) (questioning the bases for the incest taboo); William Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1057 (2005) (“In large part because the social and normative stakes of adult incest among cousins or siblings by affinity are so low, *Lawrence* and its (or my) jurisprudence of tolerance do not clearly require that even these statutes violate the Fourteenth Amendment.”).

¹⁴ As discussed *infra* at Section IV.A., there are other reasons, independent of incest fears, to set limits.

¹⁵ For example, the risk of spreading genetic diseases is palpable. See, e.g., Judith Graham, *When a Disease is Donated*, CHI. TRIB., March 27, 2008, at C1 (describing five children conceived from the same sperm donor who were “found to share a genetic mutation for severe congenital neutropenia, a rare blood disease” and a child conceived with a donor egg who “developed Tay-Sachs, a fatal genetically inherited neurological disease”).

¹⁶ See, e.g., MD. CODE ANN., CRIM. LAW, § 3-323(a) (West 2008) (making incest in the form of sexual relations a crime); MD. CODE ANN., FAM. LAW, § 2-202(a) (West 2008) (civil law prohibiting marriage within three degrees of consanguinity).

¹⁷ See generally Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008) (exploring the relationship between incest and fam-

penalize behavior between individuals because they are family members, regardless of whether the underlying behavior would itself be subject to sanction.¹⁸ Under civil law, an incestuous marriage is automatically void from the outset, without any action by either spouse.¹⁹ As courts and legislatures expand the definition of what should be included in the private and protected sphere of consensual relationships, the continuing prohibition on incest has come under some challenge.

Calls for relaxing the prohibition on incest come from two directions, one constitutional and the other jurisprudential. First, there is the claim that the Supreme Court's recent decision in *Lawrence v. Texas* calls incest bans into question because of the private nature of the behavior;²⁰ second, there is the claim that incest bans are unjustifiable, inherently serve to reinforce the traditional nuclear, heterosexual family, and are a patriarchal, hierarchical construct.²¹

Many thoughtful commentators have challenged the continued existence of a criminal incest ban.²² For example, Professors Jennifer M. Collins, Ethan J. Leib, and Dan Markel argue that consensual sexual relationships between adults, which might otherwise be subject to incest laws, should be decriminalized and, to the extent that there is abuse in these relationships, non-family based criminal laws should apply.²³ Yet, as applied

ily status). Many states have criminalized incestuous relationships based both on consanguinity and affinity. *See supra* notes 4, 16; *but see* *Commonwealth v. Rahim*, 805 N.E.2d 13 (Mass. 2004) (dismissing incest indictment in case involving sexual relationship between sixty year-old stepfather and his sixteen year-old stepdaughter because of lack of blood relationship). In the adoption context, for example, many states bar siblings who are related by adoption, rather than by blood, from marrying. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1139–46 (2003).

¹⁸ Literary critic Frances Bartkowski explains that “[k]inship is the place where lines of affiliation, consanguinity and affinity come together. And incest is that site where law intervenes in these arrangements of intimacy.” FRANCES BARTKOWSKI, *KISSING COUSINS: A NEW KINSHIP BESTIARY* (forthcoming 2008) (manuscript at 11, on file with the Harvard Law Library).

¹⁹ *See* DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 128 (2006).

²⁰ *See* *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (arguing that the Court's reasoning would call into question the constitutionality of “criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity”); *see also* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO J. L. & GENDER 337, 348–55 (2004) (asking whether, after *Lawrence*, consensual adult incest falls within the zone of intimate behavior covered by the Constitution's guarantee of liberty).

²¹ *See, e.g.,* Note, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family”*, 119 HARV. L. REV. 2464, 2465–76 (2006) (suggesting that incest bans that criminalize sexual relationships between certain relatives whether consensual or non-consensual are based on traditional heterosexual norms of marriage and family and “undermine a consistent, consent-based scheme for enforcing incest prohibitions”).

²² *See, e.g.,* Collins, Leib & Markel, *supra* note 17; Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 758–65 (2002) (questioning marital incest prohibitions); Brenda J. Hammer, Note, *Tainted Love: What the Seventh Circuit Got Wrong in Muth v. Frank*, 56 DEPAUL L. REV. 1065, 1097 (2007) (questioning an incest ban as applied to a consensual adult relationship where the adults were not raised together as children).

²³ Collins, Leib & Markel, *supra* note 17.

to minors, even they would “agree that when sexual misconduct occurs in a relationship of asymmetrical dependency, a sentencing enhancement is warranted for the breach of trust created by that asymmetrical dependency.”²⁴ Professor Courtney Cahill “propose[s] that the law reappraise the extent to which disgust, rather than reasoned argument, sustains laws directed at sexual and familial choice.”²⁵ She notes that “the incest taboo has continued to provide the language — or grammar — in which we articulate and ‘speak about’ the family.”²⁶

Incest laws *can* reinforce the traditional nuclear family form²⁷ and infringe on private relationships. Nonetheless, it remains critical to recognize the uniqueness of the breach of trust between family members that occurs if these family members engage in sexual relationships, even when the family members are adults. This breach of trust occurs regardless of how one defines family, because the breach involves an abuse of power within an intimate relationship. Given that incest typically occurs between a younger woman and an older man, generally of a different generation (but sometimes not),²⁸ I remain concerned about power asymmetries in these relationships. Sanctions on behavior between adults need not necessarily be criminal, so long as they indicate strong antipathy and disapproval toward this type of relationship.

Unlike bans on same-sex sexual behavior, few question the basic ban on relationships between genetically-related parents and children.²⁹ Indeed,

²⁴ *Id.* at 1399.

²⁵ Cahill, *supra* note 13, at 1547.

²⁶ *Id.* at 1610.

²⁷ For example, incest laws would not protect a child with gay or lesbian parents from sexual relations with the non-biological parent, where the state does not allow the second parent to establish a legal relationship with the child.

²⁸ Most reported criminal cases involve father-daughter sexual relationships. See Jocelyn Ho, Note, *Incest and Sex Offender Registration: Who is Registration Helping and Who is it Hurting?*, 14 *CARDOZO J. L. & GENDER* 429, 433 (2008).

²⁹ Some challenge the criminalization of incest between consenting adults. See *supra* note 23 and accompanying text; see also Cahill, *supra* note 13, at 1550; Christine McNeice Metteer, *Some “Incest” is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes*, 10 *KAN. J.L. & PUB. POL’Y* 262 (2000). However, there is no debate over the need to criminalize parent-child sexual relationships. See, e.g., Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship*, 93 *IOWA L. REV.* 131, 145–49, 166 (2007) (suggesting that, where it is available, prosecutors may file criminal charges under the lesser penalties applicable to incest rather than to child sexual abuse, and arguing that this privileges parent offenders); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by A Sexually Predatory Parent to the Victim’s Siblings*, 51 *EMORY L.J.* 241 (2002) (discussing father-daughter incest, and noting that when one child is molested, there is a high risk of additional siblings being sexually abused); see also Robin Fretwell Wilson, *Removing Violent Parents from the Home: A Test Case for the Public Health Approach*, 12 *VA. J. SOC. POL’Y & L.* 638, 665 (2005) (arguing that intra-familial dynamics of potential abuse and exploitation provide a significant justification for the continuation of the incest ban; while these intra-familial dynamics are less important when the children are raised in separate families, there are additional justifications for continuing to ban incest in this circumstance);

as this Article argues, from both a constitutional and jurisprudential standpoint, incest is distinctly and inherently different from same-sex sexual behavior; there is no slippery slope between incest and same-sex intimate behavior. Ultimately, the Article calls for setting limits on the number of offspring born from any one individual's gametes, *and* for continuing to sanction incest, even when it comes to adult, inter-sibling consensual behavior. The Article examines the tension between overlapping and distinct justifications for accidental and more traditional forms of incest while also addressing the need and rationales for limiting the number of offspring produced through any individual donor's gametes.

Indeed, applying the rationale for banning incest based on abuse of power relationships to half-siblings who share a donor, but grew up in different families, is far trickier than when the half-siblings grew up together. In order to explicate the differences and similarities between traditional forms of incest and accidental incest, the Article explores the traditional bases of the incest ban. It then suggests that, for multiple reasons, the incest ban should apply to half-sibling and donor/offspring relationships created through reproductive technology, even though power imbalances probably do not exist because the "family" members have had little contact. The label, "accidental incest," suggests that a relationship between donor-conceived offspring — or a donor and his or her offspring — who may have had no prior contact, is analogous to more traditional forms of incest, such as father-daughter sexual relationships. The analogy works with respect to incest justifications based on genetics, but is more problematic if a rationale for the incest ban is based on intra-familial power dynamics.

Regardless of whether there are convincing reasons for maintaining a ban on certain incestuous relationships (I believe there are), the article calls for restrictions on the number of offspring produced by any individual gamete donor. There are numerous additional reasons to impose these restrictions: concerns about the health of the donors through repeated donations, particularly for women; about donors' willingness to disclose their identities to potentially hundreds of offspring; and about children's feelings of being, in the words of one mother who has already discovered almost a dozen half-siblings for her donor-conceived child, "mass produced."³⁰ Moreover, when

see also Cahn, *Perfect Substitutes or the Real Thing?*, *supra* note 17, at 1140–44 (discussing reasons for banning incest between adopted and adopted-out siblings).

³⁰ This is excerpted from a conversation on the Donor Sibling Registry listserv. The identities of the posters have been protected, but editors of the Journal have seen these, and other, postings. As donor-conceived offspring become increasingly more likely to meet the donor, there are serious psychological concerns about all involved: "Meeting a few or even 10 donor-linked families can be joyous and incredibly positive; the impact of meeting [twenty-five to fifty] families may be more challenging and even negative." Joanna Scheib & Alice Ruby, Letter to the Editor, *Mathematical Models Used to Determine Sperm Donor Limits for Infertility Treatment*, FERTILITY & STERILITY eLETTERS TO THE EDITOR, Nov. 21, 2008, <http://fertstert.wordpress.com/2008/11/21/281/>; *see* Neroli Sawyer & John McDonald, *A Review of Mathematical Models Used to Determine Sperm Donor Limits for Infertility Treatment*, 90 FERTILITY & STERILITY 265, 265–66 (2008)

families who are genetically related by sharing a donor's gametes discover each other, they often do feel connected; they may label their children "half-siblings," and feel some type of familial relationship.³¹

As an initial matter, to show the culturally contested significance of reproductive technology, Part I briefly explores feminist approaches to the topic. Developing a feminist approach to use of the reproductive technologies requires recognizing their promises and limits: promises of liberation — ranging from freedom from the biological clock to new perspectives on male bodies — and limits on women's autonomy — ranging from the mothering mandate to the sale of eggs. Feminism provides insight into the creation of alternative families through reproductive technology and the formation of communities through a shared donor. Feminist analysis of power dynamics is also integral to an understanding of the reasons for continuing to ban incest. Part II turns to a discussion of existing practices on recruiting and limiting donors in the reproductive technology ("reprotech") world. It then suggests reasons for enacting limits on donors, including the rationales used in other countries. For egg donors, the equation is much simpler than for sperm donors; there are health concerns for women who donate too often. Sperm, however, is a constantly renewable resource, and there is little concern about the long-term health of frequent donors. Instead, frequent sperm donation implicates broader concerns of incest and anonymity, from genetics to disease transmission to moral repugnance. An exploration of how the gamete market is currently structured and managed provides the context for discussing the difficulties of further regulation.

To many people, incest just seems wrong.³² This abhorrence of incest is fundamental to many of the justifications for an incest ban as well as in the seemingly unrelated context of numerical limits on gamete donation. Part III explores the various possible sources for this reaction. Rationales for justifying the incest ban come from diverse sectors, including anthropology, genetics, religion and evolutionary biology. As part of the survey of perspectives on incest, it also discusses the conflicting approaches to incest within feminist scholarship. Next, Part IV analyzes the existing legal literature on incest, ranging from Justice Scalia's hand-wringing fears about the limited longevity of incest bans to scholars' arguments against the incest ban, which provide support for Scalia's concerns. Finally, Part V offers preliminary suggestions rooted in feminist theory for justifying incest regulation and advocates that, independent of the future of the incest ban, federal law

(observing that the need for limitations on donors is both a "psychosocial" and "biological" concern).

³¹ See *infra* notes 70–78 and accompanying text.

³² See, e.g., Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814 (2001) (exploring models of moral judgment that cause most people to label incest as "wrong"); Paul H. Robinson, Robert Kurzban & Owen Jones, *The Origins of Shared Intuitions of Justice*, 60 *VAND. L. REV.* 1633, 1645 (2007) (briefly exploring evolutionary reasons for the shared sentiments of disgust towards incest).

place appropriate limits on the number of children born using any one donor's gametes.

I also examine the points of intersection of various feminist approaches to issues within reproductive technology. Feminism appears repeatedly in considerations of the utility of the technologies, providing an appreciation of what it means (for the provider, the recipients, and the child) to use other-provided gametes. Feminism also offers a framework for articulating a coherent, sensitive, and contextual approach to regulation. The development of this framework includes an examination of the differing feminist approaches to use of the technology (see Part I), an analysis of whether incest provides a meaningful construct (see Part III), and attention to the contextual and psychological aspects of donor gamete use.

I. FEMINISM, REPRODUCTIVE TECHNOLOGY, AND THE MARKET

The promise of reproductive technologies — production of babies — now goes beyond a cure for infertility to challenge our conception of natural families by giving virtually anyone, regardless of age, gender, or sexual orientation, the ability to have a child.³³ Creating a family, regardless of whether you are an infertile husband-and-wife couple, a same-sex couple, or a single person, is often (although not always) a deliberate choice. Indeed, approximately two-thirds, or four million, of all pregnancies in the United States are “wanted”³⁴ (although only a small portion of these are to the millions of people defined as infertile). Of course, use of the technologies is not equally available to all, regardless of sexual orientation, class, or race.³⁵ Moreover, the possibility of purchasing eggs, sperm, or embryos from another person has engendered its own controversies.³⁶

The politics of reproductive technology are deeply intertwined with the politics of reproductive rights.³⁷ This connection is one that conservatives

³³ See JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 246 (1997).

³⁴ See NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *FAST FACTS: UNPLANNED PREGNANCY: KEY DATA* (2008), available at <http://www.thenationalcampaign.org/resources/pdf/fast-facts-unplanned-key-data.pdf>.

³⁵ See, e.g., Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18 (2008) (discussing barriers to reproductive technology access, including the high cost of these technologies and providers' discretion in choosing who to treat). The costs of these technologies puts them out of financial reach for many people. Ironically, some of the people providing donor gametes would likely be unable to afford these technologies. See Camille C. Spencer, *Donating Eggs Draws Criticism*, MONTEREY COUNTY HERALD (Cal.), Nov. 26, 2007 (discussing the financial needs which lead egg donors to donate).

³⁶ See, e.g., Krawiec, *supra* note 5 (discussing the legal and normative issues at stake in selling babies).

³⁷ See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

profoundly understand, and that accounts for many of the legal and policy debates swirling around the technologies. These debates cover topics ranging from abortion to pre-implantation genetic diagnosis to fertility treatment for poor women.³⁸ On the other hand, many feminists have not connected the two movements, and, although the reproductive rights debate has a long feminist genealogy, infertility does not.³⁹ This section first provides a feminist framework for understanding reproductive technology, before describing the infertility business and its inadequate regulation. Some feminists applaud the lack of regulation for reproductive technologies because the lack of restraint facilitates development of alternative families.⁴⁰ Nonetheless, this lack of regulation increases the possibility of accidental incest and impedes the nurturance of communities formed through a shared genetic heritage.

A. *Feminism and Reproductive Technology*

Much of the feminist history of reproductive politics involves an examination of attempts by women to control their own fertility and sexuality through contraception or the power to refuse sex, and attempts by third parties to control women's fertility and sexuality through means such as eugenics.⁴¹ While this history has included relatively little inquiry into the need to enhance fertility, there is a developing literature as feminists explore the multiple legal and policy issues posed by new reproductive technologies. Reproductive technologies promise to rescue women from two different sets of dilemmas: 1) being a coerced baby vessel versus engaging in voluntary motherhood; and 2) having a baby at a young, more fertile age versus establishing a career and deferring childbearing.⁴² Yet, as some feminists have

³⁸ For the politically conservative approach to these issues, see, for example, AMERICANS UNITED FOR LIFE, *DEFENDING LIFE 2008: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA: A STATE-BY-STATE LEGAL GUIDE TO ABORTION, BIOETHICS, AND THE END OF LIFE*, http://www.aul.org/xm_client/client_documents/dl08/DL08All.pdf (including sections on "Abortion and Protection of the Unborn" and "Preserving Human Dignity: Regulation of assisted reproductive technologies (ART)"). For opposing perspectives, see, for example, *infra* note 41.

³⁹ See *infra* note 42.

⁴⁰ See, e.g., Martha Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 3-4 (2003) ("[T]he sale of parental rights through the alternative insemination market facilitates the formation of families based on intention and function rather than biology and heterosexuality.").

⁴¹ For powerful discussions of reproductive politics, see generally KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* (1984); VICTORIA F. NOURSE, IN *RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS* (2008); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001).

⁴² For more discussion of women bearing children later in life, see ELIZABETH GREGORY, *READY: WHY WOMEN ARE EMBRACING THE NEW LATER MOTHERHOOD* 3 (2007); June Carbone, *If I Say "Yes" to Regulation Today, Will You Still Respect Me in the Morning?*, 76 GEO. WASH. L. REV. (forthcoming 2008) (manuscript at 16, on file with the Harvard Law Library) (discussing how reproductive technology facilitates a morality which

alleged, these choices may be an illusion. The technology might simply reinforce the importance of motherhood in women's lives and the difficulty of women "having it all."

1. *The Mothering Mandate*

In its starkest terms, these are the elements of the basic debate: (1) for those who have access to it, reproductive technology exploits women because it reinforces a pronatalist ideology; (2) for those who do not have access to it, reproductive technology provides evidence of privilege, allowing wealthy white women to reproduce themselves; and (3) the mere concept of reproductive technology encourages women to live men's lives.⁴³ Additionally, with donor eggs or surrogacy, there is a transfer of money from wealthier couples to poor women, who may not freely choose their participation. It is a market transaction that resembles a sale. Indeed, as one student note alleges in the slightly different context of international adoption, it is difficult to control the "rapaciousness of U.S. baby consumers."⁴⁴

A related critique, a "patriarchal reproduction" position, fears that women are unable to choose new technologies voluntarily; instead, male doctors or male partners indoctrinate women to produce children.⁴⁵ Because of this mothering mandate, women do not really have a choice whether to use the technologies; moreover, they have little understanding of the technologies.⁴⁶ From this perspective, women are taught to value their lives based on whether they have produced children and are culturally coerced onto a

"makes financial independence and emotional maturity the new hallmarks of readiness for childbirth"); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. (forthcoming 2008) (manuscript at 61–63 and *passim*, on file with the Harvard Law Library) (discussing the state's treatment of women as coerced baby vessels and noting that reproductive technology is an exception, an area in which women's autonomy is protected). On the issue of childfree living, see generally ELINOR BURKETT, *THE BABY BOON: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* (2000) (discussing the many ways in which United States culture privileges parents); NICKI DEFAGO, *CHILD-FREE AND LOVING IT* (2005) (telling the stories of women from around the world who choose not to have children); MAYBE BABY: 28 WRITERS TELL THE TRUTH ABOUT SKEPTICISM, INFERTILITY, BABY LUST, CHILDLESSNESS, AMBIVALENCE, AND HOW THEY MADE THE BIGGEST DECISION OF THEIR LIVES (Lori Leibovich ed., 2006) (describing the process individual women went through in determining whether to have a child by using reproductive technologies).

⁴³ See generally KAREY HARWOOD, *THE INFERTILITY TREADMILL: FEMINIST ETHICS, PERSONAL CHOICE, AND THE USE OF REPRODUCTIVE TECHNOLOGIES* (2007) (discussing the debate over whether reproductive technology exploits women who have access to it, or privileges those women who have access to it over poor women, or both).

⁴⁴ Nicole Bartner Graff, Note, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?*, 27 SYRACUSE J. INT'L L. & COM. 405, 430 (2000).

⁴⁵ See GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBES* 166–83 (1985); Richard Stortow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 308–09 (2005) (discussing the radical feminist approach to reproductive technology and mothering).

⁴⁶ See COREA, *supra* note 45 at 166–69.

never-ending treadmill of fertility.⁴⁷ Catharine MacKinnon has made similar arguments with respect to the authenticity of women's voices, suggesting that women may be unable to offer valid consent under patriarchy.⁴⁸ One extrapolation of this argument is the criticism that infertile women are socialized into wanting biological children and, therefore, the law should block new technologies so that women are not victimized.⁴⁹ Relatedly, Professor Michele Goodwin warns of the "seductive appeal" of reproductive technologies. Women may not be able to make an informed choice about whether to use reproductive technologies because their desire to defer childbearing to advance their careers potentially blinds them to the health and emotional risks of reproductive technologies.⁵⁰

While this patriarchal reproduction analysis presents a significant and cautionary perspective, it nonetheless denies women agency. Within feminism, there are numerous other approaches to the possibility of reproductive technology, and other feminists might claim that this patriarchal reproduction analysis⁵¹ denies the possibility of choice under existing social conditions, treating women as passive victims disempowered from making their own legal choices concerning reproductive technologies. Religious ethicist and philosopher Karey Harwood, who is concerned about "overconsumption" of the new reproductive technologies and the way in which assisted reproductive technology ("ART") encourages women to delay their childbearing, has nonetheless suggested that "the charge of pronatalism is overly simplistic,"⁵² and that the focus should shift to how our culture can support caregiving.⁵³ She supports the treatment of infertility through reproductive technology, but suggests that women consider having children at a younger age, rather than waiting until it becomes more difficult.⁵⁴

I suggest that this narrative can become more celebratory, focusing on how reproductive technology allows alternative opportunities to create chil-

⁴⁷ See *id.*

⁴⁸ CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126–54 (1989).

⁴⁹ See HARWOOD, *supra* note 43, at 21 (discussing this perspective).

⁵⁰ Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 4–5 (2005).

⁵¹ Just as there is a diversity of views among feminists generally, each strand of feminism has a multiplicity of views; in contrast to the radical feminist approach described in the text, some radical feminists have celebrated the ability to separate sex from reproduction. For one articulation of this view, see SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970). Debora Spar briefly considers the diverging early responses of feminists to in vitro fertilization ("IVF"). See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 26 (2006).

⁵² HARWOOD, *supra* note 43, at 102.

⁵³ *Id.*

⁵⁴ In an interview, Harwood observed, "my hope would be that more women would consider being trailblazers — by which I mean continuing to pursue all the educational and career aspirations they desire while also trying to have children when it is biologically easier." Univ. of N.C. Press, Author Q & A: Karey Harwood (2007) <http://www.uncpress.unc.edu/browse/page/500>.

dren and may serve to alter the vision of the traditional married heterosexual family. Indeed, the technologies have the potential to allow alternative family forms that do not involve one mother and one father.⁵⁵ Moreover, an alternative, more celebratory perspective suggests that women may have helped to shape the new technologies and that women have willingly undertaken the risks associated with them. It may even be, as Professor Martha Ertman argues, that women and men exchange roles when it comes to consumption of donor sperm.⁵⁶ That is, men are the mere sperm providers, while women are the discerning consumers who want men only for their bodies or bodily products.⁵⁷ Indeed, while women's experiences are mediated through a culture that reinforces biological motherhood, they may still look to technology as means of empowerment for choosing with whom and when to have children.

2. *Having It All*

When the American Society for Reproductive Medicine ("ASRM") decided to launch an infertility awareness campaign in 2001, emphasizing that a number of factors, ranging from smoking to age, affect infertility, its leaders were concerned that a discussion of age might be seen as encouraging adolescent pregnancy or as castigating older women.⁵⁸ The National Organization for Women ("NOW") viewed the ASRM's "Protect Your Fertility" advertisements as "essentially a scare campaign."⁵⁹ Kim Gandy, the president of NOW, claimed that the advertisements, including one involving a baby bottle shaped like an hourglass, gave the impression that younger women must "hurry up and have kids" or give up and never have them.⁶⁰ Others saw the messages as telling women that they should not be too ambitious, and should return to their homemaking roles.⁶¹ Feminist health advocate Barbara Seaman accused the major drug companies, which sell

⁵⁵ Elizabeth Marquardt suggests: "Our culture needs a serious debate about the implications of technologies used to form many of today's alternative families Our culture also needs to face up to the importance of mothers and fathers in children's lives." Elizabeth Marquardt, *My Daddy's Name is Donor*, CHI. TRIB., May 15, 2005, at C3, available at <http://www.americanvalues.org/html/donor.html>. As Kay Hymowitz charged, "American fatherhood has yet another hostile force to contend with: artificial insemination." Kay S. Hymowitz, *The Incredible Shrinking Father*, CHI. SUN-TIMES, April 29, 2007, at B1, available at http://www.manhattan-institute.org/html/_chicsuntimes-the_incredible_shrinking.htm. Some are opposed to creating life outside the womb. See, e.g., Nicole Klass, *Making Babies, For a Price*, ONLINE METROLAND (Albany, N.Y.), http://www.metroland.net/back_issues/vol29_no49/features.html (discussing opposition of Citizens Concerned for Human Life).

⁵⁶ See Ertman, *supra* note 40.

⁵⁷ See *id.* at 41.

⁵⁸ See MUNDY, *supra* note 9, at 43-44.

⁵⁹ *Id.* at 43 (quoting Kim Gandy, then president of NOW); see also Claudia Kalb, *Should You Have Your Baby Now?*, NEWSWEEK, Aug. 13, 2001, at 40.

⁶⁰ See Nancy Gibbs, *Making Time for a Baby*, TIME, Apr. 15, 2002, at 48.

⁶¹ See *id.*

hormones, of encouraging women “to feel guilty . . . implying that infertility is on the rise because feminism tricked women into focusing on careers.”⁶²

As feminists have alleged, it is possible to turn women’s age-related fertility decline into an admonition that women should have babies at a younger age and consequently a subversion of women’s advances towards equality.⁶³ Indeed, the national average age of a woman’s first birth increased from 21.4 in 1970 to 25.2 in 2004.⁶⁴ For college-educated women, the average age of first birth is 30.1.⁶⁵ “Within such a model, ‘responsible’ reproduction follows financial independence and emotional maturity,” leading women to have children after they have established themselves in their careers, but at a time of declining fertility.⁶⁶ Assisted reproduction thus becomes a critical component of feminist support for gender equity.

Shunning information about the relationship of infertility and age ignores biological facts and, ultimately, not only inhibits women’s understanding of their own fertility, but also ignores the necessity of providing the legal structures necessary to give meaning to reproductive choice. Information about controlling fertility must include means for preventing and for promoting conception. It is only with this information that reproductive choice becomes a meaningful concept; choice cannot mean only legal control over the means *not* to have a baby, but must include legal control over the means *to* have a baby. This information can enrich the available work-family literature, helping to increase awareness among women that using a younger woman’s eggs may allow a woman to extend her own fertility (for better or worse) and using donor sperm facilitates the formation of families outside of the heterosexual and/or two-parent structure.

The dichotomy between women as victims of technology and women as agents in needing and demanding the technology is false. Instead, while women make choices constructed by and within a social ideology that values childbearing, they are still able to exercise some control over their options within these social constraints. Arguing that women are unable to make their own decisions about reproductive technology reflects an outmoded view of women as dependent, passive creatures, without a corresponding

⁶² Barbara Seaman, *Treating Infertility: Amid a Confusing Array of Resources, How to Decide Which You Can Trust*, WOMEN’S REV. BOOKS (Oct. 2004), available at <http://www.wellesley.edu/WomensReview/archive/2004/10/highlt.html#seaman>.

⁶³ As one woman warns, stressing to young women the fact that they will become more infertile as they age might “merely make women feel even more anxious and guilty about being in a situation not necessarily of their own making.” Jemima Lewis, *Infertility*, SUNDAY TELEGRAPH (LONDON), June 8, 2008, at 20. For analysis of how becoming mothers affects women’s workplace equality, see, for example, Naomi Cahn & Michael Selmi, *The Class Ceiling*, 65 MD. L. REV. 435 (2006); Joan C. Williams & Nancy Segal, *Beyond The Maternal Wall: Relief For Family Caregivers Who Are Discriminated Against On the Job*, 26 HARV. WOMEN’S L.J. 77 (2003).

⁶⁴ See GREGORY, *supra* note 42, at 2–3.

⁶⁵ See *id.*

⁶⁶ See Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, U. BALT. L.F. (forthcoming 2009) (manuscript at 6, on file with the Harvard Law Library).

recognition of the context in which these choices are constructed. Instead of taking away options for women, the focus should be on reforming the context that emphasizes women's non-agency, and on providing support for mothers who have been able to "choose" the new reproductive technologies.⁶⁷

B. Connections

For many women — whether they are single, lesbian, infertile themselves, or partnered with an infertile male — reproductive technologies provide their only option for childbearing. Among these technologies, the virtually unregulated world of gamete donation is increasingly important. Some feminists suggest that legal institutions should "protect and nurture the connections that sustain and enlarge us."⁶⁸ While this, of course, leads to respect for connections between family members, it also results in an acknowledgement of the connections that many donor siblings and parents feel to one another — and to their donors. Indeed, sperm banks increasingly allow their clients to choose between identified and anonymous donors.⁶⁹

Donor-conceived offspring often rue their lack of connection with at least one-half of their genetic heritage.⁷⁰ Because they want knowledge about their biological progenitors, and because of their emotional needs for this knowledge, donor offspring and their parents have begun to advocate for disclosure of donor identities.⁷¹ Indeed, many women have begun to use the internet "to expand their kinship circle, to create a unique extended family."⁷² Wendy Kramer and Ryan Kramer, her donor-conceived son, started the Donor Sibling Registry (DSR) in 2000 so that they could establish an internet meeting place for donor-created offspring and their genetic rela-

⁶⁷ These women generally have at least a middle-class income. Respecting these women does not mean ignoring issues of access to infertility treatments for poorer women.

⁶⁸ ROBIN WEST, *CARING FOR JUSTICE* 4 (1997). West also argues that the law has not intervened in intimate relationships to protect against the dangers of connection. *See id.*; *see generally* LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* (2006) (arguing that the family, whether traditional or non-traditional, is the key to fostering civic virtues); Naomi Cahn, *Birthing Relationships*, 17 *WIS. WOMEN'S L.J.* 163 (2002) (exploring adoption from the perspective of "relational feminism").

⁶⁹ *See, e.g.*, Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 *J.L. & HEALTH* 1, 11–12 (2007).

⁷⁰ *See generally* Annette Appell, *The New Blended Families: Legal, Blood and Fictive Kin Networks and Open Adoption* (forthcoming 2008) (manuscript at 14–16, on file with the Harvard Law Library) (explaining that donor insemination children are expressing an interest in connecting with their donor parents and siblings).

⁷¹ *See* NAOMI CAHN & DONALDSON ADOPTION INSTITUTE, *OLD LESSONS FOR A NEW WORLD: APPLYING ADOPTION RESEARCH AND EXPERIENCE TO ART* (forthcoming 2008) (manuscript at 14, on file with the Harvard Law Library).

⁷² MUNDY, *supra* note 9, at 169.

tives.⁷³ In 2007, almost 123,000 people visited the site, and the DSR has facilitated contact among more than 5,000 genetically-related people.⁷⁴ Consider Gwenyth Jackaway, who found genetic half-siblings for her son, Dylan, because she wanted him to be “part of a larger community,” and refers to the other children she found as “Dylan’s siblings.”⁷⁵ Or think about Mike Rubino, Donor 929 at California Cryobank. Nine years after Donor 929 began providing sperm, Oprah Winfrey aired an episode about donor-conceived families. Rubino logged on to the Donor Sibling Registry website and ultimately discovered that Rachael McGhee had written a thank you message to Donor 929.⁷⁶ He contacted her, the two of them talked, and she, along with her two children that resulted from his sperm, spent a week with him in California.⁷⁷ Some parents who have found offspring from the same donor through the Donor Sibling Registry have left the site because they have been overwhelmed by too many possible connections.⁷⁸

Biological connection is, of course, only one way to form a family. Yet the genetic ties between their children cause many women to feel family-like connections with each other.

* * *

There is no single feminist approach to fertility or to incest. The basics — examining the impact of a particular approach or policy on gender, race, sexual orientation, and class — are a given. Yet there is no agreement on how to measure, access or accommodate those impacts. Some feminist scholars suggest that reproductive technology is a blessing, because it facilitates reproduction and the formation of alternative families, while others argue that it is a curse, because it facilitates “too much” biological mothering,⁷⁹ and promotes class and race distinctions concerning access to childbearing.⁸⁰

A strong feminist position on these issues might have some impact on the laws governing reproductive technology. As the next section shows, however, the reproductive technology world has developed with little consensus or regulation of critical legal issues: fertility clinics may discriminate

⁷³ See Donor Sibling Registry, <http://www.donorsiblingregistry.com/index.php> (last visited November 23, 2008).

⁷⁴ See *id.*; see also MUNDY, *supra* note 9, at 168–69; Claudia Kalb, *A Sperm-Biz Overhaul*, NEWSWEEK, June 2, 2008, at 41.

⁷⁵ See Emily Bazelon, *The Children of Donor X*, O: OPRAH MAG., April 1, 2008, at 250.

⁷⁶ See Michael Leahy, *Family Vacation*, WASH. POST, June 19, 2005, at W12.

⁷⁷ See *id.*

⁷⁸ See Cheryl Miller, *Parenthood at Any Price*, THE NEW ATLANTIS, Summer 2007, at 96, available at <http://www.thenewatlantis.com/publications/parenthood-at-any-price> (also pointing out that it is difficult for a sperm donor to “connect” with multiple offspring).

⁷⁹ That is, it puts pressure on women to become mothers and it discourages the mothering of non-biological children by disfavoring adoption.

⁸⁰ See Daar, *supra* note 35; see also *supra* text accompanying note 35.

based on sexual orientation,⁸¹ there are no binding standards on how many embryos may be transferred, and there is no legally enforceable requirement that anyone keep track of the numbers of children born from sperm donors.⁸²

II. UNLIMITED GIVING: THE DONOR WORLD

Feminist approaches show the jurisprudential — and concrete — promises and limitations of reproductive technology. This section turns to the actual practices within the donor world, providing a basis for the later discussion of how feminists might impact the future of reproductive technology. The donor world comprises gamete providers, recipient and potential parents, donor-conceived offspring, medical professionals, and the fertility industry. It also includes the government. This section sets out background on the growth and development of the gamete industry and discusses the type of regulations that are imposed by the government. It then compares the regulatory structure in the United States to that in other countries.

A. *The Domestic Donor World*

For anyone seeking sperm, there are hundreds of sperm banks.⁸³ In the United States alone, dozens of sperm banks take part in a business that accounts for about seventy-five million dollars per year.⁸⁴ Consumers can let their fingers do the walking online, in the privacy of their own home.⁸⁵ Banks may provide different levels of screening, offer videos, ship frozen sperm in special canisters, or specialize in particular donor characteristics.⁸⁶ There is even a website that will help with the shopping so that the consumer doesn't have to search each website.⁸⁷ Although frozen egg banks are relatively new, there are countless means for finding egg providers, ranging from special matching services that are part of larger fertility clinics to

⁸¹ The California Supreme Court has held that state law prohibits a physician from discriminating against lesbians who seek insemination with donor sperm. *See N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct.*, 189 P.3d 959 (Cal. 2008). In states or jurisdictions without specific protections based on sexual orientation, the law is not settled.

⁸² Fertility clinics document the use of donor eggs and embryos, however, because they must report success rates. *See The Fertility Success Rate and Certification Act of 1992*, 42 U.S.C. § 263a-1(a) (2000) (requiring assisted reproductive technology programs to annually report pregnancy success rates).

⁸³ *See* Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 B.Y.U. L. REV. 107, 128.

⁸⁴ *See* Kotler, *supra* note 2.

⁸⁵ *See* Paul Ellis, *Online Sperm Banks*, 4 MEN'S HEALTH, <http://www.4-men.org/sperm/online-sperm-bank.html> (last visited Nov. 23, 2008).

⁸⁶ *See id.* For an example of one bank's particularities, see Fairfax Cryobank, FAQs, <http://www.fairfaxcryobank.com/faqs.aspx?menu=7&turn=ON> (last visited Nov. 23, 2008).

⁸⁷ SpermCenter.com, Reasons to Join SpermCenter.com, <http://www.spermcenter.com/reasons.htm> (last visited Nov. 23, 2008).

stand-alone recruiting options.⁸⁸ The number of clinics offering assisted reproductive services has increased dramatically.⁸⁹ The Society for Assisted Reproductive Technology, the main trade group in this field, reports that it has 392 member practices within the United States that offer reproductive technology services, accounting for more than ninety-five percent of all IVF clinics.⁹⁰

Yet there are few systems in place to monitor gamete providers. In one of the only studies to look at the quality of sperm from commercial providers, Douglas Carrell and his co-authors found that more than a quarter of the participating sperm banks could have been providing “suboptimal” sperm.⁹¹ In another study, researchers at New York University found that egg donors frequently understated their weight. They looked at charts for more than three hundred donors and compared the weight that donors reported when they first came to the clinic with the actual weights recorded at their first physical exams and concluded that “donors do not give accurate measurements of their body weight.”⁹² Yet, there are no requirements that clinics verify the information submitted by donors. The only federal requirements concern the safety testing of gametic material.⁹³

Although reproductive technology is today a multibillion dollar business, the amount of state and federal regulation of any of the participants is limited, as is the amount of self-regulation. The lack of market oversight has repeatedly been traced to the comparatively limited use of the technology until the 1980s, as well as the contested nature of the technology’s relationship to parenthood and other social issues.⁹⁴ The technologies and their uses have radically changed over the past several decades, with, for example, the increasingly successful use of donor eggs and commercial sperm banks supplanting doctor-chosen sperm.⁹⁵ Many of the controversies in this area have

⁸⁸ See WebMD.com, Finding and Choosing a Donor, <http://www.webmd.com/infertility-and-reproduction/guide/donor-eggs-in-fertility-treatments> (last visited Nov. 23, 2008) (discussing the different options for finding egg donors).

⁸⁹ See SPAR, *supra* note 51, at 28–29 (discussing growth of IVF centers); Gina Kolata, *Fertility Inc.: Clinics Race to Lure Clients*, N.Y. TIMES, Jan. 1, 2002, at F1 (noting that between 1995 and 1998 the number of clinics increased by 28 percent).

⁹⁰ Eric Surrey, President, Society for Assisted Reproductive Technologies, What is SART?, <http://www.sart.org/WhatIsSART.html> (last visited Nov. 23, 2008).

⁹¹ Douglas T. Carrell, Deborah Cartmill, Kirtly P. Jones, Harry H. Hatasaka & C. Matthew Peterson, *Prospective, Randomized, Blinded Evaluation of Donor Semen Quality Provided by Seven Commercial Sperm Banks*, 78 FERTILITY & STERILITY 16, 20 (2002) (finding that two of seven participating sperm banks might have offered “suboptimal semen quality” and suggesting that a “significant percentage of donor semen provided by commercial banks may be of poor quality”).

⁹² M. Cho & F. Licciardi, *Egg Donors Significantly Under-Report their Weights*, 86 FERTILITY & STERILITY S138, S138 (2006).

⁹³ See 21 C.F.R. § 1271.75, 1271.90 (2008).

⁹⁴ See generally Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002) (discussing reasons for the lack of oversight).

⁹⁵ See Suz Redfearn, *Did Elizabeth Edwards Use Donor Eggs?*, SLATE, Oct. 29, 2004, <http://www.slate.com/id/2108863/>. See generally DAVID PLOTZ, *THE GENIUS FAC-*

appeared, and have been temporarily resolved, outside of the law: in doctors' offices, in scientific advances, or in philosophical inquiries.⁹⁶ It may well be, as one legal scholar suggested, appropriate "to allow non-legal institutions such as 'science' or 'medicine' to be the primary forum for policy debate and resolution."⁹⁷ This resolution may be particularly likely in light of the secrecy surrounding individuals' use of the technology and the potential consequences of coming forward to advocate change in a system that ultimately satisfies many market participants.⁹⁸

Until the mid-1980s, the market for sperm was quite small.⁹⁹ As infertility physician Barry Verkauf explained in 1966, the medical literature contemplated only three uses for donor sperm: (1) when the "husband" was infertile; (2) when children had died from Rh incompatibility; and (3) when the husband had a hereditary disease that should not be passed on to his children.¹⁰⁰ There was no discussion of limits on the number of children resulting from any individual donor; there was an enormous pool of sperm donors and relatively few solicitations.¹⁰¹

1. *Donating to History*

In 1948, the influential physician and lawyer Alfred Koerner, who was the Executive Secretary to the National Research Foundation for Fertility, Inc., wrote one of the first articles in a law journal addressing donor insemination. He observed that it was important for the recipient woman to trust her physician to choose the right donor as well as not to disclose her use of donor sperm.¹⁰²

By the late 1980s, more than four hundred sperm banks were in operation.¹⁰³ Banks still sold their wares primarily to doctors; in fact, in 1987,

TORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK (2005) (discussing changes in the donor sperm industry).

⁹⁶ See, e.g., Larry I. Palmer, *Private Commissions, Assisted Reproduction, and Lawyering*, 38 JURIMETRICS 223, 234–35 (1998) (reviewing JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997) and CYNTHIA B. COHEN, *NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* (1996)).

⁹⁷ See Palmer, *supra* note 96.

⁹⁸ For example, some fear that mandating disclosure of donor identity may result in a decrease in gamete supply. See, e.g., Mark Hamilton and Allan Pacey, *Sperm Donation in the UK*, 337 BRIT. MED. J. 1124 (2008), available at http://www.bmj.com/cgi/content/full/337/nov11_3/a2318. Nonetheless, in the sections that follow, this article suggests that the law should take a much more active role in regulating reproductive technologies in the interests of patients, donors, and offspring. See *infra* Part I.B.5.

⁹⁹ See SPAR, *supra* note 51, at 35–36; see discussion *infra* Part II.A.1.

¹⁰⁰ Barry Stephen Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion — An Appraisal of Current Medico-Legal Status*, 3 HOUS. L. REV. 277, 282 (1966).

¹⁰¹ See, e.g., PLOTZ, *supra* note 95, at 165 (describing how donors were solicited).

¹⁰² Alfred Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 490 (1948).

¹⁰³ Karen M. Ginsberg, Note, *FDA approved?: A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 826 (1997) (noting that although the number of sperm banks used is not specified, "[b]y 1993, more than 80,000

sixty percent of federally surveyed sperm banks would sell *only* to doctors, and none would sell only to recipients.¹⁰⁴ Sperm banking became increasingly consumer-oriented throughout the 1980s, however. In a series of articles for *Slate* magazine, journalist David Plotz credits the Repository for Germinal Choice (also known as the “Nobel Sperm Bank”), created in the late 1970s, with transforming the sperm banking business by requiring rigorous testing and providing increasing amounts of information to consumers.¹⁰⁵ Other banks began offering the same services to consumers, and the AIDS epidemic added incentives for additional safety tests.¹⁰⁶

While there are no reliable figures on who uses sperm banks, anecdotal evidence suggests that their usage by heterosexual couples is declining, while usage by single women and lesbians is increasing.¹⁰⁷

2. *The Incredible Egg*

Egg donation has a far shorter history. The first documented egg donation occurred in 1984.¹⁰⁸ In 2003, clinics implanted more than fourteen thousand embryos created from donated eggs.¹⁰⁹ Egg donation began with identified donors, who were often related to the recipients.¹¹⁰ Today, identified donors constitute a much smaller part of the donation pool and recipients are more likely to use specifically recruited donors.¹¹¹ Eggs are typically available under two circumstances: first, women already undergoing an In Vitro Fertilization (“IVF”) cycle may agree to provide their eggs to other women in exchange for a reduced IVF fee; and second, women from outside of the clinic may be recruited specifically to provide eggs.¹¹²

Until recently, most donor eggs had to be “fresh.”¹¹³ As of 2007, there were only an estimated two hundred children worldwide born from frozen

women were undergoing AI each year, resulting in the conception of more than 30,000 babies”).

¹⁰⁴ See OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY* 63 (1988).

¹⁰⁵ See David Plotz, *Collected “Seed”*, SLATE, June 7, 2005, <http://www.slate.com/id/2119808/>.

¹⁰⁶ See MUNDY, *supra* note 9, at 112.

¹⁰⁷ See Steve Dilbeck, *Sperm Donors Wanted, Only High-Caliber Jocks Need Apply*, DAILY NEWS OF L.A., Aug. 26, 2008, at A1.

¹⁰⁸ See SPAR, *supra* note 51, at 48.

¹⁰⁹ See *Golden Eggs; Drowning in Credit-Card Debt and Student Loans, Young Women are Selling Their Eggs for Big Payoffs. But Can They Really Make the Right Medical and Moral Decisions When They’re Tempted with \$15,000*, BOSTON GLOBE, June 25, 2006, Magazine, at 18.

¹¹⁰ See SPAR, *supra* note 51, at 42; Bonnie Steinbock, *Payment for Egg Donation and Surrogacy*, 71 MT. SINAI J. MED. 255, 257–58 (2004) (explaining that close friends and relatives served as egg donors when egg donation was first introduced).

¹¹¹ See SPAR, *supra* note 51, at 44–46.

¹¹² See Ethics Comm., ASRM, *Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 305 (2007).

¹¹³ See Jeffrey Kluger, *Eggs on the Rocks: A New Procedure May Offer Women the Chance to Freeze Their Ova — and Stop Their Biological Clock*, TIME, Oct. 27, 1997, at

eggs, and egg banks were just beginning to be established.¹¹⁴ Frozen eggs, however, provide opportunities for expanding the market in eggs, perhaps resulting in an increased number of banks.

3. *Clinically Speaking*

Egg and sperm donation programs are structured similarly, with comparable stages for donors and recipients.¹¹⁵ All programs must first recruit donors, and second, screen them.¹¹⁶ The screening process typically includes collection of both medical and personal history data.¹¹⁷ Aside from the laws governing the various contractual relationships, few of which apply directly to reproductive technology, this is perhaps the only stage where the law plays a direct role in the reproductive industry, mandating certain safety tests of the donated gametic material.¹¹⁸

After recruitment and screening, programs help the donor prepare a personal profile to be used to advertise the donor to prospective consumers. Clinics vary considerably as to how much information they include in these profiles.¹¹⁹ While egg donors may be identified through a picture and a first name, sperm donors are more typically identified by number until the recipient requests (or pays for) additional information.¹²⁰ This distinction may be gendered,¹²¹ or it may be due to the comparative number of sperm and egg donors, or the lengthier production process for eggs.

Once the profile is publicly available, the next stage involves matching donors and recipients — and collecting fees.¹²² Programs are also required by federal law to do some minimal follow up with sperm donors, such as

105 (explaining that while sperm and fertilized eggs can remain viable when frozen, unfertilized eggs are fragile and are often damaged by freezing); see also Gina Kolata, *Successful Births Reported with Frozen Human Eggs*, N.Y. TIMES, Oct. 17, 1997, at A1 (reporting on the first successful pregnancy in the United States using an egg that had been frozen); Press Release, ASRM, Highlights from the 63rd Annual Meeting of the American Society for Reproductive Medicine: ASRM Urges Caution, Strong Counseling for Women Seeking Egg Freezing (Oct. 16, 2007), available at <http://www.asrm.org/Media/Press/AM07urgecautioneggfreezing.html> (emphasizing that egg freezing remains an experimental procedure and that the data available is too limited to allow egg freezing to be considered an established medical treatment).

¹¹⁴ See James W. Akin, Katrina A. Bell, Diana Thomas & Jeffrey Boldt, *Initial Experience with a Donor Egg Bank*, 88 FERTILITY & STERILITY 497.e1, 497.e3 (2007).

¹¹⁵ See Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AMER. SOC. REV. 319 (2007).

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 329; ASRM, *Psychological Assessment of Gamete Donors and Recipients*, 77 FERTILITY & STERILITY S11 (2002).

¹¹⁸ See discussion *infra* at Part II.A.4.

¹¹⁹ See *supra* notes 85–88 (discussing donor bank websites).

¹²⁰ This description draws on my own analysis of egg and sperm banks as well as that of Rene Almeling. See Almeling, *Selling Genes, Selling Gender*, *supra* note 115, at 329.

¹²¹ This set-up appears much more revelatory and intimate for women, while more protective of the privacy of men.

¹²² See Almeling, *Selling Genes, Selling Gender*, *supra* note 115, at 331–34.

making sure that they are tested for HIV once they have stopped providing samples.¹²³

4. *Inspecting Gametes*

Over the past several decades, the federal government has taken a few tentative steps towards the regulation of reproductive technology. Today, the federal government oversees the clinical laboratory services, drugs, and medical devices used in IVF treatments, has established standards for the use of human tissue, and monitors clinic success rates.¹²⁴ Federal regulations covering the safety of “human cells, tissues, and cellular and tissue-based products,” (“HCT/Ps”) which include donor gametes, were finalized in 2005.¹²⁵ By federal law, all gamete providers must be screened, and all of their “products” must be tested.¹²⁶ Once a potential donor arrives at a clinic, the clinic must take certain steps to determine the donor’s eligibility, including a review of the applicant’s medical records for various communicable diseases, such as Chlamydia and HIV.¹²⁷ If the donor passes the medical records examination, then the clinic must test the actual specimen collected for communicable diseases.¹²⁸ Further, for anonymous sperm donations, a new, second specimen must be tested at least six months after the date of donation; during this six month period the anonymous donor’s semen is quarantined.¹²⁹ Interestingly, the same stipulation does not apply to donated oocytes, which are only required to be withheld until donor eligibility is established, without the comparable necessity of re-testing.¹³⁰ Only after both screening and testing (and quarantine, for anonymous donors), is a donor-eligibility determination made.

In addition to implementing standards for testing donors, the federal regulations require that donation facilities maintain sufficient staff to ensure that they can comply with the federal regulations and that personnel must be competent based on measures of education, experience, and training.¹³¹ Clinics must establish their own internal quality control programs to make

¹²³ *See id.* at 334.

¹²⁴ *See* The Fertility Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1 (2000) (requiring assisted reproductive technology programs to annually report pregnancy success rates); *infra* notes 125, 127–33 (discussing federal regulation of human tissue).

¹²⁵ 21 C.F.R. § 1271.1 (2008). The regulations provide that “[e]xamples of HCT/Ps include, but are not limited to . . . semen or other reproductive tissue.” 21 C.F.R. § 1271.3(d) (2008).

¹²⁶ *See* Betsy Streisand, *Who’s Your Daddy? Sperm Donors Rely on Anonymity. Now Donor Offspring (and Their Moms) Are Breaking Down the Walls of Privacy*, U.S. NEWS & WORLD REP., Feb. 13, 2006, at 53.

¹²⁷ 21 C.F.R. § 1271.75 (2008).

¹²⁸ 21 C.F.R. §§ 1271.85(a), (c).

¹²⁹ 21 C.F.R. § 1271.85(d); 21 C.F.R. § 1271.60(a).

¹³⁰ 21 C.F.R. § 1271.60 (a).

¹³¹ 21 C.F.R. § 1271.170.

sure that any corrective actions are documented, personnel receive proper training and education, periodic audits are performed, and computer software is validated for its appropriate use.¹³² Clinics must also set up procedures for all the steps involved in screening, testing, and determining eligibility.¹³³

Aside from these safety procedures, federal law does not regulate the medical procedures involved in donation. No additional federal restrictions are imposed on clinics. They are not required to prevent discrimination against certain potential recipients or donors,¹³⁴ mandate any ongoing obligation of donors to report health information, regulate the disclosure of information to any subsequently-born children, limit the numbers of embryos transferred per cycle, or even limit the number of times that one person can donate sperm or eggs. As one journalist accurately charged after a thorough report on California Cryobank, the largest sperm bank in the world, “the industry has operated almost completely unmolested. Outside of a mostly inept series of somewhat bizarre FDA rulings, there is no top-down governance in the field. It is, as it has always been, self-policing.”¹³⁵ For its part, the industry often resists further regulation, claiming that it restricts patient choice.¹³⁶ Yet, as discussed in the next section, there are non-binding industry guidelines that address these issues.

5. *The State of Industry Regulation*

Long before the federal standards went into effect, the reproductive technology industry had undertaken self-regulation through the development of organizations such as the American Society for Reproductive Medicine

¹³² 21 C.F.R. § 1271.160.

¹³³ 21 C.F.R. § 1271.47.

¹³⁴ While California law is now clear that clinics cannot discriminate based on sexual orientation, *see* N. Coast Women’s Care Med. Group v. San Diego County Super. Ct., 189 P.3d 959 (Cal. 2008) (ruling that the First Amendment right to free exercise does not grant physicians the right to deny fertility treatments to lesbian patients), the law is far less settled in other states.

¹³⁵ Kotler, *supra* note 2.

¹³⁶ *See* Bob Pool & Maria L. La Ganga, *Fooling Nature, and the Fertility Doctor*, L.A. TIMES, Jan. 30, 2007, at A1 (quoting one physician who worried that “[a]s soon as you get into an area of zero tolerance, it’s easy to find a case when regulation becomes wrong or harmful [t]o go and try to interfere with someone’s reproductive rights is a very touchy area”); Surrey, *supra* note 90:

SART serves as the governmental watchdog for ART. . . . [M]embers of SART have worked diligently to protect our patients and the practice of ART from inappropriate external intrusion and regulation. We have worked successfully to mitigate many of the somewhat onerous requirements that had been initially proposed by the Food and Drug Administration, including the need to quarantine all embryos derived from donor eggs.

(“ASRM”).¹³⁷ This process is still ongoing, and the industry has established its own voluntary standards and processes of accreditation that supplement federal and state regulations.¹³⁸ The industry has also developed a series of ethical guidelines that, again, are not binding, but that contain advice and standards on a variety of topics that go beyond basic assisted reproductive technology medical practice.¹³⁹

The ASRM Practice Committee has developed recommendations on the number of babies born from one donor’s gametes.¹⁴⁰ These recommendations are explicitly based on concerns about genetically related donor offspring having children together (rather than, for example, risks of widespread transmission of genetic disease or health issues for donors):¹⁴¹

Institutions, clinics, and sperm banks should maintain sufficient records to allow a limit to be set for the number of pregnancies for which a given donor is responsible. It is difficult to provide a precise number of times that a given donor can be used because one must take into consideration the population base from which the donor is selected and the geographic area that may be served by a given donor. 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.¹⁴²

These standards are highly influential, but, as discussed *supra* at Part II.A.4., there is no regulatory agency that oversees individual donors or that monitors gamete banks on a routine basis. Banks and clinics are not required to verify the personal information or much of the medical information that donors provide them, and there is no mechanism for monitoring limits on the number of times that one individual can provide gametic material to another individual.¹⁴³ Banks are also not required to monitor what happens to the gametic material once it leaves their offices, and there is no required

¹³⁷ Cf. SPAR, *supra* note 51, at 34 (“The threat of regulation hangs heavily over the industry, prodding suppliers to conform to a fairly rigorous regime of self-regulation and often to act as if they were anticipating a regulatory response.”).

¹³⁸ These guidelines and standards are compiled on the ASRM website. See ASRM, Guidelines and Minimum Standards, <http://www.asrm.org/Media/Practice/practice.html/Guidelines> (last visited Nov. 21, 2008).

¹³⁹ See generally ASRM, Considerations of Assisted Reproductive Technologies: ASRM Ethics Committee Reports and Statements, <http://www.asrm.org/Media/Ethics/ethicsmain.html> (last visited Nov. 21, 2008) (ASRM’s ethical guidelines on a range of bioethical issues related to assisted reproductive technologies).

¹⁴⁰ See Practice Comm., ASRM, *supra* note 10, at S216.

¹⁴¹ See *id.*

¹⁴² Practice Comm., ASRM & Practice Comm., Soc’y for Assisted Reprod. Tech., 2008 Guidelines for Gamete and Embryo Donation, 90 FERTILITY & STERILITY S30, S35 (2008). Although this recommendation is focused on sperm donors, the ASRM has made the same recommendation for egg donors. See *supra* note 140, at S216.

¹⁴³ For a discussion of the federal regulations applicable to sperm banks and egg clinics see *supra* notes 127–33 and accompanying text.

tracking of donors' or their offspring's genetic diseases or other health problems.¹⁴⁴ The occasional "mix-ups" that make their way into court remind consumers and the public of the lack of oversight,¹⁴⁵ but these reminders have not been enough to rectify the existing, inadequate legal framework with reforms that would prevent and remedy these "mix-ups" in the future.¹⁴⁶ Moreover, given the mobility of many Americans (and overseas gamete purchasers), the advisory limits based on an area population of 800,000 may not be adequate.¹⁴⁷ Donors — those who use their gametic material — and donor-conceived offspring are beginning to understand the limits of current oversight and to advocate for change.¹⁴⁸ Because the non-binding industry standards do not adequately address all relevant issues and concerns, laws must mandate better practices rather than relying on industry internal guidelines and voluntary compliance.

B. *Are We Alone Out There? Practices in Other Countries*

Many other countries have imposed limits on the numbers of offspring produced by an individual donor. In its landmark report in 1984, England's Warnock Commission recommended that no more than ten children be born from any one individual donor.¹⁴⁹ The Commission explained its concern about "the remote possibility of unwitting incest between children of the same donor, and . . . risks of transmission of inherited disease," but also noted that, "there was no conclusive argument for any particular figure."¹⁵⁰ The British Human Fertilisation and Embryology Authority responded to this recommendation by enacting a similar policy, but instead of limiting the

¹⁴⁴ See *id.*

¹⁴⁵ There have been several reported cases of embryos that were mistakenly implanted in the wrong woman, for example. See Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, and Law*, 12 COLUM. J. GENDER & L. 1 (2003); Leslie Bender, "To Err Is Human" ART Mix-ups: A Labor-Based, Relational Proposal, 9 J. GENDER RACE & JUST. 443 (2006) (focusing on ART-related mix-ups) [hereinafter "To Err is Human"].

¹⁴⁶ See Bender, "To Err Is Human", *supra* note 145, at 486 (discussing a new approach to deciding parentage where there has been a mix-up because other alternatives "do not work"). For someone who has had the wrong embryo implanted, monetary damages are a poor substitute for the desired result.

¹⁴⁷ See Practice Comm., ASRM & Practice Comm., Soc'y for Assisted Reprod. Tech., *supra* note 142 (using 800,000 as a baseline population for determining limits on donation to avoid inadvertent consanguinity).

¹⁴⁸ The Donor Sibling Registry, see discussion *supra* at Part I.B., connects donor-conceived individuals and hosts various discussion groups where participants discuss the number of children who should be born from each donor and argue for changing the current system. See Donor Sibling Registry, <http://www.donorsiblingregistry.com/index.php>. (last visited Nov. 23, 2008). Citation to specific postings has been omitted to protect the posters' confidentiality.

¹⁴⁹ REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY 26–27 (1984).

¹⁵⁰ *Id.* at 26. The Commission recommended ongoing review of whether ten was the appropriate number. *Id.* at 27.

number of *children* born with any particular donor's gametes, the Authority limited the number of *families* who could use any one donor's gametes to ten (each family could have more than ten children, of course).¹⁵¹ Similarly, Austria allows donors to provide gametes to only one clinic, where no more than three couples may use them.¹⁵² Other countries have focused on the number of children born from a single donor. For example, in Hong Kong, legislation was enacted in 2007 to limit the number of children born from a single donor to three.¹⁵³ Spain limits the number of children born from any one donor's gametes to six.¹⁵⁴

A second means of preventing "accidental incest" involves ensuring that offspring know they are donor-conceived. The United Kingdom has considered legislation that would require special notations on birth certificates for the donor-conceived.¹⁵⁵ The state of Victoria, in Australia, has launched a "Time to Tell" campaign, encouraging parents to tell their children of their origins in an effort to ensure honesty as well as to prevent consanguineous unions.¹⁵⁶ Offspring who know they are donor-conceived are more likely to be sensitive to the issue of potential incestuous relationships and may investigate further to determine if their donor-conceived significant other was conceived using the same donor.

III. WHY BAN INCEST?

The traditional justifications for incest bans have centered on religion, genetics, and anthropology.¹⁵⁷ Newer accounts have relied on insight from evolutionary biology to support "kinship avoidance" behavior.¹⁵⁸ Freud opined that incest was natural and that girls inevitably felt sexual desire for their fathers.¹⁵⁹ Although the veracity of this analysis has been repeatedly

¹⁵¹ See Human Fertilisation Embryology Authority, *Using Donated Sperm, Eggs, or Embryos*, THE HFEA GUIDE TO INFERTILITY 29, 31 (2007/08), available at <http://www.hfea.gov.uk/docs/Guide2.pdf>.

¹⁵² See Howard W. Jones, Jr. & Jean Cohen, *IFFS Surveillance 07*, 87 FERTILITY & STERILITY, S1, S28 (2007), available at http://www.iffs-reproduction.org/documents/surveillance_07.pdf.

¹⁵³ See Ella Lee, *Database to Track Sperm and Offspring: Records Kept to Avoid Incest, Unethical Acts*, S. CHINA MORNING POST, Feb. 13, 2008, at 3.

¹⁵⁴ See Jones & Cohen, *supra* note 152, at S31.

¹⁵⁵ See David Derbyshire, *Children of Egg Donors "Should Have Birth Certificates Stamped"*, DAILY MAIL (London), Dec. 11, 2007, §1, at 4; Amy Iggulden & Sophie Goodchild, *Symbol to Identify Donor Babies on Birth Certificates*, EVENING STANDARD (London), Dec. 10, 2007, at A10.

¹⁵⁶ See Barry, *supra* note 3.

¹⁵⁷ See discussion *infra* at Part III.1.

¹⁵⁸ See *id.*

¹⁵⁹ See SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (James Strachey trans., 1949). *But see* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 221–22 (2001) (explaining scholarly critiques of Freud's theory).

questioned,¹⁶⁰ it is essentially irrelevant to any explanation of, or reasons for, the ban (although it does provide support for the ban's continued existence). My goal in this Section is to provide a brief review of other explanations and justifications for the incest prohibition.

A. *Traditional and Modern Justifications*

Traditional and more contemporary justifications for the incest ban include: genetics, anthropology, evolutionary biology, and morality. By the beginning of the twentieth century, all states banned some types of incestuous marriages.¹⁶¹ As discussed in the Introduction, these bans continue to be in effect — incestuous relationships may subject both parties to criminal prosecution and may result in voided marriages.¹⁶² That is, incest is a double wrong against the public, with both a criminal and a civil component. Unlike other criminal acts, the civil wrong does not result in a private remedy, but in public non-recognition of the relationship.¹⁶³

Genetics: In any given non-consanguineous relationship, the rate of severe abnormalities in offspring is estimated at two to three percent.¹⁶⁴ For offspring of first cousin incestuous relationships, the risk increases to approximately four to seven percent, while children of siblings or a parent-child coupling have a risk between thirty-one and forty-four percent.¹⁶⁵

¹⁶⁰ See, e.g., Adler, *supra* note 159, at 221–22; H. Spain, *The Westermarck-Freud Incest-Theory Debate: An Evaluation and Reformulation*, 28 CURRENT ANTHROPOLOGY 623, 625 (1987).

¹⁶¹ See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 111, 145 (1985).

¹⁶² See, e.g., CAL. PENAL CODE § 285 (2009) (criminalizing incest); CAL. FAM. CODE § 2200 (2009) (defining void marriages); see also Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO J. L. & GENDER 337, 348 n.73 (2004) (“In a number of states, the two laws are structurally interrelated: the statute criminalizing incestuous acts will refer to the statute voiding incestuous marriages to define which types of relationships are covered.”).

¹⁶³ Indeed, the remedy of a void marriage from the outset appears contrary to the wishes of the individuals involved (who consented to the marriage in the first place, and so would appear unlikely to want to invalidate their own marriage). Of course, sexual relationships outside of marriage may be subject to anti-fornication or cohabitation criminal statutes. See ABRAMS ET AL., *supra* note 19, at 274. Aside from these sanctions, which are rarely enforced, civil law has few sanctions for nonmarital, consensual sexual relationships. See *id.*

¹⁶⁴ See Robin L. Bennett, Louanne Hudgins, Corrine O. Smith & Arno G. Motulsky, *Inconsistencies in Genetic Counseling and Screening for Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97, 104 (2002) (providing examples of studies determining baseline population estimates for major birth defects and genetic disorders); Bernadette Modell and Aamra Darr, *Genetic Counseling and Customary Consanguineous Marriage*, 3 NATURE REVIEWS GENETICS 225 (2002), available at <http://www.nature.com/nrg/journal/v3/n3/full/nrg754.html> (estimating 2–2.5% of non-consanguineous matings produce children with birth defects, while first cousin matings produce double that number, but pointing out numerous flaws in how data are collected); William Saletan, *The Love that Dare Not Speak Its Surname*, SLATE, April 10, 2002, <http://www.slate.com/id/2064227/>.

¹⁶⁵ See HELEN V. FIRTH, JANE A. HURST & JUDITH G. HALL, OXFORD DESK REFERENCE: CLINICAL GENETICS 370 (2005); Bennett et al., *supra* note 164, at 105 (finding risk

While it is difficult to study the impact on humans over numerous generations, studies of other animals show the genetic and survival costs of inbreeding.¹⁶⁶ When sibling birds are paired over successive generations, the offspring line dies out because “some damaging genes are more likely to be expressed in inbred animals. Some potentially harmful genes are recessive and therefore harmless when they are paired with a dissimilar gene, but they become damaging in their effects when combined with an identical gene.”¹⁶⁷

The higher rate of genetic abnormalities in consanguineous relationships provides a partial justification for the incest prohibition. Yet it does not entirely explain the strength of the prohibition, given that the overwhelming number of children born to these relationships will not have abnormalities, and that we do not require genetic testing “even when there is a strong likelihood that each parent carries a recessive trait, as in the case of Tay-Sachs disease in the Ashkenazi Jewish community.”¹⁶⁸ Moreover, the incest ban, which has existed for centuries, arose prior to our contemporary understanding of the relationship between genes and consanguinity. On the other hand, early incest bans may have resulted from the anecdotal observations of abnormal children who resulted from sexual relationships between closely-related family members.¹⁶⁹ The genetic justification does not, however, explain the ban on sexual relationships between affinity-related family members, such as adoptees or step-relatives.¹⁷⁰

Given our knowledge about genetics, we might decide it is appropriate, based on potential harm, to police certain relationships because of the statis-

for offspring of first cousin relationship to be between 1.7–2.8 percent above the general population risk), 106–07 (finding 31.4 percent risk for children of sibling or parent-child incestuous relationships); Saletan, *supra* note 164. Firth, Hurst, and Hall point out that the estimated risk is actually lower than the observed, empirical risks; the estimated risk is 12.5% for recessive disorders, while the observed risk is thirty percent. Apart from physical abnormalities, the empirical risk for mental disability is closer to fifty percent in sibling-sibling and parent-child unions. *See* FIRTH, HURST & HALL, *supra*, at 370. The estimated rate for half-siblings is approximately one-half that of full-blooded siblings. *See id.* Other studies vary dramatically on the actual genetic risks.

¹⁶⁶ Lukas F. Keller & Donald M. Waller, *Inbreeding Effects in Wild Populations*, 17 TRENDS ECOLOGY & EVOLUTION 230, 230 (2002), available at <http://www.homepage.montana.edu/~wwwbi/staff/creel/bio480/keller.pdf> (“Data from bird and mammal populations suggest that inbreeding depression often significantly affects birth weight, survival, reproduction and resistance to disease, predation and environmental stress.”); *see also* John T. Hogg, Stephen H. Forbes, Brian M. Steele & Gordon Luikart, *Genetic Rescue of an Insular Population of Large Mammals*, 273 PROC. ROYAL SOC’Y B 1491 (2006) (discussing the benefits of outbreeding in improving fitness of a small, isolated population of bighorn sheep, and contrasting the benefits to the effects of inbreeding).

¹⁶⁷ *See* Patrick Bateson, *Inbreeding Avoidance and Incest Taboos*, in *INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY* 24, 25 (Arthur P. Wolf & William H. Durham eds., 2004).

¹⁶⁸ Cahill, *supra* note 13, at 1570.

¹⁶⁹ Certainly, by 1873, one of the leading family law treatises noted: “Marriages between persons closely allied in blood are apt to produce an offspring feeble in body, and tending to insanity in mind.” Grossberg, *supra* note 161, at 145 (quoting JOEL BISHOP, COMMENTARIES ON MARRIAGE AND DIVORCE 273–74 (5th ed. 1873)).

¹⁷⁰ *See* Cahn, *supra* note 17; McDonnell, *supra* note 162, at 352–53.

tically significant increased risk of genetic abnormalities. The risk of harm to future offspring is palpable and certain (although most such offspring will not experience these abnormalities).¹⁷¹ Modern understandings of genetics documented in the studies discussed above provide a strong basis for making such an assessment, regardless of whether this justification provided a historical explanation for the incest ban. It may also be possible that, through the process of evolution, natural selection favored behaviors of kin avoidance.¹⁷² If this were the case, there might be an additional genetic rationale for the incest ban: to prevent those with the recessive tendency toward taboo from passing that tendency on to future generations, thus perpetuating the kin-love disorder. Ultimately, then, the genetics explanation could separate into two arguments: (1) higher risk of birth defects; and (2) an inherited tendency toward taboo.

To alleviate the concern over birth defects, in light of advances in genetic understandings, it would be possible to allow incestuous relationships between relatives who are incapable of procreating, or to require genetic testing in the case of pregnancy. Although this might raise privacy concerns, a constitutionally sustainable compromise could be possible. Nonetheless, this solution would not address the other potential justifications for maintaining an incest ban.

Anthropology: A discussion of taboo brings us to the classic anthropological formulation, which belongs to Claude Lévi-Strauss. He explained that the incest prohibition forced families to marry outside of their closed biological units by creating bonds with other groups, thereby overcoming “the isolating influence of consanguinity.”¹⁷³ These bonds facilitated more harmonious group relations by assuring kinship with potential enemies. A second, and equally familiar, explanation from the anthropology literature, which addresses parent-child incest, focuses on the harmony of intra-familial relationships.¹⁷⁴ Later anthropologists have suggested that the incest taboo was not just a cultural artifact, but also biologically-based; social construction theory has also become more open to this possibility.¹⁷⁵ The issue of

¹⁷¹ The increasing use of screening tests before and during pregnancy can help in reducing this risk.

¹⁷² See *infra* text accompanying notes 176–87.

¹⁷³ Claude Lévi-Strauss, *The Family*, in *MAN, CULTURE, AND SOCIETY* 261, 278 (Henry L. Shapiro ed., 1956); see also CLAUDE LÉVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., 1969) (1949); Susan McKinnon, *The Economies in Kinship and the Paternity of Culture: Origin Stories in Kinship Theory*, in *RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES* 277, 288–98 (Sarah Franklin & Susan McKinnon eds., 2001).

¹⁷⁴ See Jack Goody, *A Comparative Approach to Incest and Adultery*, 7 *BRIT. J. SOCIOLOGY* 286, 301 (1956) (summarizing Brenda Seligman’s argument that the incest ban protects the internal value of the parent-child relationship and its role as the foundation of social structure).

¹⁷⁵ See, e.g., Andreas de Block & Bart du Laing, *Paving the Way for an Evolutionary Social Constructivism*, 2 *BIOLOGICAL THEORY* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087524 (arguing that evolutionary social constructivism could enhance the Darwinian argument that incest avoidance is at least par-

whether the taboo, as a natural phenomenon, should give basis to criminal liability may be a tough question, however.

Evolutionary biology: Evolutionary biology may provide an understanding of the origins and maintenance of the incest ban, although it does not provide a justification per se.¹⁷⁶ As discussed in this Section, evolutionary biologists have noted kinship avoidance behavior, but believe that it is associated with familiarity rather than genetics.

In his 1891 book, Edward Westermarck suggested that sexual aversion develops between family members who are raised together.¹⁷⁷ Subsequent studies have confirmed and refined his initial hypothesis, suggesting a strong psychological mechanism against sexual relationships with intimate family members that does not necessarily depend on shared genes, but rather on behaviors most likely to detect shared genes. While it is difficult to perform a controlled experiment on the Westermarck hypothesis, evidence from Israeli kibbutzim and Taiwanese marriages provide support for evolutionarily-based incest avoidance behavior.¹⁷⁸

In his study of fourteen thousand Taiwanese women and their fertility, Arthur Wolf found that early cohabitation (beginning during infancy or at a young age) with a later “mate” resulted in lower fertility and a higher divorce rate than did marriages between mates who were not raised together.¹⁷⁹ The individuals were not genetically linked, so this lack of sexual interest could be the result of cultural messages. That explanation appears unlikely, however, because it would require both that culturally-imposed inhibitions against incest be “somehow transmitted from elders to offspring with exceedingly high reliability; and second, [that] such messages affect the development of sexual attraction with exceedingly high reliability.”¹⁸⁰

In another study involving six hundred subjects, researchers found that childhood observations of a mother’s interactions with another child and co-residence with a sibling provide a strong basis for a “kinship estimator.”¹⁸¹

tially a result of close inbreeding increasing the expression of deleterious recessive genes); Roy H. Bixler, *Incest Avoidance as a Function of Environment and Heredity*, 22 CURRENT ANTHROPOLOGY 639 (1981).

¹⁷⁶ As June Carbone and I have argued, just because a particular behavior has evolved in a certain way, does not mean that we as a legal society must legislate to reinforce that behavior. See June Carbone & Naomi Cahn, *The Biological Basis of Commitment: Does One Size Fit All?*, 25 WOMEN’S RTS. L. REP. 223, 223–34 (2004).

¹⁷⁷ EDWARD WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* 320 (1891). For one application of the hypothesis in legal literature, see David J. Herring, *Foster Care Placement: Reducing the Risk of Sibling Incest*, 37 U. MICH. J.L. REFORM 1145, 1146–62 (2004) (discussing Westermarck’s thesis, and two studies of Irene Bevc and Irwin Silverman showing that opposite sex siblings who live together before the age of three develop a strong aversion to incestual behavior).

¹⁷⁸ See Debra Lieberman & Donald Symons, *Sibling Incest Avoidance: From Westermarck to Wolf*, 73 Q. REV. BIOLOGY 463, 465 (1998).

¹⁷⁹ See ARTHUR P. WOLF, *SEXUAL ATTRACTION AND CHILD ASSOCIATION: A CHINESE BRIEF FOR EDWARD WESTERMARCK* 98–134 (1995).

¹⁸⁰ Lieberman & Symons, *supra* note 178, at 465.

¹⁸¹ Debra Lieberman, John Tooby & Leda Cosmides, *The Architecture of Human Kin Detection*, 445 NATURE 727, 730 (2007), available at <http://www.psych.ucsb.edu/re->

The subjects were asked about family composition and co-residence and then answered questions about their altruistic behavior towards their siblings (for example, how they had helped siblings in the past and whether they would donate a kidney for a sibling) or their attitudes towards a series of sexual acts, including some with family members.¹⁸² The strongest cue for predicting kinship estimation came from older children observing their mothers' interaction with a younger sibling.¹⁸³

Freud believed that the incestuous impulse was natural and that cultural factors prevented its full expression; the Oedipus complex was the result of the suppression of these incestuous impulses.¹⁸⁴ Contemporary evolutionary biologists and psychologists believe just the opposite: incest avoidance is natural, and incest occurs because of a disruption in normal relationships.¹⁸⁵

Evolutionary behaviors can also help explain the parent-child taboo. Because such behavior distorts a child's long-term mating strategies, researchers have suggested that the incest taboo provides a generally effective prevention mechanism against:

psychopathologies, which, in turn, reduce the affected individuals' chances for normative marriage and parenting profiles. In addition, a similar dynamic would hypothetically result from adult-male to boy incest. It is suggested that to minimize the chances of adult-child sexual intercourse, incest taboos have historically been reinforced and extended to nonparental adults, especially men, beyond the immediate nuclear family.¹⁸⁶

Indeed, some have suggested that the process of human evolution has actually "selected for genes that cause organisms to develop behavioral systems that lead them away from mating with close genetic relatives," particularly given the strong association of incest with visceral reactions of disgust.¹⁸⁷

search/cep/papers/kinnature05510.pdf [hereinafter *The Architecture of Human Kin Detection*]; see also Debra Lieberman, John Tooby & Leda Cosmides, *Does Morality Have a Biological Basis? An Empirical Test of the Factors Governing Moral Sentiments Relating to Incest*, 270 PROC. ROYAL SOC'Y LONDON 819, 821 (2003)

¹⁸² See *The Architecture of Human Kin Detection*, *supra* note 181.

¹⁸³ See *id.*

¹⁸⁴ See Mark Erickson, *Rethinking Oedipus: An Evolutionary Perspective of Incest Avoidance*, 150 AM. J. PSYCHIATRY 411, 411-12 (1993); Spain, *supra* note 160 at 625 (quoting Freud's conclusion that, "the findings of psycho-analysis make the hypothesis of an innate aversion to incestuous intercourse totally untenable"). Spain summarizes the differences between the Westermarck and Freud arguments as follows: "Westermarck claims that familiarity breeds contempt and Freud that it breeds attempt." *Id.* at 626.

¹⁸⁵ See, e.g., Erickson, *supra* note 184; *The Architecture of Human Kin Detection*, *supra* note 181.

¹⁸⁶ Ronald S. Immerman & Wade C. Mackey, *An Additional Facet of the Incest Taboo: A Protection of the Mating-Strategy Template*, 158 J. GENETIC PSYCHOL. 151, 151 (1997).

¹⁸⁷ Robinson, Kurzban & Jones, *supra* note 32, at 1645.

Morality: Moral repugnance and disgust have served as traditional bases for the incest ban.¹⁸⁸ Many states legislate against activities such as incest “just because those activities are wrong.”¹⁸⁹ Disgust is a cluster of approaches based in human emotional reactions to various acts, involving extreme aversion typically based on a fear of contamination.¹⁹⁰ It is inherently connected with underlying cultural values, although some behaviors appear to elicit disgust across cultures.¹⁹¹ Disgust can provide a useful basis for judging the legality of certain acts: for example, disgust might help in distinguishing various kinds of murders, with more disgusting ones more deserving of harsher sanctions.¹⁹² It might be possible to develop appropriately structured disgust responses within the law “so that we come to value what is *genuinely* high and to despise what is *genuinely* low.”¹⁹³

On the other hand, disgust is an emotion that has, as *Lawrence* shows, typically been used as a way to ostracize and discriminate against acts that are culturally unpopular.¹⁹⁴ Disgust establishes a hierarchy of appropriate behavior that attempts to limit not just public, but also intimate, actions.¹⁹⁵ While the acts themselves may not be harmful, culturally conditioned responses result in strong feelings of aversion that, without any other basis, are converted into law. The long history of anti-miscegenation laws provides an example of how one group’s feelings of disgust resulted in discriminatory legislation. As Martha Nussbaum claims, not all incestuous relationships inspire the same amount of disgust: “if we want to find reasons to make

¹⁸⁸ See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 15 (1997). A full discussion of the significance of emotion to legal reasoning is well beyond the scope of this Article, although it is an issue that must be recognized. For useful commentary on this issue see, for example, *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) and Haidt, *supra* note 32.

¹⁸⁹ John Witte Jr., *Can America Still Ban Polygamy?*, CHRISTIANITY TODAY MAG., May 23, 2008, http://www.christianitytoday.com/ct/article_print.html?id=55605.

¹⁹⁰ See MILLER, *supra* note 188, at 2. Miller provides a social history and defense of disgust. For insightful discussion of the politics of disgust in conjunction with *Lawrence* and traditional religious approaches to same-sex relationships, see Eskridge, *supra* note 13.

¹⁹¹ See MILLER, *supra* note 188, at 15. Miller hypothesizes that some elements of incest definitions, such as the prohibition on parent-child relationships, are in fact universal. *Id.* at 260 n.39.

¹⁹² See generally Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (calling for criminal law to take account of disgust); Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW*, *supra* note 188, at 63, 63 [hereinafter Kahan, *Progressive Appropriation*].

¹⁹³ Kahan, *Progressive Appropriation*, *supra* note 192, at 71.

¹⁹⁴ See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 125, 171 (2004). The philosopher Leon Kass has used repugnance as a means for limiting various new uses of reproductive technology, including cloning. See, e.g., LEON R. KASS, *DEFENDING HUMAN DIGNITY*, in *Human Ethics and Human Dignity: Essays Commissioned by the President’s Council on Bioethics* 297, 298 (PRESIDENT’S COUNCIL ON BIOETHICS ED., 2008), available at http://www.bioethics.gov/reports/human_dignity/human_dignity_and_bioethics.pdf.

¹⁹⁵ See Jonathan Haidt, *The Moral Emotions*, in *HANDBOOK OF AFFECTIVE SCIENCES*, 852 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith, eds., 2003), available at <http://faculty.virginia.edu/haidt/lab/articles/haidt.the-moral-emotions.manuscript.html>.

[brother-sister or adult-first cousin] incest illegal, disgust will not help us, and arguments about health issues are perhaps exactly what we need.”¹⁹⁶ The emotion of disgust is, in this view, an unstable basis for making legal decisions.

Within contemporary social psychology, there is a healthy debate on the nature of how we develop moral reasoning. Jonathan Haidt’s social intuitionist model suggests that moral reasoning follows moral judgment — we develop reasons to support our moral intuitions¹⁹⁷ and, within certain limitations, we follow them.¹⁹⁸ Moral judgments result from innate intuitions, although, Haidt explains, they are also affected by social context and groupings.¹⁹⁹ By contrast, others argue that rational deliberation and reasoning are critical in the development of moral judgments.²⁰⁰

Ultimately, the initial reaction of disgust may serve as a useful guide for establishing a legal framework for incest, so long as this reaction is then challenged and subjected to a more rigorous analysis that explores its bases. Indeed, the feeling of disgust is generally much less intense when the genetic half-siblings at issue were not raised as family.²⁰¹ Within the donor world, however, these feelings towards potential matings between offspring conceived with the same gametes can be quite intense.

B. *Is There a Feminist Approach to Incest?*

There is, of course, a feminist consensus that parent-child incest is exploitative, at least when the child is a minor.²⁰² An analysis of a sample of criminal incest cases decided by state courts over the past decade supports this view.²⁰³ The most common form of parent-child incest, as revealed by

¹⁹⁶ Nussbaum, *supra* note 194, at 81.

¹⁹⁷ Haidt, *supra* note 32, at 817–18; *see also* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 955–63 (2007) (explicating and evaluating Haidt’s moral intuitionist theory).

¹⁹⁸ Simone Schnall, Johnathan Haidt, Gerald L. Clore & Alexander H. Jordan, *Disgust as Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096, 1106 (2008) (finding disgust particularly effective for affecting moral judgments).

¹⁹⁹ Jonathan Haidt & Fredrik Bjorklund, *Social Intuitionists Answer Six Questions About Morality*, in MORAL PSYCHOLOGY, VOL. 2: THE COGNITIVE SCIENCE OF MORALITY 181 (W. Sinnott-Armstrong ed., 2007), available at <http://faculty.virginia.edu/haidtlab/articles/haidt.bjorklund.social-intuitionists-answer-6-questions.doc>; *see also* Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127, 188–89 (2008) (discussing the role of disgust in responses to gay sex).

²⁰⁰ *See, e.g.*, David A. Pizarro & Paul Bloom, *The Intelligence of the Moral Intuitions: Comment on Haidt (2001)*, 110 PSYCHOL. REV. 193, 195 (2003) (arguing that conscious deliberation shapes our moral intuitions).

²⁰¹ I have discussed this Article with numerous lawyers, and they have, in fact, been far less concerned about incest in this situation.

²⁰² *See supra* note 29 and accompanying text (discussing the consensus that parent-child incest be criminalized).

²⁰³ *See* Memorandum from Katherine Carroll to Naomi Cahn (May 22, 2008) (on file with the Harvard Law Library).

these cases, involves an older male, such as a stepfather, uncle, or father, abusing a child.²⁰⁴

Some feminists contest the incest ban and its traditional justifications because they see the ban and its justifications as exploiting women. Theorist Judith Butler suggests that the anthropological justification for the taboo — that it requires marriage outside of one's kin group — subjugates women who are unable to remain within their own tribes, and rather must serve as reproductive vessels for other cultures.²⁰⁵ Similarly, anthropologist Susan McKinnon has observed that the incest taboo enforces patriarchal control over women because it allows men to control women's reproduction.²⁰⁶

Many feminist scholars argue for relaxing the incest ban on consensual sexual relationships between adults. Such bans cannot, as Collins, Lieb, and Markel observe, be maintained, given the Supreme Court's recognition of a liberty right in consensual sexual relationships: "[A] respect for autonomy and limited government permits consenting adults to engage in the sexual relations they deem appropriate [Collins, Lieb, and Markel] largely agree with [Justice Scalia that *Lawrence*] makes it difficult to resist the conclusion [they] draw."²⁰⁷ Although she does not advocate overturning incest laws, Professor Courtney Cahill urges "that the law reappraise the extent to which [it is motivated by] disgust."²⁰⁸ One note author argues that *Lawrence* requires courts to favor "liberty over loathing" and thereby allow consensual incestuous relationships.²⁰⁹

By contrast, feminist theorists who concentrate on father-child incest are more likely to highlight the dangers of incest.²¹⁰ Focusing on the power imbalances inherent in "an asymmetrical relationship of dependency" leads to prohibitions on certain relationships, regardless of whether they are established through blood, marriage, or caretaking.²¹¹ Although uncle-niece is not generally a direct dependency relationship, intergenerational relationships

²⁰⁴ See Mark T. Erickson, *Evolutionary Thought and the Current Clinical Understanding of Incest*, in INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY, *supra* note 167, at 161, 167.

²⁰⁵ Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES 14, 32–35 (2002).

²⁰⁶ See McKinnon, *supra* note 173, at 293, 297; see also Cahill, *supra* note 13, at 1610 (discussing McKinnon's theory).

²⁰⁷ Collins, Lieb & Markel, *supra* note 17.

²⁰⁸ Cahill, *supra* note 13, at 1611.

²⁰⁹ Hammer, *supra* note 22.

²¹⁰ See, e.g., Wilson, *supra* note 29. SEE GENERALLY Karen A. Duncan, HEALING FROM THE TRAUMA OF CHILDHOOD SEXUAL ABUSE: THE JOURNEY FOR WOMEN (2004) (suggesting treatments for female victims of childhood sexual abuse); JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST (1981) (discussing how mothers can help to prevent childhood incest between fathers and daughters).

²¹¹ Collins, Lieb & Markel, *supra* note 17, at 1389–90 n.276 ("[A]symmetrical dependency" refers to "relationships where one person possesses substantial authority and responsibility over another person who is largely dependent for his or her well-being on the authority-wielding person.")

involve comparable power dynamics and should be included in the prohibition.

A final feminist insight revisits behavioral biology, suggesting that men and women's different reproductive strategies raise the possibility that technology will magnify the reproductive advantages of dominant men. The feminist arguments identifying polygamy as a form of male dominance relate to these concerns. As Professor June Carbone notes:

Behavioral biology, with support from anthropology, suggests that a hunter gatherer society limited the possibilities of one man siring too many children. Once technology made an increase in wealth possible, it expanded the opportunities for differential reproduction. . . . Many argue that monogamy then became a critical aspect of democracy not to increase the status of women, but to limit the reproductive advantages of powerful men for the benefit of other men. This system, of course, also linked individual women's status to their relationship to their husbands, and used legitimacy to privilege some offspring over others, and tie the well being of a given woman's children to her relationship with their father. Unlimited sperm donation threatens to set up a new status hierarchy, with big reproductive payoffs for those men who would be picked from the fertility clinic lineup. Some men would find that very attractive, while most of us are horrified.²¹²

Feminism provides multiple understandings and potential justifications for limiting the number of offspring from any individual donor, including a profound appreciation for the complexities of an incest ban. Because this Article uses incest as a primary — albeit not the only — justification for such limits, the next Section turns to a legal analysis of the incest ban.

IV. WHY IS INCEST OVER THE LEGAL LINE?

Although incest is the stuff of popular culture, it appears much more rarely in the legal world. Leigh Bienen's landmark 1998 article, *Defining Incest*, has been cited fewer than fifteen times in the LEXIS database.²¹³ Based on *Lawrence*, however, scholars have begun to reexamine the incest ban.²¹⁴ Incest also figures in the litany of cultural and legal disasters that critics claim might result from recognizing a constitutional right to the "liberty" of sexual privacy.²¹⁵ This Part first examines Supreme Court doctrine

²¹² E-mail from Professor June Carbone to Naomi Cahn (Aug. 11, 2008) (internal citations omitted).

²¹³ A search for "Bienen w/3 incest" in the Law Reviews, CLE, Legal Journals & Periodicals, Combined database produced 14 results in the LEXIS database. (Nov. 15, 2008).

²¹⁴ See, e.g., *supra* note 13 and accompanying text.

²¹⁵ See *infra* Part IV.A.

on the relationship of incest to other issues of sexual privacy before turning to a discussion of the justifications for the incest ban.

A. *Just What Is Private?*

The Supreme Court has never opined directly on the constitutionality of the incest ban, although the word “incest” does occasionally appear in Supreme Court cases (usually regarding a list of possible offenses other than the one for which the defendant was convicted), and the Court has considered criminal procedure issues in connection with incest convictions.²¹⁶ Incest appears as a more direct concern in a limited number of the Court’s cases that seek to define the parameters of reproductive privacy.²¹⁷ In *Planned Parenthood v. Casey*, the Supreme Court analyzed various challenges to a Pennsylvania statute setting limits on access to abortion.²¹⁸ The Court upheld limits applicable to minors seeking abortions, but struck down various limits for adult women on the basis of the Due Process Clause and its protection of “liberty.”²¹⁹ In his dissent, Justice Scalia defended the criminalization of various private actions, including incest:

The emptiness of the “reasoned judgment” that produced *Roe* is displayed in plain view by the fact that . . . the best the Court can do to explain how it is that the word “liberty” *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. . . . But it is obvious to anyone applying “reasoned judgment” that the same adjectives can be applied to many forms of conduct that this Court . . . has held are *not* entitled to constitutional protection — because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally “intimate” and “deeply personal” decisions involving “personal autonomy and bodily integrity,” and all of which can

²¹⁶ Running a LEXIS search of Supreme Court cases for the term “incest” resulted in fifty-eight cases (search performed Nov. 29, 2008, LEXIS, U.S. Supreme Court Cases, Lawyers’ Edition). Criminal procedure cases involving incest convictions include *Montana v. Hall*, 481 U.S. 400 (1987), in which the Court considered a double jeopardy challenge in a case involving an alleged incestuous act, and *Kentucky v. Hamilton*, 468 U.S. 1217 (1984), in which the Court denied certiorari, effectively affirming the Kentucky Supreme Court’s decision that sentencing a father for both rape and incest violated the constitutional guarantee against double jeopardy because both convictions were based on a single act of intercourse with his daughter.

²¹⁷ See *infra* notes 218–22 and accompanying text (discussing *Casey* and *Lawrence*).

²¹⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²¹⁹ *Id.* at 877–901.

constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable.²²⁰

Justice Scalia also addressed incest in *Lawrence*, accusing the majority of undermining traditional prohibitions on a wide variety of sex crimes:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.²²¹

The majority in *Lawrence*, however, did, in fact, "cabin" its holding (though it did not mention incest). It explicitly clarified the "scope of its decision," observing that the "case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."²²²

B. *Is Disgust a Constitutional Justification?*

If the dominant theme of abortion cases now concerns the jurisprudence of regret,²²³ disgust is the corresponding theme in the other reproductive privacy cases. Indeed, Courtney Cahill's article about the "slippery slope" that is so critical to Justice Scalia's accusations in *Lawrence*, suggests the importance of challenging "the extent to which incest-revulsion has substituted for

²²⁰ *Id.* at 983–84 (Scalia, J., dissenting); see also *Bowers v. Hardwick*, 478 U.S. 186, 209–10, n. 4 (1986) (Blackmun, J., dissenting) ("[A] court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted.").

²²¹ *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

²²² *Id.* at 578. Indeed, much of the commentary on *Lawrence* mentions Kennedy's efforts to acknowledge the specific value of same-sex intimacy. See, e.g., Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J. L. & FEMINISM 1, 29 (2004) (arguing that Kennedy is distinguishing homosexuality from polygamy and incest); Sonia Katyal, *Sexual Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1468 (2006).

²²³ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007) (Ginsburg, J., dissenting); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1025 (2008). As Justice Ginsburg scathingly observed in her dissent in *Carhart*, "[u]ltimately, the [majority] admits that 'moral concerns' are at work . . . [and that] the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational." *Carhart*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting). Thanks to Nancy Levit, Curators' and Edward D. Ellison Professor of Law, University of Missouri-Kansas City School of Law, for this analogy.

national evaluation of the incest taboo (and anything to which incest has been compared).²²⁴ Like others, Cahill calls attention to the role of repugnance in creating taboos, and the need to question the validity of this visceral, emotional reaction as a basis for lawmaking.²²⁵ Yet, as this Article suggests, it is possible to distinguish incest from other consensual sexual relationships that have elicited moral revulsion, using rationales other than disgust, such as abuse of trust or abuse of power.

The role of morality and consensus within constitutional law jurisprudence defies any precise definition. Interpreting the meaning of the Eighth Amendment's ban on cruel and unusual punishment, for example, the Supreme Court has repeatedly referred to "evolving standards of decency."²²⁶ As in *Lawrence*, *Roe*, and recent death penalty cases, the Court assesses how states have defined the parameters of "decency."²²⁷ Like regret and disgust, decency is a term with indefinite moral reach that depends on cultural concepts of appropriateness. While regret and disgust are emotional responses, their underlying content is inseparable from comparable cultural standards that establish a baseline of socially acceptable conduct. Of course, as the Court pointed out in *Kennedy* (a case involving rape by a stepfather), societal "[c]onsensus is not dispositive."²²⁸ On the other hand, the Court used much of its *Kennedy* opinion to discuss the penalties for child rapists in various states, and the Court also attempted to distinguish the "moral depravity" of child rape from the depravity involved in murder.²²⁹ The dissent challenged the majority's gradations of acts of moral depravity, observing that, to "ordinary Americans, the very worst child rapists . . . are the epitome of moral depravity."²³⁰ Thus, the question of what role morality, emotions, and evolving social norms should play in constitutional jurisprudence remains unresolved.

C. *Incest is Different*

In light of the various criticisms of the incest ban, a justification for continuing the ban in any context must satisfy three tests to be coherent: (1)

²²⁴ Cahill, *supra* note 13, at 1609.

²²⁵ *See id. passim*.

²²⁶ *See Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2652 (2008); *see also* Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the Roper-Atkins "Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129 (2006).

²²⁷ *See Kennedy*, 128 S. Ct. at 2652 (holding that evolving standards of decency are at odds with imposition of the death penalty in child rape case because forty-four states do not make child rape a capital offense); *Roper*, 543 U.S. at 564–65 (finding that thirty states and the District of Columbia did not authorize the death penalty and concluding that there was evidence of an evolving standard of decency against the juvenile death penalty).

²²⁸ *Kennedy*, 128 S.Ct. at 2642.

²²⁹ *Id.* at 2654.

²³⁰ *Id.* at 2676 (Alito, J., dissenting).

It must be segregable from the ban on incest's possible uses as a legal and cultural reinforcement of the marital family. (2) It must carefully craft an approach towards moral repugnance so that disgust is not determinative of our ban on incestuous relationships. (3) It must not call into question the growing acceptance of same-sex relationships.

Consider the California Supreme Court's invocation of incest in its decision requiring the state to recognize same-sex marriage. The court carefully distinguished its rationale on the equality of same-sex relationships from the rationales supporting other sexual matings, noting:

We emphasize that our conclusion that the constitutional right to marry properly must be interpreted to apply to gay individuals and gay couples does not mean that this constitutional right similarly must be understood to extend to polygamous or incestuous relationships . . . *because of their potentially detrimental effect on a sound family environment.*²³¹

Constitutionally, there are several methods for upholding the incest ban depending on the level of scrutiny applied. First, even if consensual sexual relationships are part of a protected fundamental right and subjected to strict scrutiny, the state may have a compelling interest in banning them.²³² Compelling interests may range from protecting children from abuse to protecting the future offspring of incestuous relationships from increased risk of genetic disorders.²³³ If the level of scrutiny is either intermediate or rational basis, then the state's compelling interest certainly justifies the ban.²³⁴

Second, there is a more fundamental question (as it were) that relates to what types of consensual sexual relationships are included within the right to sexual privacy. If the right is defined to include only partners in non-caretaking, dependency relationships,²³⁵ for example, then the level of scrutiny is irrelevant, and certain incestuous relationships fall outside the scope of the right. The right to sexual privacy could be defined to include relationships

²³¹ In re Marriage Cases, 183 P.3d 384, 434 n.52 (Cal. 2008) (emphasis added). The dissent, however, echoes Justice Scalia's admonition about the majority not "cabining" its decision, *see supra* text accompanying note 221. *See* In re Marriage Cases, 183 P.3d at 463–64 (Baxter, J., concurring and dissenting).

²³² The state's interests — other than disgust — are discussed later in this Article. For further discussion of the constitutional implications, *see* McDonnell, *supra* note 20, at 350–52.

²³³ The definition of "family" is highly contested. *See, e.g.,* Note, *supra* note 21, at 2483. Here, I am referring to intergenerational relationships of caretaking.

²³⁴ *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."); Vance v. Bradley, 440 U.S. 93, 97 (1979) (applying rational basis review, the court said: "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.").

²³⁵ This formulation is based on Note, *supra* note 21, at 2484 ("The determination whether two people were 'family members' [subject to the incest law] would be an inquiry into whether there was a natural dependency relationship involved.").

between: (1) adults who were never part of a caretaking relationship — this would exclude not just parent-child incest, but also stepparent-child incest, even in the absence of a legally recognized bond between the parent and the child;²³⁶ and (2) adults who are related through affinity or blood as second cousins or further removed — this would exclude uncle/aunt-niece/nephew incest.²³⁷

Third, even if some incest laws — such as those between comparatively distantly related relatives — might be suspect under a privacy analysis,²³⁸ a nuanced application of constitutional law could help in drawing the right lines both inside and outside of the reproductive technology world. While *Lawrence* may call into question some forms of consensual intra-familial relationships, it still allows for carefully crafted laws banning some forms of incest.²³⁹

Establishing the standard for measuring the constitutionality of an incest ban or the parameters of a right to sexual privacy depends on the question of what justifications exist for the prohibition. The risk of birth defects may provide a rationale for the ban on incest in itself, though gay and lesbian sex does not result in such palpable harms. This rationale is strongest between immediate family members and becomes more attenuated with cousins.²⁴⁰ Once the ban is recognized to require a compelling state interest,

²³⁶ Unless a stepparent has adopted a child, there is no legally recognized relationship.

²³⁷ Some members of the Supreme Court have questioned the parameters of the constitutional right to privacy. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (emphasizing that while laws infringing on *fundamental* liberty interests are subject to strict scrutiny under substantive due process jurisprudence, fundamental rights are limited to those “deeply rooted in this Nation’s history and tradition;” all other liberty interests may be infringed by valid state laws that are rationally related to a legitimate state interest). Therefore, even if incest falls within the right to privacy, the right to privacy may fall outside the scope of substantive due process fundamental interest protections.

²³⁸ For one suggestion, see, e.g., Joanna L. Grossman, *The Consequences of Lawrence v. Texas*, FINDLAW’S WRIT, July 8, 2003, <http://writ.news.findlaw.com/grossman/20030708.html> (suggesting that bans on marriage between adoptive siblings who share no genes and who are similar in age or between cousins might be suspect under *Lawrence*’s privacy analysis).

²³⁹ For differing perspectives on the applicability of a privacy analysis to issues of restricting choices within the reproductive technology world, such as by limiting the freedom of donors to sell gametes as frequently as they would like, the freedom of numerous consumers to purchase the one “best” donor, and the freedom of fertility clinics and banks to buy and sell without limits, see, e.g., Goodwin, *supra* note 50, See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, GEO. WASH. L. REV. (forthcoming 2008) (on file with the Harvard Law Library); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1083–84 (1998); John A. Robertson, *PROCREATIVE LIBERTY IN THE ERA OF GENOMICS*, 29 AM. J.L. & MED. 439 (2003); Cass Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 994 (2002) (“[N]one of this means that there is a presumptive right to do whatever might be done to increase the likelihood of having, or not having, a child.”).

²⁴⁰ See *supra* text accompanying notes 164–65.

it does not necessarily follow that every type of incest ban is subject to strict scrutiny, but the dividing line among different forms of incest bans may be arbitrary.

V. SETTING LIMITS IN THE GAMETE WORLD

Without depending on rationales supporting a prohibition on incest, there may be reasons to limit gamete donations that develop from practices within reproductive technology. This section explores the multiple reasons for establishing limits, ranging from incest concerns to protecting donors and donor-conceived families.

A. *Protecting Donors and Donor-Conceived Families*

Many gamete donors experience psychological ramifications — they realize that the eggs or sperm they donated will be used to create a child.²⁴¹ They may also feel that they have engaged in exploitation — that by providing eggs or sperm they are commodifying body products.²⁴² While these psychological consequences must be considered when it comes to limits on donation, there are additional issues for each type of gamete provider that should also be considered.

For egg donors, limits are much easier to justify based on health risks, and the feminist health community has mobilized to document the effects of fertility drugs on women. For example, Judy Norsigian, the executive director of Our Bodies, Ourselves, has written about the “substantial risks to women’s health” from multiple egg extraction.²⁴³ There is also a problem of

²⁴¹ Although there is relatively little literature on this in the reproductive technology world, there is a significant amount of comparable discussion in the adoption world. Anecdotal accounts in the reproductive technology world also abound, however. See, e.g., *Nightline: Making Babies, Sperm Donor Regrets* (ABC online television broadcast Sept. 1, 2006) (one sperm donor stating that “I think the people who had children who are now eighteen would want to know, did he get heart disease, did he go bald, I mean, what happened to this guy? I think the kids should be told, and I think that the donors should be told that they exist, and that they’re healthy or not”).

²⁴² For further analysis of the commodification issues, see generally *RETHINKING COMMODIFICATION* (Martha Ertman & Joan Williams eds., 2005) (discussing the commodification of reproductive technology, and with it children, in the market place); Ertman, *supra* note 40 (arguing that commodification of parenthood sometimes, but not always, impedes human flourishing).

²⁴³ Judy Norsigian, *Risks to Women in Embryo Cloning*, *BOSTON GLOBE*, Feb. 25, 2005, at A13; see also Judy Norsigian, *Egg Donation for IVF and Stem Cell Research: Time to Weigh the Risks to Women’s Health*, *ETOPIA NEWS*, 2005, <http://www.etopiamedia.net/empnn/pdfs/norsigian1.pdf> [hereinafter Norsigian, *Egg Donation*]; Barbara Seaman, *Is This Any Way to Have a Baby?*, *O: OPRAH MAG.*, Feb. 2004, available at <http://www.gilliansanson.com/articles/infertility.htm> (outlining, through anecdotal evidence, the negative medical effects that women have experienced after undergoing in vitro fertilization and fertility treatments). Seaman was the co-founder of the National Women’s Health Network. Nat’l Women’s Health Network, Barbara Seaman (1935–2008), <http://www.nwhn.org/>

disclosure — egg donors are often not provided with sufficient information concerning potential risks.²⁴⁴

Aside from emotional and psychological concerns,²⁴⁵ egg donation poses both short- and long-term health risks for the woman donor. The first set of health risks results from the impact of the hormones. The most common short-term complication for oocyte donors is ovarian hyperstimulation syndrome (“OHSS”).²⁴⁶ Indeed, the donation procedure itself is actually controlled oocyte hyperstimulation, designed to produce the maximum number of mature eggs, and a mild form of OHSS is considered almost inevitable.²⁴⁷ Severe OHSS is rare but can be fatal, with symptoms that include kidney and liver dysfunction, and respiratory distress.²⁴⁸ Some studies have shown that severe OHSS may be less common in outside donors than in women undergoing IVF, partially based on the fact that outside donors stop hormone treatment after the eggs have been retrieved, while IVF patients continue with additional procedures and hormones in their attempts to conceive.²⁴⁹ However, the risk increases based on the number of donations.²⁵⁰ To minimize OHSS, researchers are studying new drug protocols and possible genetic markers, although the risks remain.²⁵¹

Finally, the long-term risks of the hormones involved in oocyte donation include various gynecological cancers, such as breast, ovarian, and uterine.²⁵² Several medical studies have shown that women who repeatedly undergo treatment with fertility drugs, as do repeat oocyte donors, have an increased risk for these cancers.²⁵³ However, the evidence is based largely on infertile women undergoing IVF, and several causes of infertility are ac-

www.nwhn.org/about/index.cfm?content_id=75§ion=about (last visited Nov. 29, 2008)

²⁴⁴ See Natalie Adsuar, Julianne E. Zweifel, Elizabeth A. Pritts, Marie A. Davidson, David L. Olive & Steven R. Lindheim, *Assessment of Wishes Regarding Disposition of Oocytes and Embryo Management Among Ovum Donors in an Anonymous Egg Donation Program*, 84 FERTILITY & STERILITY 1513, 1514 (2005).

²⁴⁵ See generally JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004) (telling one woman’s story of being a twelve time egg donor).

²⁴⁶ Ruth Farrell, Susannah Baruch & Kathy Hudson, Genetics & Pub. Policy Ctr., IVF, Egg Donation, and Women’s Health (July 14, 2006), http://www.dnapolicy.org/resources/IVF_Egg_Donation_Womens_Health_final.pdf.

²⁴⁷ COMM. ON ASSESSING THE MED. RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH, *ASSESSING THE MEDICAL RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH: WORKSHOP REPORT 18* (Linda Guidice, Eileen Santa & Robert Pool eds., 2007).

²⁴⁸ ADVISORY GROUP ON ASSISTED REPROD. TECHS., *TASK FORCE ON LIFE AND THE LAW*, N.Y. STATE DEP’T OF HEALTH, *BECOMING AN EGG DONOR* (n.d.), available at http://www.health.state.ny.us/community/reproductive_health/infertility/eggdonor.htm.

²⁴⁹ See Farrell, Baruch, & Hudson, *supra* note 246.

²⁵⁰ See Practice Comm., ASRM, *Repetitive Oocyte Donation*, 90 FERTILITY & STERILITY S194, S195 (2008).

²⁵¹ See Farrell, Baruch, & Hudson, *supra* note 246.

²⁵² See *id.*

²⁵³ See, e.g., Alison Venn, Lyndsey Watson, Fiona Bruinsma, Graham Giles, & David Healy, *Risk of Cancer After the Use of Fertility Drugs with In-Vitro Fertilisation*, 354 LANCET 1586 (1999).

knowledgeled to cause cancer as well.²⁵⁴ Disentangling the data is difficult, but initial analysis suggests that healthy donors do not necessarily share the same increased risk for breast and ovarian cancer, although the extent to which fertility treatments do affect those cancers for healthy donors is uncertain.²⁵⁵ Yet, the data on the risk of uterine cancer for healthy donors is sparse but of more concern.²⁵⁶ Moreover, researchers do not know whether repeated donations can affect the donor's future fertility, and they are still uncertain about the psychological consequences.²⁵⁷

A second set of risks, beyond those associated with taking hormones, concerns the oocyte retrieval process itself. This is a surgical procedure that requires repeated punctures of the vaginal wall and ovarian follicles.²⁵⁸ As with any other surgery, complications are possible, including vaginal bleeding and infection.²⁵⁹ While the procedure is generally done on an outpatient basis, physicians usually use some form of sedation.²⁶⁰ Thus, the risks inherent in anesthesia, such as stroke and respiratory failure, are also present.²⁶¹

The short- and long-term health risks involved in oocyte donation are numerous and potentially serious, and most researchers and policy-makers believe that these risks require further research.²⁶² Nonetheless, the ASRM concluded that, "there are no clearly documented long-term risks" for egg donors, although, "because of the possible health risks . . . it would seem prudent to consider limiting the number of stimulated cycles for a given oocyte donor to approximately six."²⁶³ Although numerous eggs can be retrieved in each cycle, many of them will not be fertilized and develop into children.²⁶⁴ The ASRM recommendation thus could provide a limit on the number of children who might be born from the gametes of any individual

²⁵⁴ See Louise A. Brinton, Kamran S. Moghissi, Bert Scoccia, Carolyn L. Westhoff, & Emmet J. Lamb, *Ovulation Induction and Cancer Risk*, 83 FERTILITY & STERILITY 261, 262 (2005).

²⁵⁵ See Sarah B. Angel, *The Value of the Human Egg: An Analysis of Risk and Reward in Stem Cell Research*, 22 BERKELEY J. GENDER L. & JUST. 183, 207 (2007).

²⁵⁶ See COMM. ON ASSESSING THE MED. RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH, *supra* note 247, at 25–26.

²⁵⁷ See Angel, *supra* note 255.

²⁵⁸ See Egg Donor Information Project, Stanford Univ., *The Medical Procedure of Egg Donation*, <http://www.stanford.edu/class/siw198q/websites/eggdonor/procedures.html> (last visited Nov. 29, 2008).

²⁵⁹ See Angel, *supra* note 255.

²⁶⁰ See *Repetitive Oocyte Donation*, *supra* note 250, at S194–95.

²⁶¹ See COMM. ON ASSESSING THE MED. RISKS OF HUMAN OOCYTE DONATION FOR STEM CELL RESEARCH, *supra* note 247, at 34–36.

²⁶² See, e.g., Norsigian, *Egg Donation*, *supra* note 243; Heidi Mertes & Guido Penning, *Oocyte Donation for Stem Cell Research*, 22 HUMAN REPROD. 629, 630 (2007); Seaman, *supra* note 243. Moreover, there are risks of coercion and exploitation. See Loane Skene, *Human Cloning and Stem Cell Research: Engaging in the Political Process*, 21 J. MED. & L. 119, 125 (2008).

²⁶³ See Practice Comm., *supra* note 20, at S194–95 (also recommending that, as with sperm donors, the number of families given any one donor's eggs be limited to twenty-five per every eight hundred thousand people).

²⁶⁴ See CTRS. FOR DISEASE CONTROL & PREVENTION, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES REPORT, *supra* note 9.

oocyte donor. Indeed, many fertility clinics do limit donation cycles per donor to six and some to as few as three.²⁶⁵ These limits are entirely self-imposed, however, and a donor with proven fecundity is valuable to these clinics. There are well-publicized stories of women who have donated at double the recommended limit.²⁶⁶

For sperm donors, the primary issue — aside from commodification — is not the donor's health or future fertility, but how many related children should be allowed to result from one sperm donor. Any form of donation, either egg or sperm, involves the potential for "inadvertent consanguinity," where a donor has provided gametes to different families and the resulting children do not know of their shared genetic heritage.²⁶⁷ As one former donor explained his unease at having produced sperm that might have resulted in hundreds of offspring, "[i]f you do the math again, there may be [one hundred] young women out there that are basically my son's age that are his half siblings. I have to tell him that's how it is."²⁶⁸

Some sperm banks impose a limit on the number of children who can be born from one person's donated sperm.²⁶⁹ The ASRM recommends taking into account the geographical area and population base for a particular donor, suggesting a limit of twenty-five births per donor per every population of eight hundred thousand people.²⁷⁰ Assuming a need to set limits, then this number provides a good starting point — albeit in a mobile country the entire country's population should be taken into account.²⁷¹ Particularly in an age of easy travel, donor secrecy, and newly developing understandings of genetics, reducing the number of children that can be born from each donor reduces the possibility of inadvertent consanguinity.

Federally imposed limits would also prevent the widespread dissemination of disease. For example, five donor-conceived offspring in Michigan — products of the same donor — all share the same extremely rare disease of

²⁶⁵ See, e.g., Ova the Rainbow, Inc., FAQs, <http://ovatherainbow.com/FAQs%20egg%20donors.htm> (last visited Nov. 23, 2008).

²⁶⁶ See generally DEREK, *supra* note 245 (telling the story of a woman who is a twelve time egg donor).

²⁶⁷ See Practice Comm., *supra* note 250, at S194.

²⁶⁸ *Nightline: Making Babies, Sperm Donor Regrets*, *supra* note 241.

²⁶⁹ See, e.g., Staff Editorial, *Incest: A Needed Taboo*, DAILY TARGUM (Rutgers Univ., New Brunswick, N.J.), Jan. 24, 2008.

²⁷⁰ Practice Comm., *supra* note 142, at S36.

²⁷¹ I believe that multiple stakeholders, including donor-conceived offspring, the industry, the FDA, donors, and recipients, should be involved in discussions of the appropriate limit. An example of the types of issues that must be addressed: some members of the British Fertility Society have expressed concern that the abolition of donor anonymity may have contributed to a sperm shortage in the United Kingdom and have suggested increasing the current limit of ten families per donor. See Hamilton and Pacey *supra* note 98; Zosia Bielski, *Sperm Shortage Possible After Landmark Decision*, GLOBE AND MAIL (Can.), Nov. 13, 2008, at L5; Denise Grady, *Shortage of Sperm Donors in Britain Prompts Call for Change*, N.Y. TIMES, Nov. 12, 2008, at A10; James Randerson, *Shortage Brings Call to Let Sperm Donors Father More Children*, THE GUARDIAN (London), Nov. 12, 2008, at 13.

congenital neutropenia.²⁷² As this example shows, donation allows an individual to have multiple offspring before the full potential of disease transmission is realized. Setting limits cannot prevent against disease transmission, but it can help minimize the number of people affected.

A final issue concerns informed consent and its corollary, counseling. For both sperm donors and embryo donors, the informed consent process should address medical risks and the possibility that offspring might be interested in finding their donor “parents.” The informed consent process should begin at the earliest possible point, prior to when the donor actually provides the gametes, to ensure that both the donor and the recipients understand the implications of the treatment. The informed consent process should include a counseling component to ensure the opportunity for adequate exploration of the responsibilities and procedures involved.

Various professional organizations, including both the Family Law Section of the American Bar Association and the ASRM have already developed guidelines for the informed consent process.²⁷³ According to these organizations, full disclosure should include a discussion of the known and potential health risks from donation, and an explanation of the donor’s choices for how to dispose of any unfertilized eggs.²⁷⁴ Clinics can implement various measures to minimize pressure that patients may feel — for example, by providing all relevant information early, by allowing patients to ask questions, and by assuring patients that the informed consent process is confidential and that decisions concerning the ultimate disposition of their gametic material will not be disclosed to anyone involved in their treatment.²⁷⁵

As a pragmatic matter, children are being told more frequently that they are donor-conceived, and prospective parents are becoming more likely to choose donors willing to disclose their identities.²⁷⁶ With donor-conceived offspring increasingly searching for their gamete providers, the providers themselves may be reluctant to be found by so many offspring. Ensuring that

²⁷² See Judith Graham, *When a Disease is Donated: Mom’s Quest to Warn Daughter’s Offspring Goes to the Heart of a Thorny Debate on Sperm, Egg Donors*, CHI. TRIB., March 27, 2008, at C1. For further discussion of observed links between unlimited sperm donations and disease transmission, see Bazelon, *supra* note 75 (discussing the transmission of autism); Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES, June 6, 2006, at F6.

²⁷³ See Practice Comm., *supra* note 142, at S36–37, S40–41, S43; PROPOSED MODEL ACT GOVERNING ASSISTED REPRODUCTION Article 2 (ABA Section of Family Law Comm, 2007), available at http://www.abanet.org/family/committees/artmodelcode_feb2007.pdf.

²⁷⁴ See PROPOSED MODEL ACT GOVERNING ASSISTED REPRODUCTION, *supra* note 273, at § 203.

²⁷⁵ See Bernard Lo, Vicki Chou, Marcelle I. Cedars, Elena Gates, Robert N. Taylor, Richard M. Wagner, Leslie Wolf, & Keith R. Yamamoto, *Informed Consent in Human Oocyte, Embryo, and Embryonic Stem Cell Research*, 82 FERTILITY & STERILITY 559, 560–61 (2004).

²⁷⁶ See Jeff Stryker, *Regulation or Free Markets: An Uncomfortable Question for Sperm Banks*, SCIENCE PROGRESS, Nov. 7, 2007, <http://www.scienceprogress.org/2007/11/regulation-or-free-markets>.

offspring are able to obtain access to this information — without donors feeling uncomfortable about the number of potential genetically-related individuals they are responsible for — provides yet another justification for setting limits on donations.²⁷⁷ Indeed, if donor identities become readily available, then limits might more appropriately be based primarily on the psychological issue of “the number of individuals with whom a donor can have meaningful interactions.”²⁷⁸

On the other hand, increasing openness may result in more investigation of possible consanguinity by donor-conceived offspring before they become sexually involved with a partner, perhaps making limits less necessary. In the alternative, marriage licenses might be conditioned upon genetic screening to ensure that there is no genetic link between the intended spouses.²⁷⁹ While it may also be possible to condition marriage licenses for related parties on proof of the parties’ inability to reproduce or, as is true in some states, proof that the parties are both over a certain age,²⁸⁰ doing so would raise significant privacy concerns and would beg the jurisprudential question of why these technically-incestuous relationships are permissible. Moreover, these limitations would shift the focus to restrictions on the behavior of donor-conceived offspring, rather than on the behavior of donors, prior to the creation of these offspring. The law has, however, traditionally focused on the best interest of the child, and this suggests the appropriateness of taking the earlier step to limit the donor’s actions — that is, to limit the number of offspring that may result from his or her donation.

B. *But is Change Possible?*

Unlike other countries, the United States has adopted a piecemeal approach to regulating the technologies, with oversight shared between the

²⁷⁷ For a discussion of the importance of offspring having access to information about their donors, see CAHN & DONALDSON ADOPTION INSTITUTE, *supra* note 71.

²⁷⁸ Scheib & Ruby, *supra* note 30 (suggesting that psychological factors might lead to more stringent limits than does the fear of consanguinity); see also Neroli Sawyer, The Authors Respond, *Mathematical Models Used to Determine Sperm Donor Limits for Infertility Treatment*, FERTILITY & STERILITY eLETTERS TO THE EDITOR, NOV. 21, 2008, <http://fertstert.wordpress.com/2008/11/21/281/>.

²⁷⁹ Conditioning marriage licenses on genetic testing nefariously echoes the late nineteenth century eugenicists’ efforts to require blood testing for marriage applicants. See Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 319, 321 (2008). Moreover, laws focusing on marriage do not prevent relationships, or childbearing, outside of marriage so they might not be particularly effective.

²⁸⁰ Arizona provides, for example, that “first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.” ARIZ. REV. STAT. § 25-101B (LexisNexis 2008); see also WIS. STAT. § 765.03 (2007).

Federal and state governments, the industry, and the market.²⁸¹ There is a tradition of federalism and industry self-regulation that characterizes the medical profession,²⁸² though Congress and the FDA have adopted regulations that apply on a national level.²⁸³ Consequently, the federal procedures already in place could be adapted to protect against multiple donations by any one individual. While the industry has already promulgated voluntary guidelines, they are not enforced, and clinics and banks are free to decide how to approach these issues themselves. The existing federal regulation infrastructure thus provides an appropriate starting place. A new section could be added to the existing regulations which mandate safety tests for gametic material.²⁸⁴ Such a regulation could be modeled on the British limitation of no more than ten families per donor,²⁸⁵ or, in recognition of the larger population of the United States, twenty-five families. Because the same individual could provide gametes at several different clinics or sperm banks, the regulations would also need to be amended to ensure that donations at multiple locations are counted and aggregated for the purposes of the twenty-five family limit.²⁸⁶

As discussed in Parts II.A.4.–A.5., the Federal Government and the ASRM each require that detailed records be kept on every donor. Because each bank gives different identification numbers to each donor, there must be an effective means to ensure that the same person does not attempt to evade limits on the number of donations per provider by visiting different recruiters and giving different names. One solution would be for fertility clinics and sperm banks to collect a genetic sample that could be sent to a central repository for verification that the donor is not circumventing limits,

²⁸¹ See June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509 (2006); Alicia Ouellette, Arthur Caplan, Kelly Carroll, James W. Fossett, Dyrleif Bjarnadottir, Darren Shickle & Glenn McGee, *Lessons From Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 434–35 (2005).

²⁸² See, e.g., John Lunstroth, *Voluntary Self-Regulation of Complementary and Alternative Medicine Practitioners*, 70 ALB. L. REV. 209, 236 (2006) (“In statutory self-regulation, a statute is passed in which the State delegates its police powers to the trade organization. . . . [This] is exemplified by the medical practice acts (MPAs) in which the State delegates to the medical profession — on a state-by-state basis — the power to regulate medical doctors.”).

²⁸³ See 21 C.F.R. § 1271 (2008).

²⁸⁴ See *id.* at § 1271.85(c).

²⁸⁵ See Human Fertilisation & Embryology Authority *supra* note 8. Banks may be concerned about the supply of sperm in light of the significant demand. This is certainly a legitimate issue. For discussions of the impact of further regulations on the supply of gametes, see Carbone & Gottheim, *supra* note 281, at 522–23.

²⁸⁶ Some of the logistical issues are discussed *infra*. Such a system potentially raises a set of privacy issues that are beyond the scope of this Article. See generally Naomi Cahn, *Necessary Subjects: The Need for Mandatory Donor Disclosure*, 12 DEPAUL J. HEALTH CARE L. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120389 (describing the set of privacy issues potentially raised by a system preventing gamete donation at multiple locations).

and for ensuring a consistent identification number for any particular donor. If each donor-conceived offspring knew, with certainty, the specific donor gamete number, then a new dating ritual — perhaps even before the first kiss — might involve inquiring about the genetic origins of one's potential sexual partner.²⁸⁷

CONCLUSION

Ultimately, the role of disgust in the reproductive technology area is unsettled.²⁸⁸ Although one reaction to learning that a man has contributed sperm to create more than one hundred offspring is disgust, this is not necessarily a universal, nor even a majority, response. Some may be troubled (perhaps not “disgusted”) by the “unnaturalness” of so many offspring of one individual in our current culture of monogamy.²⁸⁹ Fears of inadvertent consanguinity contribute to this feeling of discomfort.²⁹⁰ Other concerns may be based on the need to protect donors from exploitation, provide the opportunity for offspring to contact their donor without overwhelming the donor with their sheer number, and prevent offspring from developing potentially unknown genetic defects, are additional issues for unease. These feelings — of disgust or concern — are helpful in developing a response to the possibility of inadvertent consanguinity.²⁹¹ Disgust should not serve as the basis for drawing a line for constitutional or regulatory demarcation, but does provide an “inkling”²⁹² of the need to consider legal standards.

Most of the traditional explanations for the incest prohibition do not apply in the reprototech context when it comes to restrictions on gamete provi-

²⁸⁷ The identity issues relating to donor-conceived offspring affect two levels of knowledge: (1) they need to know that they are donor-conceived; and (2) they need information about the identity of their donor. Although I think that limits can be placed effectively on donors in the absence of identity disclosure programs, the United States should move towards a system of limited identity disclosure, such that offspring can access identifying information about their donors when they reach the age of eighteen. *See id.*

While some children may not know the identity of their biological fathers (some adoptees, for example, may not know), they generally have some information. Moreover, the need for identity disclosure in the reproductive technology arena is particularly acute because any given donor might have fathered or mothered dozens of children, an unusual circumstance outside of the reproductive technology world.

²⁸⁸ *See Cahill, supra* note 13. As discussed, the role of disgust is unsettled in other areas of the law as well.

²⁸⁹ E-mail from Professor June Carbone to Naomi Cahn, *supra* note 212.

²⁹⁰ Of course, most people outside of the donor world have not thought about issues of inadvertent consanguinity. By contrast, it is periodically discussed on the Donor Sibling Registry listserv. Telephone interview with Wendy Kramer, Co-Founder, Donor Sibling Registry (July 8, 2008). These concerns within the donor community are also expressed in news and media coverage. *See, e.g.,* Streisand, *supra* note 126 (discussing the concern of one donor, who suspects he helped create numerous offspring, that his offspring might become romantically involved).

²⁹¹ *See* Toni M. Massaro, *Show (Some) Emotion, in THE PASSIONS OF LAW, supra* note 188, at 80, 97, 101.

²⁹² The word “inkling” is attributed to Nancy Levit.

sion. Indeed, the term, “inadvertent consanguinity” may be a more precise term than “accidental incest” for the world of reproductive technology. The Westermarck hypothesis and its contemporary modifications do not apply to gamete donors because children typically have not been raised together.²⁹³ While the parents may feel a bond at having used the same gamete donor, this does not translate into the prolonged contact associated with the evolution of kin avoidance. The anthropological explanation, which requires marrying outside of one’s kin group in order to forge alliances and create a larger society, similarly does not apply because the half-genetically related offspring have been raised in different kin groups — although it is important to recognize that recipients of gametes from the same donor do feel connection and kinship based on biology.

While justifications based on fears of intra-familial abuse and breach of trust *do* provide support for the continuation of the ban on incest, these same concerns do not support a ban on sexual relationships between donor-conceived offspring or between removed donors and these offspring. The more modern justification for the incest ban, based on the higher risks of genetic defects associated with incestuous relationships, provides a partial foundation for banning these relationships. While the law could permit half-siblings raised apart from each other or donors and their offspring to engage in sexual relationships while continuing to ban these relationships between individuals who spent time together in the same family, this may be a difficult distinction to maintain.

By contrast, it is easier to find a basis for limiting the number of offspring per donor on account on health concerns for donors, a fear of the unwitting widespread distribution of genetic abnormalities, concern about the potential relationship between numerous donor offspring and their donor, feminist fears of unequal reproductive advantage, and the emotion of disgust or concern associated with inadvertent consanguinity. These can guide us in thinking about what it is we are seeking to regulate, and why.

²⁹³ See *supra* note 173 and accompanying text (providing anthropological explanations).

